

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Lake Oswego School)
District No. 7J)
)
)

CORRECTED¹
FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 08-054-018

I. BACKGROUND

On May 9, 2008, the Oregon Department of Education (Department) received a letter of complaint from the parents of a student attending school and residing in the Lake Oswego School District (District). The parents requested that the Department conduct a special education investigation under OAR 581-015-2030.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint, unless exceptional circumstances require an extension.² On May 20, 2008, the Department sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated. The District asked the Department for an extension of the complaint time line due to the complexity of the issues and the volume of the materials required in this case. On May 29, 2008, the Department allowed a 7-day extension to respond to the complaint allegations. On June 10, 2008, the District timely submitted its *Response* to the allegations and sent the parents a copy. The parents provided a reply to the District's Response, received on June 16, 2008.

The Department's complaint investigator reviewed the information submitted by the parents and the District, and determined that on-site interviews were needed. On June 13, 2008 (prior to receipt of the parent's reply in an attempt to investigate the case prior to the unavailability of District staff), the investigator conducted on-site interviews with the District's special education director, psychologist, elementary school principal, classroom teacher, occupational therapist and speech language pathologist. On June 27, 2008, the complaint investigator conducted an on-site interview with the parents. Due to the necessity for follow-up interviews of District staff and the unavailability of District staff, the Department extended the investigation timeline by an additional nine days. On June 30, 2008, the complaint investigator conducted additional interviews with the District's special education director and psychologist. The Department's investigator reviewed and considered all of the documents and interviews.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under OAR 581-015-2030 and 34 CFR 300.151-153. The allegations and the Department's conclusions are set out in the chart

¹ The Department issued a final order on July 23, 2008. Subsequent to the issuance, the Department became aware of errors within the order. Specifically, the order misidentified a number of dates surrounding the October 9, 2007 meeting between the parents and the District. The changes appear in paragraphs 21 and 25 of the Findings of Fact. The corrections appear in highlighted text in this version.

² OAR 581-015-2030 (12); 34 CFR 300.151-153.

below. The Department based its conclusions on the Findings of Fact (Section III) and the Discussion (Section IV).

No.	Allegations	Conclusions
(1)	<p><u>Manifestation Determination:</u></p> <p>The District failed to conduct a manifestation determination prior to changing the student's permanent placement on October 9, 2007.</p>	Substantiated
(2)	<p><u>Stay Put:</u></p> <p>The District failed to return the student to the student's regular classroom pursuant to the December 6, 2006 IEP, after the parents' served a request for a due process hearing on the District on October 9, 2007</p>	Not Substantiated
(3)	<p><u>Prior Written Notice (PWN); Placement:</u></p> <p>The District failed to give PWN to the parents within a reasonable period of time before the District changed the student's placement on October 9, 2007, March 31, 2008 and May 1, 2008. The parents further allege:</p> <p>(a) that they did not receive the PWN concerning the October 9, 2007 placement determination until October 15, 2007.</p> <p>(b) that they did not receive the PWN concerning the March 31, 2008 placement determination until five school days after it went into effect; that the PWN provided no explanation for the District's change of the location of tutoring from a community site to a school site; that the PWN incorrectly states that the student is being home schooled at a time that the District was aware that the parents placed the student in home schooling only after a disagreement concerning placement of the student; that the District considered no other options</p>	Not Substantiated

No.	Allegations	Conclusions
	<p>before changing placement; and that the PWN does not explain how the student's evaluations justify the placement.</p> <p>(c) that the District did not provide the May 1, 2008 PWN to the parents a reasonable time before it was to be implemented; that the PWN provided for implementation of the placement on May 1, 2008 but the District did not mail the PWN until May 5, 2008; that the PWN incorrectly states that communication eligibility was discussed when no significant discussion of this issue occurred; that the PWN does not explain how the student's evaluation justify the placement; that the IEP meeting did not discuss a need for specially designed instruction at a slower pace; that the PWN erroneously concludes that the student needs intensive direct social skill instruction; and that the PWN incorrectly implies that the parents agreed to the prior placement of tutoring.</p>	
(4)	<p><u>IEP Implementation:</u></p> <p>The District failed to implement the student's December 6, 2006 IEP and failed to implement the change of placement provided in the PWN dated January 7, 2008. The parents further allege, concerning the student's December 6, 2006 IEP:</p> <p>(a) that the District failed to properly implement the student's BIP from December 6, 2006 until October 8, 2007.</p> <p>(b) that the District failed to offer speech services since October 8, 2007.</p> <p>(c) that the District failed to offer social skills group since October 8, 2007.</p> <p>(d) that the eligibility of communication and the accompanying goals have never been reviewed, and that the District did not ensure the attendance of the District's speech pathologist at</p>	Not Substantiated

No.	Allegations	Conclusions
	<p>any IEP meetings after March 31, 2008</p> <p>The parents further allege, concerning the January 7, 2008 PWN, that the District has failed to implement the provision that the student was to receive “up to five hours per week tutoring in a community site until the assessments are complete or the IEP determines/develops a mutually agreed upon step up plan.” The parents allege that the tutor stopped providing services on February 14, 2008, and that the District has provided only 17.5 hours of tutoring from December 12, 2007 to May 9, 2008.</p>	
(5)	<p><u>Least Restrictive Environment</u></p> <p>The District has failed to place the student in the least restrictive environment since December 21, 2007. The parents further allege:</p> <p>(a) the District’s placement of five hours of tutoring (the placement from December 21, 2007 to May of 2008), whether in a school or at a community site, is inappropriately restrictive and not justified. The parents further allege that the student has no opportunity to be educated with disabled and non-disabled peers. The parents further allege that the student requires modifications to help the student with the student’s sensory processing challenges, and that the modifications that the student requires do not justify removing him from the regular classroom.</p> <p>(b) the District’s present placement of the AIM program is not an appropriate placement. The student’s disability is not such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.</p>	Not Substantiated

No.	Allegations	Conclusions
(6)	<p data-bbox="289 254 513 289"><u>Related Services</u></p> <p data-bbox="289 323 881 491">The District refused to provide vision therapy, requested by the parents on April 21, 2008. The District refused to provide adequate occupational therapy as requested by the parents on April 28, 2008.</p>	Not Substantiated
(7)	<p data-bbox="289 543 423 579"><u>IEP Team</u></p> <p data-bbox="289 613 870 743">The District failed to have all appropriate IEP team members present at the IEP meetings on March 31, 2008, April 21, 2008 and April 28, 2008.</p>	Not Substantiated
(8)	<p data-bbox="289 800 813 835"><u>Parental Participation; IEP Development</u></p> <p data-bbox="289 869 878 1136">The District prevented the parents from meaningfully participating in the placement discussion by failing to inform them about the AIM program in advance and failing to provide an opportunity to visit the program before the IEP meeting. The parents further allege that the IEP was not completed within 30 days of the eligibility determination.</p>	Not Substantiated

III. FINDINGS OF FACT

Background

1. The student is presently eight years old and will begin third grade in the fall of 2008. The student is presently eligible for special education as a student with "Other Health Impairment".
2. At the beginning of the 2007-2008 school year, the student's December 6, 2006 IEP noted eligibility for services based upon a communication disorder. This IEP provided for placement in a regular classroom with special services in "speech (voice)". The Present Levels of Academic Achievement and Functional Performance (PLAAFP) notes that the student had a history of upper respiratory infections as a young child, and was found to have bilateral vocal nodules by his physician. The student exhibits a strained, hoarse voice quality. The student demonstrates notable body tension in his chest and shoulders and appears to breathe in a shallow manner which does not give him sufficient support for easy speech production. The PLAAFP rated the student's hoarseness as moderate on a voice assessment scale, and notes that the student reports that he has difficulty avoiding yelling or crying loudly when he is upset or angry, and notes that the student needs to learn alternatives to his habit of yelling excessively or crying in a manner that abuses his voice

and results in chronic vocal hoarseness. The Specially Designed Services section of the student's December 6, 2006 IEP provides for communication services 30 minutes per week in the speech room. The Supplementary Aids/Services; Modifications & Accommodations of the IEP provides for a behavior plan, daily, in the classroom; and a social skills group 30 minutes per week in the school setting. The student's communication goal states that the student will increase awareness of abusive vocal behaviors and body tension by practicing alternative strategies across three settings at school.

