

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of North Santiam SD 29J

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FINDINGS OF FACT  
CONCLUSIONS AND  
FINAL ORDER  
Case No. 14-054-029

**I. BACKGROUND**

On July 7, 2014, the Oregon Department of Education (Department) received a written request for a special education complaint investigation from the parent (Parent) of a student (Student) residing in the North Santiam School District 29J (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 by email on July 8, 2014.

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. This timeline may be extended if the Parent and the District agree to the extension in order to engage in mediation or local resolution of the complaint. This order is timely.

On July 11, 2014, 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 July 25, 2014.

On July 25, 2014, the District submitted a *Response* indicating it disputed all of the allegations in the Parent's complaint. The District provided these materials:

- A. A Response Letter;
- B. IEP's
- C. Evaluation Documents from District and Other Agency Staff;
- D. Prior Written Notices;
- E. Discipline Referrals and Behavior Support Plans;
- F. Meeting Notices and Minutes;
- G. Eligibility Statements;
- H. Placement Determinations;
- I. Medical Statements;
- J. Written Agreements between the District and the Parent;
- K. Letters from District staff to the Parent; and,
- L. Student Behavior Data.

The Parent provided these materials:

- a. Evaluation and Eligibility Documents;
- b. IEP's;
- c. SPED Paperwork from other Districts;
- d. DD Eligibility Packet;
- e. Prior Written Notices;
- f. DD Service Coordinator Notes; and,
- g. Notes from Residential and Day Treatment Settings.

On July 28, 2014, the Parent submitted a *Reply* to both the complaint investigator and to the District. The Department's complaint investigator determined that on-site interviews were needed. On August 6, 2014, the Department's complaint investigator interviewed a special education teacher; the District Special Education Director; and the District Associate Superintendent. On August 7, 2014, the complaint investigator interviewed the Parent and the Student's assigned case worker from Developmental Disabilities (DD). On August 22, 2014, the Department's complaint investigator interviewed the District Autism Specialist and the District middle school Assistant Principal by telephone.<sup>1</sup> During the interviews, both District staff and the Parent gave the complaint investigator additional materials. 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.

## 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. These 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 8, 2013 to the filing of this complaint on July 7, 2014.

	Allegations	Conclusions
1.	<p><b><u>Determination of Eligibility and Interpretation of Evaluation Data:</u></b></p> <p>a. The Parent alleges that the District violated the IDEA when it did not consider all previous and current evaluations in order to determine whether or not the Student was eligible as a student with Autism Spectrum Disorder (ASD).</p> <p>(OAR 581-015-2120 (2) &amp; CFR 300.306) (OAR 581-015-2125 &amp; CFR 300.306)</p>	<p><b><u>Not Substantiated:</u></b></p> <p>The District responded to the Parent's request to reevaluate the Student's area of disability and reconsider ASD. The District evaluated the Student, met twice to ponder the question; and considered the mental health evaluation completed in July, 2013 by a psychologist.</p> <p>The Autism Specialist and Speech Language Pathologist (SLP) at the eligibility meeting did not agree with the autism eligibility for Student and indicated this both on the Statement of Eligibility for Special Education which was provided to the Parent, written letters which clearly explained, and documented their decision to disagree with the autism eligibility.</p> <p>The Department does not substantiate the allegation.</p>

<sup>1</sup> The Department's Investigator was not able to interview the Behavior Specialist. This individual has left the District and the field of education, and did not return the Investigator's phone calls.

2.	<p><b><u>Evaluation Requirements and Eligibility Determination:</u></b></p> <p>a. The Parent alleges that the District violated the IDEA when it refused to consider the Student's possible eligibility categories until agencies outside of the District, Developmental Disabilities (DD), became involved.</p> <p>(OAR 581-015-2100(1), OAR 581-015-2110(5), 34 CFR 300.304, and 34 CFR 300.306)</p>	<p><b><u>Not Substantiated:</u></b></p> <p>An individual from another agency, DD, did attend the September 24, 2013 eligibility meeting and did participate in the discussion. However, nothing in the record suggests that this person substantially influenced the final decision nor indicates that the District only considered eligibility due to their presence. Therefore, the Department does not substantiate this allegation and orders no corrective action.</p>
3.	<p><b><u>Parent Participation – General:</u></b></p> <p>a. The Parent alleges that the District violated IDEA when it did not present pertinent information for discussion at the September 24, 2013 IEP meeting; but instead, sent the information to the Parent in a letter after the meeting.</p> <p>(OAR 581-015-2205(1), OAR 581-015-2190, 34 CFR 300.501, and 34 CFR 300.324(a)(1))</p>	<p><b><u>Substantiated:</u></b></p> <p>Here, the District held two meetings to consider the question of appropriate eligibility for the Student. At the second eligibility meeting, the District staff did not explain that team members may disagree, and as part of that process may write a statement explaining their disagreement. As a result, the team did not allow Parent to ask any questions related to this matter. All members of the team verbalized agreement with the ASD eligibility decision at this meeting. However, this was not a true representation of the team member's individual conclusions, and consequently the Parent was deprived of the right to ask questions and receive answers about the individual team member's opinions and professional conclusions at this eligibility meeting. For this reason, the Department substantiates this allegation and orders corrective action.</p>
4.	<p><b><u>Requirement for Least Restrictive Environment and Non-Academic Settings:</u></b></p> <p>a. The Parent alleges that the District violated the IDEA when it refused to allow the Student to be in the hallways with peers before and after lunch; and, when it restricted the Student to the self-contained classroom for non-academic activities such as breakfast and lunch. When the Parent asked the District why this was happening, the District said it did not have enough staff</p>	<p><b><u>Not Substantiated:</u></b></p> <p>After the Student was enrolled in the District and returned from a therapeutic day treatment program, the IEP in effect listed on the nonparticipation justification portion that Student would have no school time with general education peers due to the Student's individual needs.</p> <p>Additionally, based on Student's needs,</p>

