

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Springfield School District)
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FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 09-054-002

I. BACKGROUND

On January 28, 2009, the Oregon Department of Education (Department) received a letter of complaint from the attorney for the parents of a student attending school and residing in the Springfield School District (District). The attorney requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint on January 28, 2009. The attorney provided the District a copy of the complaint letter.

On February 4, 2009, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegations in the complaint to be investigated with a Response due date of February 18, 2009. The District submitted its timely *Response* to the Department and to the parents on February 18, 2009. The District's Response included four pages of narrative explanation and an additional 229 pages of documents and exhibits requested in the RFR. On February 24, 2009, the parents' attorney informed the Department's investigator that she would not be further involved in the complaint investigation and to proceed with the investigation directly with the parents.

The Department's complaint investigator determined that on-site interviews were necessary. The Department's investigator interviewed one parent by phone on March 4, 2009, and received an email statement from the other parent on March 3, 2009. On March 4, 2009, the Department's investigator interviewed a District principal; the District's school counselor who serves as the student's case manager; the student's special education teacher; the student's general education teacher; a District school psychologist; and the District's Special Programs Facilitator. The Department's investigator initially scheduled the parents' interview, by mutual agreement, for March 4, 2009, but the parents' work schedule changed and did not allow the parents to meet on the agreed upon date. The Department's complaint investigator reviewed and considered all of these documents, interviews and exhibits.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations within the twelve months prior to the Department's receipt of the complaint and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.¹ This order is timely.

II. ALLEGATIONS AND CONCLUSIONS

¹ OAR 581-015-2030(12)

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 (Section III) and the Discussion (Section IV). This complaint covers the one year period from January 29, 2008, to the filing of this complaint on January 28, 2009.²

	Allegations	Conclusions
1.	<p>Allegations to be investigated. The written complaint alleges that the District violated the IDEA in the following ways:</p> <p><u>Parental Participation:</u></p> <p>Not providing one or both parents with an opportunity to participate in meetings, specifically the January 13, 2009 meeting, 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; and,</p>	<p>Not Substantiated.</p> <p>At least one of the student's parents meaningfully participated in the January 13, 2009 IEP meeting.</p>
2.	<p><u>General Evaluation and Reevaluation Procedures:</u></p> <p>Not conducting an evaluation which was sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified, by failing to consider information provided by the parent regarding the evaluation of the student; and,</p>	<p>Not Substantiated</p> <p>The Department finds that the District reviewed and utilized the parent's December 2007 evaluation at the meeting that month and at the May 2008 meeting and that the psychologist who conducted the evaluation participated in those meetings to explain the evaluation results.</p>
3.	<p><u>IEP Implementation:</u></p> <p>Not providing special education and related services to the student in accordance with the student's Individualized Educational Program by failing to modify assignments.</p>	<p>Not Substantiated.</p> <p>The student received modified assignments and instruction appropriate for his rate and level.</p>
4.	<p><u>Requested Corrective Action:</u></p>	

² See 34 CFR 300.153 (c); OAR 581-015-2030(5).

	<p>The parents are requesting an IEP meeting to address their concerns. The Department understands that an IEP meeting was scheduled for February 4, 2009.</p>	<p>The District held an IEP meeting on February 4, 2009, and plans another IEP meeting to share the additional evaluations presently being conducted.</p>
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III. FINDINGS OF FACT

Background

1. The child is currently 10 years old, resides in the District, and attends fifth grade at a District elementary school. The child was first determined eligible for early childhood special education in 2001. He is presently eligible for special education as a child with a communication disorder and as a child with autism spectrum disorder.

2. The parent gave consent for initial placement in special education on May 28, 2003, based on an eligibility of communication disorder. The District obtained a medical statement from the student's physician dated March 11, 2004, confirming "autism" as a health condition affecting the student's educational performance. The parents obtained a private evaluation from a medical doctor in August 2004, which concluded that that the student continued to have need for special education services in the area of "speech/language and occupational therapy (for sensory processing difficulties)" and should be monitored for "a language based learning disability". The report also stated that the student "does not fulfill the medical criteria for an Autism Disorder", but the doctor supported an IEP "under this educational eligibility in order for [the student] to receive ...services." While the parents have expressed disagreement with eligibility of Autism Spectrum Disorder since 2004 when it was first discussed, the District added an additional special education eligibility of Autism Spectrum Disorder on June 8, 2004.