3. The District's former psychologist completed a Functional Behavioral Assessment (FBA) on October 26, 2006. This FBA notes that recent testing revealed that the student is eligible as a gifted and talented student. The IEP team adopted a Behavior Intervention Plan (BIP) during the December 6, 2006 IEP meeting.
4. During the 2006-2007 school year (first grade) and the beginning of the 2007-2008 school year (second grade), the student attended the same regular education class, a class with both first and second grade students. The District tracked the student's behavior using "behavioral tracking sheets". A summary of 92 days of behavioral tracking sheets from December 6, 2006 to June 6, 2007 reveals 1.5 suspension days, and six incidents of physical aggression, 15 incidents of verbal aggression, 34 incidents of non-compliance, 10 incidents involving flight, two incidents involving "tear up work", four incidents involving "throw things (not at people) and one incident of non-verbal aggression. The summary notes "92 days of data / 42 days no incidents = 46% of days with no incidents" and 45 breaks outside class. The student's classroom teacher reported that during the 2006-2007 school year two aides were also in the classroom, one for another student and a reading aide. Both aides and the teacher were involved in implementing the student's BIP following behavioral incidents.
5. The 2007-2008 school year began on September 4, 2007. The student's teacher and principal reported during the on-site interviews an increase in the frequency and intensity in the student's behavior during the beginning of the 2007-2008 school year. District staff reported that the student's behavior was an issue every day and that not all acts were noted in the records, such as the student pushing other students. On September 7, 2007, the student became upset during lunch in the classroom (the District serves lunch in the classrooms at all of its elementary schools), and threw his pudding very hard, hitting the wall. This resulted in a behavior referral. On September 11, 2007, the student refused a teacher's request to finish correcting his math pages. The teacher told the student this was not an appropriate response and invited the student to sit with her at the back table so she could help the student complete his work. The student walked back to the table, threw his pencil and eraser at the teacher and knocked his math workbook to the floor. On September 13, 2007, the student refused the music teacher's request to stand in a circle with other students. On September 17, 2007, while on the playground the student threw bark chips at a District staff member after being reminded to follow the rules in wall ball. In an e-mail dated September 19, 2007, a school psychologist reported that she had been working with the student extensively the past few days and that the student had to leave music on September 18, 2007 and math on September 19, 2007 because of the student's refusal to do his work. The psychologist reported that it is very challenging to get the student to cooperate with leaving the classroom as well as doing what the student needs to do to rejoin the class. The psychologist reported that on the morning of September 19, 2007 the student moved chairs in the office and laid down on the floor, made airplanes out of "good choice slips" earned by other students, tipped over a large "Stop sign" in the front hall, ran back to the door of his classroom, punched the psychologist once, and ran down the hall

as if to leave the building through the back door. The student was not ready to return to complete work for 80 minutes, whereas the day before he was ready to work within 17 minutes. The psychologist noted that until a meeting scheduled for September 26, 2007, staff would be encouraged not to make an issue of the student's refusal to work unless his behavior is disruptive to the learning of other students or perceived to be unsafe.

6. An incident report dated September 20, 2007, notes that the student made a choice to not do his math work and moved to the back table to sit. When asked by the teacher why he was not doing his work, the student said he was not going to do it and threw his math work at the teacher. During lunch in the classroom, the student walked on student chairs and told the teacher "no" when directed to sit down. The student "drove" a small toy car he had brought on his desk and the desks of other students and walked a toy plastic dolphin up the arm of other students. When the teacher provided options for the student – to choose a safe place to sit and eat his lunch and then stay at the place he chose – the student yelled at another student. During health, the student "was constantly talking" and did not respond to redirection by the teacher or educational assistant. During the transition from health to recess, the student stood up before being excused by the teacher and took a computer lab pass. When another student told the student they are to pick up passes when excused, the student yelled at the student. The student gave his computer lab pass to another student and decided to go to the library during the recess period. In the library, the student stated he now wanted to go to the computer lab. When the library assistant reviewed the recess rules and advised that the computer lab had the maximum amount of students allowed for recess, the student picked up a chair and threw it towards the library assistant (it did not hit her). Then the student sat on top of a table in the library and threatened to throw a felt marker at the library assistant. After the library assistant again reviewed the rules and turned around, the student threw the marker and hit the library assistant. Following recess, the student returned to his classroom where, in response to another student asking the student why he was so mad, the student picked up the other student's three-ring binder and hit the other student in the abdomen/side very hard. The student then tore work off of the white board at the front of the classroom and attempted to erase the board. When the principal entered the room, the student ran to the back of the room and picked up a tray of approximately 30 sharpened pencils and threw the tray and pencils across the room hitting three students. The student grabbed a second tray of pencils, and the principal took them out of the student's hands and some of the pencils fell on the floor. The principal took the student's hands and knelt with him to the floor and whispered to the student that he was not going to hurt anyone and asked the student to take four deep breaths as he had practiced with a counselor. The teacher calmly began removing students from the room. After two to three minutes, the principal and the student stood up, and the student picked up some of the pencils from the floor and threw them across the room. The student refused the principal's request that he walk to the office with her. After a male staff person arrived, they walked the student to the office unassisted. When in the office, the student began kicking chairs. The principal asked the student to sit in a chair and asked an aide to sit with the student so he was safe. The principal left and called the special education director and the parents from her office. When the principal returned, the student was lying on the floor kicking the chairs. One of the student's parents arrived and, after the principal discussed suspension with the parent, left with the student.
7. On September 20, 2007, the District wrote a letter to the student's parents advising that the student is suspended for two days, from September 21, 2007 (a Friday) through September 4, 2007 (a Monday), for exhibiting unsafe behavior in the school. The letter also

advised that a meeting would take place on September 24, 2007, to review and update the student's BIP and discuss next steps in his educational program.

Manifestation Determination and Stay Put

8. The District suspended the student for 1.5 days during the 2006-2007 school year and two days during the 2007-2008 school year. On September 21, 2007, the District issued a PWN scheduling a meeting for September 24, 2007 to "Review/Update Behavior Intervention Plan; Reentry from Suspension Conference." At the beginning of the September 24, 2007, meeting, the District noted that the meeting is both an IEP and placement meeting. The IEP team determined that the student's current eligibility of communication disorder did not accurately depict the student's issues. The team agreed to discuss evaluation planning and agreed that further evaluation is necessary, including evaluations for emotional disturbance and OHI. The team agreed that the evaluations should be completed as soon as possible, and District staff stated they would inquire about getting the evaluations done before the required 60 days. The IEP team, without agreement by the parents, changed the student's placement to "a diagnostic placement" for the next two weeks with the student to receive instruction in the Learning Center 9:00 to 12:00 supported 1:1 by an adult. The District issued a PWN on September 24, 2007, to reflect this change in placement. The PWN states that the District considered placement in a special classroom but rejected that placement at this time until further evaluation. The parents expressed concern with limiting the student to one-half school days, and District staff noted that the student has not been successful with a whole day. District staff also noted that the temporary placement would keep regular content: math, handwriting, writing, reading, with the work to come to the student through a teacher. District staff stated that this time is to be used to teach the student his "cueing system", and that in two weeks, barring acts of aggression, they could slowly bring the student back to the regular education classroom with an aide. District staff stated that they could meet in two weeks, either way.
9. The District did not receive a signed evaluation form from the parents until October 18, 2007.
10. On September 25, 2007, the student began the half-day placement in the Learning Center. District staff reported two incidents of not being respectful and one incident of not following school/classroom rules. On September 26, 2007 District staff reported the student as on task about 33% (60 minutes) of the 180 possible minutes that day. District staff observed the student, noting the number of adult cues required on October 4, 2007 (18 cues), October 5, 2007 (19 cues) and October 8, 2007 (at least 13 cues).
11. On October 5, 2007, the student left the Learning Center classroom without permission, despite being asked to not leave the room by District staff. The student then left the school building without permission, requiring that several staff members pursue him and talk to him to get him to return to the classroom. On October 8, 2007, the principal observed the student, and noted several incidents of the student engaging in unsafe behavior, including putting a small trampoline on his head, climbing on and throwing a chair, and refusing to follow directions several times. The student also hit the teacher in the stomach with his elbow when she told him he needed to complete his work.
12. On October 9, 2007, the student's IEP team met. The meeting notice prepared by the District stated that the purpose of the meeting would be to discuss the results of the student's diagnostic placement. At the meeting, the special education director noted that