	<p>to accommodate the Student's needs.</p> <p>(OAR 581-015-2240 &amp; 34 CFR 300.114) (OAR 581-015-2255 &amp; 34 CFR 300.117)</p>	<p>the Student received instruction on a shortened day so this also did not require Student to eat lunch with general education peers. For these reasons, the Department does not substantiate.</p>
<p>5.</p>	<p><b><u>When IEP's Must Be in Effect:</u></b></p> <p>a. The Parent alleges that the District violated the IDEA when it did not provide the Student with a Behavior Support Plan (BSP) or with specially designed instruction (SDI) in speech and language as specified in the Student's IEP.</p> <p>(OAR 581-015-2220 (1) &amp; 34 CFR 300.323).</p>	<p><b><u>Not Substantiated:</u></b></p> <p>The District cannot be held accountable to implement services or instruction that are not outlined and described on the Student's IEP. By their very natures, both the day treatment program and the SLP classes are structured to support students with behavioral, social and emotional needs. While both IEPs in effect during the time under investigation note the Student had communication needs, neither included any form of communication specially designed instruction, related services, or accommodations. Additionally, no BSP or SDI for speech language is included in any of the Student's most recent IEPs. While this may well be an IEP Content issue, it does not provide for substantiation of an IEP Implementation violation. For this reason, the Department does not substantiate this allegation and orders no corrective action.</p>
<p>6.</p>	<p><b><u>Free Appropriate Public Education (FAPE)- Denial of FAPE</u></b></p> <p>a. The Parent alleges that when the District did not provide IEP specified services; withheld information at the IEP meeting; refused to consider an ASD eligibility without the involvement of an outside agency; and limited the Student's time in non-academic settings, the District did not provide the Student a Free and Appropriate Public Education.</p> <p>(OAR 581-015-2040 &amp; 34 CFR 300.101)</p>	<p><b><u>Not Substantiated :</u></b></p> <p>The question here is whether these allegations amount to a denial of FAPE in this case. The Department finds that although the actions taken with regard to parent participation do amount to a procedural violation it does not amount to a denial of FAPE. There is no indication that Student did not receive educational benefit as a result of Parent not being able to ask questions at the eligibility meeting. The IEP in effect was still utilized for Student at all times to meet Student needs. Further, in Oregon a Student's needs drive their applicable IEP services, not an IDEA eligibility type or category. Therefore, the Department does not substantiate this allegation.</p>

<p><b><u>Proposed Corrective Action:</u></b></p> <p>District transfer and transport Student to Salem-Keizer School District</p>	<p>See Corrective Action</p>
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**III. FINDINGS OF FACT:**

1. The Student is 14 years old and resides in the North Santiam School District 29J. The Student is eligible for Special Education as a Student with Autism Spectrum Disorder (ASD).
2. During the 2013-2014 school year, the Student attended school in four different school settings as an 8th grader. The Student started the school year in a Day Treatment Program and then began transitioning to the District on a part-time basis on September 30, 2013. Starting on that date, the Student attended the Day Treatment Program two days per week and the District three days per week. On October 29, 2013, the Student began attending classes in the District five days per week. On November 15, 2013, the Parent withdrew the Student from the District and home-schooled the Student until February 4, 2014. The Student moved into a Grandparent's home in a neighboring district and began attending school there on February 26, 2014. The Student finished the 2013-2014 school year in the neighboring district.

**Pertinent Background Information Outside of Complaint Timeline:**

3. Previous to the start of the 2013-2014 school year, the Student had many different educational placements and was enrolled in two different districts at different times. The Student has been placed in self-contained classrooms in at least<sup>2</sup> two different school districts since the second grade. In addition, the Student has received services from a variety of community mental health agencies. In April and May of 2012, the Student was placed in a Residential Program twice; first for two days, and second from April 27, 2012 until June 1, 2012. The Student was originally placed in this setting because of threats to the Parent and siblings; defiant and extremely angry behavior; and refusal to cooperate with community mental health professionals. The Student was diagnosed as DSM-IV Axis I<sup>3</sup>: ADHD, combined type; Oppositional Defiant Disorder (ODD); Mood Disorder NOS; Parent-Child Relational Problem; Asperger's Disorder; and Anxiety Disorder NOS by the residential treatment program.
4. The Student was first<sup>4</sup> found eligible as a student with ASD in kindergarten, and was initially placed in special education on March 10, 2006.<sup>5</sup> In 2009, the District evaluated the Student to determine if the Student's behaviors were significant enough to qualify for an eligibility under the categories of Emotional Disturbance (ED) or Other Health Impairment (OHI). The team received a medical statement from the Student's doctor verifying a diagnosis of Attention Deficit Hyperactivity Disorder on February 10, 2009. After conducting evaluations in all three areas, the team met on February 23, 2009 and considered the question of eligibility. After consideration, the team agreed the Student demonstrated characteristics of

<sup>2</sup> There is a reference in the District's response that the Student lived out of state at one point, but the District does not have any additional details about the Student's schooling at that time.

<sup>3</sup> Axis I: Clinical Disorders: This the top-level of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) multiaxial system of diagnosis. It represents acute symptoms that need treatment. Although there is now a DSM-V; this student was diagnosed under the DSM-IV.

<sup>4</sup> A review of the student's eligibilities is necessary to understand the current situation.

<sup>5</sup> The actual eligibility date is not referenced here as there was no other paperwork to review from this time period, except the Prior Notice and Written Consent for Initial Placement in Special Education form, dated 3/10/2006.

and was eligible for special education as a student with OHI. However, the team found that the Student did not demonstrate any characteristics of ASD or of ED. At the time, a Grandparent was the Student's guardian, and the Parent did not attend the meeting.

5. When the Student's three year re-evaluation was due again in 2012, the Parent agreed with the District that no testing was needed to continue the Student's eligibility as OHI. On September 17, 2012, the team re-established this eligibility. However, during the meeting, both the Parent and the Grandparent stated they still believed the Student had ASD.
6. On June 28, 2012, the Student began treatment in a summer school program at the Day Treatment Program. On September 20, 2012, the Student was evaluated by a psychiatrist who specified a DSM-IV diagnosis of Asperger's Disorder, ADHD, ODD, Parent-Child Relational Problem, and Mood Disorder, Not Otherwise Specified (NOS) (Axis I<sup>6</sup>). The psychiatrist recommended that the Student be assessed in speech and language, "looking particularly for ways to help the patient express self with language without so much associated frustration with resulting shutdown behavior"<sup>7</sup>
7. After a recommendation from the Student's pediatrician and the therapists in the Day Treatment Program, the Student was evaluated at a children's hospital on October 1, 2012. A licensed clinical social worker had assessed the Student at the beginning of the Day Treatment Program, and had assigned the same Axis I diagnosis as the previous psychiatrist.<sup>8</sup> After a clinical interview with the family, and an individual interview with the Student, children's hospital staff conducted an intellectual evaluation, and a behavioral evaluation. This team assigned a DSM-IV Axis I diagnosis of Communication Disorder, NOS, Rule-Out Mixed Receptive Expressive Language Disorder; ADHD, combined type; Mood Disorder, NOS; and Rule-Out a Reading Disorder. Similarly, this team recommended a full evaluation by a speech and language pathologist; and a focus on building the Student's coping skills to manage anger, frustration and depressive symptoms.
8. On October 30, 2012, the day treatment team re-wrote the Student's IEP, as outlined below:

<b>Consideration of Special Factors:</b>	a. Student has communication needs.
<b>PLAAFP: Present Levels of Academic Achievement and Functional Performance</b>	<ol style="list-style-type: none"> <li>a. The Parent is concerned that the Student does not access school and learning;</li> <li>b. The Student is likeable and energetic, enjoys animals and hands-on activities;</li> <li>c. The Student's academic performance is difficult to measure as the Student spends little time in class, and does not generate written work very often;</li> <li>d. The Student tries hard to fit in with peers, but does antagonize and make fun of some peers; and,</li> <li>e. The Student shows signs of ADHD daily in class by fidgeting and not staying on task.</li> </ol>
<b>District and Statewide Assessments:</b>	a. Standard with the accommodations of a quiet, separate testing area with limited distractions
<b>Goals:</b>	a. The Student will participate in class activities by

