June 4, 2021

 **BY EMAIL**

REDACTED

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Meera Rupp, Director

Bend International School

63034 OB Riley Road

Bend, OR 97703

Lora Nordquist, Interim Superintendent

Bend-La Pine School District

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REDACTED, Director Rupp, and Interim Superintendent Nordquist:

This letter is the order on the June 5, 2020, appeal filed by REDACTED (Parent) alleging that Bend International School (which is a public charter school within the Bend-La Pine School District) violated ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly) and OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education). To ensure compliance with these laws and rules, the Oregon Department of Education will make findings of fact to determine whether a violation occurred and what action, if any, should be taken.[[1]](#footnote-1)

**APPELLATE PROCEURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

On appeal, Parent alleges that Bend International School discriminated against her child (Student). Parent specially alleges that: (1) the school failed to adequately support Student to accommodate Student’s disability, (2) the school failed to evaluate Student to determine whether the child needed a 504 Plan or Individualized Education Plan, (IEP); (3) the school excluded Student from participating in certain classes and activities for reasons related to Student’s disability, (4) the school implemented shortened school days for Student for reasons related to Student’s disability, and (5) the school suspended Student for reasons related to Student’s disability.

I. Appellate Procedures Alleging Discrimination

The Oregon Department of Education has jurisdiction to resolve this complaint under OAR 581-002-0003. When a person files with the department an appeal of a complaint alleging discrimination, the department will initiate an investigation to determine whether discrimination may have occurred.[[2]](#footnote-2) If the department determines that a violation of a law or rule described in OAR 581-002-003 occurred, the department must issue a preliminary order to the complainant and the district.[[3]](#footnote-3) The preliminary order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s preliminary findings of fact, and the department’s preliminary conclusions.[[4]](#footnote-4) If the department determines that a violation of law or rule described in OAR 581-002-003 did not occur, the department must issue a final order as described in OAR 581-002-0017.[[5]](#footnote-5) The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.[[6]](#footnote-6)

II. Appeals of Complaints Originating at Public Charter Schools

Because the specific school against which Parent has filed a complaint is a public charter school, it is important to clarify how the law provides the Oregon Department of Education with jurisdiction over this matter. Procedurally, the department has jurisdiction over districts, not public charter schools.[[7]](#footnote-7) Under the law, a district must have an opportunity to hear a complaint originating in a public charter school with which it holds its charter. In this case, Bend-La Pine School District did not have an opportunity to hear Parent’s complaint before Parent filed an appeal with the department. However, despite the district not hearing the complaint, the department accepted the appeal on the basis that the district had an opportunity the hear the complaint under OAR 581-002-0005(1)(a)(C). Pursuant to that rule, the department will accept a complaint on appeal if “[t]he district fails to resolve the complaint within 90 days of the initial filing of the complaint.”

Generally, a school district may delegate any duty to a public charter school that is otherwise required by law to be met by the school district, including the duty to process complaints originating in the public charter school. However, this ability to delegate does not apply to all duties imposed by law. This case involves such a duty. Under ORS 338.165, “[t]he school district in which a public charter school is located shall identify, locate[,] and evaluate students enrolled in the public charter school to determine which students may be in need of special education services.”[[8]](#footnote-8) The plain meaning of that statute clearly requires school districts to perform a duty with respect to students enrolled in public charter schools.

This does not mean that a public charter school is not responsible for its actions. The plain meaning of ORS 338.165 does not prohibit a school district from delegating to a public charter school the duty to also “identify, locate[,] and evaluate students” with disabilities. The statute merely states that a school district may not unilaterally delegate that duty. To put it differently, the statute does not state that a public charter school, pursuant to the charter between a school district and the public charter school, *may not* *be held responsible* for failing to identify students with disabilities.[[9]](#footnote-9)

In this case, after reviewing the charter between Bend La-Pine School District and Bend International School, the department has determined that the duty to identify students with disabilities is a shared responsibility between the district and the school. The charter specifically states that the school must adhere to state discrimination law, which includes ORS 659.850.

Because the duty to “identify, locate[,] and evaluate students” with disabilities in this case is a shared responsibility, if the department finds that there is a deficiency by Bend International School, both the district and the school necessarily must participate in conciliation.[[10]](#footnote-10) If conciliation fails, any corrective action imposed by the department will be tailored to the deficiency of the responsible party. Bend-La Pine School District’s corrective action will be tailored to the areas in which it was deficient and Bend International School’s corrective action will be tailored to the areas in which it was deficient.

III. Status of Appeal

In this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department’s order as to whether discrimination may have occurred.

**PROCEDURAL BACKGROUND**

This is an appeal alleging discrimination by Bend International School.

Parent emailed Bend International School several times over the course of the 2018-2019 and 2019-2020 school years, raising concerns over the alleged conduct.

Throughout both school years, Parent drew attention to the school failing to provide adequate support to accommodate Student’s disability in multiple emails.

On November 6, 2018, Parent requested a 504 Plan or IEP for Student for the first time, writing, “I . . . have suggested . . . he become a 504 student or develop an IEP.” In that same email, Parent requested that Student not be excluded from being suspended or participating in certain classes and activities, writing, “Please do not threaten him with being kicked out of school or not be a part of PE. His therapist and myself know that this will only cause more problems.” Parent also wrote,

He told me he was not allowed to sing or dance because he didn’t finish his skeleton from last week. [Student] needs creative outlets, such as singing, dancing, and playing music. Excluding him from these activities because he doesn’t finish his writing lessons at school will not improve his behavior. He does not understand long term consequences, and again it won’t improve his anxiety or stress, only add to it, which would cause him to lash out again.

On May 19, 2019, Parent requested that Student be able to attend school for the entire school day, writing, “We would like [Student] to be able to go all day as the rest of class does[.]”

In its response to Parent’s appeal, the district argues that Parent never made a “formal complaint” with either the school or the district. The department understands the district’s argument to be that the department should not have accepted Parent’s appeal. The department rejects this argument. Even though Parent did not file a formal complaint, Parent specifically alleged in emails that Student was being discriminated against on the basis of disability. Instead of directing Parent to use its formal complaint process, Bend International School attempted to address Parent’s concerns through email. The department understands why the school did so. The school attempted to resolve Parent’s concerns in the form that Parent submitted them. However, because Parent raised the issue of discrimination on the basis of disability in those emails, Parent’s allegations fall squarely under ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly), OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education), and OAR 581-021-0310 (requiring school districts to develop a complaint process). The school had actual notice of alleged facts that would constitute, if true, discrimination under Oregon law and rule. By attempting to address Parent’s concerns through email, the school impliedly waived any formal complaint process it otherwise used. If the school had wanted Parent to use a formal complaint process, it would have directed Parent to do so.

For the reasons articulated above, the department accepted Parent’s appeal on June 5, 2020. The department accepted the appeal pursuant to OAR 581-002-0005(1)(a)(C), under which the department will accept a complaint on appeal if “[t]he district fails to resolve the complaint within 90 days of the initial filing of the complaint.”

**PRELIMINARY FINDINGS OF FACT**

After conducting its investigation, the Oregon Department of Education makes the following findings of fact:

1. At times relevant to this appeal, Student attended kindergarten and first grade at Bend International School.
2. On October 9, 2018, Student began attending kindergarten. Student began attending approximately one month after the beginning of the school year. Student began attending after the beginning of the school year because Student’s family was traveling.
3. Within one week of the date on which Student began attending kindergarten, Student was having “meltdowns” in class.
4. On October 16, 2020, the school held a “Children at Risk Excel (CARE) meeting” where school staff discussed Student. To provide support to students with disabilities, the school had designated certain educators as members of a “CARE team.” The school’s CARE team would meet regularly to discuss providing support to students with behavioral problems, including students with disabilities that may be limiting their education.
5. On October 22, 2018, an administrator of the school (Administrator), a teacher at the school (Teacher 1), and Parent met to discuss Student.
6. On November 5, 2018, Administrator emailed Parent, reporting an incident involving Student. Administrator wrote,

Unfortunately, [Student] had a major incident today in P.E. He was upset that he didn’t have the ball, and went after [another student holding] the ball and hit him a few times . . . but I’m sure you know we cannot have this type of environment here at school, because it really makes others feel unsafe. We are concerned with him participating in P.E. at this point, because of the nature of class . . . One needs to know how to deal with emotions in [a] safe way. He will be coming home with a red slip today (again). Please talk with him about the incident at home. Let him know that his teachers are about ready to not let him participate in P.E. if this is the way he is going to act.”