the student is currently on a 10 day restrictive diagnostic placement, and that the District wants to evaluate and is in the middle of the evaluation. The director also noted that the District wants to see what the next steps are, but the District needs permission to evaluate in order to proceed. The special education director noted that the student is showing aggressive behavior, not just defiant behavior and that the student needs a reduction in his time here until the evaluation is finished. The special education director also stated that the question remains how to keep the student and others safe, and that once the evaluations are completed we will come back to the table. The special education director offered a placement of tutoring, The parents disagreed with this placement and served a Request for a Due Process Hearing on the District before leaving the meeting. The IEP team, without agreement of the parents, changed the student's placement (as reflected in a PWN issued by the District) "from daily 1:1 instruction in the Learning Center 15 hours a week (excluding time for lunch) to 1 hour/day in an alternative setting. This placement has the option of allowing [the student] to participate with his class for lunch and recess based on his behavior during the instructional session. This Placement is effective from 10/10/07 to 11/5/07 when the team will reconvene at 1:00 to determine appropriate next steps and share evaluation results. In addition, there will be a phone conversation between school and home on Oct. 19th to see if [the student's] program can be stepped up to include additional school time that may include PE and writing." The District mailed the PWN to the parents by certified mail on October 11, 2007. The PWN stated that the change in placement was made because the student "has exhibited behavior that is unsafe to the staff working with him, other students, and himself. In addition, he is having significant difficulty with following directions and using appropriate words and actions. These challenges are impacting his learning and often the learning of others." The PWN also states that the District "considered increasing his participation in the regular program. We rejected this option due [to] continued concerns regarding safety and appropriate school behavior. The team also discussed placement in a special classroom, but rejected due to desire to finish the evaluation which will provide added information." Finally, the PWN included a statement that "the team cannot proceed with evaluation until parents provide a copy of the signed consent or sign the new consent requested on October 9, 2000."

13. On October 10, 2007, one of the parents "came to school . . . with the intent of having [the student] return to his regular class today." The parent opined in an e-mail to the District that the regular class is the student's placement, because the 10-day interim period has ended and we did not reach an agreement on October 9, 2007. The parent also opined that the filing of the Due Process Hearing Request should freeze his regular placement once the 10-day period expired. The parent related that she was told that the student could not attend the classroom and would be afforded one hour of tutoring. The parent stated that the tutoring does not meet the student's needs and is not the least restrictive environment. The parent also stated that the student "will no longer participate in one on one tutoring for his general education."
14. The District responded to the parent's e-mail on October 11, 2007, noting in an e-mail that after the September 24, 2007 placement of three hours daily in the Learning Center that "data was taken each day to determine progress, areas of strength, and areas that need continued improvement. It was determined that [the student] had 1.5 successful days during the 10-day interim period. This is a success rate of 15%. While he had successful periods of work completion with 1:1 instruction, and many motor break periods each day, he still displayed unsafe behavior of hitting staff, open defiance, and running from the school. It was determined at the October 9th meeting that [the student] continues to display unsafe behavior for him to return to school in his regular classroom full time." The District's e-mail

states that the September 24, 2007 placement “was made as a temporary design placement based on [the student’s] progress in the area of behavior”, and notes that the District still needs a signed permission form from the parents to complete the entire assessment. The District stated that it “continues to offer a placement of one hour of tutoring, five days a week at a location of your choice, with increasing [the student’s] hours in the regular classroom as his behavior improves.”

15. In a letter dated October 12, 2007, the parents advised that because the District has failed to offer the student the education he is entitled to while the Due Process request is pending, the parents obtained private instruction for the student.
16. The Due Process Hearing Request of October 9, 2007, states that the student’s “interim placement exceeded 10 days” and was harmful to the student. The parents requested that the student be provided appropriate accommodations, including an aide to redirect the student’s behavior to help the student reintegrate back into “mainstream”. No order was issued by the administrative law judge concerning “stay put”. The District and the parents eventually reached a mediated agreement on November 14, 2007 and the parents notified the administrative law judge that they were withdrawing their hearing request. The administrative law judge thus dismissed the due process proceeding.

PWN and Placement

17. Following the October 9, 2007, IEP meeting, the District mailed the PWN to the parents by certified mail on October 11, 2007.
18. Following a March 31, 2008 eligibility meeting, the District provided a PWN to the parents dated March 31, 2008, which was received by the parents five school days later, on April 7, 2008. The IEP team continued the student’s OHI eligibility from a December 2007 meeting. The PWN dated March 31, 2008, does not specify the location of the tutoring offered by the District. This PWN correctly states that the student is being home schooled, but does not state that the parents placed the student in home schooling due to a disagreement concerning the placement of the student. The IEP team did not make a change in placement at the March 31, 2008 meeting and did not develop an IEP due to time constraints, but scheduled a meeting to develop the IEP, for April 21, 2008. The PWN states that the student is eligible for services in the area of OHI and that the District offered services of five hours of tutoring a week until the team could meet to develop the student’s IEP. The parents stated at the March 31, 2008, meeting that they did not want tutoring services unless the student can be “back in school in the mainstream.”
19. Following development of an IEP for the student at meetings on April 21, 2008, and April 28, 2008, the District issued a PWN dated May 1, 2008, and mailed a copy to the parents on May 5, 2008. The placement arrived at during the April 21, 2008, and April 28, 2008, IEP meetings is placement in a special class with opportunity for mainstream. This placement refers to what is known as the AIM program in the District. The parents disagreed with this placement during the April 28, 2008, meeting, and stated they would probably file a complaint. The PWN summarizes the two IEP meetings (April 21, 2008 and April 28, 2008) that resulted in the current placement arrived at by the IEP team, without the agreement of the parents. The District used the term “slower pace” to describe the impact of the student’s three goals and objectives relating to social-behavioral and social-communication skills, which are supported by 14 objectives. The PWN does not use the word “intensive” to modify “direct social skill instruction”. The PWN’s statement that a

“previously agreed to placement” of 5 hours of tutoring only appears in the description of options considered but rejected by the IEP team (without the consensus of the parents).

