

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of )  
District B School District )

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FINDINGS OF FACT,  
CONCLUSIONS  
AND FINAL ORDER  
Case No. 12-054-015

**I. BACKGROUND**

On April 30, 2012, the Oregon Department of Education (Department) received a written request, via email, for a special education complaint investigation from the parent of a student (Student) formerly residing in the District A School District (District). The parent, on behalf of her adult student, requested that the Department conduct a special education investigation under OAR 581-015-2030. The Department confirmed receipt of this complaint and forwarded the request to the District by email and by US mail on May 2, 2012.

Under state and federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.<sup>1</sup> This timeline may be extended if the parent and the school district agree to the extension in order to engage in mediation or local resolution or for exceptional circumstances related to the complaint.<sup>2</sup>

On May 2, 2012, the Department's complaint investigator sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of May 16, 2012.

On May 5, 2012, the assigned complaint investigator informed the Department that he had major schedule conflicts with the timeline in the complaint, and asked that it be reassigned to a different investigator. On May 7, the Department reassigned the complaint to a second investigator who completed this investigation. Due to the exceptional circumstances in this complaint, namely the reassignment of the investigator, and the complexity and size of the record, this complaint timeline was extended by seven days. This complaint is timely.

On May 7, 2012, the District submitted a timely *Response* indicating that they disputed both of the allegations in the parent's complaint. The response packet contained IEP's, evaluation and eligibility reports; transcripts and progress reports; Prior Written Notices (PWN), meeting notices and meeting minutes; and copies of correspondence between the District and the parent. The Department's complaint investigator determined that on-site interviews were needed. On May 25, the complaint investigator interviewed the parent and the adult student. On May 31, 2012 the complaint investigator interviewed the District Special Education Director, the District Superintendent and the District evaluation coordinator. On the same day, the complaint investigator interviewed the Oregon Connections Academy (ORCA) special education coordinator and the ORCA Executive Director. On June 7, and on June 11, 2012, the complaint investigator interviewed ORCA general education (Science, Math, Social Studies, and Language Arts) teachers; the national senior director for student services, the national special education manager, the ORCA academic advisor/counselor, Section 504 coordinator, and an ORCA special education teacher. The attorney for ORCA sat in on all interviews with ORCA staff. The District B School District attorney sat in for all interviews of District B staff.

<sup>1</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(a) (2011)

<sup>2</sup> OAR 581-015-2030(12) and 34 CFR § 300.152(b)

The investigator also interviewed a family friend, who attended<sup>3</sup> most of the meetings held from January through March, 2012. The investigator also listened to part of an Audio Tape of the meetings held in January, 2012. The complaint investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of fact and conclusions of law contained in this order.

## 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 in Section III and the Discussion in Section IV. This complaint covers the one year period of May 1, 2011 through April 30, 2012.

	<u>Allegations</u>	<u>Conclusions</u>
	Allegations to be investigated. The written complaint alleges that the District violated the IDEA in the following ways:	
1.	<p><b><u>Special Education Evaluations:</u></b></p> <p>Not identifying and evaluating the Student for Special Education Eligibility when the District should have known that the Student was in need of special education services and providing incorrect information about district responsibilities;</p> <p>(Allegation #1, 2, 7, &amp; 8; OAR 581-015-2080, OAR 581-015-2105, and OAR 581-015-2110(5) and 34 CFR 300.303, and 34 CFR 300.111).</p>	<p><b><u>Substantiated.</u></b></p> <p>Given the amount of time the District took to respond to the adult student's request for evaluation, the failure to ensure that accurate information regarding special education was distributed by the charter schools of the district, the knowledge it had about the student's history of disability, and the fact that it summarily cancelled any consideration of eligibility, the Department finds a violation and orders Corrective Action.</p>
2.	<p><b><u>Parental Participation:</u></b></p> <p>Not providing the parent or adult student<sup>4</sup> with the opportunity to participate in meetings held in January 2012, referred to as a "pre-referral" special education evaluation meeting, by:</p> <ul style="list-style-type: none"> <li>a. not considering evaluations and information provided by the adult student; and,</li> <li>b. by predetermining the outcome of the meeting;</li> </ul>	<p><b><u>Not Substantiated.</u></b></p> <p>First, the IDEA does not list requirements for parent participation in "Pre-referral meetings." Nor does the law acknowledge, warrant, or require such meetings in the special education process. However, assuming this meeting was a valid IDEA meeting, here, the District did consider the information presented and spent a lengthy amount of time discussing what to examine and how to evaluate the student. Even though the Director signaled several times that special education eligibility was doubtful; and</p>

<sup>3</sup> Many of the ORCA staff members and the family friend attended the meetings by telephone.