3. On May 30, 2006, the parent and District agreed that the District would not conduct a three-year re-evaluation for Communication Disorder and agreed to continuing eligibility in Communication Disorder.

4. On May 17, 2007, the parent met with District staff for the three year re-evaluation for Autism Spectrum Disorder eligibility. Following a file review, review of the results from a Woodcock-Johnson III Tests of Achievement, and informal interview with the student's classroom teacher, the team, over the parents' objection, concluded that the student remained eligible for special education services as a student with Autism Spectrum Disorder.

2007-2008 School Year

5. The student was evaluated by a private licensed psychologist, whose findings were included in a report dated December 18, 2007. The District received the report on December 20, 2007. The report included the results of a number of instruments, including intelligence tests, neuropsychological tests, achievement tests, and autism rating scales (the Childhood Autism Rating Scale [CARS] and the Australian Scale for Asperger Syndrome). The report concludes that one instrument “suggested ADD” (Attention Deficit Disorder). The report concurs with the findings listed in the August 2004 physician report (discussed in Finding of Fact Number 2 above). The author offered a primary diagnosis of “Non-Verbal Learning Disability” which “is often mistaken as a disorder within the Autism Spectrum and is considered by some authorities to be part of the Autism Spectrum” and a secondary diagnosis of “ADHD [Attention Deficit Hyperactivity Disorder], Predominantly Inattentive”.
6. The private psychologist reviewed her report at a meeting on December 21, 2007. The meeting was attended by all IEP team members including the parent but was not noticed as an IEP meeting. She reiterated that she did not believe the student presented as a child with autism, but would more accurately be characterized as a child with a non-verbal learning disorder. The psychologist described the student as having difficulties with spatial perception, memory for faces, and comprehension of non-concrete concepts. The parent expressed her continuing concern about the label of autism and she wanted her son in the general education classroom. The psychologist stated that the student probably would not do well if placed in a regular education classroom on a full time basis. The District, at its expense, offered to have the student evaluated by the Child Development and Rehabilitation Center (CDRC), and the notes of the meeting indicate that the parent consented if the evaluation was not lengthy.³ The student’s reading comprehension present level was discussed and the team agreed to place the student in the general education class for the majority of his day.
7. The IEP team met on May 12, 2008, for the student’s annual IEP review. The team included the parent and six District staff members. The psychologist who authored the December 18, 2007 report also attended. The student’s IEP included areas of specially designed instruction of Speech/Language Therapy, 160 minutes per month and Social Skills, 90 minutes per week. Related services included daily transportation to and from school. Modifications and accommodations included “preferential seating, modified assignments, breaks, fidgets.” Services also included occupational therapy consultation for 120 minutes per year. No special factors were noted in the IEP. Specifically, the student was not noted to have behaviors that impeded his learning or the learning of others. The minutes of the meetings reflect discussion of the student’s present levels, parent concerns including her belief that the student had been misdiagnosed, benchmark tests results, and the adoption of a communication

³ The records provided by the District did not include a signed consent for the CDRD evaluation.

notebook between school and home. The minutes of the meeting reflect that the psychologist reviewed and explained her report.

