

No.	Allegations	Conclusions
(1)	<p><u>General Evaluation and Reevaluation Procedures:</u></p> <p>The parents allege that the District failed to obtain written consent from the parents before conducting observations of the student on three occasions.</p>	<p>Not Substantiated</p> <p>The Department finds that the three observations on those two days were a continuation of the monitoring of the student's progress toward the goal and related short-term objectives identified in the student's July 15, 2008 IEP. Although these observations were among the information relied upon to support the District's determination that the student is no longer eligible for special education services, the observations did not require separate consent as they were part and parcel of the IEP in effect at that time. The Department does not substantiate this allegation.</p>
(2)	<p><u>Evaluation and Reevaluation Requirements:</u></p> <p>The parents allege that the District terminated the student's eligibility for special education services without following the appropriate reevaluation procedures set forth in OAR 581-015-2105 through 581-015-2125.</p>	<p>Substantiated</p> <p>The Department finds that the District was not yet authorized to engage in a reevaluation process because less than a year had passed since the student's April 23, 2008 evaluations and the District failed to obtain agreement from the parent to reevaluate the student within a year of the prior evaluation. Thus, the Department substantiates the allegation that the District terminated the student's eligibility for special education services without following the appropriate reevaluation procedures.</p> <p>The Department agrees with the parents that the remedy is to immediately reinstate the student's special education eligibility until an</p>

		appropriate eligibility process is completed. Additionally, the District must provide appropriate compensatory education. See Corrective Action Plan.
(3)	<p><u>Parental Participation - General:</u></p> <p>The parents allege that the District did not provide the parents with the information necessary for the parents to fully participate in the January 29, 2009 IEP meeting by failing to produce notes from the District's three observations of the student.</p>	<p>Not Substantiated</p> <p>The Department finds that the data collected during the observations on January 20 and 26, 2009, because it was used to determine the student's eligibility, should be included in the District's evaluation reports. However, the Department also finds that the District was not required to provide the parents' with a copy of the report prior to the determination of eligibility. Therefore, the Department does not substantiate this allegation.</p>

III. FINDINGS OF FACT

Background:

1. The student is presently thirteen years old and is in the seventh grade at the District's middle school. Prior to the determination by the District that the student was no longer eligible on January 29, 2009, the student was eligible for special education under Other Health Impairment (OHI), with initial eligibility under Emotional Disturbance (ED) established on January 12, 2006. On April 10, 2008, the District changed the student's eligibility from ED to OHI.
2. The student's February 4, 2008 IEP notes that the student "has a history of concerns dating to early childhood when he was found eligible for early childhood special education as developmentally delayed with significant deficits in gross and fine motor, adaptive and social function and expressive and receptive language. Cognitive measure at that time was measured as low-average with a standard score of 83 (report 4/22/98). In school, he was evaluated for eligibility for Other Health Impairment in 2003 and found not to qualify. He was on a 504 plan for some time for ADHD. Fetal Alcohol Syndrome was also noted by [a medical doctor] (statement 5/9/05). Attention, impulsivity and conduct problems have been areas of concern. Generally, over time, academic and cognitive function

has been measured in the low average range by standard measures as well as teacher informal and anecdotal information. Math is an area of strength.”