<sup>4</sup> For adult students, the parental rights will transfer at the age of majority per OAR 581-015-2000(1) and OAR 581-015-2325.

	<p>(Allegation #5 &amp; 6; OAR 581-015-2115 (1), 2190 &amp; 2195 and 34 CFR 300.305 &amp; 300.501).</p>	<p>inaccurately informed the family on state special education laws related to IDEA<sup>5</sup>; the Director did listen to the parent and adult student, did allow for meeting participation, and did consider the parent/adult student's concerns. Therefore, the Department does not substantiate the allegation and orders no Corrective Action.</p>
	<p><b><u>Proposed Corrective Actions:</u></b></p> <ol style="list-style-type: none"> <li>1. The District pay for the student's living expenses (including rent, utilities, phone, travel and health insurance) for eighteen months while the student attends an out of state facility;</li> <li>2. The District pay for tuition and living expenses for the Student to complete 36 units (three semesters) of remedial college credits;</li> <li>3. If the 36 units of remedial college credits are not sufficient, the District shall pay for additional math, reading and writing instruction from appropriate agencies and highly qualified individuals in the area that the Student is located at the time such instruction is needed; and</li> <li>4. Reimburse parent for attorney fees incurred.</li> <li>5. The parent's monetary request totals \$71,764.00, but does not include a claim for compensatory damages related to: <ol style="list-style-type: none"> <li>a) Lack of access to the curriculum and limited choice of classes, and</li> <li>b) Lack of access to National Honor Society and other extra-curricular activities and student clubs;</li> <li>c) The costs incurred for courses taken outside the District to meet local high school requirements;</li> <li>d) Private tutoring costs;</li> <li>e) Thousands of hours parent and other spent providing individualized instruction or acting as reader or scribe;</li> <li>f) The cost of privately paid</li> </ol> </li> </ol>	<p>See Section V, Corrective Action</p>

<sup>5</sup> Stating that no services were available to students after graduation with a regular diploma.

	evaluations.	
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**Issues Outside the Scope of the Investigation** The parent alleges that the District did not follow the Student’s 504 plan, including not modifying absences due to the Student’s disability (Allegation 3). Hearings under Section 504 are controlled pursuant to OAR 581-015-2390 and 2395. Alternatively, a claim for violation of a 504 plan may be filed with the Seattle office of the US Department of Education’s Office of Civil Rights. See, <http://www.hhs.gov/ocr/civilrights/complaints/index.html>. This allegation is therefore outside the scope of this investigation under OAR 581-015-2030.

The parent includes an allegation that the District did not “provide notice of procedural safeguards in accessible format” to the Student (Allegation 4). The controlling regulation does not refer to “accessible format” but provides that the Notice be provided in the native language of the parent or other mode of communication of the parent or adult student.<sup>6</sup> Issues of “accessibility” for disabled parties may be further addressed by coverage offered in the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act, which are bodies of law outside the jurisdiction afforded to the Department for this complaint.

The parent alleges that the charter school where the Student attended during the 2011-12 school year included incorrect information in its handbook relating to which district was the “resident” district for the purposes of special education (Allegation 7). The Department will investigate this allegation in part, as related to the District’s responsibilities for eligibility and evaluation and the oversight of appropriate IDEA information distribution by district charter schools in Allegation #1 above. As part of its oversight of District special education and related services for all students, including those in charter schools, the District must ensure correction of any misinformation (see OAR 581-015-2075 and 34 CFR 300.209).

### **III. FINDINGS OF FACT**

1. The student was a resident of the District A School District who attended a virtual charter school, Oregon Connections Academy (ORCA), in the District B School District during the time period under investigation. The student graduated from ORCA on January 26, 2012 with a standard high school diploma. Currently, the student is over 18 years old, and attends an out of state private residential center which serves individuals with blindness and low vision. The student is learning orientation and mobility, independent living, Braille, recreation, financial management and adaptive and assistive technology skills.
2. On July 1, 2011, as a result of revisions to Oregon law regarding residency of students enrolled charter schools,<sup>7</sup> District B School District was obligated to “identify, locate and evaluate all resident children with disabilities” that were enrolled in ORCA. Further, these changes made the District B School District, rather than the parental resident district (District A School District), responsible for any special education needs of this student.
3. The student went to the Children’s Vision and Neuro-Optometry Binocular Vision Clinic that is part of the School of Optometry at the University of California, Berkeley on August 4, 2011. Two optometrists examined the student and tested Student’s vision over a one week period. The first examination was completed by Dr. Ian Bailey, O.D., D.Sc. Dr. Bailey observed; “While we were conducting some tests of reading performance using a computer display, we inadvertently provoked