<sup>6</sup> Axis I: Clinical Disorders: This is the top-level of the DSM multiaxial system of diagnosis. It represents acute symptoms that need treatment

<sup>7</sup> Psychiatric Assessment, 9/20/12

<sup>8</sup> (see Fact # 6)

	<p>attending class, doing daily work and asking questions for help at 85% accuracy as measured by the daily point and incentive program;</p> <p>b. The Student will attend class without being a distraction to peers at 85% accuracy as measured by the daily point and incentive program;</p> <p>c. The Student will avoid name calling and put downs of peers and staff at 85% as measured by the daily point and incentive program;</p> <p>d. The Student will choose appropriate mathematical functions and operations in regards to whole numbers, fractions and decimals at 85% accuracy as measured by teacher and curricular created assessment; and,</p> <p>e. The Student will use reading and comprehension strategies to read grade level material and answer questions at 85% accuracy as measured by teacher and curricular created assessment.</p>
<b>SDI: Specially Designed Instruction</b>	<p>a. Math, 90 minutes per week in SPED classroom;</p> <p>b. Reading, 90 minutes per week in SPED classroom; and,</p> <p>c. Social Skills/Behavioral, 15 hours per week All School Settings.</p>
<b>Related Services</b>	<p>a. Family Training, Counseling, Consultation, 60 minutes per week; and,</p> <p>b. Transportation, 2 sessions per day to and from school.</p>
<b>Supplementary Aids/Services, Modifications, Accommodations:</b>	<p>a. Access to computer to complete assignments, daily in all school settings;</p> <p>b. Access to personal time-outs when frustrated, daily in all school settings;</p> <p>c. Extra time to complete assignments daily in all school settings; and,</p> <p>d. Frequent check-ins and clear expectations on assignments daily in all school settings.</p>
<b>Supports for School Personnel:</b>	<p>a. Consultation with home school, quarterly as needed in GEN ED and SPED.</p>
<b>Non-Participation Justification:</b>	<p>a. The Student is removed from the GEN ED setting for 1440 (sic) hours per week (5 days) to benefit from smaller class and school size, in order to receive more individual attention, instruction and mental health counseling.</p>
<b>ESY: Extended School Year:</b>	<p>a. No</p>
<b>Placement Determination:</b>	<p>a. Public Separate School for the greatest amount of emotional and mental health support provided from special education program.</p>

9. The Student was evaluated for speech/language issues on November 14, 2012. This clinician diagnosed a mixed receptive and expressive language disorder with below average skills especially in the areas of language content and memory.
10. On April 9, 2013, while the Student was still in Day Treatment, the District asked for and received permission from the Parent to evaluate the Student for possible eligibility as a student with ASD. The District noted that the proposal to conduct this evaluation was based on the Student's current placement at the Day Treatment Program, and on evaluations completed at the children's hospital and the Day Treatment Program.
11. The District conducted an Autism Spectrum Disorder evaluation and a Communication Assessment in late April and early May of 2013. Two different Speech/Language Pathologists conducted the Communication Assessment. One pathologist completed a file review and observation and evaluated the Student using the Comprehensive Assessment of Spoken Language (CASL),<sup>9</sup> and the Test of Problem Solving –Adolescent (TOPS).<sup>10</sup> On the CASL, the Student received scores in the range of 91-109; and 85—115 is considered to be in the average range. On the TOPS, the Student scored a 98; again, the range of 85—115 is in the average range. This pathologist concluded that the Student "may exhibit communication skill deficits that can be typical of individuals with ASD; but noted that the team needed to meet and consider all background information and other assessment information".
12. The second Pathologist attempted to assess the Student using the Test of Pragmatic Language – 2 (TOPL-2) but the Student was not cooperative; either answered questions inappropriately or not at all. The Pathologist did not attempt a hearing screening, but noted the Student was observed listening and answering questions in a conversation. However, the Pathologist was able to conduct a speech/language sample and found the Student's language skills to be age and grade appropriate.
13. An Autism Specialist conducted an ASD evaluation. The Specialist completed a Developmental Profile; a File Review; and administered an Autism Spectrum Rating Scale; a Sensory Profile; an Asperger's Disorder Assessment Scale; Test of Problem Solving; and a Comprehensive Assessment of Spoken Language. The Autism Specialist also reviewed the 2009 medical statement and observed and interacted with the Student in three settings (social activity, classroom, and one on one). Noting that individuals with ASD often struggle with pragmatics, nonliteral language and verbal problem-solving; the Specialist concluded the Student's scores in these areas ranged from 91—98, all in the average range. The Specialist also observed that the Student was able to understand emotions in others, unlike individuals with ASD. The Specialist concluded that although the Student demonstrated some specific sensory sensitivities these were not impacting the Student's ability to access education; and that the difficulties the Student demonstrated with adults and peers were more consistent with the ADHD, Mood Disorder and ODD diagnoses.
14. The District team met on June 7, 2013 to consider the results of these assessments. The discussion at this meeting, by all accounts was difficult and the group was not able to reach consensus on what eligibility category best articulated the Student's difficulties and most impacted the Student's ability to make progress in school. The Parent felt strongly that the Student continued to evidence ASD characteristics as identified in 2006 and noted by other evaluators; and the District staff, in particular the ASD Specialist and Speech/Language

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<sup>9</sup> The CASL is designed to measure the processes of comprehension, expression, and retrieval of language.

<sup>10</sup> The TOPS is designed to assess problem solving and critical thinking skills of secondary students.



Pathologists disagreed. As a result, and because additional evaluations were scheduled for the summer, the team decided to postpone the eligibility decision until September, 2013.

**July, 2013 to July, 2014:**

15. As noted in Fact # 2, the Student had received community mental health services from a variety of agencies over the years. On July 17, 2013, the Student was evaluated by a licensed psychologist, as part of a recommendation from a therapist, that the Student be considered for eligibility for the Community Developmental Disabilities Program. This program is part of the Oregon Department of Human Services for Senior Citizens and People with Disabilities (DD). The referring therapist presented three questions for the psychologist's consideration:

- a. Does the Student have a form of an autistic spectrum disorder (sic)?
- b. Is the Student exhibiting significant difficulties in adaptive behavioral function, and is it directly associated with an Autism Spectrum disorder or are adaptive difficulties related to attention deficit hyperactivity disorder (sic)?
- c. What are the Student's sensory needs?