3. The student’s July 15, 2008 IEP notes that a medical doctor “reported that [the student] has ADHD and FAS in a statement on 5/9/05. In 2003, an eligibility team determined that [the student] did not qualify for special education services as a student with a health impairment and he was assigned a 504 plan. His eligibility for services as a student with an emotional disturbance was determined after 2 suspensions for bringing a dangerous object to school. The team recently agreed that [the student] does not have an emotional disturbance and that eligibility was terminated. They agreed to grant eligibility as Other Health Impaired to address any remaining concerns. The district engaged [a psychologist] to conduct a full psychological evaluation to inform these decisions. On a scale for ADHD (ADDES, 4/2/08) all three school respondents rated [the student] within typical range in all categories and parents rated barely into borderline significant in Inattentive only (not in Hyperactive-Impulsive). Additionally, in the Child Behavior Checklist (CBC, 4/2/08) subscales for ADHD were not significantly elevated in any of the 3 respondents. On a behavior rating index for executive function, (BRIEF, 4/2/08) one of the four respondents listed [the student] across the board as significant for problems relating to executive function. In his summary impressions, the psychologist described [the student] as having weakness in independent function, stating that he presents as emotionally needy with exaggerated emotional reactions. [The student] also indicated to the psychologist that he does not want to grow up. He has a tendency to over focus and difficulty with shifting mental sets. [The student’s] ability measures are in the low average range. This is consistent with school anecdotal reports and work samples. [The psychologist’s] report states that [the student’s] ‘achievement is higher than what might be expected for his cognitive profile’ and ‘he is making good use of his academic instruction’ (report 4/2/08, pg. 13). This is consistent with teacher assessments and SLP verbal comments (meeting notes 5/8/08).”
4. The student’s July 15, 2008 IEP also states that “Goals on [the student’s] most recent IEP included increasing work completion and on-task time in reading. [The student’s] most recent measure of work completion included the following: 80% work completion in Math, 91% work completion in Reading, 90% work completion in Writing and 100% work completion in Social Studies. When [the student] is off task during work time he is usually easily redirected.”
5. The student’s July 15, 2008 IEP includes a goal in “Self-Management/Independence”, and states that the student “will improve his ability to act independently as a learner by maintaining 75% time on-task during work time for 6 out of 8 weeks.” The short-term objectives related to this goal are: “1. [The student] will learn and use strategies to overcome intrusive thoughts regarding personal issues and objects as measured by: (a) Describing strategy to teacher once per week for 3 weeks. (b) Using the strategy to avoid off-task time (to 75% on-task) resulting from personal issues for 6 out of 8 weeks. 2. [The student] will learn and use strategies to identify task at hand and prepare himself

to address it as measured by: (a) Naming or showing strategy to teacher when asked once per week for 3 weeks. (b) Use the strategy to avoid off-task behavior (to 75% on task) resulting from organization problems for 6 out of 8 weeks. 3. [The student] will learn and use strategies to self-direct by: (a) naming strategy to self direct when asked by teacher once per week for 3 weeks. (b) Using strategy to avoid off-task behavior (to 75% on-task) resulting from a lack of self direction for 6 out of 8 weeks.”

6. The student’s July 15, 2008 IEP includes specially designed instruction, as follows: “Self-Management/Independence” to occur “30 min/week” in the “classroom”. The IEP also includes the following supplementary aids/services; modification; and accommodations: “1. Daily self check with weekly check in w/ homeroom teacher to identify monitor and problem solve” for “15 min/week” in the “classroom”; “2. Self check systems/checklist for understanding assignment directions” for “15 min/week” in the “classroom”. Additional accommodations set forth in the July 15, 2008 IEP, all of which are to be provided “As determined by teacher in consult with student”, include: “Visual supports for verbal information”, “Relate information presented with what student already knows”, “Check off or numbered lists of steps in a task”, “Emphasize critical information”, “Provide frequent check-ins for Comprehension” and “Repeat and clarify directions”.
7. With the exception of math class, the student is in a regular classroom with the same teacher during the school day. All students in middle school, including the student, receive instruction in a “two-year blended grade, self-contained classroom” with seventh and eighth grade students in the classroom.

Evaluation and Reevaluation Procedures; and Parental Participation

8. During the 2008-2009 school year, the special education director, who is also the special education teacher, monitored the student’s progress weekly for “on-task time.” The observations began September 16, 2008 and concluded on January 26, 2009. A progress summary report states that as of December of 2008 the student had “met” his annual goal and reported the student met the short-term objectives 12 out of 13 weeks. The report also notes that the student’s class spent the majority of one of the thirteen weeks outside of the classroom setting due to field trips.
9. On January 14, 2009, the District provided notice to the parents of a January 29, 2009 team meeting, “As per our phone conversation on 1/9/09.” The notice states that at the IEP meeting the team would “Review existing information about your child,” and “Decide whether your child is eligible for or continues to be eligible for special education.”
10. On January 26, 2009, a private psychologist who has worked with the student and the parents for some time sent an e-mail message to the District stating that the District “will need to be proactive in developing a more specific plan of support to ensure ongoing success.” The psychologist opined that the District needs to

address the following issues: the student's "special needs in the social arena cause difficulty from time to time" and the student's "academic needs still don't seem to be entirely addressed."