IEP Implementation

20. The Department cannot address implementation of the student’s BIP prior to May 9, 2007, one year prior to the filing of the complaint in this case. The District did not fail to implement the student’s BIP, adopted at the December 6, 2006 meeting, from May 9, 2007 to the present. The District provided behavioral data from December 6, 2006 through June 6, 2007 and again from September 7, 2007 to October 8, 2007. No significant behavioral issues arose during the 2006-2007 school year, when compared to the behavioral issues that arose during the 2007-2008 school year. The data shows implementation of important components of the student’s BIP, including positive reinforcement and debriefing after major incidents.
21. The parents removed the student from school, to home schooling, beginning with the October 10, 2007 school day. The District’s offer of five hours per week of tutoring beginning October 10, 2007 did not expressly state that speech services would be provided. The student’s December 6, 2006 IEP, in effect at the beginning of the 2007-2008 school year, provided for 30 minutes of communication services each week in the speech room. The District’s offer of five hours each week of tutoring also did not expressly state that social skills group would be provided. The student’s December 6, 2006 IEP provided for a social skills group 30 minutes each week in the school setting.
22. The IEP team briefly discussed the student’s eligibility for communication at a March 31, 2008, meeting. The IEP team reviewed the student’s social-communication needs at the April 21, 2008, and April 28, 2008, IEP meetings, and included social-communication services for 30 minutes each week in the April 28, 2008 IEP. The April 28, 2008 IEP also contains a social-communication goal.
23. The PWN dated April 1, 2008, provides notice of the April 21, 2008 IEP meeting and states that the speech pathologist will be present if the “medical statement has been received”. The District asserts, that the parents were given the option to reschedule the April 2008 meetings to allow the speech pathologist to attend and declined to do so. In their Reply to the District’s Response, the parents state that the parents had not had time to obtain the requested physician’s statement and that it was unrealistic for the parents to reschedule the meetings after taking time off from work because the parents’ educational consultant was present. The District’s speech pathologist developed the social communication goals and objectives.
24. On January 7, 2008, the District offered up to five hours per week tutoring in a community site until the assessments are complete or the IEP team develops a mutually agreed upon step up plan. The District provided tutoring services beginning January 14, 2008, through February 14, 2008, when the District stopped the tutoring because the student would not engage in the instruction and exhibited non-compliance. The parents received a private psychological evaluation on March 10, 2008, and provided the evaluation to the District by mail the next day. The District clarified in an e-mail on February 15, 2008 the District’s understanding that because the student is presently home schooled that the District was not required to offer tutoring, but did so during the evaluation period with the understanding that they should work towards the student returning to school in the District. The District noted

that it has offered to meet and determine if services can be delivered in conjunction with the home school program.

Least Restrictive Environment

25. On December 21, 2007, when the student was being home schooled, the IEP team met to review some evaluations and discuss eligibility. The team determined that the student is not eligible under the category of emotional disturbance and extended the student's OHI eligibility until further testing could be completed. The District offered to provide up to five hours per week tutoring in a community site until the assessments are complete or a mutually agreed upon step up plan is developed. The District based its determination, made on October 9, 2007, to change the student's placement to tutoring upon the student's non-compliant, aggressive, and unsafe behavior. The placement was to begin on the following day, October 10, 2007. After the parents removed the child from school, the District attempted to reach agreement with the parents concerning placement, but could not do so. The "diagnostic" placement during the evaluation process was intended to be a placement of short duration, pending completion of evaluations of the student.
26. The present placement of the student is the placement in the student's April 28, 2008 IEP. This placement is "special class with opportunity for mainstream." The IEP team, other than the parent, agreed that placement in the AIM classroom is the appropriate placement for the student due to the agreed upon services and goals contained in the April 28, 2008. The April 28, 2008 contains three goals, two in "social/behavioral" and one in "social/communication". Each goal has several short term objectives (14 among the three goals). The April 28, 2008 IEP provides for the related service of occupational therapy for 30 minutes each week for four weeks; specially designed services in social/behavioral for 300 minutes a week, and specially designed services in social/communication for 30 minutes each week. The IEP also provides the following supplementary aids/services modifications and accommodations; cueing 10 minutes each day, designated calming space available daily, preferential seating, adult support for transitions, "modeling and practicing calming", behavior plan with reinforcement as appropriate, sensory diet (walk, gross motor), visually simplified assignments, check for understanding, graphic organizers, extra time for tasks, home/school communication, adult proximity (daily recess) and occupational therapy protocol.
27. The student's April 28, 2008 IEP, in the PLAAFP, states that as a result of the student's sensory processing challenges his development has lagged behind his intellect and that much of the student's behavior can be seen as a combination of a response to being either hyper or hypo-stimulated, confusion and learned responses, and volition. During the on-site investigation, some of the IEP team members stated that based upon the level of services required for this student, the District could not practically provide the required services in a regular classroom with supports. In its response, the District stated that many of the supportive aids and services have already been tried with the student in the regular classroom and were not successful, and that it was the frequency, amount and type of services in the IEP that led the IEP team, other than the parents, to conclude that the special (AIM) classroom is the least restrictive environment. The District notes in its response that the specially designed instruction in the student's April 28, 2008 IEP are extensive and require a smaller setting with a focus on teaching skills. The District also noted that a placement in the regular education setting without the support of the specialized class, even with a 1:1 assistant, would be more restrictive, because the student would constantly be removed from the regular classroom to receive the services required by the

student's IEP. The District also stated during the on-site investigation that the opportunity for mainstream as appropriate is a critical factor in the decision to place the student into the AIM classroom.

28. The District refers to the particular "special classroom" provided for in the student's IEP as the Alternative Instruction Methods (AIM) program. The AIM classroom is located in one of the District's elementary schools, and is designed for a maximum of ten students, with one full-time teacher and two special education assistants in the classroom. The philosophy of the AIM program is to use the AIM classroom as a "home room" with the opportunity for the students to access regular education classrooms at the elementary school when the data shows that is appropriate. Each AIM student is tracked daily using tracking sheets kept with each student, and the data is entered into a computer each day, to allow a prompt level of responsiveness to the data. Once the data shows it is appropriate, AIM students are individually allowed to begin attending the regular classroom(s) that the data reveals are areas of strength of the student. The goal of the AIM program is to have its students begin in the AIM classroom and then check out to attend regular classes, followed by checking in at the end of the school day. The AIM classroom is always available for the individual students to return to at any time during the school day, for any reason.

Related Services

29. At the April 21, 2008 IEP meeting, the parents requested that the District provide vision therapy. The parents based this request upon a letter from an Optometric Physician following examination of the student on April 2, 2008. In the letter, the doctor stated that the testing revealed "a focusing problem as well as difficulty with the binocular teaming of the eyes, both of these deficiencies were marked at near 50% of normal skill level. This means that [the student] has trouble holding his focus on near work for longer periods of time in addition to trouble changing his focus from, for example his desk work to a whiteboard. Similarly, [the student] demonstrates below normal test results when asked to converge (turn inward) and diverge (turn outward) the eyes - - this is a necessary skill during copying tasks: the eyes must be converged to the point at paperwork then diverged to aim at the chalkboard. These deficient visual skills can be successfully remediated with compliant vision therapy treatment." At the April 21, 2008 meeting, the team discussed the parents' request but noted that the research is mixed on vision therapy and the effectiveness thereof. District staff stated that the parents could provide information on the research, and the District would consider the research. In its Response, the District states that the team, other than the parents, determined that vision therapy is not necessary as a related service, because the student can access educational materials and obtain educational benefit without these services. In the parent's Reply to the District's Response, the parents state that the best way to understand vision therapy and how it will enable the student to receive educational benefits is to speak with the experts, including the optometric physician. The records reviewed in this case do not show that the parents have provided further information concerning vision therapy research to the District. The PWN issued by the District on May 1, 2008 notes that at the April 28, 2008 IEP meeting the District refuses to pay for vision therapy and that "the student is currently able to attain educational benefit without this type of intervention."
30. The team discussed occupational therapy as a related service for the student at the April 28, 2008 IEP meeting. The April 28, 2008 IEP provides for the related service of occupational therapy for 30 minutes per week for four weeks. In the complaint, the parents state that occupational therapy is necessary for more than four weeks, and that the student

would benefit from occupational therapy for 30 minutes in alternating weeks, after the four weeks of weekly occupational therapy sessions provided in the IEP. In the parent's Reply to the District's Response, the parents note that the student has been receiving 50 minutes of OT on alternating weeks since March, 2008, presumably from a private provider.