16. To answer these questions, the psychologist reviewed the Student's record, observed the Student, interviewed the Parent and administered the Delis-Kaplan Executive Functioning System: Trail Making Test, Verbal Fluency Test, and Color-Word Interference Test; and the Rorschach Inkblot Test. The psychologist noted the Student was cooperative during testing; displayed some unusual mechanisms (refused to drink water because it might be poisoned with fluoride, and appeared and behaved significantly younger than the stated age. The psychologist also described the Student's manner of verbalization and play as more similar to a primary aged child than a middle school aged child.) After reviewing the record, evaluations and testing, the psychologist concluded:

- a. *"The Student is a complex young person struggling with multiple issues. It is understandable that diagnostic clarification has been difficult. However, I suggest the preponderance of evidence indicates symptoms of an autistic spectrum disorder that were present long before the traumatic circumstances in [the Student's] life. Early maternal and educational observations clearly suggest sensory sensitivities, unusual social interaction and stereotyped behaviors prior to a lengthy separation from the mother. Additionally, symptoms of attention deficit hyperactivity disorder were present at an early age, although these symptoms cannot account for difficulties with reciprocal interaction, unusual stereotyped mannerisms, or ongoing social deficits. I perceive these as comorbid conditions.*
- b. *Psychometric testing also reinforces the concept of cognitive rigidity and inflexibility that goes beyond attention deficit hyperactivity disorder or oppositional behavior. It is my belief that some of the oppositional behavior is likely in reaction to prolonged separation from mother, and is further exacerbated by overall rigid thinking related to [the Student's] neurodevelopmental disability."<sup>11</sup>*

17. The psychologist recommended counseling for the Student, Parent and family; clear and structured behavioral expectations; that the family share the report with the school to clarify the complexity of the Student's difficulties; provision of sensory interventions; and that the family apply for services through DD to support them and the Student. The Parent provided the District with a copy of this report when the report was finished.

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<sup>11</sup> Psychologist's Report, August 27, 2013, pp.8.

18. On September 4, 2013, the Student was found eligible for services through Marion County DD, and was assigned a Service Coordinator. The Student's area of developmental disability was identified as Autism.
19. On September 24, 2013, the IEP team met again to finish the discussion it had started in May on the Student's eligibility. The Autism Specialist and one of the Speech/Language Pathologists met with District administrators prior to the meeting and expressed their belief that the Student did not meet the criteria for eligibility as a Student with ASD. The Administrators and the Specialists agreed to proceed with the eligibility decision and to accept the Parent's desire for the Student to be eligible as a student with ASD. At the meeting, the team briefly reviewed the evaluation conducted by the psychologist on July 17, 2013, as well as a speech language assessment conducted at the Day Treatment Center; the evaluation conducted by a psychiatrist in 2012, and the evaluation conducted by the licensed clinical social worker at the Day Treatment Center. In addition the team reviewed the evaluation conducted by the Autism Specialist.
20. The DD Service Coordinator, the Student's Parent and Aunt, and the social worker from the Day Treatment Center attended the September 24, 2013 meeting. Neither the District special education teacher nor the Day Treatment special education teacher attended the meeting. At the meeting, the Autism Specialist read the Autism Eligibility form to the team and everyone on the team answered "Yes" in agreement that they agreed the Student exhibited each characteristic. As a result, the team found the Student eligible as a student with ASD. The Autism Specialist and the Speech/Language Pathologist checked the box as disagreeing with the decision. Neither the Parent nor the DD Service Coordinator remember seeing the two specialists check the disagreement box, and neither the Parent nor DD Service Coordinator remember these two educational specialists expressing their disagreement with the autism eligibility during the meeting.<sup>12</sup> After the meeting, the Autism Specialist and the two Speech/Language Specialists wrote letters stating they disagreed with the decision to identify the Student as a student with ASD in order to document and explain their rationale for not agreeing with the eligibility to Parent. On October 22, 2013, the DD Service Coordinator noted in the case log that the Parent had called the coordinator to say the Parent had received the letters and was surprised by the letters because everyone had agreed with the decision on September 24, 2013. On October 22, 2013, the Parent sent a letter to the District requesting that the Autism Specialist be removed from the Student's IEP team, and that the Autism Specialist no longer provide services to the Student. The Parent expressed disappointment that the Autism Specialist had not expressed these concerns during the September 24, 2013 meeting.
21. The DD Service Coordinator took notes at the September 24, 2013 meeting.<sup>13</sup> According to these notes, the team discussed a transition plan for the Student and made a placement decision. The Team decided to transition the Student to the District middle school Structured Learning Program (SLP) half days, on Mondays, Wednesdays and Fridays, starting on September 30, 2013. On Tuesdays and Thursdays, the Student would remain in the Day Treatment Program. The Day Treatment Counselor summarized some of the strategies the staff used in that setting to support the Student, e.g., 1:1 relationships, hands-on jobs in the morning. The team also decided the Autism Specialist would visit the Day Treatment Program and shadow the Student so that the Student could get to know the Autism

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<sup>12</sup> The Autism Specialist told the Department's complaint investigator that the Specialist did not express any disagreement with the decision at the meeting. The Specialist said, "I had expressed all of my disagreement at the May meeting".

<sup>13</sup> The District did not provide any meeting minutes from the September 24, 2013 meeting, even though the complaint investigator requested them.

Specialist in a neutral environment. Finally, the team decided to keep the IEP goals on the current IEP, and discussed the possibility of a modified diploma.

22. The Parent asked the Autism Specialist what the Student's day would look like in the Structured Learning Program (SLP) in the District. The Autism Specialist told the Parent that after visiting the Day Treatment Program the District would develop a schedule and routine, behavior support plan, and a safe room for breaks.
23. The Student started the transition back to the District on September 30, 2013 as planned. The Student attended for three hours per day, 8 a.m. to 11 a.m. Generally the Student arrived at school about 7:40 a.m. to get breakfast. At 10:30 a.m. the Student went with an Instructional Assistant to the cafeteria to pick up lunch, and then returned to the SLP classroom to eat the lunch. The Student had Reading, Math and PE classes each day. The structure of the SLP classroom is such that each student works on a daily goal and earns points toward an incentive. The Student liked to work on an I-Pad, and earned points to do that. The special education teacher tracked the Student's points for 13 days of the Student's attendance in the District. On those 13 days, the Student earned 43 of 114 points on Behavior Goals, 37%. The special education teacher reported that the Student did not like to do the Reading and Math work unless it was a skill the Student already knew.
24. One of the expectations in the SLP class is that students go to the cafeteria and pick up their breakfasts and then return to the SLP classroom to eat. The Student did not like this requirement, and argued with the teacher and vice principal consistently about having to eat breakfast in the SLP room. On the morning of October 2, 2013, the Student brought a backpack to school and refused to go to the classroom, but instead, stood in the hallway and began handing out candy from the backpack to other students. The Assistant Principal (AP) asked the Student to stop and to go to the SLP classroom. Again, the Student refused, and so the AP warned the Student that if the Student did not follow the directions, then the AP would confiscate and search the backpack. After the Student refused a third time, the AP did confiscate and search the bag. During the search, the AP found not only the candy, but also a box cutter with a blade and a bottle of pills.<sup>14</sup> The AP took the backpack and all the items from the Student and wrote up a discipline referral. On the discipline referral the AP noted that the problem behavior was "Use/Possession of a Weapon", and that the SPED was "coming up with a plan". The AP does not remember whether the Student was suspended<sup>15</sup> from school.<sup>16</sup>
25. The Behavior Specialist wrote a Behavior Support Plan (BSP) for the Student on October 10, 2013. The plan specified that the Student would not bring a backpack to school and that the SLP teacher would search the Student's pockets every morning when the Student arrived at school. In addition, the Behavior Specialist notated Proactive/Preventative Strategies; Teaching Strategies; Crisis Response plans; and a list of criteria the Student needed to meet in order to increase the Student's time at school. The Parent does not ever remember seeing the plan; however, the Parent did know the Student had a pocket check

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<sup>14</sup> The AP said the bottle of pills was not labeled, but was clearly Advil. The parent said the Student needs the pills for headaches, and that the bottle was labeled.