Administrator also suggested that Parent track Student’s behavior at home and use positive reinforcement to encourage good behavior.

1. On November 6, 2018, Parent emailed Administrator in response. Parent wrote, “I was also very disappointed when I found out he peed his pants while sitting on the sidelines after being reprimanded for hitting.” Parent then expressed concerns over Student’s eating habits at school because Student was not regularly eating lunch. Parent continued,

Please do not threaten him with being kicked out of school or not being able to be part of PE. His therapist and myself know that this will only cause more problems. Excluding him from activities is counter productive and will not improve his anxiety about school[.] It will add more stress, lower his confidence[,] and make it harder for him to do other group activities.

Parent then referred to another situation where the school was excluding Student from activities. Parent wrote,

He told me he was not allowed to sing or dance because he didn’t finish his skeleton from last week. [Student] needs creative outlets, such as singing, dancing, and playing music. Excluding him from these activities because he doesn’t finish his writing lessons at school will not improve his behavior. He does not understand long term consequences, and again it won’t improve his anxiety or stress, only add to it, which would cause him to lash out again.

Parent also requested that the school develop a 504 Plan or IEP for Student. Later that day, Administrator responded, writing,

We did not threaten [Student] with being kicked out of school by any means. I did say that if [Student] can’t act in a safe manner in P.E., no violence, that he won’t be able to participate in class. And this is true. This is true for any student. We need to maintain a safe learning environment for our students . . . [Student] has also had many incidents of hitting in P.E., and it seems to be a difficult class for him. If P.E. continued to be a struggle, we may need to work up to it . . . It is not a punishment. It is realistic.

\* \* \* \* \*

[Student] is currently getting weekly lessons and practice, with the group, on social skills/healthy social interaction from our Speech and Language Pathologist. I will consult with [a district teacher (Teacher 3)] about other options/supports for [Student] here at [Bend International School] that you mentioned[.]

1. On November 7, 2018, Parent authorized Student’s community counselor to provide medical information to the school by signing a release of information form.
2. Also on November 7, 2018, Teacher 3 emailed Administrator, describing the school’s plan to pull Student out of class and provide him “with putty and some hands on sensory activities” and discuss with him techniques used by the school to assist students in modifying their behavior.
3. On November 9, 2018, Student’s community counselor received the release of information form that Parent had signed two days earlier.
4. On November 17, 2018, Parent met with Teacher 3 to discuss Student’s needs. During the meeting, Teacher 3 explained to Parent that the school’s CARE program was the school’s preferred method for providing “pre-referral interventions and . . . support” to students with behavioral problems, including students with disabilities that may be limiting their education.
5. On December 14, 2018, Administrator, Teacher 1, Teacher 3, and a district staffer met to discuss interventions for Student. During the meeting, the group discussed “Zones of Regulation,” giving Student breaks from class, and encouraging Student to talk about his feelings.
6. On January 14, 2019, the school’s CARE team met. The team discussed using a peace corner to calm Student. Peace corners had sensory objects and weighted blankets. Teachers at the school would relegate students experiencing behavioral problems to a peace corner to calm them.
7. On February 1, 2019, the school’s CARE team met to discuss medical information that the school had received about Student from the Student’s community counselor and physician. The community counselor had diagnosed Student with social phobia and separation anxiety. The community counselor and physician informed the school that Student may have Attention Deficit and Hyperactivity Disorder (ADHD).
8. On March 1, 2019, Administrator emailed Parent and parent’s spouse, informing them that Student was involved in a fight with a peer. Administrator wrote, “[W]e have to let him know that if someone doesn’t want to be chased, we must listen and respect those words[] and wishes of our classmates.” Administrator discussed Student’s conduct, concluding, “[Student] really provoked this other student. We appreciate your support at home about this. Beyond that, we still see tantrums and emotional fits quite often in the classroom[] and are trying to work through these things, as they impede learning.”
9. On April 15, 2019, Administrator and Teacher 1 created for Student a “kinder support schedule to increase support in the class.”
10. On May 1, 2019, the school’s CARE team met. The team documented the following regarding Student:

[Student] is very capable in writing, average to above average in writing[.] He can read at a typical level for kindergarten. Behavior is the biggest concern, but he is getting better at it. An incentive program has helped by making a goal to have no tantrums/fits all day and then fill in a box. After 4 boxes/days he gets the prize box.

1. On May 16, 2019, Parent emailed Teacher 1 and another teacher at the school (Teacher 2), asking to meet with them. Parent wanted “to talk about an IEP because of [Student’s] behavior challenges, if [Student] isn’t already participating in one.”
2. On May 17, 2019, Administrator emailed Parent and Teacher 3, writing,

We were so excited that [Student] was doing so well, with all of our interventions and scheduled breaks[,] and learning how to regulate his emotions. However, since spring break, he has regressed. We do see students who struggle with behaviors often have a difficult time at the end of the year . . . [Student] is having a very hard time being successful. The majority of [Student’s] incidents are in the afternoon. [Student] is a student who I believe would have benefitted from [a] half day kindergarten program, which unfortunately we cannot offer. Unfortunately, it has gotten to a point where his behavior is affecting the learning of the rest of his classmates – with screaming fits and throwing shoes and items, where other classmates are actually having to ‘take cover.’ And[,] of course, if he is in this state, he also is not going to be learning. He seems to be pretty checked out by the afternoon, and just worn out, after the morning fill of scheduled learning activities . . . We can do a “Step-Up-Plan,” where we limit the amount of time he is here at school . . . I think the [CARE] team should consider putting [Student] on a half day for the rest of the year. I believe he will mature a lot over the summer, and he could start full day in September. Also[,] we will consider special education for him as well. I will let [Teacher 3] chime in here, but I am thinking it would be best to begin the evaluation and assessment for this process in the fall.”

Later that day, Teacher 3 emailed Parent and Administrator. Teacher 3 wrote,

I agree with everything [Administrator] said in the email. We should meet and discuss what the special education process involves. That process would be most efficient to start in the fall. I did find the release you signed earlier in the year was valid. On Wed. (5/15) I faxed the release to [Student’s community counselor].

1. On May 19, 2019, Parent emailed Administrator and Teacher 3 in response to the May 17th email. Parent wrote,

I thought [Student] was already in an IEP, as I requested he be evaluated for a 504 or IEP back in November. Considering this I would like to get the ball rolling on that as soon as possible . . . We would like him to be able to go all day as the rest of the class does[.] Is there any way he can have extra support in the classroom while we work on an IEP? [Student] already feels targeted and excluded as a ‘bad kid’ and we don’t want him to feel more left out than he already is.

1. The school’s CARE team documented Parent’s May 19th email as follows: “[An email] sent by [Parent] saying she requested in Nov. 2018 for SPED/504. We responded and said he has been in our CARE process in which we try interventions first. We would see how he does in the fall [of] 2019 after summer. Increase interventions.”
2. On May 20, 2019, the school informed an administrator at Bend-La Pine School District about Parent’s concerns that Student lacked a 504 Plan or IEP.
3. On May 22, 2019, Teacher 3 emailed Parent and Administrator to report an incident involving Student. Teacher 3 wrote,

[Teacher 1] had already cleared the room of the other kindergarteners due to [Student’s] throwing blocks at everyone. When I entered [Student] tried to hit me with two blocks as well. At that point I had staff take him up to the office and call you. In the past, he has had fits in which he is throwing items at people such as his shoes and purposefully trying to hit them. Earlier in the day, he was also getting escalated at recess because he feels the others were not sharing . . . I know you are concerned if he leaves at 1:40 he will miss library and art . . . my concern[] is if [Student] has more escalation involving the safety of others and is sent home [it] reinforces that if he has a really bad tantrum he gets to go home. Taking a more pro-active approach in having him leave at 1:40 . . . does not reinforce the negative behavior.