IEP team

31. The PWN dated April 1, 2008, provides notice of the April 21, 2008 IEP meeting and states that the speech pathologist will be present if the "medical statement has been received." The District asserts, that the parents were given the option to reschedule the April 2008 meetings to allow the speech pathologist to attend and declined to do so. In their Reply to the District's Response, the parents state that it was unrealistic for the parents to reschedule the meetings after taking time off from work and because the parents' educational consultant was present. The District's speech pathologist developed the social communication goals and objectives adopted by the IEP team (the goals were agreed to by the parents).
32. The following District staff attended the March 31, 2008 eligibility meeting: the special education director, a regular education teacher, a case manager, a psychologist, a speech pathologist, a occupational therapist, a principal, and a supported education specialist.
33. The following District staff attended the March 31, 2008 eligibility meeting: the special education director, a regular education teacher, a case manager, a psychologist, a speech pathologist, a occupational therapist, a principal, and a supported education specialist.
34. The following District staff attended the April 21, 2008 IEP meeting: the special education director, a regular education teacher, a principal, and a supported education specialist. The District's Response states that the "original case manager had a family emergency and went on official leave. The Supported Education Specialist, who is a licensed learning specialist and whom was involved in all the previous meetings, replaced her."
35. The following District staff attended an IEP meeting on April 28, 2008: the special education director, a regular education teacher, a principal, a supported education specialist and a psychologist.

Parental Participation and IEP Development

36. The District did not make a decision to place the student in the special classroom (the AIM program) until the IEP meeting on April 28, 2008. Thus, the District did not inform the parents before the meetings on April 21, 2008, and April 28, 2008, that the District would propose placement in the AIM program. The District did not provide the parents an opportunity to visit the AIM program before the April 28, 2008 IEP meeting. The District's "Recommendations for Special Education and Program Services" publication does not clearly state that parents must be provided an opportunity to visit the program if it is outside of the neighborhood school, and does not clearly state any visitation must occur prior to placement in such a program.
37. Following an eligibility meeting on March 31, 2008, the District provided a PWN to the parents dated March 31, 2008, which the parents received five school days later, on April 7, 2008. The IEP team continued the student's OHI eligibility from a December, 2007 meeting. The PWN dated March 31, 2008, states that the student is eligible for services in

the area of OHI and that the District offered services of five hours of tutoring a week until the team could meet to develop the student's IEP. The IEP team completed the IEP process on April 28, 2008.

IV. DISCUSSION

A. Manifestation Determination

The parents allege that the District failed to conduct a manifestation determination prior to changing the student's permanent placement on October 9, 2007.

Several regulations address discipline and disciplinary removals:

OAR 581-015-2400 provides:

Discipline

Definitions

For the purposes of OAR 581-015-2400 through 581-015-2445, the following definitions apply:

(1) "Behavioral intervention plan" means an individualized plan, including positive interventions, designed to assist a student to decrease inappropriate behavior and increase or teach an alternative appropriate behavior.

(2) "Current educational placement" means the type of educational placement of the child as described in the child's "annual determination of placement" document at the time of the disciplinary removal. It does not mean the specific location or school but the type of placement on the continuum of placement options (e.g. regular classroom with support; regular classroom with resource room support; special class; special school; home instruction, etc.).

(3) "Disciplinary removal" means suspension, expulsion, or other removal from school for disciplinary reasons, including removals for mental health examinations for students who threaten violence or harm in public schools under ORS 339.250(4)(b)(C). It does not include:

- (a) Removals by other agencies;
- (b) Removals for public health reasons (e.g. head lice, immunizations, communicable diseases, etc.);
- (c) In-school suspensions if the child continues to have access to the general curriculum and to special education and related services as described in the child's IEP, and continues to participate with nondisabled children to the extent they would in their current placement; or
- (d) Bus suspensions, unless the student's IEP includes transportation as a related service, the district makes no alternative transportation

arrangements for the student, and the student does not attend school as a result of the bus suspension.

(4) "Functional behavioral assessment" means an individualized assessment of the student that results in a hypothesis about the function of a student's behavior and, as appropriate, recommendations for a behavior intervention plan.

(5) "Suspension" means any disciplinary removal other than expulsion.

OAR 581-015-2415 provides:

"Disciplinary Removals of More than 10 School Days (Pattern or Consecutive)

(1) A disciplinary removal is considered a change in educational placement and the school district must follow special education due process procedures if:

- (a) The removal will be for more than 10 consecutive school days (e.g. expulsion); or
- (b) The child will be removed for more than 10 cumulative school days from their current educational placement in a school year, and those removals constitute a pattern under OAR 581-015-2410(2).

(2) School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a disciplinary removal under subsection (1) for a child with a disability who violates a code of conduct.

(3) Manifestation determination. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district must determine whether the child's behavior is a manifestation of the student's disability in accordance with OAR 581-015-2420.

(4) Manifestation. If the determination under subsection (3) is that the child's behavior is a manifestation of the child's disability, the school district must:

- (a) Return the child to the placement from which the child was removed, unless:
 - (1) The parent and school district agree to a change of placement as part of the modification of the behavioral intervention plan under subsection (4)(b);
 - (2) The school district removes the child to an interim alternative educational setting under OAR 581-015-2425 for a weapons or drug violation or for infliction of serious bodily injury; or
 - (3) The school district obtains an order from an administrative law judge under OAR 581-015-2430 allowing a change in placement to an interim alternative educational setting for injurious behavior; and

(b) Either:

- (1) Conduct a functional behavioral assessment, unless the school district conducted a functional behavioral assessment before the behavior occurred that prompted the disciplinary action, and implement a behavior intervention plan; or
 - (2) If the student already has a behavior plan, review the behavioral intervention plan and modify it, as necessary, to address the behavior.
- (5) No manifestation. If the determination under subsection (3) is that the child's behavior is not a manifestation of the child's disability:
- (a) The school district may proceed with disciplinary action applicable to children without disabilities under section (1) of this rule, in the same manner and for the same duration in which the procedures would be applied to children without disabilities.
 - (b) If the school district takes such action applicable to all children, the school district must:
 - (1) On the date on which the decision is made to remove the student under subsection (5), notify the parents of that decision and provide the parents with notice of procedural safeguards under OAR 581-015-2315.
 - (2) Provide services to the student in an interim alternative educational setting, determined by the IEP team, in accordance with OAR 581-015-2435; and
 - (3) Provide, as appropriate, a functional behavioral assessment, and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.
- (6) Placement pending due process hearing. If a parent requests a due process hearing because of a disagreement with the manifestation determination or any decision about placement related to the disciplinary removal in section (1) of this rule, the child remains in the interim alternative educational setting pending the decision of the administrative law judge under OAR 581-015-2445, or until the end of the disciplinary removal under subsection (1), whichever occurs first, unless the parent and school district agree otherwise.

OAR 581-015-2420 provides:

Manifestation Determination

- (1) In determining whether the child's behavior is a manifestation of the child's disability, the school district, the parent, and relevant members of the IEP team (as determined by the parent and the district) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:
 - (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(b) If the conduct in question was the direct result of the school district's failure to implement the IEP.

(2) If the school district, the parent, and relevant members of the IEP team determine that either subsection (1)(a) or (b) is applicable for the child, the conduct must be determined to be a manifestation of the child's disability.

(3) If the basis for the team's determination is that the school district did not implement the child's IEP, the school district must take immediate steps to remedy those deficiencies.

In this case, the parents argue that the District's actions constitute a "disciplinary removal" because the District suspended the student for two school days (September 21 and 24, 2007) followed by an interim placement for nine school days (September 25 and 26, 2007; and October 1, 2, 3, 4, 5, 8 and 9, 2007) and refused to return the student to the regular education classroom on October 10, 2007. The District asserts that because the student was suspended for only 1.5 days during the 2006-2007 school year and only two days in the 2007-2008 school year, the student was not suspended for more than 10 days and no manifestation determination was required. The District characterizes the placement decision made on September 24, 2007 as an evaluative or diagnostic placement while awaiting new evaluations to consider the student's disability.