<sup>15</sup> All records have now been rolled over from the 2013-2014 school year and were not easily available.

<sup>16</sup> District policy JFCJ, "Weapons in School" mandates that students who violate the policy be suspended, referred to parents and the police, and proceedings for expulsion begin immediately. The policy also noted that when a student has a disability under IDEA or Section 504, the district must determine whether or not the student's conduct is related to the student's disability. Finally, the policy does give the superintendent discretion to consider mitigating factors such as the student's intent to use the weapon on campus.

every morning. The Parent does not know if the plan was ever presented in its entirety to the Student.

26. On October 16, 2013, the IEP team met to revise the IEP. The Parent told the team that the Student was very unhappy about not being able to "hang out" in the halls with the other students before school started in the morning. The AP stated that the Student was "too inappropriate to be out in the halls without supervision and that the District does not have staff to do that". The Parent asked if there were any other alternatives. District staff suggested that the Student's sister bring some friends and their breakfasts to accompany the Student into the SLP classroom for breakfast every morning. The Parent and the DD Service Coordinator asked again if there were other alternatives, and the District said there were none.<sup>17</sup>

27. During the October 16, 2013 IEP meeting the team decided to remove the academic goals from the IEP and to focus specifically on the Student's behavioral needs. The team discussed the modified and extended diploma plans and agreed on the plan for the Student to earn an Extended Diploma. The team specified the following in the IEP:

<b>Consideration of Special Factors:</b>	<ul style="list-style-type: none"> <li>a. Student has communication needs; and</li> <li>b. Student has behavior needs.</li> </ul>
<b>PLAAFP: Present Levels of Academic Achievement and Functional Performance</b>	<ul style="list-style-type: none"> <li>a. The Parent is concerned about the transition from the Day Treatment Center and about high school graduation options;</li> <li>b. The Student reads well aloud and enjoys being active;</li> <li>c. The Student is often unwilling to produce work in class and is well below grade level;</li> <li>d. The Student's disabilities and disruptive behaviors make success in school difficult: and,</li> <li>e. The Student overtly defies authority, leaves class without permission and curses in class.</li> </ul>
<b>District and Statewide Assessments:</b>	<ul style="list-style-type: none"> <li>a. Standard with the accommodations of frequent breaks and testing in short increments.</li> </ul>
<b>Goals:</b>	<ul style="list-style-type: none"> <li>a. The Student will participate in class activities by attending class, doing daily work and asking questions for help at 80% accuracy as measured by observation with data;</li> <li>b. The Student will attend class without being a distraction to peers at 80% accuracy as measured by observation with data;</li> <li>c. The Student will avoid name calling and put downs of peers and staff 4 of 5 days at 90% accuracy as measured by observation with data; and,</li> <li>d. The Student will remain in seat when instructed with 80% accuracy and not leave the classroom without permission, to include coming directly to class when he gets to school with 90% accuracy as measured by observation with data.</li> </ul>

<sup>17</sup> The School's policy is that all of the SLP students are required to bring their breakfasts to the SLP classroom in the morning.

<b>SDI: Specially Designed Instruction:</b>	a. Social/Emotional/Behavioral: 90 minutes per month in all school settings.
<b>Related Services:</b>	a. Transportation, 2 sessions per day to and from school.
<b>Supplementary Aids/Services, Modifications, Accommodations:</b>	a. Tracking Sheet: daily, LEA/school
<b>Supports for School Personnel:</b>	a. Autism and Behavior Specialists, 3 hours each per year in all school settings,
<b>Non-Participation Justification:</b>	a. The Student is removed from the GEN ED setting for 100% of the school day because the Student's behaviors are such that the Student is not successful in the general education environment. The Student requires a highly structured environment with more supervision and support than the Student would be able to get in a general education setting.
<b>ESY: Extended School Year:</b>	a. No
<b>Placement Determination:</b>	b. SLP for half-days, five days per week.

28. The Student attended 13 days of school from September 30, 2013 to November 6, 2013. On November 15, 2013 the IEP team met at the Parent's request and the Parent informed the District that the family was going to home-school the Student. The Parent decided to do this because the Student was not attending school regularly or for very much time each day; and Student often got sent home on the days the Student did attend school due to behavioral concerns. Once again, the team revised the IEP and chose a home-schooling placement. The District agreed to provide academic consultation to the family (provided by the SLP teacher); and counseling to the Student (provided by the Behavioral Specialist). The team added the academic consultation as Support for School Personnel to the IEP; did not add the Counseling to the IEP, and left all other sections of the IEP intact. In the minutes of this November 15, 2013 meeting, the team noted that a new Functional Behavior Assessment (FBA) needed to be done for Student.

29. The Student met with the Behavior Specialist three times in January, 2014, for a total of two hours. On February 26, 2014, the Student started school in a neighboring school district due to a change of residence.

#### IV. DISCUSSION

##### 1. Determination of Eligibility and Interpretation of Evaluation Data:

The Parent alleged that the District violated the IDEA when it did not consider all previous and current evaluations to determine whether or not, the Student was eligible as a student with Autism Spectrum Disorder (ASD).

When determining eligibility and interpreting evaluation data, a district must draw information from a wide variety of sources, including but not limited to: aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior. Each area of disability specifies the types of evaluations, observations and other data

which must be reviewed in order to determine student eligibility. A district is obligated to ensure that all information obtained from these sources is documented and considered.<sup>18</sup> The team considering this evaluation information and making the eligibility determination must include the parent, two or more qualified professionals, at least one of whom is knowledgeable and experienced in the evaluation and education of children with disabilities. There is no legal requirement that each team member must agree with the Student's eligibility individually. Rather, the eligibility must be determined by the team. The written statement of eligibility must include the signature of each member of the team indicating agreement or disagreement with the eligibility determination.<sup>19</sup> For a child who may have disabilities in more than one category, the team need only qualify the child under one disability category.<sup>20</sup> Finally, the team must prepare an evaluation report and written statement of eligibility.<sup>21</sup>

In this case, the Student's team included all the appropriate individuals. The team evaluated the Student earlier than was necessary at the Parent's request. An Autism Specialist and two Speech/Language Specialists evaluated the Student. The District team met on June 7, 2013 to consider the results of the assessments. The discussion at this meeting, by all accounts, was difficult and the group was not able to reach consensus on what eligibility category best articulated the Student's difficulties and most impacted the Student's ability to make progress in school. The Parent felt strongly that the Student continued to evidence ASD characteristics as identified in 2006 and noted by other evaluators as a result of referrals from community health providers during the intervening years. The District staff, in particular, the ASD Specialist and Speech/Language Pathologists, disagreed with an autism eligibility. Therefore, the team decided to postpone the eligibility decision until September, 2013 due to the fact that a mental health group had referred the Student for further evaluation. In July, 2013, a psychologist associated with DD services evaluated the Student.