11. In the same January 26, 2009 email, the private psychologist further stated:
"As I understand it, [the student] participates in a self-directed math program. Reportedly, he has made little progress and is repeating many lessons, many times. Has this been addressed in the IEP? Additionally, from the looks of his report card, he seems to be struggling in several other areas as well. Given his grades, I am curious about the level of support that is offered to him during the day given his special needs; is the work assigned appropriate and commensurate with his ability? Is he receiving the support/extra help he needs to be successful? (Please review most recent psychological evaluation for details on areas of strength and weakness, IQ, etc)."
12. On January 20, 2009, and again on January 26, 2009, the District's special education director observed the student in the classroom and documented those observations in handwritten notes provided during the on-site investigation. These handwritten observations were typed and provided to the parents and their attorney two business days after the January 29, 2009 meeting.
13. The meeting notes from the January 29, 2009 IEP meeting state that the purpose of the meeting is that the student "has already met IEP goals as reported on recent special education progress report. [The special education director] explains the district is required to develop new goals or revisit the eligibility. District would like to revisit the eligibility. [The student] has made the transition to middle school. [The special education director] reviews that [the student] was evaluated extensively last spring. The team determined that [the student] does not have Emotional Disturbance. The family wanted to determine for Other Health Impairment. At that time there was much discussion on the qualifying question 'limited strength, vitality and alertness...environmental stimuli...educational environment'. District conceded points at that time so that eligibility could be granted and team could reach consensus as [the student] transitioned to middle school as the parents were concerned for the transition."
14. The meeting notes also indicate that the parents' attorney stated that "she does not think we can proceed with eligibility. No new evaluations have been conducted and a year has not passed. Indicates there are OARs. [The district's attorney] asks what legal point. Objection is noted. Team will proceed. [The special education director] indicates that [the full psychological evaluation] is still current from last April and she has current observations and progress reports. [The parents' attorney] inquires about observations. [The special education director] indicates that she has them but they are not here and she will give an oral report to the team and provide written report on Monday. [The special education director] agrees to fax written report Monday."

15. The special education director then discussed the student's goals, noting that the student easily met the goal, and then discussed three observations made by the special education director, one on January 20, 2009 and two on January 26, 2009. The special education director reported that the student was on task 100%, 90%, and 80% of the time. The meeting notes also include a discussion of the students' psychologist's concerns for the student's academics. Concerning math, the student's math teacher "discusses [the student's] math function. [The student] has passed 5 math tests. He is progressing slowly. [The teacher] would like him to progress more quickly, but the same is true for much of the rest of the class. [The parent] says math is 'self taught' and [the student] cannot do that. [The math teacher] says that is not the case. He gives lessons. Parents ask if his instruction is beyond the lessons/tests [the student] is working on. [The math teacher] says that he is teaching lessons that are ahead of where [the student] is. [The parents] say he cannot benefit. [The math teacher] says he and others do benefit. Some discussion of spiral curriculum. Level of mastery is higher because a variety of concepts are revisited every test and the student needs to pass with 80%. [A parent] says that she taught [the student] his math up until now – he did not learn it at school and now that she is not doing math with him he is way behind." The math teacher believed that the student is still on track to complete the math book in two years.
16. The student's regular education teacher reported at the January 29, 2009 meeting that the student "is just generally low, consistent with his cognitive profile. He is at about the bottom third of her class." The regular education teacher also reported that writing is the hardest for the student and that they are working on his organization and conventions, and that the student has made progress and has been able to stay on task 75% of the time with minimal reminders, if any.
17. The January 29, 2009 meeting notes also state that the parents' attorney "wants new evaluations", described as "standardized" evaluations. The parents and their attorney were asked what information the team does not have and no specific suggestions were provided by the parents or their attorney. The attorney "will send a list". One of the parents said that the student is doing well than they should not remove any supports, and the special education director responded that supports are not really being removed. "He can get all these support[s] through regular education and he has achieved his goals. We are just not adding new special education goals. * * * Regular instruction is built around concept of continuous progress for all students." The meeting notes also state that review of the student's psychological evaluation in April of 2008 reveals that on both scales addressing ADHD ("the ADDES and a subscale on the CBC"), the "ADHD behaviors (hyperactivity and inattentive) are not elevated to the significant range." "Team reviews first eligibility question: 'limited...alertness...' District staff maintains that [the student's] alertness to the educational environment is not compromised. Parents disagree. Disagreement will be noted on the form. * * * District staff maintains that the diagnosis of ADHD does not demonstrate educational impact. Parents disagree. Disagreement is noted on the form.

