

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Tigard-Tualatin School)
District)
)
)

FINDINGS OF FACT,
CONCLUSIONS,
AND FINAL ORDER
Case No. 15-054-015

I. BACKGROUND

On April 22, 2015, the Oregon Department of Education (Department) received a letter of complaint from the parent (Parent) of a student (Student) residing and attending school within the Tigard-Tualatin School District No.23J (District) during the 2014-2015 school year. The Parent requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of the complaint and forwarded the request to the District by email on April 23, 2015. On April 29, 2015, the Parent, through her advocate, submitted an addendum to the initial complaint adding an allegation.

On April 23, 2015, the Department sent a *Request for Response* (RFR) to the District identifying the specific allegation in the complaint that the Department would investigate. On April 29, 2015, the Department sent an *Amended Request for Response* to the District including the additional allegation in the amended complaint that the Department would investigate. The District mailed its timely *Response* to the Department's contract complaint investigator which was received on May 1, 2015, and to the Parents. In addition, the District provided 243 numbered pages of documents including District policies and procedures in support of its *Response* and pursuant to the requests contained in the RFR. The District provided a supplemental *Response* to the Amended RFR by email on May 7, 2015, a copy of which was provided to the Parent the same day.

The Department's complaint investigator determined that on-site interviews were required. On May 18, 2015, the Department's investigator interviewed the Student's Parents, their Advocate, the Student's Grandmother, and the Student's Clinical Psychologist in person. On May 19, 2015, the Department's investigator interviewed the District staff including the Associate Director of Student Special Services, the Student's Teacher, the District Autism Specialist, a District School Psychologist/counselor and the Student's Occupational Therapist. Also on May 19, 2015, the Department's investigator interviewed the District Director of Student Services by phone. The Department's complaint investigator reviewed and considered all of these documents, exhibits, and interviews.

Under federal and state law, the Department must investigate written complaints that allege IDEA violations that occurred 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.¹ The Department may extend the timeline if the District and the Parent agree to an

¹ 34 CFR §300.151

extension to participate in local resolution, mediation, or if requisite exceptional circumstances are present.² This order is timely.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR 300.151-153 and OAR 581-015-2030. The Parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact (Section III) and the Discussion (Section IV). This complaint covers the one-year period from April 22, 2014 to the filing of this complaint on April 22, 2015.³

	Allegations	Conclusions
	<p>The written complaint alleges that the District violated the IDEA in the following ways:</p>	
1.	<p>Eligibility/ Determination of Disability</p> <p>Not correctly applying the criteria to determine whether the Student is a child with a disability under OAR 581-015-2130 through OAR 581-015-2180. Specifically, not correctly applying the criteria to determine whether the Student was eligible under Autism Spectrum Disorder (ASD) or Other Health Impaired (OHI).</p> <p>(Relevant Law and Regulations: OAR 581-015-2120, OAR 581-015-2130, OAR 581-015-2165, and 34 CFR 300.306)</p>	<p>Not Substantiated</p> <p>The District completed all of the evaluations, observations, and required components for the Student's eligibility determinations for both ASD and OHI. These evaluations did not yield the necessary data for the eligibility team to establish either eligibility based on IDEA's applicable criteria.</p>
2.	<p><u>Special Education Evaluations/Child Find</u></p> <p>Not identifying and initiating special education evaluations regarding the Student for Special Education Eligibility when the District should have suspected that the Student was in need of Special Education services.</p> <p>(Relevant Law and Regulations: OAR 581-</p>	<p>Not Substantiated</p> <p>The District did complete evaluations for the Student in all areas of suspected disability and also completed all necessary eligibility requirements. The eligibility team did not find that the Student needed specially designed instruction for one area and that the Student did not qualify based on the</p>

² OAR 581-015-2030(12)

³ See OAR 581-015-2030(5)(2008); 34 CFR § 300.153(c).