The Parent shared this psychologist's report with the District before the IEP team met again on September 24, 2013 to consider eligibility. The team was well ahead of schedule for this meeting, and it is well within reasonable practice to postpone the eligibility decision pending additional information for a student.

The DD documents provided by Parent and dated September 4, note that a psychologist determined Student had Autism Spectrum Disorder on July 19, 2013 along with ADHD and a parent child relational problem. Further, this document lists prior diagnoses from previous years including two separate doctor's diagnoses of the Student with Asperger's Disorder April and September of 2012.

The District did not submit any meeting notes from September 24, 2013 that indicate Student's most recent mental health reports were discussed at that time. However, the DD representative at the meeting did provide notes of the September 21, 2013 meeting. These notes concur that the Autism Specialist and one SLP were at this meeting along with one other district representative. There were four other non-District IEP team members, which included one Parent and an aunt. These notes stated that, "Report from license (sic) physicians clearly found Student experiences Autism." The notes further state that "Today the team went through the district evaluation questions for finding a person eligible through Autism (sic). The questions were read aloud to the team by the Autism Specialist. All the questions were answered "yes" and found eligible for autism." The notes further indicate the Parent only asked a question

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<sup>18</sup> OAR 581-015-2125

<sup>19</sup> OAR 581-015-2120(2)(F)

<sup>20</sup> OAR 581-015-2120(4)

<sup>21</sup> OAR 581-015-2120 (1)(a) (2)

regarding what Student's day would look like and some discussion about a safe break area and a behavior support plan for Student.

The DD representative also submitted notes dated October 22, 2013 which stated Parent called to discuss concerns about the District's Autism Specialist. Parent stated she got paperwork from the Autism Specialist that disagreed with the autism eligibility. The notes from DD state, "This was a surprise to Parent and myself because at the IEP meeting it was expressed to the team that everyone agreed that Student needed autism supports and that it would be put on Student's IEP."

The eligibility statement dated September 24, 2013 also notes that the team reviewed an observation of the child completed by a psychologist on July 19, 2013 and a direct interaction with the child made by the same psychologist on July 19, 2013. This document also indicates the team reviewed a variety of other observations and assessments. This form also clearly indicates that two members of the team disagreed with this eligibility for Student, the Autism Specialist and the SLP. The other six members of the team checked or Xed boxes to indicate they did agree with the eligibility. A box is also checked to indicate a copy of the evaluation report and eligibility statement was given to Parent.

In this complaint, the District did respond to the Parent's request to reevaluate the Student's area of disability and reconsider an ASD eligibility for Student. The District evaluated the Student, met twice to ponder the question and reviewed additional evaluation materials for Student. District provided Parent with a copy of the evaluation report and eligibility statement that clearly indicated two members of the team disagreed with the autism eligibility. As there is no legal requirement for all team members to agree with a particular eligibility type, and the evaluation report form which must be provided to parents even affords a basis for parties to document their individual disagreement with the eligibility that is selected for a student, there is no basis to require each team member to agree with an eligibility type. Accordingly, the professionals here who did not agree with the autism eligibility sent Parent a letter to further document and explain why they disagreed.

Given this, the Department does not substantiate these allegations.

## **2. Evaluation Requirements and Eligibility Determination:**

The Parent alleged that the District violated the IDEA when it refused to consider the Student's possible eligibility categories until agencies outside of the District (Developmental Disabilities) became involved.

For school-aged children, school districts and juvenile and adult corrections education programs are the public agencies responsible for evaluating children and determining their eligibility for special education services.<sup>22</sup> The school district is represented in this process by a group of qualified professionals who are obligated to include the parent in the eligibility determination process.<sup>23</sup>

When the IEP team first met on June 7, 2013 to consider the Student's eligibility, professionals from both the school district and the Day Treatment Center attended the meeting. The Parent also attended this meeting. At the time, the Student also received counseling from a community agency. This agency recommended that the Student be evaluated for eligibility as an individual

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<sup>22</sup> OAR 581-015-2100(1)

<sup>23</sup> 34 CFR 300.306

with a developmental disability—as per the county health department. After the evaluation, the county certified that the Student was eligible for DD services, and assigned a Service Coordinator to the Student. This Service Coordinator attended the September 24, 2013 eligibility meeting.

As noted in the previous allegation, the District decided to extend the eligibility process in order to review the most recently obtained mental health evaluation information and data that was acquired from Student in July, 2013. Although the DD Service Coordinator attended and participated in the September meeting, there is no evidence to suggest that this person dominated the meeting or influenced the District's decision making in any substantial manner. Rather, the DD staff's notes indicate that the team reviewed the eligibility criteria together and the District then determined Student was eligible for IDEA services under an Autism eligibility. What is clear here is that the Parent noticed a significant change in the District staff's attitudes; and quite possibly attributed this to the presence of the DD Service Coordinator at the meeting. It is also noteworthy that District was provided by Parent with a more detailed report of Student's disability related needs at this time, particularly in light of the lengthy Notice of Eligibility Determination for Community Developmental Disabilities Program dated September 12, 2013 which notes that Student has autism or a developmental disability in several places based on medical/clinical assessments and diagnoses.

There is no evidence that the DD Service Coordinator's presence at the meeting had substantial effect on District staff. The record shows that District was working with Parent for the evaluation and eligibility requirements well before September of 2013. Therefore, the Department does not substantiate this allegation and orders no corrective action.

### **3. Parent Participation – General:**

The Parent alleged that the District violated IDEA when it did not present pertinent information for discussion at the September 24, 2013 eligibility determination meeting; but instead, sent the information to the Parent in a letter after the meeting. Specifically, the Parent alleged that members of the District team did not clearly state their disagreement with the decision to make the Student eligible as a student with ASD in the meeting. Instead, the team members merely sent the Parent letters after the meeting stating their disagreement with the eligibility meeting.