District staff maintains that Jacob does not need special education services as a student with an Other Health Impairment. Parents. Disagree.”

18. At the end of the January 29, 2009 meeting the parents attorney stated that the parents would send information on what evaluations were being requested. The on-site investigation revealed no such requests for specific evaluations from the parents or their attorney.
19. A prior written notice issued by the District on January 29, 2009 states, in part, that the District has determined that the student “does not meet the eligibility requirements as a student with an Other Health Impairment as determined by the team.” The notice also states that the action is based on the following evaluation procedures, tests, records, or reports: “ADDES, CBC (4/2/08), observations, teacher reports, WISC IV, Woodcock Johnson (4/2/08).” The District also issued a statement of eligibility on January 29, 2009, stating that the team has determined that the student does not qualify for special education.
20. During the on-site investigation, the Department obtained from both the District and the parents a copy of the student’s most recent “progress report” (the report card issued to the District’s regular education students, including the student in this case. This progress report shows a marked decrease in completion of assignments as compared to the progress report issued in the fall of 2008.

IV. DISCUSSION

Reevaluation Procedures

The parents allege that the District failed to obtain written consent from the parents before conducting observations of the student on three occasions. One of the observations in question took place on January 20, 2009, and the others took place on January 26, 2009.

OAR 581-015-2090(3) provides, in part:

(3) Consent for reevaluation:

(a) A school district must obtain informed parent consent before conducting any reevaluation of a child with a disability, except as provided in subsections (b) and OAR 581-015-2095.

(b) If a parent refuses to consent to the reevaluation, the school district may, but is not required to, pursue the reevaluation by using mediation or due process hearing procedures. A district does not violate its obligations under 34 CFR 300.111 and 300.301-311 if it declines to pursue the reevaluation using these procedures.

The Department finds that the District was not required to obtain parental consent to observe the student on January 20 and 26, 2009 because the observations in question were not evaluations. OAR 581-015-2000(10) defines an evaluation as “procedures

used to determine whether the child has a disability, and the nature and extent of the special education and related services that the child needs. The federal Office of Special Education Programs provides additional guidance in its *Letter to Sarzynski* issued on May 6, 2008. In that letter, OSEP indicates that an assessment is considered an evaluation if it is intended to be used either to determine the student's disability status or to determine the extent of the student's special education and related service needs.

Based on the available evidence, the Department is unable to find that the District observed the student on three occasions in January 2008 with the intent of using those observations as part of an eligibility determination. The Department's conclusion is based primarily on the inclusion of observations in the section describing how the student's progress will be measured on the student's July 15, 2008 IEP. The Department finds that the three observations in question were a continuation of the monitoring of the student's progress towards the goal and related short-term objectives identified in the student's July 15, 2008 IEP. Although these observations were later relied upon to support the District's determination that the student is no longer eligible for special education services, the observations did not require separate consent as they were part and parcel of the IEP in effect at the time of the observations. Additionally, the District did not need to obtain parental consent to review the observation data, regardless of the purpose of the review, once the data was collected for the purpose of progress monitoring. Because the Department finds that the observations of the student on January 20 and 26, 2008 were not evaluations as defined by OAR 581-015-2000(10), the Department does not substantiate the allegation that the District violated IDEA by failing to obtain parental consent prior to observing the student.