015-2080, 581-015-2085, 581-015-2100, OAR 581-015-2105 through OAR 581-015-2120, 34 CFR 300.303, 34 CFR 300.111, 34 CFR 300.131 and 34 CFR 300.157)	eligibility criteria of the other area. The team made this determination after completing all procedural requirements.
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<p>1. <u>Requested Corrective Action.</u></p> <p>The Parent proposed the following solutions:</p> <ol style="list-style-type: none"> 1. Convening an another eligibility meeting to determine whether the Student is eligible for Special Education services; 2. After determination of eligibility, convening an IEP meeting to design the Student's IEP; 3. Discontinuing the use of a "hug" chart in the Student's classroom; 4. Moving the Student to a different classroom with a different teacher. 	No Corrective Action Ordered
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III. FINDINGS OF FACT

Background

1. The Student is currently 11 years old and attends fifth grade within the District for the 2014-2015 school year. The Student has attended the same school within the District since third grade and has attended school within the District since kindergarten. The Student has not previously been found eligible for Special Education services, although the Parents had made requests for Special Education evaluations in 2010, 2011, and 2012. The District held evaluation planning meetings for each of the Parent referrals, but determined not to move forward with the evaluations.

2014-15 School Year

2. On November 6, 2014, the Parent again requested that the District evaluate the Student for Special Education eligibility. The Parent provided the District with a report referencing August and October 11, 2014 from the Student's clinical psychologist in support of her request for a Special Education evaluation.

3. On November 18, 2014, the District held an evaluation planning meeting, attended by the Parent, her Advocate, and seven District staff members.⁴ The evaluation planning group determined that the following evaluations would be appropriate to evaluate the Student in all areas of suspected eligibility and need: "Conners- 3; Behavior Assessment System Children (BASC-2); Behavior Rating Inventory of Executive Function (BRIEF); Observations- direct and interaction; Autism Spectrum Rating Scales (ASRS); functional communication assessment; medical statement; file review; developmental history; [and] Wechsler Individual Achievement Test (WIAT)- Third ed. - writing subtest". It was also noted that "during this evaluation the team will start a HUG program."⁵ The Parent signed the consent for these evaluations the same day.
4. On December 3, 2014, the District Occupational Therapist observed the Student to assess the Student's fine motor writing skills and authored a report on the same date.

Eligibility Meeting January 8, 2015

5. On January 8, 2015, the District held the eligibility determination meeting. Attending the meeting were the same individuals that attended the eligibility planning meeting with the addition of the Student's "Skill trainer",⁶ and a District Occupational Therapist.
6. The Parent had previously provided an Autism Spectrum Disorder evaluation (undated) from a clinical psychologist who saw the Student on two occasions - August 8 and October 11, 2014, which was shared with the group. The District evaluations were previously distributed and then discussed at the meeting. Two eligibilities were considered by the team: Other Health Impaired (OHI) and Autism Spectrum Disorder (ASD). Each evaluation is described in greater detail in subsequent Findings of Fact. In addition to the evaluations, the team considered a Medical Statement dated November 25, 2014,⁷ and a letter from the Student's primary care physician dated December 14, 2014.⁸
7. The District's ASD evaluation stated, in summary and as related to ASD, that:
 - a. The Student "did not demonstrate communication deficits that are consistent with the Autism Spectrum Disorder";
 - b. The Student "demonstrates some struggles with social skills however overall, [the Student] did not demonstrate social interactions that are consistent with the Autism Spectrum Disorder";

⁴ The Associate Director of Student Services, the school principal, a District Autism Specialist, a District School Psychologist, a school Learning Specialist (Special Educator) and a District Speech and Language Pathologist.

⁵ The District explained that the "Hug Program" refers to "Hello, Update and Goodbye". This program includes a "check-in and check-out" contact with the school counsellor and a daily behavioral tracking sheet, by times of the day, with the teacher marking the Student's behavior as red (not acceptable); yellow (marginal); and green (acceptable).

⁶ This individual works in the same office as the clinical psychologist who performed the Psychological Evaluation in August and October 2014.

⁷ The Medical Statement stated that the Student had an impairment lasting more than 60 days of Autism Spectrum Disorder, with additional diagnoses of ADHD, Oppositional Defiant Disorder and Sensory Integration Disorder.