The Department finds that the change of placement initiated on September 24, 2007 constitutes a disciplinary removal, as that is defined in the regulations. The primary characteristic of a disciplinary removal is removal from the student's "current educational placement." OAR 581-015-2415(1)(b); OAR 581-015-2400(4). On September 24, 2007, the District clearly removed the student from the student's current educational placement, when the District placed the student in the diagnostic or evaluative placement. This disciplinary removal lasted until the next change in placement made by the District on October 9, 2007, and when combined with the District's two-day suspension of the student on September 21 and 24, 2007, totals 11 days. OAR 581-015-2400(3) (definition of "disciplinary removal"). Thus, a manifestation determination was required under OAR 581-015-2415, and the District failed to conduct a manifestation determination within 10 school days of the decision to suspend the student and the decision to change the student's placement because of a disciplinary violation, as required under OAR 581-015-2415(3). The Department finds that the change in placement and the suspension occurred because of the student's disciplinary violations and behavior.

The difficult circumstance presented in this case is that the District had little information to make a manifestation determination at the time. The student was eligible for special education as a student with a communication disorder, due to voice nodules and the impact on communication. Everyone on the IEP team agreed that more extensive evaluations were required in an attempt to determine what was driving the student's behavior at school. It is thus not clear and probably unlikely that the District would have found the student's behavior constituted a manifestation of his disability.

Instead of conducting the manifestation determination the District imposed a *de facto* removal to an interim alternative educational setting, as envisioned under OAR 581-015-2425(2). However, an interim alternative educational placement was not allowed under the circumstances of this case, because the District did not act based upon a drug or weapon violation or based upon infliction of serious bodily injury by the student.

The Department substantiates the allegation that the District failed to timely conduct a manifestation determination in this case. The issue then becomes what corrective action should

be ordered by the Department. In considering this issue, the Department considers the likely result if the District had properly conducted a manifestation determination, taking into account the facts and circumstances at the time of the removal. As discussed above, it is unlikely that the District would have concluded that the student's behavior was a manifestation of his disability because of the lack of information available at the time. Thus, the student would probably not have been entitled to return to the regular education classroom, and the District could have proceeded with disciplinary actions applicable to children without disabilities, subject to notice to the parents. OAR 581-015-2415(5).

If the District had determined that the student's behavior was a manifestation of the student's disability, the District would have been required to return the student to the placement from which the student was removed unless (1) the parents and the District agreed to the change of placement, (2) the District removed the student to an interim alternative education setting under OAR 581-015-2425(2) or (3) the District obtained an order from an administrative law judge allowing a change in placement to an interim alternative educational setting for injurious behavior and reviewed and modified the student's BIP. (OAR 581-015-2415(4)). Taking into account the frequency and intensity of the student's behavior at the beginning of the school year, the Department concludes it is likely that an administrative law judge would have approved a removal to an alternative placement as permitted under OAR 581-015-2415(4)(a)(C).

The Department finds that the appropriate corrective action is to order staff training concerning when a manifestation determination is required, and the correct procedures to follow when a student's behavior is the reason that the District wishes to change the student's placement. See Corrective Action.

B. Stay Put

The parents allege that the District failed to return the student to the student's regular classroom pursuant to the December 6, 2006 IEP, after the parents served a request for a due process hearing on the District on October 9, 2007.

OAR 581-015-2415(6) provides:

“(6) Placement pending due process hearing. If a parent requests a due process hearing because of a disagreement with the manifestation determination or any decision about placement related to the disciplinary removal in section (1) of this rule, the child remains in the interim alternative educational setting pending the decision of the administrative law judge under OAR 581-015-2445, or until the end of the disciplinary removal under subsection (1), whichever occurs first, unless the parent and school district agree otherwise.”

In this case, the parents argue that the District had to return the student to the regular classroom upon service of the Due Process Hearing Request on October 9, 2007. The District argues that it never received a stay put order from the administrative law judge that determined the student's present placement for purposes of stay put; and that the parents withdrew the request for a due process hearing.

The Department does not substantiate the parents' allegation. OAR 581-015-2415(6) provides that the student is to remain in the “interim alternative educational setting pending the decision of the administrative law judge . . . or until the end of the disciplinary removal . . . whichever

occurs first.” The interim alternative education setting in this case was the Learning Center, because that is the placement in effect when the District said it was not going to continue that placement and instead would provide tutoring by a certified teacher for five hours each week. Additionally, the placement in the Learning Center had not expired on October 9, 2007, as the District had stated that the Learning Center placement was to be for two weeks, from September 25, 2007 (to October 9, 2007) and on October 9, 2007 the District changed that placement to tutoring. Additionally, the parents then removed the student from school in the District, beginning on October 9, 2007. Based on the foregoing, the Department finds that the District did not have an obligation to return the student to the regular classroom on October 9, 2007, or when one of the parents attempted to return the student to the regular classroom on October 10, 2007. The Department does not substantiate the allegation that the District was required to return the student to the regular classroom when the parents served the District with a Due Process Hearing Request on October 9, 2007.

C. Prior Written Notice (PWN)

The complaint alleges that the District did not timely provide PWNs following the October 9, 2007, March 31, 2008, and May 1, 2008 meetings. The parents further dispute the content of the latter two PWNs.

OAR 581-015-2310 provides:

Prior Written Notice (PWN)

- (1) Prior written notice must be given to the parents of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.
- (2) Prior written notice must be given after a decision is made and a reasonable time before that decision is implemented.
- (3) The content of the prior written notice must include:
 - (a) A description of the action proposed or refused by the school district;
 - (b) An explanation of why the district proposes or refuses to take the action;
 - (c) A description of any other options that the IEP team considered and reasons why those options were rejected;
 - (d) A description of each evaluation procedure, assessment, test, record, or report the school district used as a basis for the proposed or refused action;
 - (e) A description of any other factors that are relevant to the school district's proposal or refusal; and
 - (f) A statement that the parents of a child with a disability have procedural safeguards, and if it is not an initial referral for evaluation,

the means by which a copy of the Notice of Procedural Safeguards may be obtained;

- (g) Sources for parents to contact to obtain assistance in understanding their procedural safeguards.

(4) The prior notice must be:

- (a) Written in language understandable to the general public; and
- (b) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(5) If the native language or other mode of communication of the parent is not a written language, the school district must take steps to ensure that:

- (a) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;
- (b) The parent understands the content of the notice; and
- (c) There is written evidence that the requirements in subsections (5)(a) and (b) of this rule have been met.

(6) If the proposed action requires prior written notice and written consent, the district may give notice at the same time it requests consent.

The parents first argue that they did not receive a PWN concerning the October 9, 2007 placement until October 15, 2007. The District responds that the District sent the PWN to the parents on October 11, 2007, by certified mail, and that the parents received it on October 15, 2007, four school days after the October 9, 2007 meeting.

The Department finds that the District mailed the PWN to the parents within a reasonable time after the October 9, 2007 IEP meeting, and that the placement decision made on October 9, 2007, was never implemented because the parents served a request for a due process hearing and removed the student from school in the District. Although the Department encourages the District to provide PWNs to parents as soon as possible, the Department does not substantiate this allegation.

The parents next argue that receipt of the PWN five school days after the March 31, 2008 meeting is not reasonable; and that the PWN does not explain why the PWN changed the location of the tutoring offered by the District from a community site to a school site, that the PWN incorrectly failed to explain that the student is being home schooled due to a disagreement with the District's placement, that the District considered no other options before changing placement and that the PWN does not explain how the student's evaluations justify the placement. The District responds that five school days is a reasonable time, and that the services offered were based on the November 14, 2007 mediation agreement.