A school district must provide one or both parents with an opportunity to participate in meetings with respect to the identification,<sup>24</sup> evaluation, IEP and educational placement of the child, and the provision of a Free Appropriate Public Education to the child. In addition to sending meeting notices outlining the date, time, place and purpose of the meeting; the district must take whatever action is necessary to ensure the parent understands the proceedings at a meeting.<sup>25</sup> This participation should include a discussion of placement options for a student and answering parents' questions.<sup>26</sup> A meeting does not include informal or unscheduled conversations involving school personnel and conversations on issues such as teaching, provisions of services, etc. if those issues are not covered in the IEP.<sup>27</sup> However, the general parent participation requirements of IDEA do apply to meetings held to discuss eligibility for students.<sup>28</sup>

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<sup>24</sup> Identification means the process for determining a child's disability and eligibility for special education and related services. See OAR 581-015-2000.

<sup>25</sup> OAR 581-015-2190 (1—3)

<sup>26</sup> Board of Educ. of Waterford-Halfmoon Union Free Sch. Dist., 20 IDELR 1092 (SEA NY 1994).

<sup>27</sup> OAR 581-015-2190(4)

<sup>28</sup> OAR 581-015-2120(1)(a)



During the June 7, 2013 meeting, the ASD Specialist and the Speech/Language Pathologists expressed their combined disagreement with ASD as the primary eligibility. The conversation was reported as intense and, as previously noted, the team did not reach consensus for the eligibility type. When the group later reconvened in September, both the Parent and the DD Service Coordinator observed that the Autism Specialist simply read the eligibility questions aloud, all team members expressed agreement, and then signed the paperwork accordingly. Both the Parent and the DD Service Coordinator noted that they did not see anyone on the team sign the box disagreeing with the decision nor was there any further discussion regarding disagreement. However, the Statement of Eligibility for Special Education dated September 24, 2013 indicates that both the Autism Specialist and the Speech Language Pathologist checked the "disagree" box for the eligibility. Further, as noted above, both the SLP and Autism Specialist sent Parent formal letters detailing why they did not agree with the eligibility. The letters were also dated September 24, 2013.

The Parent reported they were surprised to receive the letters after the meeting stating that the Autism Specialist and the Speech/Language Pathologist disagreed the Student met criteria for eligibility as ASD. Neither the District's meeting minutes nor do the DD Service Coordinator's minutes indicate that anyone on the team expressed disagreement with the decision; or that anyone explained how a team member can disagree. Parent reported this left them wondering how an Autism Specialist who disagreed with the autism eligibility could reasonably provide services to the Student. The obligation to ensure parent participation and understanding at team meetings is not limited to merely providing a translator or interpreter for the parent if needed for linguistic reasons. The District is obligated to explain the IEP and process and answer questions a parent may have about the process if needed. Not providing such explanations, team members opinions, or opportunities for dialogue between team members limits a parent's ability to thoroughly understand and participate in the decision-making related to a student.

Here, the District held two meetings to consider the question of appropriate eligibility for the Student. District staff did not explain that team members may disagree, and as part of that process may write a statement explaining their disagreement. All members of the team verbalized agreement with the ASD eligibility decision at the meeting when Parent could have participated. However, this was not a true representation of the team member's individual conclusions and consequently the Parent was deprived of the right to ask questions, receive answers about the team member's opinions and professional conclusions, and potentially change their mind related to the eligibility type based on this expert information from District special education staff. For this reason, the Department substantiates this allegation and orders corrective action.

#### **4. Requirement for Least Restrictive Environment and Non-Academic Settings:**

The Parent alleges that the District violated the IDEA when it refused to allow the Student to be in the hallways with peers before and after lunch; and, when it restricted the Student to the self-contained classroom for non-academic activities such as breakfast and lunch. When the Parent asked the District why this was happening, the District said it did not have enough staff to accommodate the Student's needs.

A district is responsible to ensure that students with disabilities are educated with students who do not have disabilities to the maximum extent appropriate. Districts must remove students from the regular education environment only when the nature or severity of the student's disability is such that modifications, accommodations and supplementary aids and services do not mitigate the negative effect of the disability. When it provides or arranges for the provision of non-

academic and extracurricular service and activities, including meals, each school district must ensure that a child with a disability participates with typically developing children to the maximum extent appropriate to the needs of that child. The district must provide supplementary aids and services determined appropriate by the IEP team so that the child may participate in the nonacademic settings.<sup>29</sup> Not every student with a disability will benefit from placement in the regular education setting. The requirement for a Free Appropriate Public Education (FAPE) overrides Least Restrictive Environment (LRE) requirements when the two principles conflict. Finally, the Student's IEP must address how the child can be educated and participate with other children with disabilities and children without disabilities, based on the student's needs.<sup>30</sup> The IEP must also include an explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and activities.<sup>31</sup>

Here, the IEP in effect for the Student that was in effect for Student dated October 16, 2013 states that Student's disability requires removal from the general education setting for 100% of the school day. It further states that, "Student's disability prevents Student from being successful in general education. Student needs a highly structured special education setting in order to access education. Additionally, the IEPs in effect from 2011 and 2012 note on the nonparticipation justification that Student is removed from general education setting 100% of the time and in a Day Treatment Program. The document states that, "Student was referred to Day Treatment due to not being able to be successful in the public school setting. The team felt that more structure, support, and therapy at (Day Treatment Center) would be best to meet Student's educational and social-emotional needs at this time." The placement selected after this IEP is a Public Separate School - Day Treatment. This document notes that Student needs high staff to student ratio and therapy support and less interaction with general education peers. Finally, the IEP dated October 30, 2012 notes that Student should be removed from general education for all of the school day due to the fact that Student "...benefits from smaller class sizes and school size. These smaller class sizes allow for more individual attention..." Therefore, there is a long and clear history that the Student needs more adult support and structure than can be afforded in the general education environment.

The Student was therefore placed in a Structured Learning Program (SLP) room after returning to the District from the therapeutic Day Treatment Program. The SLP program is not part of the general education setting at the school. Part of the design of this program is that all students in the program must eat breakfast in the SLP classroom. They may not be in the hallways during the time between arriving at school and the time classes begin. When the Student began attending the SLP program, the teacher explained this rule to the Student. The Student did not cooperate with staff about this rule, and often refused to stay in the SLP classroom. After an incident when the Student distributed candy to others before school started, and was subsequently caught with a box cutter and pills in the Student's backpack, staff redoubled efforts to keep the Student in the SLP classroom during breakfast. The Parent challenged this requirement, and a District staff member informed the Parent that no other options were available.

While a district may restrict a student's access to non-academic settings, it must only be done after the team has determined this is necessary based on a Student's unique needs. The IEP team had significant information here to support that Student needed more structure and attention from adults than could be provided in the general education setting. Additionally, Student was also caught with a dangerous weapon while interacting with general education peers without adult support, which further supports the District's decision not to place Student in

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<sup>29</sup> OAR 581-015-2240; OAR 581-015-2255; OAR 581-015-2070

<sup>30</sup> OAR 581-015-2200999(1)(d)(C)

<sup>31</sup> OAR 581-015-2200(1)(f)

the general education environment. Finally, this Student's IEP team noted that Student was more successful at school when placed on a shortened day. As such, the Student was not at the school during the general education lunch periods.