⁸ The physician's letter stated that the Student "underwent a recent assessment by a clinical psychologist and met diagnostic criteria for autism spectrum disorder. [The Student] also has a history of attention deficit disorder with hyperactivity (ADHD), oppositional defiant disorder and sensory integration disorder."

- c. The Student “demonstrates some struggles with behavior however overall, [the Student] did not demonstrate patterns of behavior that are consistent with the Autism Spectrum Disorder”;
 - d. Regarding Sensory Responses, the Student was reported to have unusual responses to sensory experiences by the Parent. The Student’s teacher reported that the Student struggled to sustain attention, twirled [the Student’s] hair in class, but had not observed unusual responses to sensory input. The conclusion, confirmed by staff during on site interviews, was that the Student did not have unusual responses to sensory experiences consistent with ASD.
8. The District’s ASD evaluation also incorporated a Communication Assessment completed by a District Speech-Language Pathologist (SLP). The SLP stated that “Functional communication is adequate at school, but an area of concern for [the Student’s] Parent in the home setting” and concluded that “overall, [the Student] demonstrates strong semantic skills and pragmatic language skills that are functional. Deficits appear to be more of a relative weakness as opposed to disordered skills. Further communication skills are observed to be functional for school participation as evidenced by state test scores, teacher report and historic standardized measures.”
9. The District’s ASD evaluation described observations in two settings by the author on one day and another observation, with direct interaction with the Student, on another day.
10. The Student’s clinical psychologist’s ASD evaluation stated, in summary, that:
- a. The Student’s full Scale IQ scores indicated cognitive functioning in the average range overall, although there were some significant differences between various subtests;
 - b. The Autism Diagnostic Observation Schedule, 2d ed.-Module 3 (ADOS-2) classified the Student in the “Autism range.... with a Moderate level of autism spectrum-related symptoms as compared to children who have an Autism Spectrum Disorder and are of the same chronological age and language level.”
 - c. Communication skills were reported as varied, with some impairment and some non-impaired;⁹
 - d. Social interactions were reported as mixed;¹⁰
 - e. Stereotypical Behaviors/Restricted Interests were reported as the Student “did not demonstrate repetitive motor mannerisms, unusual sensory interests, compulsions or rituals, or self-injurious behavior;”
 - f. Sensory Processing, based on a profile completed by the Parent, were summarized as [the Student’s] “sensory experiences impact [the Student’s]

⁹ The clinician used descriptions in the report such as “spoke fluently with appropriate grammar ” and “tone of voice was often exaggerated”; “often used repetitive speech” and “spontaneously offered and asked for information”; “conversation skills were adequate, but flowed awkwardly”; “used many descriptive gestures during the assessment”.

¹⁰ Descriptions used in the report included “social eye contact and facial expressions were limited”; “was able to describe social interactions but lacked insight into [the Student’s] own role”; “overall most of [the Student’s] interactions with the psychologist appeared reciprocal in nature”; “Social overtures were mostly restricted to [the Student’s] personal interests. Social responses were adequate in quality. Rapport was sometimes comfortable, but sometimes awkward”.

conduct, social-emotional functioning and attention significantly more than typical others;”

- g. The Psychologist diagnostic impression, based on the DSM-V, was that the Student is a child with “Autism Spectrum Disorder, without intellectual impairment or language impairment; and Attention-Deficit/Hyperactivity Disorder - combined presentation.”¹¹