The Department finds that under the circumstances, a PWN following an eligibility determination and scheduling of a placement meeting, the District provided the PWN to the parents within a reasonable time following the March 31, 2008 meeting. Concerning the deficiencies in the PWN

claimed by the parents, the Department finds no violations of the notice requirements. The March 31, 2008 PWN does not specify the location of the tutoring offered by the District, so the parent's allegation that the District did not explain changing the location is not supported by the facts. The fact that the PWN does not state that the parents placed the student in home schooling due to a disagreement with the District's placement simply does not state a violation. Additionally, the IEP team did not change the student's placement at the March 31, 2008 eligibility meeting, so the parents' allegations that the District considered no other options before changing placement and that the PWN does not explain how the student's evaluations justify the placement are also not supported by the facts.

The parents next argue that the District did not mail a PWN following a May 1, 2008 meeting until May 5, 2008; and that the PWN incorrectly shows there was a discussion of communication eligibility at that meeting, that the PWN does not explain how the student's evaluations justify the placement, that there was no discussion of a need for the delivery of specially designed instruction at a "slower pace", that the PWN erroneously states that the student needs intensive direct social skills instruction; and that the PWN incorrectly implies that the parents agreed to the prior placement of tutoring.

The Department finds that the under the circumstances the District provided the PWN to the parents within a reasonable time. The PWN dated May 1, 2008 (a Thursday) and mailed to the parents on May 5, 2008 (a Monday) concerned the IEP adopted following the March 31, 2008 eligibility and the April 21 and 28, 2008 IEP meetings. The parents stated that they did not agree with the District's placement (in a special class with opportunity for mainstream) and that the parents would probably file a complaint. Additionally, the PWN summarizes the eligibility meeting on March 31, 2008, and the two IEP meetings on April 21 and 28, 2008. The student's eligibility, including communication, was discussed at the March 31, 2008 meeting, and it is not inappropriate for the May 1, 2008 PWN to mention the eligibility discussions occurring at the eligibility meeting, as a precursor to the placement decision made on April 28, 2008. Concerning the allegation that the PWN does not explain how the student's evaluations justify the placement, the Department finds that the PWN need not contain such a determination, when that was fully discussed during the March 31, 2008 and April 21 and 28, 2008 meetings. Concerning the allegation that no discussion occurred about delivery of specially designed instruction at a slower pace, the Department finds that the District's Response, explaining that the substantial goals and objectives provided in the April 28, 2008 IEP would necessarily result in delivery of instruction at a slower pace. Concerning the allegation that the PWN erroneously concludes that the student needs "intensive" direct social skills instruction, the Department finds that this allegation is not supported by the facts, because the PWN does not use the word "intensive" in describing social skills instruction. Finally, the Department finds that the fact that it may be implied from the PWN that the parents agreed to the tutoring placement does not state a violation. The records in this case clearly reveal that the parents disagree with any placement other than placement in the regular classroom and the statement in the PWN stating that the District rejected the prior "agreed upon" placement of tutoring is of no import. The Department does not substantiate these allegations.

D. IEP Implementation

- (1) The parents allege that the District failed to properly implement the student's Behavior Intervention Plan (BIP) from December 6, 2006 through October 8, 2007.

The Department first finds that the Department cannot address implementation of the student's BIP from December 6, 2006 to May 9, 2007, due to the one-year limitations period that applies to complaint investigations. The Department also finds that the

District did implement the student's BIP from May 9, 2007 to October 8, 2007, (the day the parents removed the student from school in the District). The behavioral data provided by the District for the 2006-2007 school year shows implementation of the student's BIP. Additionally, the student did not experience significant behavioral issues during the 2006-2007 school year, when compared to the behavior issues that arose during the 2007-2008 school year. The Department also finds, based on the behavioral data provided for September 7, 2007 to October 8, 2008, that during the 2007-2008 school year, the District implemented important components of the student's BIP, including positive reinforcement and debriefing after major incidents. The Department does not substantiate the allegation that the District failed to properly implement the student's BIP.

- (2) The parents allege that the District failed to offer speech services or social skills group since October 8, 2007.

The Department finds that the District was not required to offer services of communication and social skills group as provided in the student's December 6, 2006 IEP once the parents removed the student from school in the District on October 8, 2007. Additionally, the December 6, 2006 IEP was not in effect on October 8, 2007, because the District had changed the student's placement twice since adoption of the December 6, 2006 IEP (on September 24, 2007 and again on October 9, 2007). The Department does not substantiate these allegations.

- (3) The parents allege that the eligibility of communication and the accompanying goals have never been reviewed, and that the District did not ensure attendance of the District's speech pathologist after the March 31, 2008 meeting.

The Department finds that the IEP team discussed the student's communication eligibility at the March 31, 2008 meeting, and adopted social-communication goals in the student's April 28, 2008 IEP. This constitutes review of the student's communication-related goals. The Department does not substantiate the allegation that the student's communication goals have not been reviewed.

- (4) The parents allege that the District did not ensure attendance of the District's speech pathologist after the March 31, 2008 IEP meeting.

The Department finds that the District's notice of the March 31, 2008 eligibility meeting clearly states that the speech pathologist would be present if certain medical statements had been received, and finds that the medical statements had not been received, as noted in the parent's Reply to the District's Response. Additionally, the parents were given the opportunity to reschedule the April 2008 meetings to a time when the speech pathologist could be present, but the parents declined to reschedule the meetings. The speech pathologist developed the social communication goals and objectives adopted in the student's April 28, 2008 IEP. The Department does not find a violation under the facts of this case, and thus does not substantiate the parent's allegation concerning the failure of the District to ensure attendance of the speech pathologist at the April 21 and 28, 2008 IEP meetings.

- (5) The parents allege that the District has failed to implement the tutoring provided in the January 7, 2008 PWN.

The Department finds that the tutoring ceased on February 14, 2008, because the student would not engage in the instruction and exhibited non-compliance. The tutoring had been offered by the District at a December 21, 2007 meeting concerning eligibility, as reflected in the PWN dated January 7, 2008, until completion of the student's assessments or a mutually agreed upon step up plan. The District offered tutoring even though the parents had removed the student from school in the District, in an effort to work on returning the student to school in the District. The District clarified on February 15, 2008, that the District was not required to offer tutoring, because the student is presently home schooled. The Department finds that the evaluation was received by the parents on March 10, 2008, and mailed to the District on March 11, 2008. On March 31, 2008, an eligibility meeting took place, followed by two IEP meetings on April 21 and 28, 2008, all resulting in the student's April 28, 2008 IEP. The difficulty experienced by the District in providing the tutoring services due to the student's behavior is a sufficient reason to stop the services to this home schooled student, especially in light of the fact that the primary evaluation was received less than a month after cessation of the tutoring, when the process of reviewing the evaluation and determining placement for the student began. The Department does not substantiate the allegation that the District failed to implement the tutoring offered by the District.

E. Least Restrictive Environment

(1) Tutoring

The parents first allege that the District's placement of five hours a week of tutoring offered beginning December 21, 2007 is inappropriately restrictive.

OAR 581-015-2240 provides:

Requirement for Least Restrictive Environment

School districts must ensure that:

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and

(2) Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The Department finds that the offer of tutoring during the December 21, 2007 meeting was not a placement decision, but an offer of services to be offered in conjunction with home schooling. This is true whether or not the parents were home schooling the student because of disagreement with the District's October 9, 2007 placement decision. Because the offer of tutoring in conjunction with the student's home school program was not a placement, the Department does not substantiate the allegation that the District placed the student in an inappropriate placement at the December 21, 2007 meeting.

(2) AIM Program

The parents next allege that the District's present placement of the AIM program is not an appropriate placement.