Later that day, Administrator emailed Parent and Teacher 3 a response. Administrator suggested shortening Student’s school day, writing, “It’s a very long day for a 5 year old, and especially at his maturity level. [Student’s] tantrums and the throwing of items around the room and safety of others is a huge concern. We just can’t have that in the classroom.” Administrator then asked Parent to contact Student’s community counselor for assistance in developing strategies to support Student.

1. The school’s CARE team documented Teacher 3’s May 22nd email as follows:

[Teacher 3’s] concerns with [Student] having tantrums in the afternoon. It seems very difficult for him to last the whole day. Once concern is that he goes home when he has highly escalated tantrums which may reinforce the tantrums because he wants to go home and be with [Parent].

1. On May 24, 2019, Teacher 3 documented that she had spoken with Student’s community counselor by phone. Teacher 3 documented that the counselor stated that Student seems “preoccupied with the behavior of others,” and that Student “has a lot of anxiety[.] He is apart from Parent and family.” Teacher 3 also documented that the counselor “agrees [Student] may not be able to last the whole day as he gets overwhelmed.”
2. On May 26, 2019, Teacher 3 and Parent arranged to meet on June 4, 2019.
3. On May 30, 2019, Teacher 3, working to set up a meeting betwwen Parent, parent’s spouse, and school staff, emailed the parents and staff: “We would talk about the difference between a 504 Plan and an IEP and what is needed to qualify for either of those.”
4. On May 31, 2019, Teacher 3 emailed the agenda for the June 4th meeting to the proposed attendees: Administrator, Teacher 1, Parent, Parent’s spouse, and Student’s community counselor. The agenda included a discussion of “504 vs. SPED qualifications and requirements.”
5. On June 3, 2019, Teacher 1 wrote an end of kindergarten assessment for Student. Teacher 1 wrote,

[Student] is an intelligent boy[. Student] doesn’t really need support academically[. Student’s] problems are more social and emotional and [Student] is immature. [Student] would go with [Teacher 3] around 9 every morning and also after lunch[. Student] would see [Administrator] or [a district staffer] . . . for his sensory breaks and transition time.

1. On June 4, 2019, Administrator, Teacher 1, Teacher 3, parent’s spouse, and Student’s community counselor met to discuss Student’s needs. During the meeting, the group discussed the difference between the qualifications for, and the accommodations in, a 504 Plan and IEP.
2. Student attended first grade at the school during the 2019-2020 school year.
3. On August 22, 2019, Administrator and Teacher 3 arranged for Student to have a break at 8:45 am.
4. On September 26, 2019, Parent emailed the school, requesting to meet about Student’s progress.
5. On October 1, 2019, Teacher 2 emailed Parent a response to Parent’s September 26th email. The school documented that Teacher 2’s email enumerated several techniques that the school was using to calm Student. The school also documented that in the email Teacher 2

mentions 2 skills for [Student] to focus on[:] handling transitions and shifting from one mindset to another. Expressing concerns, needs, thoughts in words. [Teacher 2] also mentions how well [Student] is doing participating in many activities, especially science in class. [Student] made many good choices even though [Student] struggles with his behavior at times. [Teacher 3] would have had an opportunity at [the June 4th] meeting to answer [Parent’s] questions about the CARE process and SPED/504 referral at this time. [Parent] was not at the 6/4/2019 meeting. Only [Parent’s] spouse attended that meeting.

1. On October 3, 2019, Teacher 3 emailed Parent about Parent’s September 26th email, requesting to meet.
2. On October 4, 2019, Parent emailed Teacher 2, writing,

A goal of mine . . . is to phase-out [Student’s] meeting with [Teacher 3] and focus on including [Student] into class more. I understand [Student] may need his space sometimes during the school day, and [Student’s] own peace corner sounds like a great place for him to escape if he needs to. Rather than having [Student] leave the classroom for breaks, is there someone who can help out in the classroom with inclusion and behavior during transitions or in general?

1. On October 5, 2019, a parent of one of Student’s classmates contacted Administrator about Student’s behavior, claiming it made class unsafe..
2. On October 14, 2019, the school’s CARE team documented that Bend-La Pine’s School District’s behavior specialist began gathering information on first grade students with behavioral problems, including Student.
3. On October 15, 2019, school staff scheduled a meeting with the district’s behavior specialist for October 23, 2019.
4. On October 15, 2019, the school’s CARE team documented that

[Student] has difficulty handling transitions and shifting from one mindset or task to another and difficulty expressing concerns, needs, or thoughts in words. [Student] has done well for many days and will have days with meltdowns and throwing shoes, profanity, blocks, etc. Academically [Student] is not impacted when reviewing classwork [and] assessments . . . Reading is below benchmark, however . . . [Student] is near grade level and typical for his reading development.

1. On October 20, 2019, the school’s CARE team documented that the district’s behavior specialist provided recommendations for first grade staff. Later that same day, the behavior specialist informed the school that they would not be able to attend the October 23rd meeting.
2. On October 21, 2019, Teacher 2 emailed the district’s behavior specialist, thanking them for their recommendations. In the email, Teacher 2 stated that the school’s use of peace corners was strained. “[T]here are currently 3 peace corners in our room. Two of them are ‘private’ (meaning they are spots that only particular kids can use) and one of them is public and as such available for all students.”
3. Also on October 21, 2019, Teacher 2 and Parent exchanged emails to schedule a parent-teacher conference. Teacher 2 documented the email exchange. In pertinent part, Teacher 2 wrote,

[Student] had repeated out of control and violent behaviors today, from kicking a plastic stool and causing the leg to snap off, to tearing his work, making it into a ball, and throwing it at me, to slamming a bin of markers on the floor, hitting other people, and running away. Nothing out of the ordinary in our day, so not sure what made this day in particular so hard for him.

The school reprimanded Student for his behavior.

1. Also on October 21, 2019, Teacher 2 informed Administrator that Student had not yet had a morning break that year. Later that day, Administrator sent an email to school staff reminding them Student needed a daily morning break.
2. On October 22, 2019, Teacher 2 emailed Parent about two incidents involving Student. One incident involved Student becoming upset with a teacher “for collecting his paper because he wanted to keep working . . . [Student] screamed and [ran] toward [the teacher] with a sharpened pencil and tried to stab [the teacher].” The other incident involved Student scratching a kindergartener during morning recess, breaking the skin and leaving a swollen mark.
3. Also on October 22, 2019, Teacher 3 discussed with school staff using a visual schedule to assist Student. They also discussed providing Student with breaks from class.
4. On October 24, 2019, Administrator met with Teacher 2, Teacher 3 and Parent’s spouse. During the meeting, Administrator reviewed the agenda that had been created for the June 4th meeting. At the meeting, Teacher 2 updated the others on interventions that appeared to be working for Student, on Student’s struggles, and on Student’s general academic progress. The group discussed Student’s difficulty with expressing his needs and transitioning from one mindset or task to another.
5. On October 27, 2019, Administrator and Teacher discussed providing Student with an additional break from class.
6. On October 29, 2019, the school provided Student with a visual schedule.
7. On November 5, 2019, Administrator and Teacher 2 exchanged emails, discussing a field trip and how Student’s parents, because of Student’s “volatile” behavior, would have to attend the field trip. Administrator wrote, “[Student’s] behavior has been so volatile, and we can’t count on [Student] to listen to direction, follow guidelines, and come when they are supposed to.”
8. On November 7, 2019, the school’s CARE team documented that the district’s behavior specialist visited Student’s class.
9. On November 9, 2019, Teacher 2 emailed Parent about “an incident [where Student was] . . . stomping around the room and using bad language, throwing his shoes while the teacher . . . and students were on the carpet.”
10. On November 11, 2019, Administrator sent a disciplinary letter home to Student’s parents. That same day, Administrator sent another letter home to parents of other students. That letter informed the parents about the school’s discipline policy with respect to unsafe behaviors. The letter read, in part,

Our team does have some concerns about [Student], especially the loud and aggressive fits. For this reason, I want to communicate clearly when a student will be removed from the classroom environment, in order to preserve a safe and healthy learning environment . . . Pounding tables, kicking tables, throwing objects, hitting or kicking others is described as physical violence, which induces anxiety and fear in peers . . . Loud noises or swearing/extremely disruptive behavior (refusal to regulate or calm with staff assisting) is also very disruptive . . . If these behaviors are observed at school the student will be sent home. It is important to send a strong message to [Student] . . . I sincerely hope [Student] can develop skills to stop these behaviors . . . [If] outbursts continue, with all of the supports we have in place, we may need to consider a shortened school day.”