2008-2009 School Year

8. On October 15, 2008, the parent consented to “Behavioral/Social Emotional” and “Speech/Language (Functional Communication Assessment)” evaluations. The parent did not consent to the student participating in a day long evaluation at the Child Development and Rehabilitation Center (CDRC). Classroom observations, evaluations, and data collection began in October and continued through January 2009.
9. On January 13, 2009, at an IEP team meeting, the District presented the Functional Communication Assessment (FCA) and the Functional Behavioral Assessment (FBA) to the IEP team, including the parent. The parent expressed her disagreement with the conclusions in the assessments and stated that she does not observe the behaviors described in the school assessments in the home setting. The parent expressed her disagreement with the goals described in a Positive Behavior Support Plan, believing that the student only needed to have instructions reviewed more clearly. While District staff reported that the student was easily distracted and required constant reminders to stay on task, the parent stated that the student had no problem at home finishing homework quickly and completely. The parent disagreed with the Autism Spectrum Disorder eligibility and agreed with the psychologist’s diagnosis of Non-Verbal Learning Disability. The District recommended that occupational therapy consultation was no longer necessary and the parent did not object.
10. During the January 13, 2009 meeting, the parent disagreed with including in the IEP specially designed instruction in “Social Skills” class. The parent did not want the student removed from his general education classroom and instructional time for ninety minutes per week (three thirty-minute sessions). The District team members recommended that the student continue with the social skills training. The parent expressed her opinion that the student’s social skills were fine and that his behavior was for the purpose of seeking attention. A District staff member informed the parent of a new federal regulation allowing parents to withdraw their children from special education placements. District staff recommended that the student remain eligible for special education services based on his need for the services. While withdrawal from special education services was raised in the meeting again, the parent stated that she would not make a decision on that issue at the meeting. District staff stated that another meeting should occur within ten days so the pending issues could be addressed. The parent understood that if she did not decide on continuing special education placement and other pending issues within ten days, that all of the student’s special education services would be terminated. District staff was clear in expressing that another meeting needed to be scheduled in the near future and mentioned ten days as the time frame to reconvene. The District’s intention was not understood by the parent, and the parent’s intention was not understood by

the District staff. The meeting concluded with a plan to reconvene the IEP team at some date in the future. Subsequently, the District sent the parent a prior written notice removing occupational therapy, and the District created a behavior support plan.

11. The District reported that the student is in ability-level writing, reading, and math. The writing assignments are accommodated by having educational assistants assist him on a one on one basis. The reading assignments are delivered on an ability-level, small-group basis. His math is an individually designed, computer-based program that allows the student to progress at his rate and to his level as he masters the various mathematical objectives. On one occasion, the computer-based math program identified that the student was ready for a test in a content area. The test included more than 60 problems, but the student was directed to complete only the first 45 problems as an accommodation of the assignment. The test was graded before the student had completed the balance of the problems. Therefore, the percentage for the entire test did not reflect the percentage of correct answers that the student completed. The parent was not provided this explanation but was only provided the percentage score for the entire number of problems, which did not reflect the high percentage of accurate answers the student completed.
12. On January 28, 2009, the parent filed a special education complaint investigation request which precipitated an investigation and the issuance of this final order.
13. On February 4, 2009, the IEP team, including both parents, met again. The outcomes of the meeting included a revised IEP, an intention to consider ESY at the next IEP meeting, and the granting of parental consent for further assessments to evaluate other areas of suspected disability including Other Health Impaired (OHI) for ADHD and Specific Learning Disability. In addition, the parents were provided rating scales and a medical statement to complete. The team intended to meet within thirty days. As of March 4, 2009, the rating scales and the medical statement had not yet been returned to the school although they were anticipated to be completed within days. No reconvened meeting had yet been scheduled.

IV. DISCUSSION

1. Parental Participation:

The parents allege that the District did not provide one or both parents with an opportunity to participate in meetings, specifically the January 13, 2009 meeting, 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.

Parental participation is an important part of the IEP team process. Parents have been members of their children's IEP teams for the entire history of IDEA. In the 1997 IDEA,

parents moved to the top of the list of IEP team members as part of a broader move to strengthen the parent role in special education processes. School personnel typically bring expertise about curriculum, instruction, and assessment to special education decision-making. Parents have extensive knowledge of their children's characteristics, experiences, and needs and thus have substantial knowledge to contribute to decisions. Parent participation is a fundamental principle of IDEA.