However, concerning here, is the District's statement that no SLP students are allowed to eat breakfast in the cafeteria. Keeping students with disabilities away from general programs, extracurricular activities, and portions of the school based on their disability type alone may be discriminatory in nature.<sup>32</sup>

After the Student returned to the SLP class in the District, the IEP team considered Student needs, relevant evaluations, and psychological reports to determine that Student was not best served in a general education environment, which included non-academic settings such as breakfast. For these reasons, the Department does not substantiate this allegation

#### **5. When IEP's Must Be in Effect:**

The Parent alleges that the District violated the IDEA when it did not provide the Student with a Behavior Support Plan (BSP) or with specially designed instruction in speech and language as specified in the Student's IEP.

For every student with a disability, public school districts must have in effect an Individualized Educational Program (IEP). School districts must provide special education and related services to each student with a disability in accordance with an IEP.<sup>33</sup> A district meets this responsibility when it has an IEP in place for every eligible student at the beginning of each school year; and when it provides the services specified in the IEP to the student.

When the Student began attending the SLP class in the District, the IEP in effect was initially carried over from the day treatment program, and the only change to the document was to amend the placement decision in order to reflect the transition plan from Day Treatment to the local public school. While the IEP specified that the Student had communication needs, there were no goals specifically addressing any speech language needs. Under the Consideration of Special Factors section of the IEP, the team had not checked the box identifying behavioral needs.<sup>34</sup> However, there were three goals addressing behavioral needs, but no reference to a specific Behavior Support Plan for Student. The goals referenced a "daily point and incentive" program, but this is part of the design of the Day Treatment Program. The IEP noted the provision of specially designed instruction in social skills and behavioral skills for 15 hours per week in all school settings; and mandated family training, consultation and counseling for 60 minutes per week. So there were no BSP or SLP services on this IEP.

The District revised the Student's IEP on October 16, 2013. This time, behavior was noted as a Special Factor, and all five goals included in the IEP focused on the Student's behavior. The only supplementary aid or service was a tracking sheet that was used to track positive behavior. Again, there were no BSP or SLP services on this IEP.

The District cannot be held accountable to implement services or instruction that are not outlined and described on the IEP. By their very natures, both the Day Treatment Program and the SLP class are structured to support students with behavioral, social and emotional needs.

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<sup>32</sup> To file a Civil Rights Complaint, please contact Winston Cornwall at the Oregon Department of Education or the US Department of Education's Office of Civil Rights (OCR) in Seattle, Washington.

<sup>33</sup> 34 CFR 581-015-2220(a), OAR 581-015-2220(1)

<sup>34</sup> This is interesting, considering the Student was placed in a day treatment program. The investigator was not able to sort out whether this was a typographical error or something else.

While both IEP's in effect during the time under investigation note the Student had communication needs, neither included any form of communication specially designed instruction, related services or accommodations. For this reason, the Department does not substantiate this allegation and orders no corrective action.

## **6. Free Appropriate Public Education (FAPE)- Denial of FAPE**

The Parent alleges that when the District did not provide IEP specified services; withheld information at the IEP meeting; refused to consider an ASD eligibility without the involvement of an outside agency; and limited the Student's time in non-academic settings, the District did not provide the Student a Free and Appropriate Public Education.

Districts must provide "special education and related services to all school-age children with disabilities". Special education is defined as "specially designed instruction that is provided at no cost to parents to meet the unique needs of a child with a disability."<sup>35</sup> Additionally, FAPE is broadly defined in the 2006 Part B regulations as special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency; include an appropriate preschool, elementary school, or secondary school education in the state involved; and are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 through 34 CFR 300.324.<sup>36</sup> The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student.<sup>37</sup> The Supreme Court has developed a two part test to determine the appropriateness of an educational program: 1) the procedural requirements of the IDEA must be met; and 2) the IEP must be developed and reasonably calculated to enable the child to receive educational benefits.<sup>38</sup>

It is useful to begin the analysis of this allegation by noting that the Department has not substantiated any allegation other than the parent participation allegation related to the September 24, 2013 eligibility determination meeting. Even though two District staff did not tell Parent they disagreed with the eligibility at the meeting, there is no indication that this denied the Student an educational benefit. The Student still had a valid IEP in effect and was receiving services based on Student need at this time. Under Oregon law, a student's needs should dictate their IEP services, rather than an eligibility type or category.

Additionally, Parent was provided with written documents by both staff who disagreed with the eligibility of autism that clearly explained their rationale for not agreeing with the decision. This provided Parent with the information necessary to participate further on behalf of the child as needed.

The question here is whether these three actions amount to a denial of FAPE in this case. The Department finds that although the actions taken with regard to the specialist's disagreement with ASD eligibility caused some confusion for the Parent, this in itself, does not amount to a denial of FAPE. Therefore, the Department does not substantiate this allegation and does not order corrective action.

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<sup>35</sup> OAR 581-015-2000(34)

<sup>36</sup> 34 CFR 300.17

<sup>37</sup> *Board of Educ. of the Hendrick Hudson Cent. School. Dist. v. Rowley*, 553 IDELR 656 ( U.S. 1982).

<sup>38</sup> *Id.*

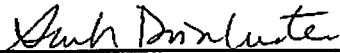
**V. CORRECTIVE ACTION<sup>39</sup>**  
*In the Matter of North Santiam School*  
*District 29*  
Case No. 14-054-029

Actions	Submissions <sup>40</sup>	Due By
<p>1. Develop a district eligibility determination process that includes methods the district will use to ensure that -</p> <p style="padding-left: 20px;">a. Team members, including the parents, discuss each item required by eligibility determination OARs: 581-015-2120 through 581-015-2180.</p> <p style="padding-left: 20px;">b. Team members discuss and document in writing at the meeting, their agreement or disagreement with the eligibility team decision.</p> <p style="padding-left: 20px;">c. Team members document discussions of primary and secondary disability, pursuant to OAR 581-015-2120(4).</p> <p style="padding-left: 20px;">d. Non-district members of eligibility determination teams are informed about the district's eligibility determination process.</p>	<p>Submit electronically a draft eligibility determination process for ODE review.</p>	<p>October 15, 2014</p>
<p>2. Upon ODE approval, provide training to staff who may participate in eligibility determination</p>	<p>Submit copy of:  Agenda, Dated sign-in sheet with names and positions of attendees</p>	<p>November 21, 2014</p>

<sup>39</sup> The Department's order shall include corrective action. Any documentation or response will be verified to ensure that corrective action has occurred. OAR 581-015-2030(13). The Department requires timely completion. 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).

<sup>40</sup> Corrective action submissions and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone — (503) 947-5722; e-mail: [raeann.ray@state.or.us](mailto:raeann.ray@state.or.us); fax number (503) 378-5156.

Dated: this 4rd Day of September 2014

  
\_\_\_\_\_  
Sarah Drinkwater, Ph.D. Assistant Superintendent  
Office of Learning/Student Services

Mailing Date: September 4, 2014