1. On Novermber 12, 2019, Parent emailed Teacher 2 and Teacher 3, asking for additional academic support for Student. Parent also asked the school “to help [Student] stay calm while working through reading and writing activities. We are doing extra work at home, but even going though kindergarten level worksheets, [Student] is still having mild/moderate meltdowns. Please let me know what we can do.” Later that day, Administrator discussed the matter with Parent in person. According to school documents, that conversation included the following:

She says that [Student] wasn’t one of the lowest achieving in the class according to . . . assessments. [Student] showed areas of strength where he scored high, such as reading three letter words with short vowel sounds and high frequency words. In writing, [Student] had a good understanding of letters . . . and he could use this knowledge to write short pieces. [Student’s] penmanship was legible and [Student] didn’t struggle with the mechanics of writing. Behavior often got in the way of instruction and independent work. [Student] sometimes would just refuse to complete his work and leave to walk the room or to the peace corner. [Student] would throw fits when something was hard . . . or [Student] would cry and reject support and lay spread out on the floor crying. It was hard to encourage [Student] to turn it around and try once [Student] was escalated. [Student] often worked alone very well, showed focus and effort. [Student] showed pride and was very happy when he got to complete good work and got a compliment. Overall, [Student] seemed to work better when working alone than working with the teacher or partner.

1. On November 13, 2019, a teacher at the school emailed Teacher 2, informing Teacher 2 that Student was using profanity.
2. On November 15, 2019, Administrator emailed Teacher 2, informing Teacher 2 of Student’s behavior in a yoga class. “[Student] was barely able to make it through yoga, sobbing through parts . . . but managed to pull it off.” Administrator also suggested that they delay meeting about Student’s recent behavior and wait for the input of Parent, until after Thanksgiving.
3. Before November 19, 2019, the school suspended Student.
4. On November 19, 2019, Administrator emailed Parent about Student’s suspension.

Please note that [Student] is not being treated differently – this is a behavior expectation for all students at Bend International School. It is our responsibility to provide a “safe learning environment” for all students. We are educators, and it is our utmost responsibility. We cannot allow hitting, kicking, or throwing objects within the classroom or at recess. It takes away from everything we are trying to accomplish. Violence induces fear, and many people are affected in this classroom, including all of the students and teachers. There are only 2 students in this classroom, including all of the students and teachers. There are only 2 students in the classroom who have been engaging in these behaviors. The other student was also sent home last week, for violent behavior. That student is going [to the doctor] and also therapy. We do not view this as a punishment. This is discipline and it is protecting the education and safety of all of our students. It sends a strong message to everyone that this is the kind of learning community and environment that [Bend International School] provides. This is [Student’s] time to learn that he cannot hit or kick people or throw things at school. We have been teaching him and will continue to teach him how to:

* take a break
* regulate . . . emotions
* calm . . . down
* get . . . in the green
* sharing/taking turns
* expressing . . . thoughts/feelings (nonviolent communication)
* active listening/empathy

**I urge you to talk with [Student] seriously and let [Student] know that Bend International School is NOT a place for those behaviors and that he needs to stop them.** (Emphasis in original.) This is a real learning opportunity – and we all sincerely hope that you will use this at home as a teachable moment to help [Student] understand this. By telling [Student] that it is a punishment, or creating disharmony between school/home[,] will not help. [Student] is excluded from school[] as a result of [Student’s] actions. [Student] violently lashed out and hurt other students. We want [Student] here at school, and I know [Student] wants to be here. Please know that we care about [Student] and see all of [Student’s] strengths[] and want the best for [Student].

Administrator concluded the email by describing what the school had done to support Student and encouraging Parent to work with the school to resolve Student’s “severe and daily . . . behaviors.” Later that day, Parent responded to Administrator’s email, informing Administrator that she was going to disenroll Student from Bend International School and homeschool Student. Parent wrote,

[Student’s behavior at school is very different than at home, and even with [Student’s] accommodations and breaks[,] school is just too stressful for [them] . . . [C]learly the school environment is increasing his anxiety. We also want a safe environment for the other students and wish to retain a positive relationship with [Student’s] classmates and their parents.

1. On November 21, 2019, Administrator emailed Parent, informing Parent of another incident involving Student at school. Administrator concluded the email by writing, “[Student] did not show any remorse, nor act like he was sorry – which is really concerning!”
2. On November 23, 2019, Parent emailed Administrator, informing Administrator that Student’s last day of school would be December 6, 2019, writing, “This is sooner than expected, but [Student] is really struggling emotionally.” Administrator responded to Parent’s email. Administrator wrote,

Just thinking on this, I really am concerned about [Student] having a negative experience next week – with behavior incidents and needing to be removed from the classroom. Just like what happened this past week. We don’t want [Student’s] final experience to be a negative/unsuccessful one.

1. December 2, 2019, was Student’s last day attending Bend International School.
2. On December 3, 2019, Student was officially disenrolled from Bend International School.
3. On May 28 2019, Parent contacted Student’s community counselor about the dates on which the counselor sent Student’s medical records to the school. Later that day, the counselor responded to Parent’s email, writing that (1) they had received Parent’s authorization to release Student’s medical records on November 9, 2018, (2) they sent the records to the school on February 1, 2019, (3) the medical records indicated that Student had social phobia and separation anxiety, (4) they further communicated with the school by phone on May 24, 2019, and (5) they participated in the meeting that was held on June 5, 2019.
4. On June 5, 2020, the department accepted Parent’s appeal.

**ANALYSIS**

I. Appeals under ORS 659.850 and OAR 581-021-0045

Under Oregon’s anti-discrimination statute,

A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.[[11]](#footnote-11)

For purposes of this prohibition, “discrimination” is defined to mean “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”[[12]](#footnote-12)

In applying this prohibition to school districts, OAR 581-021-0045(3) specifically states that a school district may not:

 (a) Treat one person differently from another in determining whether such person satisfies any requirement of condition for the provision of such aid, benefit, or service;

 (b) Provide different aid, benefits, or services; or provide aids, benefits, or services in a different manner;

 (c) Deny any person such aid, benefit, or service;

 (d) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

 (e) Aid or perpetuate discrimination by joining or remaining a member of any agency or organization which discriminates in providing any aid, benefit, or service to students or employees; [or]

 (f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

The question on appeal is whether Greater Albany Public Schools – under the circumstances at hand – violated either ORS 659.850 or OAR 581-021-0045(3).

II. Applicability of Federal Law

With respect to analyzing a school district’s duties with complaints alleging discrimination on the basis of disability, the Oregon Department of Education relies on the application of Section 504 of the federal Rehabilitation Act of 1973 (Section 504) and federal regulations implementing Section 504. Because Section 504 has the same intent as ORS 659.850 and OAR 581-021-0045, and because the text of ORS 659.850 and OAR 581-021-0045 allow the state statute and rules to be applied broadly, the interpretation of Section of 504 and its implementing regulations by federal courts and the United States Department of Education’s Office for civil Rights (Office for civil Rights) is an important tool for the Oregon Department of Education to use in adjudging the application of ORS 659.850 and OAR 581-021-0045.

Under Oregon’s anti-discrimination statue, “discrimination” is defined to mean “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”[[13]](#footnote-13)

Section 504 is a federal law that prohibits disability discrimination by recipients of federal financial assistance.[[14]](#footnote-14) All school districts that receive federal financial assistance from the United States Department of Education must comply with the statute and regulations implementing the statute. Generally, the statute requires such recipients to provide students who are disabled within the meaning of the statute with a free and appropriate education.[[15]](#footnote-15) Students covered by the statute are entitled to receive regular or special education services designed to meet their individual educational needs.[[16]](#footnote-16) A school district must provide those services in a manner that meets the needs of students who are disabled as adequately as the district meets the needs of students who are not disabled.[[17]](#footnote-17)

Under state law, a school district cannot act in a manner that is “fair in form but discriminatory in operation.”[[18]](#footnote-18) By not providing regular or special education services designed to meet students’ individual educational needs, and thereby failing to meet the needs of a students who are disabled as adequately as the needs of students who are not disabled, a school district provides educational services in a manner that is “fair in form but discriminatory in operation.”