11. The District also prepared an evaluation report dated December 11, 2014 co-signed by the School Psychologist/counselor and a school Learning Specialist which was shared with the eligibility team. This evaluation included a file review (including past medical records relating to ASD), a developmental history, an independent observation by the School Psychologist, results from the administration of the Conners-3 (a behavior rating instrument focused on behavioral, social and cognitive symptoms of ADHD), results from the (BASC-2), results from the BRIEF, results from the WIAT- 3rd ed. in written language only. In addition, the evaluation included an academic file review, the results from kindergarten through fifth grade of the Dynamic Indicators of Basic Early Literacy Skills (DIBELS),¹² the Oregon Assessment of Knowledge and Skills (OAKS),¹³ and a writing curriculum based measure (CBMs) administered on one occasion.
12. The eligibility for ASD was considered by the team. The District members of the team determined that the Student did not meet the criteria as a Student with ASD. The members of the team associated with the Parent did not agree with the District's team members and believed that the Student was eligible under the category of ASD and needed Special Education services.
13. The eligibility for OHI was also considered by the team. All members of the team agreed that the Student met the criteria as a student with ADHD eligible under the category of OHI. However, the District members of the team found that the Student did not need Special Education services. The members of the team associated with the Parent did not agree with the District's team members and believed that the Student needed Special Education services.
14. Suggestions from the Parent to support Student's need for specially designed instruction, submitted in the Parent's narrative *Reply* to the District's *Response* to the RFR, included: a morning check in to remind Student to turn in homework, an afternoon check in to review homework in the evening, a checklist for extended assignments with key dates for checking interim progress, a planner to track assignments, use of assistive technology (specifically an iPad) to support Student's

¹¹ In an email reply from the psychologist to the Department's investigator, the psychologist stated: “My report is based on the medical diagnosis, where the autism specialist's report would be based on the educational diagnosis. So that is the main difference. The same person could meet eligibility criteria for the medical dx, but not the educational dx, or vice versa. My professional opinion is just one professional opinion out there, and I am fine with whether they agree with it or not.”

¹² The Student's DIBELS scores all trend to increased speed and accuracy throughout his school years, although there are various missing scores in the data.

¹³ The Student's OAKS scores show increased scores from grade to grade, and met or exceeded the state standard benchmarks during the third, fourth and fifth grade in both reading and math benchmarks. It was noted that the OAKS test is not a “timed” test.

needs in Writing, and other instructional strategies (e.g., checking for understanding, prompts, rewrites, etc.).

15. The Student's fourth grade report card (2013-2014 school year) reflected that Student was generally "proficient" and at grade level in most areas, but was "developing" and not at grade level in two subtopics of Math - division and multiplication, but the balance of Student's Math skills were rated as proficient. In Writing, Student was initially described as developing in all areas at the end of the second quarter, becoming more proficient during the subsequent grading terms. The Student's rating of "successful learner characteristics" decreased from generally "consistently demonstrates" to "occasionally demonstrates" as the school year progressed.
16. The Student's fifth grade report card reflected that Student was generally "approaching standards" and making progress toward grade level but "...needs support in order to make sufficient growth to reach grade level" in most areas.¹⁴ Student's rating of "successful learner characteristics" through the second quarter noted a number of "rarely demonstrates" characteristics, although Student was consistent in demonstrating cooperative, responsible, and respectful behavior. The Student's negative classroom behaviors were described by staff as attention seeking and, at times, disruptive and annoying.
17. The District drafted and sent to the Parent a Prior Written Notice (PWN) dated January 8, 2015, informing the Parent that the District was refusing to find the Student eligible for Special Education services under both ASD and OHI. The PWN stated, "The team determined that [the Student] does not meet the qualification criteria for Autism Spectrum Disorder or Other Health Impaired (as a student with ADHD)." The PWN stated that the Student is eligible for a Section 504 plan.
18. On January 8, 2015 the entire eligibility team agreed, and signed, a 504 eligibility statement for the Student.

Section 504 Plan

19. On February 2, 2015, the District met with the team, including the Parent, and drafted the Student's Section 504 plan (504 Plan). The 504 Plan was revised on April 9, 2015 to address testing accommodations.

Current Complaint

20. On April 22, 2015, the Parent filed this complaint with the Department.
21. On April 29, 2014, the Parent amended the complaint with the additional IDEA allegation.

¹⁴ The District's "Achievement Scoring Guide" descriptions of the numerical rating system (1 (lowest), 2, 3, and 4 (highest)) changed between fourth and fifth grade, although the numbering system remained the same.

IV. DISCUSSION

A. Eligibility/Determination of Disability

The Parent alleges that the District failed to correctly apply the criteria to determine whether the Student is a child with a disability under OAR 581-015-2130 through OAR 581-015-2180. Specifically, the Parent alleges that the District did not correctly applying the criteria to determine whether the child was eligible under Autism Spectrum Disorder (ASD) or Other Health Impaired (OHI).