Appendix A to the federal IDEA regulations (1999) described the intended level of participation:

"The parents of a child with a disability are expected to be *equal participants along with school personnel*, in developing, reviewing, and revising the IEP for their child. This is an *active role* in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

As previously noted in the introduction to section II of this Appendix, Part B specifically provides that parents of children with disabilities—

1. Have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of their child, and the provision of FAPE to the child (including IEP meetings)⁴;
2. Be part of the groups that determine what additional data are needed as part of an evaluation of their child, and determine their child's eligibility and educational placement⁵;
3. Have their concerns and the information that they provide regarding their child considered in developing and reviewing their child's IEPs[.]⁶

The IDEA requires more than an opportunity for parents to attend and speak at IEP meetings; it requires a good faith exchange of ideas. If this exchange does not lead the team to consensus, the school district must still ensure that the child receives FAPE.

As recently as December 2008, in discussing regulations that went into effect on December 31, 2008, OSEP stated, "We agree with the commenters that parents should be equal partners in the educational decision-making process for their child..."⁷ In this case, the parent disagreed with many of the Functional Behavioral Assessment conclusions and recommendations presented during the meeting and continued to

⁴ OAR 581-015-2190

⁵ OAR 581-015-2115

⁶ OAR 581-015-2195, OAR 581-015-2205, OAR 581-015-2210

⁷ 73 Fed. Reg. 73018 (2008) (Analysis of Comments & Changes for 34 CFR 300.512)

disagree with the Autism Spectrum Disorder eligibility of the student as she had consistently done since this eligibility was first established. The parent was informed of the parental right to unilaterally withdraw her child from special education services and requested that she speak with her husband before making any decision. The misunderstandings between District staff and the parent relating to the new regulation authorizing the parent's unilateral right to withdraw their child from special education undoubtedly precipitated the initiation of the present complaint. While consensus was clearly not reached by the entire IEP team during the January 13, 2009 meeting, it is clear that the parent was given the opportunity to participate, to ask questions, and to offer her opinions and information, and she was given time to consider the issues discussed during the meeting. The parent and psychologist's lack of awareness that non-verbal learning disability is not an enumerated special education eligibility category may also have contributed to the present controversy.

When an IEP/placement team is unable to reach consensus, such as in the present case, OSEP has provided the following guidance:

"The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the (1) child's needs and appropriate goals; (2) extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs (Secs. 300.343(c)(iii) and 300.346(a)(1) and (b)).

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority 'vote'. If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B."⁸

In this case, the parent accessed her procedural rights by filing the present complaint. She has the additional procedural safeguard, as discussed above, to initiate a due process hearing. However, based on the facts in this case, the Department does not find persuasive evidence to

⁸ 34 CFR Appendix A to Part 300—Notice of Interpretation (July 1, 2006)

substantiate the allegation that the parent did not participate in the January 13, 2009 IEP meeting.

2. General Evaluation and Reevaluation Procedures:

The parents allege that the District did not conduct an evaluation which was sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified, and by failing to consider information provided by the parent regarding the evaluation of the student.

Under the IDEA, a school district must ensure that a student is assessed in all areas of suspected disability and the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs.⁹ Initial evaluations (if appropriate) and reevaluations must begin with a review of existing evaluation data on a student, including evaluations and information provided by the parents; classroom-based, local and state assessments; classroom-based observations; and observations by teachers and service providers.¹⁰ Based on this review of existing information, the IEP team (and other qualified professionals, as appropriate) determines what additional data, if any, are needed to determine the student's eligibility for special education, present levels of academic achievement, and related needs; the team then considers the need for any changes to the student's IEP services.¹¹

An evaluation must occur every three years – more frequently if conditions warrant – or if the child's parent or teacher requests an evaluation.¹² The District must ensure that the child is assessed in all areas related to the suspected disability.¹³ For a child who may have disabilities in more than one category, the team need only qualify the child under one disability category. However, the child must be evaluated in all areas related to the suspected disabilities, and the child's IEP must address all of the child's special education needs.¹⁴

The District's most recent three year reevaluation for autism spectrum disorder occurred in May 2007, outside the complaint time frame of twelve months before the Department received the present complaint. However, the District agrees in its narrative Response to the RFR that the reevaluation "was not a comprehensive assessment."¹⁵ This reevaluation was a file review, informal inquiry with the classroom teacher and the results from a Woodcock-Johnson III Tests of Achievement. The team, over the parent's objection, continued to find the student eligible under the category of Autism Spectrum Disorder. The team had previously determined the student re-eligible for Communication Disorder in May 2006.