Reevaluation Requirements

The parents allege that the District terminated the student's eligibility for special education services without following the appropriate reevaluation procedures set forth in OAR 581-015-2105 through 581-015-2125.

OAR 581-015-2105 provides, in part:

Evaluation and Reevaluation Requirements

(1) General: A public agency must conduct an evaluation or reevaluation process in accordance with this rule and 581-015-2110 before:

* * *

(d) Terminating the child's eligibility as a child with a disability, unless the termination is due to graduation from high school with a regular diploma or exceeding the age of eligibility for a free appropriate public education under OAR 581-015-2045.

* * *

(4) Reevaluation:

(a) The public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with OAR 581-015-2115, subject to subsection (b) and OAR 581-015-2110(2):

(A) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(B) If the child's parents or teacher requests a reevaluation.

(b) A reevaluation for each child with a disability:

(A) May occur not more than once a year, unless the parent and public agency agree otherwise; and

(B) Must occur at least every three years, unless the parent and public agency agree that a reevaluation is unnecessary.

The essence of the complaint in this case is that the District terminated the student's special education eligibility without following the requirements set forth in the applicable OARs. The OARs quoted above state that the District must conduct a "reevaluation process" before "terminating the child's eligibility as a child with a disability." OAR 581-015-2105. Additionally, OAR 581-015-2105(4)(b)(B) provides that reevaluation "[m]ay occur not more than once a year, unless the parent and public agency agree otherwise".

The Department finds that the District violated IDEA by failing to obtain parental agreement to reevaluate the student within one year of prior evaluations of the student. In this case, the Statement of Eligibility for Special Education (Other Health Impairment 80) dated January 29, 2009 indicates that the student was evaluated for special education eligibility on April 2, 2008. The Statement of Eligibility for Special Education (Communication Disorder 50) dated May 8, 2008 indicates that the student was underwent additional evaluations for special education eligibility on April 23, 2008. The Department finds that, at the time of the January 29, 2009 meeting, one year had not passed since the student had undergone a special education evaluation.

Because one year had not passed since the prior evaluation of the student, the District was required to obtain parental agreement to evaluate the student prior to April 23, 2009. Neither party has presented documentary evidence establishing that the District and the parents agreed to evaluate the student within the one year period prohibited by rule. Additionally, the meeting notes from the January 29, 2009 meeting indicate that the parents' attorney opposed the consideration of the student's eligibility without first engaging in the reevaluation process. Therefore, the Department finds that the District violated IDEA by failing to obtain parental agreement before reevaluating the student within one year of a prior evaluation. The Department substantiates this allegation.

The Department also finds that the District's improper termination of the student's eligibility resulted in a denial of services to the student spanning from January 29, 2009 until the District either reinstates the students eligibility and the delivery of special education and related services to the student in accordance with applicable state and

federal laws. The Department agrees with the parents that the remedy is to immediately reinstate the student's special education eligibility until an appropriate eligibility process is completed. Additionally, the District must provide appropriate compensatory education. See Corrective Action Plan.

The Department is also concerned about the recent "progress report" (a report card issued to the District's regular students including the student in this case), issued in March of 2009 to this student. This progress report indicates declining performance as compared to the student's progress report issued in November of 2008. In light of the serious cognitive issues faced by this student, the lack of progress in the regular education coursework may be indicative of a need for reevaluation to determine if specially designed instruction is needed in the various regular education academic areas in which the student is currently enrolled or in organizational and self-advocacy skills.

Parental Participation

The parents allege that the District did not provide them with the information necessary for the parents to fully participate in the January 29, 2009 IEP meeting by failing to produce a written copy of notes from the District's three observations of the student. This allegation requires the Department to make two inquiries: 1) whether the observations should be included in an evaluation report and 2) whether the District was required to provide the report to the parents in written form prior to the January 29, 2009 meeting.