Generally, developing and implementing a 504 Plan is the means by which a school district ensures that a student is receiving a free and appropriate education. To develop and implement a 504 Plan, a school district must evaluate students suspected of having a disability.[[19]](#footnote-19) A school district must evaluate any student who has a physical or mental impairment that limits one or more life activities, or who is regarded as having such an impairment.[[20]](#footnote-20) In evaluating students for disability, school districts must use a variety of data, including achievement tests, teacher recommendations, manifestations of impairment ,and adaptive behavior.[[21]](#footnote-21)

Once a student has a 504 Plan, a school district must periodically reevaluate the student using the same procedures and criteria required for initial evaluation.[[22]](#footnote-22) As with developing a 504 plan, school districts must reevaluate a student when “educational or related services needs, including improved academic achievement and functional performance, warrant a reevaluation.”[[23]](#footnote-23)

Unlike IEP processes, federal law and regulations setting forth 504 processes do not require school districts to include parents or guardians in the 504 decision making process.[[24]](#footnote-24) Any person can refer a student for 504 evaluation; however, the Office for civil Rights has ruled that “the school district must also have reason to believe that the [student] is in need of services under section 504 due to a disability.”[[25]](#footnote-25) In consideration of best practices, the department believes that, school districts should respond to parents’ and guardians’ concerns about, and seek parental input concerning, a student’s potential disability.

To implement a 504 Plan, a school district must provide the student with the aids, services, accommodations and modifications identified in the 504 Plan. A school district’s “failure to implement the aids, services, accommodations, or modifications identified in the 504 Plan of a student with a disability may deny the student a [free and appropriate education] and, thus, violate Section 504.”[[26]](#footnote-26) However, developing and implementing a 504 Plan is not the exclusive means by which a school district may ensure a free and appropriate education.[[27]](#footnote-27)

III. Whether Bend-International School failed to adequately support Student to accommodate Student’s disability

The first question on appeal is whether Bend-International School failed to adequately support Student to accommodate Student’s disability and, thereby, failed to provide Student with a free and appropriate education as required by Section 504, denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), or otherwise limited Student’s enjoyment of rights, privileges, advantages, or opportunities in violation of OAR 581-021-0045(3)(f).

It should first be noted that the school had at its disposal, as early as February 1, 2019, information from Student’s community counselor diagnosing Student with social phobia and separation anxiety. On November 7, 2018, Parent authorized the community counselor to provide medical information to the school by signing a release of information form. On November 9, 2018, the community counselor received the release of information form. On or before February 1, 2019, the community counselor sent Student’s medical records to the school. The medical records indicated that Student had social phobia and separation anxiety. On or before February 1, 2019, both Student’s community counselor and Student’s physician informed the school that Student may have ADHD.

The community counselor also spoke with Teacher 3 on May 24, 2019, when the counselor informed Teacher 3 that Student “has a lot of anxiety[.] He is apart from Parent and family.” Finally, the community counselor participated in a meeting held on June 4, 2019, attended by Administrator, Teacher 1, Teacher 3, and Parent’s spouse. At the meeting, the group discussed Student’s needs and the difference between the qualifications for, and the accommodations in, a 504 Plan and IEP.

Student’s behavior reflected the community counselor’s diagnosis. Student’s behavior can best be described as withdrawn from school, overly invested in individual tasks, and aggressive –occasionally even violent – toward other students. The school sent Parent emails describing this behavior on November 5, 2018, November 6, 2018, March 2, 2019, May 17, 2019, May 22, 2019, October 21, 2019, October 22, 2019, November 9, 2019, November 19, 2019, and November 21, 2019. The school told Parent about this behavior in a telephonic conversation held on November 12, 2019. The school recorded Student’s behavioral problems in documents dated December 14, 2018, January 14, 2019, May 1, 2019, May 22, 2019, June 3, 2019, October 1, 2019, October 21, 2019, November 5, 2019, November 11, 2019, November 12, 2019, November 13, 2019, and November 15, 2019. The school recorded one instance where a parent of one of Student’s classmates contacted the school about Student’s behavior, claiming that it made class unsafe.

The evidence indicates that the school knew that Student’s behavior derived, at least in part, from mental health issues. On February 2, 2019, the school’s CARE team met to discuss medical information received from Student’s community counselor diagnosing Student with social phobia and separation anxiety. The team also discussed medical information from Student’s community counselor and physician, informing the school that Student may have ADHD. On May 22, 2019, the school asked Parent to contact Student’s community counselor for assistance in developing strategies to support Student. On October 1, 2019, the school wrote to Parent about how its CARE program was supporting Student and how Student’s behavior indicated that he needed to be evaluated for a 504 Plan or IEP.

The school did attempt to accommodate Student’s disability. On November 7, 2018, the school developed a plan for Student, under which the school would pull Student out of class and provide him “with putty and some hands on sensory activities” and discuss with him techniques used by the school to assist students in modifying their behavior. On December 14, 2018, the school considered interventions for Student, including “Zones of Regulation,” giving Student breaks from class, and encouraging Student to talk about his feelings. On April 15, 2019, Administrator and Teacher 1 created for Student a “kinder support schedule to increase support in the class.” Throughout the 2018-2019 school year, the school utilized a peace corner to calm Student. In assessing the 2018-2019 school year, the school documented that

[Student] is immature. [Student] would go with [Teacher] around 9 every morning and also after lunch[. Student] would see [Administrator] or [a district staffer] . . . for his sensory breaks and transition time.

The school continued attempting to accommodate Student’s disability during the 2019-2020 school year. In the fall of 2019, the school arranged for Student to have a break at 8:45 am. On October 4, 2019, the school and Parent exchanged emails about Student taking breaks from class. On October 22, 2019, and October 27, 2019, school staff discussed providing Student with breaks from class. On October 29, 2019, the school provided Student with a visual schedule. Throughout the 2019-2020 school year, the school continued to utilize a peace corner to calm Student.

With respect to its attempts to accommodate Student’s disability, the school admitted that the attempts were inadequate. On May 17, 2019, the school admitted that

since spring break, [Student] has regressed. We do see students who struggle with behaviors often have a difficult time at the end of the year . . . [Student] is having a very hard time being successful. The majority of [Student’s] incidents are in the afternoon.

\* \* \* \* \*

Unfortunately, it has gotten to a point where his behavior is affecting the learning of the rest of his classmates – with screaming fits and throwing shoes and items, where other classmates are actually having to ‘take cover.’ And[,] of course, if he is in this state, he also is not going to be learning. He seems to be pretty checked out by the afternoon, and just worn out, after the morning fill of scheduled learning activities.

On October 15, 2019, the school’s CARE team documented that

[Student] has difficulty handling transitions and shifting from one mindset or task to another and difficulty expressing concerns, needs, or thoughts in words. [Student] has done well for many days and will have days with meltdowns and throwing shoes, profanity, blocks, etc.

On October 21, 2019, the school told the Bend-La Pine School District’s behavior specialist that the school’s use of peace corners – a device used to accommodate Student – was strained. “[T]here are currently 3 peace corners in our room. Two of them are ‘private’ (meaning they are spots that only particular kids can use) and one of them is public and as such available for all students.”

After November 12, 2019, the school documented that

Behavior often got in the way of instruction and independent work. [Student] sometimes would just refuse to complete his work and leave to walk the room or to the peace corner. [Student] would throw fits when something was hard . . . or [Student] would cry and reject support and lay spread out on the floor crying. It was hard to encourage [Student] to turn it around and try once [Student] was escalated. [Student] often worked alone very well, showed focus and effort. [Student] showed pride and was very happy when [they] got to complete good work and got a compliment. Overall, [Student] seemed to work better when working alone than working with the teacher or partner.

In consideration of the above, the Oregon Department of Education finds that there is substantial evidence that Bend International School may have failed to adequately support Student to accommodate Student’s disability and, thereby, failed to provide Student with a free and appropriate education as required by Section 504, denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and limited Student’s enjoyment of rights, privileges, advantages, or opportunities in violation of OAR 581-021-0045(3)(f).