In order for a student to be eligible for IDEA services under the eligibility category of ASD, the District must conduct the following evaluations and review them with the eligibility team:

1. Developmental profile. A developmental profile that describes the child's historical and current characteristics that are associated with an autism spectrum disorder, including:
 - (A) Impairments in communication;
 - (B) Impairments in social interaction;
 - (C) Patterns of behavior, interests, or activities that are restricted, repetitive, or stereotypic; and
 - (D) Unusual responses to sensory experiences.

(b) Observations. At least three observations of the child's behavior, at least one of which involves direct interactions with the child. The observations must occur in multiple environments, on at least two different days, and be completed by one or more licensed professionals knowledgeable about the behavioral characteristics of autism spectrum disorder.

(c) Communication assessment. An assessment of communication to address the communication characteristics of autism spectrum disorder, including measures of language, semantics, and pragmatics completed by a speech and language pathologist licensed by the State Board of Examiners for Speech-Language Pathology and Audiology or the Teacher Standards and Practices Commission;

(d) Medical or health assessment statement. A medical statement or a health assessment statement indicating whether there are any physical factors that may be affecting the child's educational performance;

(e) Behavior rating tool. An assessment using an appropriate behavior rating tool or an alternative assessment instrument that identifies characteristics associated with an autism spectrum disorder.

(f) Other.

(A) Any additional assessments necessary to determine the impact of the suspected disability:

- (i) On the child's educational performance for a school-age child; or
- (ii) On the child's developmental progress for a preschool child; and

(B) Any additional evaluations or assessments necessary to identify the child's educational needs.

To be eligible as a child with an autism spectrum disorder, the child must meet **all** of the following minimum criteria:

- (a) The team must have documented evidence that the child demonstrates all of the characteristics listed under subsection (1)(a) above. Each of these characteristics must be:
- (A) Characteristic of an autism spectrum disorder;
 - (B) Inconsistent or discrepant with the child's development in other areas;
- and
- (C) Documented over time and/or intensity.

Additionally, for a child to be eligible for IDEA's special education services as a child with an autism spectrum disorder, the eligibility team must also determine that:

- (a) The child's disability has an adverse impact on the child's educational performance; and
- (b) The child needs special education services as a result of the disability.

See; OAR 581-015-2130, Autism Spectrum Disorder

The District completed all of the evaluations, observations, and required components for eligibility determinations which are outlined in the applicable regulation. The District's assessment did not find any of the four required impairments, e.g. impairments in communication; impairments in social interaction; patterns of behavior, interests or activities that are restricted, repetitive, or stereotypic; or unusual responses to sensory experiences. The regulation requires all of the four impairments to be identified in order to be eligible for ASD.

The Student's Clinical Psychologist's report has equivocal findings in three of the four areas, but clearly states that the Student did not "demonstrate repetitive motor mannerisms, unusual sensory interests, compulsions or rituals or self-injurious behavior." Since the eligibility for ASD requires all four of the impairments to be present in order to qualify, and the Clinical Psychologist's report did not find behaviors, interests, or activities that were restricted, repetitive, or stereotypic, even the Clinical Psychologist's ASD report could not have been the basis for establishing an ASD eligibility under OAR 581-015-2130.

Next, the Department will discuss the Other Health Impairment (OHI) eligibility in dispute. In order for a student to be eligible under OHI, the District must conduct the following evaluations:

- (a) Medical or health assessment statement. A medical statement or a health assessment statement, indicating a diagnosis of a health impairment or a description of the impairment, and a statement that the child's condition is permanent or is expected to last for more than 60 calendar days;
- (b) (A) Any additional assessments necessary to determine the impact of the suspected disability:
 - (i) On the child's educational performance for a school-age child; or
 - (ii) On the child's developmental progress for a preschool child; and
- (B) Any additional evaluations or assessments necessary to identify the child's educational needs.

In addition, to be eligible under IDEA as a child with OHI, the child must meet all of the minimum criteria set forth in the regulation:

- (a) The child exhibits limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment;
 - (b) The child's limited strength, vitality or alertness is due to a chronic or acute health problem; and
 - (c) The child's condition is permanent or expected to last for more than 60 calendar days.
- See OAR 581-015-2165, Other Health Impairment.