The Department finds that, because the data collected during the observations was later used to inform the team's eligibility determination, the information gathered during the observations should be included in the final evaluation report. However, the Department is unable to find that the District violated IDEA by not presenting the parents with a written evaluation report prior to the January 29, 2009 meeting.

The federal regulations includes the requirement that districts provide evaluation reports to parents in 34 CFR 300.306(a)(2), which is entitled "Determination of eligibility." The federal provision also indicates that the report must be provided to parents "[u]pon completion of administration of assessments and other evaluation measures." The analogous state provision, OAR 581-015-2120(6), is also included in a rule entitled "Determination of Eligibility;" however, the state provision does not indicate an event which triggers the District's obligation to provide the evaluation report.

Due to the lack of a timeframe in which a district must provide an evaluation report to parents in the Oregon rule, the Department relies on the guidance provided by the Department of Education. The Department, indicating that the evaluation report is primarily documentation of the eligibility determination, states that "providing documentation of the eligibility determination to a parent prior to a discussion with the parent regarding the child's eligibility would indicate that the public agency made its determination without including the parents and possibly, qualified professionals, in the decision." 71 FR 156 (May 14, 2006), p. 46645. Making the eligibility determination in such a fashion would violate the requirement that eligibility determinations be made by a group of qualified professionals and the parents. OAR 581-015-2120(1)(a). Therefore,

the Department finds that the District was not required to provide the parent with an evaluation report prior to the meeting and did not violate OAR 581-015-2120(6) by failing to provide the parents with a hard copy of the report at that time. The Department does not substantiate this allegation.

V. CORRECTIVE ACTION¹

In the Matter of Corbett SD 39
Case No. 09-054-004

#	Action Required	Submissions ²	Due Date
(1)	<p><u>Training:</u></p> <p>The District must provide training to all District staff acting as IEP team members to special education students concerning the procedures governing changing or terminating a student's eligibility including the provisions concerning the reevaluation of students, OAR 581-015-2100 to OAR 581-015-2120 required prior to changing or terminating special education eligibility.</p>	<p>A copy of the training materials and an attendance roster including the date of attendance.</p>	<p>June 12, 2009</p>
(2)	<p><u>Reinstatement of Eligibility; IEP Meeting/revision</u></p> <p>The District must immediately reinstate the student's eligibility for special education and related services and resume services according to the student's July 15, 2008 IEP. Additionally, the student's IEP team must, with parental agreement, initiate a reevaluation process in accordance with OARs 581-015-2100 through 581-015-2125.</p>	<p>A copy of the Statement of Eligibility for Special Education indicating that the student's eligibility has been reinstated.</p> <p>A copy of a parental agreement to allow evaluation prior to April 23, 2009, if obtained; meeting minutes from any meeting regarding pre-evaluation planning,</p>	<p>May 11, 2009</p> <p>June 12, 2009</p>

¹ 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).

² Corrective action plans and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.

		evaluation of the student, the student's eligibility, etc.; any evaluation reports generated; and, if created, the IEP is the results of the any new evaluations.	
(3)	<p><u>Compensatory education</u></p> <p>The District must, in conjunction with the parent, develop a plan for providing compensatory services to the student that is substantially similar to the services that the student should have received through the District from January 29, 2009 until the District conducts eligibility determination for the student in accordance with the applicable OARs and must provide compensatory education and services equal to that amount of hours over the course of the remaining 2008-2009 school year.</p>	<p>A copy of the proposed plan for compensatory education signed by the parent and a District representative, for Department approval.</p> <p>A letter of assurance, signed by a District representative, indicating that the District has provided the services agreed to in the compensatory education plan.</p>	<p>May 11, 2009</p> <p>Submission date to be determined based on the District's proposed plan for compensatory education</p>

Dated: April 10, 2009

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

Mailing date: April 10, 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.