IV. Whether Bend-International School failed to evaluate Student to determine whether Student needed a 504 Plan or IEP

The second question on appeal is whether Bend-International School failed to evaluate Student to determine whether he needed a 504 Plan or IEP, as required by federal law, and, thereby, denied Student an aid, benefit, or service in violation of OAR 581-021-0045(3)(c).

On October 16, 2018, the school held a CARE meeting where school staff discussed Student. Instead of evaluating Student for a 504 Plan or IEP, the school choose to accommodate Student through a service that it provided to students with behavioral problems. Certainly accommodating Student through the school’s CARE program was initially appropriate, particularly as the school evaluated whether Student’s disability limited a life activity. However, the school continued to accommodate Student through its CARE program for nearly 15 months and never evaluated Student for a 504 Plan or IEP.

Importantly, Parent requested that the school evaluate Student for a 504 Plan or IEP as early as November 6, 2018. In response to that request, during a meeting held on November 17, 2018 – about a month after Student enrolled in the school – Teacher 3 explained to Parent that the school’s CARE program was the school’s preferred method for providing “pre-referral interventions and . . . support” to students with behavioral problems, including students with disabilities that may be limiting their education.

Parent continued to request that the school evaluate Student for a 504 Plan or IEP throughout the 2018-2019 school year. Parent requested evaluation on May 16 2019, May 19, 2019, and June 4, 2019. In an email written by Parent on May 19, 2019, Parent wrote that she “thought [Student] was already in an IEP . . . as requested . . . in November.”

The school communicated to Parent that it would evaluate Student for a 504 Plan or IEP at the beginning of the 2019-2020 school year. On May 17, 2019 – after a year of Student’s disability limiting his ability to participate in school – the school told Parent that “we will consider special education for [Student] as well.” However, the school also communicated to Parent that commencing the process of evaluating Student for a 504 Plan or IEP “would be most efficient to start in the fall.”

During the summer of 2019, the school recognized that Student’s disability necessitated evaluating him for a 504 Plan or IEP. On May 30, 2019, the school communicated to Parent and certain school staffers that it “would like to talk about the differences between a 504 Plan and an IEP and what is needed to qualify for either of those.” The school scheduled a meeting with Parent, Parent’s spouse, Administrator, Teacher 1, and Student’s community counselor to discuss providing those services to Student. On May 31, the school sent the meeting participants an agenda for the meeting. The meeting was held on June 4, 2019. Everyone attended the meeting except for Parent. Parent’s spouse attended in her stead.

The school continued to recognize that Student’s disability necessitated evaluating him for a 504 Plan or IEP during the fall of 2019. On October 1, 2019, the school contacted Parent about referring Student for 504 or IEP evaluation. On October 24, 2019, the school met with Parent’s spouse and reviewed the agenda that had been created for the June 4th meeting, which included discussing “the differences between a 504 Plan and an IEP and what is needed to qualify for either of those.”

The evidence suggests that the school failed to refer Student for 504 or IEP evaluation partly because of Student’s academic performance. In assessing the 2018-2019 school year, the school documented that “[Student] is an intelligent boy[. Student] doesn’t really need support academically[.]” On October 15, 2019, the school documented that “[a]cademically [Student] is not impacted when reviewing classwork [and] assessments . . . Reading is below benchmark, however . . . [Student] is near grade level and typical for his reading development.”

After November 9, 2019, the school documented that

[Student] wasn’t one of the lowest achieving in the class according to . . . assessments. [Student] showed areas of strength where he scored high, such as reading three letter words with short vowel sounds and high frequency words. In writing, [Student] had a good understanding of letters . . . and he could use this knowledge to write short pieces. [Student’s] penmanship was legible and [Student] didn’t struggle with the mechanics of writing.

However, the key to determining whether a student should be evaluated for a 504 Plan or IEP is not academic performance, alone. The key is the entire constellation of a student’s needs at school, including achievement tests, teacher recommendations, manifestations of impairment, and adaptive behavior.[[28]](#footnote-28)

Despite recognizing that Student’s disability necessitated evaluating him for a 504 Plan or IEP, despite holding a meeting to discuss that need, and despite further acknowledging that need after a year of evidence substantiated Student’s limitations, the school did not evaluate Student. Before any evaluation occurred, Student disenrolled from the school.

Of particular concern to the Oregon Department of Education is the school’s seeming belief that its CARE program was an adequate substitute for its legal duty to evaluate Student for a 504 Plan or IEP, as is evident in its continual adherence to the program and school documents. “[An email] sent by [Parent] saying she requested in Nov. 2018 for SPED/504. We responded and said *he has been in our CARE process in which we try interventions first.* We would see how he does in the fall [of] 2019 after summer.”

The department finds that there is substantial evidence that Bend-International School may have failed to evaluate Student to determine whether he needed a 504 Plan or IEP, as required by federal law, and, thereby, denied Student an aid, benefit, or service in violation of OAR 581-021-0045(3)(c).

V. Whether Bend International School excluded Student from participating in certain classes and activities for reasons related to Student’s disability

The third issue on appeal is whether Bend International School excluded Student from participating in certain classes and activities for reasons related to Student’s disability and, thereby, provided Student with different aids, benefits, or services in violation of OAR-021-0045(b), denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and subjected Student to different rules of behavior or treatment in violation of OAR 581-021-0045(3)(d).

The school first stated that Student would be excluded from certain classes on November 5, 2018, when Administrator informed Parent that – for behavioral reasons – “[Student’s] teachers are about ready to not let him participate in P.E. if this is the way he is going to act.” Parent responded by imploring Administrator to not exclude Student for reasons related to his disability:

Please do not threaten him . . . not being able to be part of PE. His therapist and myself know that this will only cause more problems. Excluding him from activities is counter productive and will not improve his anxiety about school[.] It will add more stress, lower his confidence[,] and make it harder for him to do other group activities.

Parent again requested that the school not exclude Student on November 6, 2018:

Please do not threaten him with being kicked out of school or not being able to be part of PE. His therapist and myself know that this will only cause more problems. Excluding him from activities is counter productive and will not improve his anxiety about school[.]

In both communications, Parent explained how excluding Student would impact his disability: “It will add more stress, lower his confidence[,] and make it harder for him to do other group activities.” Parent also indicated that her opinion was partly informed by Student’s “therapist.”

The school often would exclude Student from classes and activities as part of the school’s CARE program. On November 7, 2018, the school developed a plan for Student, under which the school would pull Student out of class and provide him “with putty and some hands on sensory activities” and discuss with him techniques used by the school to assist students in modifying their behavior. On December 14, 2018, the school considered giving Student breaks from class. In assessing the 2018-2019 school year, the school documented that

[Student] is immature. [Student] would go with [Teacher] around 9 every morning and also after lunch[. Student] would see [Administrator] or [a district staffer] . . . for his sensory breaks and transition time.

During the 2019-2020 school year, the school continued to pull Student from class. In the fall of 2019, the school arranged for Student to have a break at 8:45 am. On October 22, 2019, and October 27, 2019, school staff discussed providing Student with breaks from class.

Parent disagreed with pulling Student from class pursuant to the school’s CARE program, stating her preference for providing Student with in-class support:

A goal of mine . . . is to phase-out [Student’s] meeting with [Teacher 3] and focus on including [Student] into class more. I understand [Student] may need his space sometimes during the school day, and [Student’s] own peace corner sounds like a great place for him to escape if he needs to. Rather than having [Student] leave the classroom for breaks, is there someone who can help out in the classroom with inclusion and behavior during transitions or in general?

However, despite having knowledge of Student’s disability, despite having admitted that its attempts to accommodate Student were inadequate, and despite having acknowledged Student’s need to be evaluated for a 504 Plan or IEP, the school continued to pull Student from class. Arguably, the school did so in response to Student’s behavior. However, whether the school did so because of its faith in its CARE program or in response to Student’s behavior is not essential for the Oregon Department of Education to analyze how 504 law and ORS 659.850 apply to the situation. The school had a duty to provide services to Student in a manner that met his needs *as adequately as* the school met the needs of students who are not disabled.[[29]](#footnote-29) The school had a duty to not treat Student in a manner that is “*fair in form but discriminatory in operation*.”[[30]](#footnote-30) Continually pulling Student from class and subjecting him to different treatment because of his disability, even if doing so was meant to accommodate him, constitutes disparate treatment in violation of the law when all of the evidence available to the school indicated that pulling Student from class was not meeting his needs.