The team had all of the required evaluations, and the Student met the criteria necessary to find the Student eligible under OHI. The District does not dispute that the Student is a student who meets the eligibility criteria for OHI with the condition of Attention Deficit Hyperactivity Disorder (ADHD), who could be considered eligible for IDEA under the category of OHI. However, besides the required evaluations and criteria that must be met for eligibility, the team must also conclude that the Student's disability has an adverse impact on the child's educational performance and that the Student needs Special Education services as a result of the disability.

This is the area where the District members of the team disagreed with the Parent members of the team. The Parent suggests that as a result of the ADHD, the Student would benefit from a morning check in to remind the Student to turn in homework, an afternoon check in to review homework in the evening, a checklist for extended assignments with key dates for checking interim progress, a planner to track assignments, and other general education instructional and executive management type strategies. In fact, the "check in and check out" program was initiated by the District at the time the initial Consent for Evaluation was signed by the Parent on November 18, 2014. The other suggestions are either good general education strategies for students or suggestions for the use of assistive technology, not specially designed instruction.

The District points out that the Student is progressing in the general education curriculum. The Student is currently passing each grade level. The Student has met all state benchmarks. The Student's DIBELS reading accuracy and fluency scores have increased from year to year. The Student's report cards were generally at grade level, although in fifth grade, there were far more areas identified as "developing" and "below grade level" than in the Student's fourth grade year. It is also noted that since the team met in January to determine eligibility, that the Student's report card trends are heading toward a standard of more "developing" than "proficient" in nature, although the eligibility team did not have the benefit of the most recent third quarter grades at the time they were to review the Student's information for IDEA eligibility purposes.

The District now provides modifications and accommodations for the Student in accordance with the Student's 504 Plan. As the Student transitions to middle school next year, the Department supports revisiting the 504 plan to make it as effective and supportive for the Student in the new school setting.

Based on all of the evidence noted above, the Department does not find that the District was in violation of IDEA by not correctly applying the criteria for the determination of ASD or OHI to determine whether the child is a child with a disability. The District did all of the

appropriate evaluations, observations and other documentation required to determine IDEA eligibility for ASD. There is no disagreement that the Student is a student with ADHD, and therefore consideration of eligibility under OHI was appropriate, however, in order to be eligible for Special Education services the Student must need Special Education services as a result of the disability. The Department does not find that there was substantial evidence for the eligibility team in January of 2015 to indicate the Student's need for Special Education services as a result of the ADHD. The Department therefore does not substantiate this allegation.

B. Child Find

The Parent alleges that the District did not identify and initiate Special Education evaluations regarding the Student for Special Education Eligibility when the District should have suspected that the Student was in need of Special Education services. The Department will only consider allegations of violations which occurred within one year from the date the complaint was received, in this case, from April 22, 2014 to the filing of this complaint on April 22, 2015.¹⁵

School districts must identify, locate and evaluate all resident children with disabilities, regardless of the severity of the disability, who are in need of Early Intervention, Early Childhood Special Education, or Special Education services.¹⁶ The District held evaluation planning meetings in 2010, 2011, and 2012 regarding the Student. The District then completed all relevant evaluations for the Student in areas of Student's suspected disability. The January 2015 eligibility meeting determined, although there was not consensus among the team members, that the Student was not eligible for Special Education, as described above. The consideration of Special Education evaluation and eligibility were fulfilled by the District. The Department does not find that the District has violated its Child Find obligations in this case; to the contrary, there is extensive evidence that the Student has been evaluated in all areas of suspected disability in accordance with the IDEA.

¹⁵ See OAR 581-015-2030(5)(2008); 34 CFR § 300.153(c).

¹⁶ OAR 581-015-2080

CORRECTIVE ACTION¹⁷

In the Matter of Tigard Tualatin School District
Case No. 15-054-015

The Department does not order any Corrective Action resulting from this investigation.

Dated: this 16th Day of June 2015



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

Mailing Date: June 16, 2015

¹⁷ 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)).