⁹ OAR 581-015-2110(4).

¹⁰ OAR 581-015-2115(1)(a).

¹¹ OAR 581-015-2115(1)(b).

¹² OAR 581-015-2105.

¹³ OAR 581-015-2110 (4)(d)

¹⁴ OAR 581-015-2120 (4)

¹⁵ District Response dated February 17, 2009, pg. 2

The parent obtained her own assessment from a clinical psychologist in December 2007. The psychologist provided the District with the report before the meeting of December 21, 2008, and attended the meeting. That report confirmed the recommendation that the student continue with services under an IEP, with her opinion that he needed assistance with expressive/receptive language. The psychologist raised a number of other issues: “primary diagnosis of Learning Disorder, NOS (Non-Verbal Learning Disorder)” with a secondary diagnosis of Attention Deficit Disorder (ADD). With the information in this report, the question is whether the District had sufficient suspicion to initiate additional evaluations.

The psychologist also attended the May 12, 2008 IEP meeting, reiterating the findings in her report including her diagnosis of “Non-verbal Learning Disorder”. Her report explains that disorder is “often mistaken as a disorder within the Autism Spectrum and is considered by some authorities to be part of the Autism Spectrum”. The psychologist’s report provided the District with valuable information, which they took into consideration and which confirmed the need for the student to receive special education services.

The District requested and received consent from the parent to conduct speech and behavioral/social emotional assessments on October 15, 2008, but the parent chose not to proceed with another day-long assessment (the CDRC assessment) for her son. The functional communication assessment and the functional behavioral assessment data was obtained between October and December and presented at the January 13, 2009 IEP meeting. The Department agrees with the District that the last three year re-evaluation in May 2007, was not a comprehensive assessment, but the Department does not find substantial evidence that the District failed to collect and consider sufficient evaluation data to make determinations regarding the student’s eligibility and appropriate special education and related services. This conclusion is supported by the amount of evaluative data regarding the student that was available to the District from earlier District evaluations and the parent’s privately obtained assessments, the information which was considered by the District at the December 21, 2007 and May 12, 2008 meetings. Therefore, the Department concludes that, although the December 18, 2007 evaluation was not conducted by the District, it was explained to the District and used to inform subsequent IEP and eligibility decisions. Furthermore, after the filing of this complaint, at the February 4, 2009 meeting, the District initiated a global reevaluation in all areas of suspected disability, with a specific focus on Autism Spectrum Disorder, Specific Learning Disability, Other Health Impaired (to assess ADHD and/or ADD), and Communication Disorder.

Based on these facts, the Department does not find persuasive evidence to substantiate the allegation. The Department notes that the Oregon Administrative Rules restrict the scope of complaint investigations to one year prior to the filing of the complaint. Therefore, the findings of fact and conclusions of law contained in this final order pertain only to allegations of violations of the IDEA that occurred on or after January 28, 2008. Due to this restriction, this final order does not contain any conclusions regarding the District’s obligation to evaluate the student prior to January 28, 2008.

3. IEP Implementation:

The complaint alleges that the District did not provide special education and related services to the student in accordance with the student's IEP by failing to modify assignments. The parent's complaint includes one specific instance relating to a math test, asserting that this assignment was not modified.

The District explained this one event as a mistake in grading the test before it was completed. The District elaborated that the student is placed in ability-level subject groupings, often in small groups, with progress within the curriculum based on the student's rate of learning. Without more, the Department finds that there is insufficient evidence to substantiate this allegation.

V. CORRECTIVE ACTION

The Department did not substantiate the complaint allegations. Therefore, no corrective action is required.

Dated this 17th day of March, 2009

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

Mailing Date: March 17, 2009

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.