The department finds that there is substantial evidence that Bend-International School may have excluded Student from participating in certain classes and activities for reasons related to Student’s disability and, thereby, provided Student with different aids, benefits, or services in violation of OAR-021-0045(b), denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and subjected Student to different rules of behavior or treatment in violation of OAR 581-021-0045(3)(d).

VI. Whether Bend-International School implemented a shortened school day for Student for reasons related to Student’s disability

The fourth question on appeal is whether Bend-International School implemented a shortened school day for Student for reasons related to Student’s disability and, thereby, provided Student with different aids, benefits, or services in violation of OAR-021-0045(b) or subjected Student to different rules of behavior or treatment in violation of OAR 581-021-0045(3)(d).

The school first recommended implementing a shortened school day for Student on May 17, 2019, when the school communicated to Parent its belief that

[Student] is a student who I believe would have benefitted from [a] half day kindergarten program, which unfortunately we cannot offer.

\* \* \* \* \*

We can do a “Step-Up-Plan,” where we limit the amount of time he is here at school . . . I think the [CARE] team should consider putting [Student] on a half day for the rest of the year. I believe he will mature a lot over the summer, and he could start full day in September.

Parent responded to the school’s suggestion by stating that she would prefer Student to attend school the entire school day with proper support.

We would like [Student] to be able to go all day as the rest of the class does[.] Is there any way he can have extra support in the classroom while we work on an IEP? [Student] already feels targeted and excluded as a ‘bad kid’ and we don’t want him to feel more left out than he already is.

On May 22, 2019, the school again broached the subject of shortening Student’s school day with Parent:

I know you are concerned if [Student] leaves at 1:40 he will miss library and art . . . my concern[] is if [Student] has more escalation involving the safety of others and is sent home [it] reinforces that if he has a really bad tantrum he gets to go home. Taking a more pro-active approach in having him leave at 1:40 . . . does not reinforce the negative behavior.

The school also told Parent, “It’s a very long day for a 5 year old, and especially at his maturity level. [Student’s] tantrums and the throwing of items around the room and safety of others is a huge concern. We just can’t have that in the classroom.”

The following school year, the school revisited implementing a shortened school day for Student. In a letter sent to school staff, the school described Student’s behavioral problems and stated that “[I]f outbursts continue with all of the support we have in place, we may need to consider a shortened school day [for Student].”

If the school had implemented a shortened school day for Student, the school may have been in violation of anti-discrimination law. Student would have received different services, and would have been subjected to different rules of behavior or treatment, than other students attending the school because of his disability. However, there is no evidence on the record that the school ever implemented a shortened school day for Student. Thus, the department finds that the school did not discriminate against Student on these grounds.

VII. Whether Bend-International School suspended Student for reasons related to Student’s disability

The final question on appeal is whether Bend-International School suspended Student for reasons related to Student’s disability and, thereby, denied Student a service in violation of OAR 581-021-0045(3)(c).

Parent first raised concerns that Student would be suspended from school on November 6, 2018, when she asked the school to not “threaten him with being kicked out of school.” Administrator denied threatening Student with suspension. Administrator also specified that Student’s behavior was affecting other students at school.

[If Student] can’t act in a safe manner in P.E., no violence, that [they] won’t be able to participate in class. And this is true. This is true for any student. We need to maintain a safe learning environment for our students . . . [Student] has also had many incidents of hitting in P.E., and it seems to be a difficult class for [them]. If P.E. continued to be a struggle, we may need to work up to it . . . It is not a punishment. It is realistic.

However, as with other communications with Parent, Administrator acknowledged that Student’s behavior derived from mental health issues.

[Student] is currently getting weekly lessons and practice, with the group, on social skills/healthy social interaction from our Speech and Language Pathologist. I will consult with [Teacher 3] about other options/supports for [Student] here at [Bend International School] that you mentioned[.]

Events leading to the suspension of Student seemingly began on October 5, 2019, when a parent of one of Student’s classmates contacted the school about Student’s behavior, claiming it made class unsafe. On November 11, 2019, responded to these concerns, sending the parents of other students a letter about the school’s discipline policy with respect to unsafe behaviors. The letter read, in part,

Our team does have some concerns about [Student], especially the loud and aggressive fits. For this reason, I want to communicate clearly when a student will be removed from the classroom environment, in order to preserve a safe and healthy learning environment . . . Pounding tables, kicking tables, throwing objects, hitting or kicking others is described as physical violence, which induces anxiety and fear in peers . . . Loud noises or swearing/extremely disruptive behavior (refusal to regulate or calm with staff assisting) is also very disruptive . . . If these behaviors are observed at school the student will be sent home. It is important to send a strong message to [Student] . . . I sincerely hope [Student] can develop skills to stop these behaviors . . . [If] outbursts continue, with all of the supports we have in place, we may need to consider a shortened school day.”

Student’s behavior escalated throughout the fall of 2019. On October 21, 2019, Teacher 2 and Parent exchanged emails to schedule a parent-teacher conference. During this email exchange, Teacher 2 told Parent that

[Student] had repeated out of control and violent behaviors today, from kicking a plastic stool and causing the leg to snap off, to tearing his work, making it into a ball, and throwing it at me, to slamming a bin of markers on the floor, hitting other people, and running away. Nothing out of the ordinary in our day, so not sure what made this day in particular so hard for him.

The school reprimanded Student for his behavior.

On October 22, 2019, Teacher 2 emailed Parent about two incidents involving Student. One incident involved Student becoming upset with a teacher “for collecting his paper because he wanted to keep working . . . [Student] screamed and [ran] toward [the teacher] with a sharpened pencil and tried to stab [the teacher].” The other incident involved Student scratching a kindergartener during morning recess, breaking the skin and leaving a swollen mark.

On November 9, 2019, Teacher 2 emailed Parent about “an incident [where Student was] . . . stomping around the room and using bad language, throwing his shoes while the teacher . . . and students were on the carpet.”

On November 13, 2019, a teacher at the school emailed Teacher 2, informing Teacher 2 that Student was using profanity.

Sometime between November 15, 2019, and November 19, 2019, the school suspended Student.

The Oregon Department of Educatoion acknowledges that Student presented the school with a disciplinary problem, one that necessitated, under the circumstances, suspending Student. However, the department also finds that the school was largely responsible for those circumstances. In consideration of the evidence at the department’s disposal, the department finds that the school (1) had at its disposal information from Student’s community counselor diagnosing Student with social phobia and separation anxiety, (2) knew that Student’s behavior derived, at least in part, from mental health issues, (3) attempted to accommodate Student’s disability, but failed to do so, (4) admitted that its attempts to accommodate Student’s disability were inadequate, (5) knew that its preferred method for accommodating students with disabilities – the school’s CARE program – was not sufficient to address Student’s mental health issues, (6) knew that it should evaluate Student for a 504 Plan or IEP, and (7) failed to evaluate Student for a 504 Plan or IEP.

In consideration of those findings, the department necessarily finds that the school suspended Student for reasons related to Student’s disability.

Of particular concern to the department is how the school did not acknowledge its role in Student’s behavior. Upon suspending Student, the school communicated to Parent the following:

Please note that [Student] is not being treated differently – this is a behavior expectation for all students at Bend International School. It is our responsibility to provide a “safe learning environment” for all students. We are educators, and it is our utmost responsibility. We cannot allow hitting, kicking, or throwing objects within the classroom or at recess. It takes away from everything we are trying to accomplish. Violence induces fear, and many people are affected in this classroom, including all of the students and teachers. There are only 2 students in this classroom, including all of the students and teachers. There are only 2 students in the classroom who have been engaging in these behaviors. The other student was also sent home last week, for violent behavior. That student is going [to the doctor] and also therapy. We do not view this as a punishment. This is discipline and it is protecting the education and safety of all of our students. It sends a strong message to everyone that this is the kind of learning community and environment that [Bend International School] provides. This is [Student’s] time to learn that he cannot hit or kick people or throw things at school. We have been teaching him and will continue to teach him how to:

* take a break
* regulate . . . emotions
* calm . . . down
* get . . . in the green
* sharing/taking turns
* expressing . . . thoughts/feelings (nonviolent communication)
* active listening/empathy

**I urge you to talk with [Student] seriously and let [Student] know that Bend International School is NOT a place for those behaviors and that he needs to stop them.** (Emphasis in original.) This is a real learning opportunity – and we all sincerely hope that you will use this at home as a teachable moment to help [Student] understand this. By telling [Student] that it is a punishment, or creating disharmony between school/home[,] will not help. [Student] is excluded from school[] as a result of [Student’s] actions. [Student] violently lashed out and hurt other students. We want [Student] here at school, and I know [Student] wants to be here. Please know that we care about [Student] and see all of [Student’s] strengths[] and want the best for [Student].