The Department finds that the IEP team, including the parents, fully reviewed the evaluations and the student's present levels of performance at the March 31, 2008, April 21, 2008 and April 28, 2008 IEP team meetings. The IEP team, including the parents, then developed three goals, with 14 short term objectives, and provided for numerous related services, as stated in factual finding #26, above. Although the parents disagreed with the District's ultimate placement decision, the District articulated sufficient reasons for its conclusion that the IEP could not be met in a regular classroom, summarized in factual findings #27 and #28, above. The Department agrees that implementation of the student's April 28, 2008 IEP would require constant removal from the regular classroom, resulting in a placement that is more restrictive than the placement of a special classroom with opportunity for mainstream adopted in the student's April 28, 2008 IEP. Accordingly, the Department does not substantiate the allegation that the student's present placement in the AIM program is not an appropriate placement.

F. Related Services

(1) Vision Therapy

The parents first allege that the District inappropriately refused to provide vision therapy, as requested by the parents at the April 21, 2008 IEP meeting.

The Department finds that the parents' request for vision therapy is based upon a report from an Optometric Physician, concluding that the student's focusing problems could be addressed by "compliant vision therapy treatment". The District responded to this request at the April 21, 2008 IEP meeting by questioning the general acceptance of the underlying research on vision therapy and providing the parents the opportunity to obtain and provide further information to the team on this issue. The parents, in their Reply to the District's Response in this case, state that the best way to understand the need for vision therapy "is to speak to the experts". This may be true. However, review of the records provided by the parties in this case do not reveal that the parents have taken the opportunity to provide further information to the IEP team concerning vision therapy. On these facts, the Department cannot find that absent vision therapy the student cannot access any educational program offered to the student. The Department does not substantiate the allegation that the District committed a violation by refusing to provide, and pay for, vision therapy for the student.

(2) Occupational Therapy

The parents next allege that the District refused to provide adequate occupational therapy as requested by the parents on April 28, 2008.

The Department finds that the April 28, 2008 IEP provides OT for 30 minutes per week for four weeks. Although the parents believe that more than four weeks of OT is necessary, that is a determination that can be made only after completion of four weeks of provision of OT services by the District. It would thus be premature for the Department to address whether additional OT services beyond the four week period provided in the student's April 28, 2008 IEP is necessary. The Department does not substantiate the allegation that the OT services provided in the student's April 28, 2008 IEP are not adequate.

G. IEP Team

The parents allege that the District failed to have all appropriate IEP team members present at the IEP meetings on March 31, 2008, April 21, 2008, and April 28, 2008.

OAR 581-015-2210 provides:

IEP Team

(1) School districts must ensure that the IEP Team for each child with a disability includes the following participants:

- (a) One or both of the child's parents, except as provided in OAR 581-015-2195;
- (b) The child where appropriate;
- (c) At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, consistent with section (4) of this rule;
- (d) At least one special education teacher of the child or, if appropriate, at least one special education provider of the child;
- (e) A representative of the school district, who may also be another member of the team, who is:
 - (1) Qualified to provide, or supervise the provision of, specially designed instruction;
 - (2) Knowledgeable about the general education curriculum;
 - (3) Knowledgeable about district resources; and
 - (4) Authorized to commit district resources and ensure that services set out in the IEP will be provided.
- (f) An individual who can interpret the instructional implications of the evaluation results (who may also be another member of the team);
- (g) Other individuals, including related services personnel as appropriate, invited by:
 - (1) The parent, whom the parent determines to have knowledge or special expertise regarding the child; or
 - (2) The school district, whom the school district determines to have knowledge or special expertise regarding the child; and
- (h) Transition services participants, as described in section (2) of this rule.

(2) If a purpose of the meeting will be consideration of the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals:

- (a) The school district must invite the student. If the student does not attend the meeting, the school district must take other steps to ensure that the student's preferences and interests are considered.

- (b) To the extent appropriate, with consent of the parents or adult student, the school district must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(3) IEP team attendance:

- (a) A member of the IEP team described in subsection (1)(c) through (1)(f) is not required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the school district agree in writing that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting.
- (b) A member of the IEP team described in subsection (1)(c) through (1)(f) may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:
 - (1) The parent and school district consent in writing to the excusal; and
 - (2) The member submits, in writing to the parent and the IEP team, input into the development of the IEP before the meeting.
- (4) The regular education teacher of the child must participate as a member of the IEP team, to the extent appropriate, in the development, review, and revision of the child's IEP, including assisting in the determination of:
 - (a) Supplementary aids and services, program modifications and supports for school personnel that will be provided for the child; and
 - (b) Appropriate positive behavioral interventions and supports, and other strategies for the child.”

The Department finds that all required team members were present at the March 31, 2008, April 21, 2008 and April 28, 2008 IEP team meetings. The only question is whether the absence of the speech pathologist meetings on at the April 21, 2008 and April 28, 2008, violated the above-quoted regulation. The Department finds that the parents were notified that the speech pathologist would only be present if certain medical statements were received, and the statements were not received. The parents were given the opportunity to reschedule the meetings, but declined to do so. On these facts, the Department does not substantiate the allegations that all appropriate IEP team members were not present at the IEP meeting March 31, 2008, April 21, 2008, and April 28, 2008.

H. Parental Participation

The complaint alleges that the District prevented the parents from meaningfully participating in the placement discussion by failing to inform them about the AIM program in advance and failing to provide an opportunity to visit the program before the IEP meeting.

OAR 581-015-2190 provides:

Parent Participation - General

(1) School districts must provide one or both parents with an opportunity to participate in meetings with respect to the identification, evaluation, IEP and educational placement of the child, and the provision of a free appropriate public education to the child.

(2) Meeting Notice:

(a) School districts must provide parents with a written notice of the meeting sufficiently in advance to ensure that one or both parents will have an opportunity to attend.

(b) The written notice must:

(1) State the purpose, time and place of the meeting and who will attend;

(2) Inform the parent that they may invite other individuals whom they believe have knowledge or special expertise regarding the child;

(3) Inform the parent that the team may proceed with the meeting even if the parent is not in attendance; and

(4) Inform the parent of whom to contact before the meeting to provide information if they are unable to attend.

(3) The school district must take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(4) A meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(5) Conducting a meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the school district has given the parent notice under subsection (2), or, for IEP or placement meetings, in accordance with OAR 581-015-2195.

The Department finds that the District did not make a decision to place the student in the special classroom with opportunity for mainstream (the AIM program) until the April 28, 2008 IEP meeting. Thus, the District could not have notified the parents in advance of the placement. Additionally, the District's policies did not require an opportunity for the parents to visit the placement before the IEP meeting. Accordingly, the Department does not substantiate the allegation that the District prevented the parents from meaningfully participating in the placement discussion.

I. IEP Development

The parents allege that the student's April 28, 2008 IEP was not completed within 30 days of the eligibility determination.

The Department does not substantiate this allegation. The District, as the parents concede in their Reply to the District's Response, determined eligibility at the March 31, 2008 team meeting, and completed the IEP on April 28, 2008. The fact that the PWN was not issued until May 1, 2008 does not mean that the District did not timely complete the IEP on April 28, 2008.

V. CORRECTIVE ACTION³

In the Matter of Lake Oswego School District 7J
Case No. 08-054-018

#	Action Required	Submissions	Due Date
(1)	<u>Training:</u> ⁴ The District will provide training to all special education staff, case managers and administrators concerning when a manifestation determination is required, and the correct procedures to follow when a student's behavior is the reason that the District wishes to change the student's placement.	A copy of the training materials, when presented, and an attendance roster must be provided to the Department.	October 15, 2008

Dated: November 3, 2008

Nancy J. Latini, Ph.D.
Assistant Superintendent
Office of Student Learning & Partnerships

Mailing date: November 3, 2008

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.

³ The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed. OAR 581-015-2030 (13). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order. OAR 581-015-2030 (15). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. OAR 581-015-2030 (17 & 18).

⁴ Initial Verification: The Department will review the written confirmation to District staff and the distribution list.