On November 21, 2019, after Student’s suspension, the school communicated to Parent that Student was involved in an incident at school ant that “[Student] did not show any remorse, nor act like he was sorry – which is really concerning!”

In other words, the school treated the matter purely as one involving a “behavior expectation” that the school had for all students attending the school. By doing so, the school violated one of the core principals of 504 law and ORS 659.850. Under 504 law, a school must provide services to students with a disability in a manner that meets the needs of the students *as adequately as* the district meets the needs of students who are not disabled.[[31]](#footnote-31) Under ORS 659.850, a school cannot act in a manner that is “*fair in form but discriminatory in operation*.”

The department finds that there is substantial evidence that Bend-International School may have suspended Student for reasons related to Student’s disability and, thereby, denied Student a service in violation of OAR 581-021-0045(3)(c).

VIII. Bend-La Pine School District’s oversight of Bend International School

The Oregon Department of Education finally notes that the evidence at hand draws into question whether Bend-La Pine School District’s oversight of Bend International School was adequate. As explained above, in this case, the duty to identify students with disabilities is a shared responsibility between the district and the school.

On May 20, 2019, the school informed an administrator at Bend-La Pine School District about Parent’s concerns that Student lacked a 504 Plan or IEP.

On October 14, 2019, the school’s CARE team documented that the district’s behavior specialist began gathering information on first grade students with behavioral problems, including Student. On October 15, 2019, school staff scheduled a meeting with the behavior specialist for October 23, 2019. That meeting was subsequently canceled. October 20, 2019, the school’s CARE team documented that the behavior specialist provided recommendations for first grade staff. On November 7, 2019, the school’s CARE team documented that the district’s behavior specialist visited Student’s class.

Over the course of three weeks, the district’s behavior specialist had an opportunity to evaluate Student, discuss with the school Student’s needs, and inform the school that Student needed to be evaluated for a 504 Plan or IEP.

That said, without further evidence, the department cannot determine what the exact proportion of the failure to identify Student’s disability is the fault of the district. At the very least, any corrective action required by the district in this case necessarily would involve the evaluation of its oversight of Bend International School to identify areas where it can improve its efforts to fulfill its duty under ORS 338.165.

**PRELIMINARY CONCLUSIONS**

In consideration of the evidence, the Oregon Department of Education finds that Bend International School may be deficient on the following grounds:

* Bend International School may have failed to adequately support Student to accommodate Student’s disability and, thereby, failed to provide Student with a free and appropriate education as required by Section 504, denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and limited Student’s enjoyment of rights, privileges, advantages, or opportunities in violation of OAR 581-021-0045(3)(f);
* Bend-International School may have failed to evaluate Student to determine whether he needed a 504 Plan or IEP, as required by federal law, and, thereby, denied Student an aid, benefit, or service in violation of OAR 581-021-0045(3)(c);
* Bend-International School may have excluded Student from participating in certain classes and activities for reasons related to Student’s disability and, thereby, provided Student with different aids, benefits, or services in violation of OAR-021-0045(b), denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and subjected Student to different rules of behavior or treatment in violation of OAR 581-021-0045(3)(d); and
* Bend-International School may have suspended Student for reasons related to Student’s disability and, thereby, denied Student a service in violation of OAR 581-021-0045(3)(c).

The department finds that Bend International School is not deficient with respect to the following:

* Bend-International School did not implement a shortened school day for Student for reasons related to Student’s disability.

With respect to Bend-La Pine School District, the department finds that the district may be deficient on the following grounds:

* Bend-La Pine School District may have failed to fulfill its duty to “identify, locate[,] and evaluate students” with disabilities enrolled in Bend International School.

Accordingly, the department encourages the district and school to reach an agreement with Parent through conciliation. If the district and school cannot reach an agreement with Parent through conciliation within 30 days, or a time otherwise agreed to by the parties, the department will issue a final order on the matter. The parties may agree in writing to extend that 30 day timeline.

If Parent or the district wishes to use the department as a resource during conciliation, Parent or the district may contact the department.[[32]](#footnote-32)

If you have any questions, please contact me.

Sincerely,



Mark Mayer

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1. The administrative rules governing the Oregon Department of Education’s appeals process are OAR 581-002-0001 to 581-002-0023. [↑](#footnote-ref-1)
2. OAR 581-002-0009. [↑](#footnote-ref-2)
3. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. OAR 581-002-0009(3)(a)(B). [↑](#footnote-ref-5)
6. OAR 581-002-0009(3)(b). [↑](#footnote-ref-6)
7. *See* OAR 581-002-0001(2). [↑](#footnote-ref-7)
8. ORS 338.165(1). [↑](#footnote-ref-8)
9. There are strong public policy considerations for why ORS 338.165 should be read only as a proactive duty and not as a prohibition on delegation. Because a public charter school has continuous direct contact with the students attending the public charter school, the school district may need the public charter school to report to the school district students that it has identified as having a disability. A reading of the statute that would impose upon the school district a unilateral duty would result in an absurd interpretation of the statute, under which a public charter school may decide to simply not report that it has identified a student with a disability or even obfuscate any attempt by a school district to identify such students, making the school district strictly liable for actions not within its control. [↑](#footnote-ref-9)
10. Importantly, if only a school district is deficient in identifying, locating, and evaluating” students with disabilities, only the school district will be found deficient. [↑](#footnote-ref-10)
11. ORS 659.850(2). OAR 581-021-0045(2) applies this prohibition specifically to the types of schools regulated by the Department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.” [↑](#footnote-ref-11)
12. ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools. [↑](#footnote-ref-12)
13. ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools. [↑](#footnote-ref-13)
14. 29 U.S.C. 794; 34 C.F.R. part 104. [↑](#footnote-ref-14)
15. 29 U.S.C. 794; 34 C.F.R. part 104. [↑](#footnote-ref-15)
16. 34 C.F.R. 104.33. [↑](#footnote-ref-16)
17. 34 C.F.R. 104.33. [↑](#footnote-ref-17)
18. ORS 659.850. [↑](#footnote-ref-18)
19. 34 C.F.R. 104.35(a). [↑](#footnote-ref-19)
20. 42 U.S.C. 12102. [↑](#footnote-ref-20)
21. 34 C.F.R. 104.35(b). [↑](#footnote-ref-21)
22. 34 C.F.R. 104.35(d). [↑](#footnote-ref-22)
23. *Id.* [↑](#footnote-ref-23)
24. *See* C.F.R. 300.301(a) and (b) (setting forth requirement to evaluate and reevaluate students for disability under federal IEP law. [↑](#footnote-ref-24)
25. United States’ Department of Education’s Office for civil Rights, *OCR Memorandum*, April 29, 1993. [↑](#footnote-ref-25)
26. United States Department of Education Office for Civil Rights, *Hillsborough County School District Investigation Letter Complaint Number 04-15-1023*, 4 (May 15, 2015). [↑](#footnote-ref-26)
27. *See id*. (explaining that “[i]mplementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting” the standards set forth in Section 504). [↑](#footnote-ref-27)
28. *See* 34 C.F.R. 104.35(b) (specifying the factors that a school must consider when determining whether a student should be evaluated for a 504 Plan or IEP). [↑](#footnote-ref-28)
29. 34 C.F.R. 104.33. [↑](#footnote-ref-29)
30. ORS 659.850. [↑](#footnote-ref-30)
31. 34 C.F.R. 104.33. [↑](#footnote-ref-31)
32. The department’s 504 expert is Winston Cornwall. He may be reached at: Winston.Cornwall@ode.state.or.us. [↑](#footnote-ref-32)