<sup>6</sup> OAR 581-015-2315(4) & (5)

<sup>7</sup> See ORS Chapter 338 and OAR 581-015-2080(3).

an episode of severely impaired vision. The student experienced double vision and we could easily see an obvious inward eye turn. Our retinoscopy results suggested that about 7-8 diopters of accommodation were being exerted. However, visual acuity was severely impaired. Visual acuity was only at a level equivalent to about 20/350." Dr. Bailey was unable to find a suitable explanation for this episodic pronounced loss of vision; and stated that he believed "it was genuine and that there was no malingering involved." Dr. Bailey recommended further examination by Dr. Pia Hoenig of the same clinic. After examining the student, Dr. Hoenig diagnosed the student as having a "spasm of the near reflex with associated visual agnosia simultanagnosia."

4. The student returned to this clinic on January 12, 2012 for further examination. In his report about this examination, Dr. Bailey concluded: "By themselves alone, the classical measures of [Student's] visual abilities would indicate that everything is normal when [Student] is in [Student's] 'normal vision' state. On the basis of the usual quantitative criteria, [Student] does not meet the simple definitions of 'low vision' commonly used to determine eligibility for rehabilitation services. However, when [Student] is not in the spastic state, [Student's] vision is still not functioning normally. [Student] always has to avoid directing visual attention at printed material, periodic displays or other objects that will precipitate a spastic attack. It is only intermittently that [Student] experiences these near-reflex spasms and then [Student] becomes profoundly functionally impaired. The frequency of the spastic episodes may be minimized by avoiding visual tasks and situations that require directed visual attention, but in reality, intermittent spastic episodes are inevitable. [Student] needs special help, and the help [Student] needs involves techniques that have been developed to aid people who are totally blind."
5. Dr. Hoenig also reexamined the student in January, 2012. Dr. Hoenig prepared a report at this time which included a review of the literature on the student's specific visual diagnosis. In closing, Dr. Hoenig stated that the student could be alternatively diagnosed with "focal visual dysfunction, ventral simultanagnosia, impaired visual attention or brain damage related visual dysfunction. All these diagnoses describe a condition where a comprehensive eye exam would establish normal anterior and posterior ocular health, normal visual functions and normal visual pathways but reveal anomalous processing in associated cortical areas."
6. The student sent a letter via email requesting an evaluation for special education to the District B Director of Special Education on September 8, 2011. The student used [Student's] "Gmail" account to send the email. The charter school staff had made an agreement with the student allowing the student to use the "Gmail" account instead of the email account on the ORCA Learning Management system because that system was too visually complex for the student to use. However, no one in the charter school had explained this agreement with the District Special Education Director. Therefore, the Director replied to the student through the charter school Learning Management email system.
7. The District was also in possession of a letter from an attorney, dated July 25, 2011, informing the District that the student was represented by the attorney and that all communications should be directed to the attorney. The attorney also requested the student's records. The District wrote back to the attorney, informing the attorney they had no special education records for the student. On September 15, 2011 and October 24, 2011 the District wrote to the attorney asking for more information about the student's request for an evaluation. On October 25, 2011, the attorney notified the District's counsel that the attorney no longer represented the student.
8. On November 22, 2011, the parent wrote to the Director on the student's behalf and asked why the Director had not responded to the student. The Director responded the next day and apologized for the mix-up and stated a willingness to meet with the student to discuss the referral/evaluation process. The Director asked the student for permission to include the parent in the discussions, and

the student signed and emailed a “Permission to Obtain and Release Information” form back to the Director.

9. The parent and the Director talked on the phone on November 23, 2011, and the parent then emailed a copy of an Assistive Technology evaluation conducted in February 2011 by the District A School District to the Director along with copies of two Assistive Technology evaluations conducted by other evaluators. The parent also emailed copies of the vision examination reports conducted in September, 2011 at the Children’s Vision and Neuro-Optometry Binocular Vision Clinic that is part of the School of Optometry at the University of California, Berkeley.
10. On December 5, 2011, the Director wrote to the parent and informed the parent that the Director had contacted the Oregon Commission for the Blind regarding criteria for services. The Director also contacted the local Education Service District to request a school psychologist who could give academic, cognitive assessments to students with vision impairments; and to request someone qualified to administer a learning media assessment. The Director noted that in a few days the District would send a form for the student to sign giving permission to evaluate so that the evaluations could start as soon as the District had appropriate assessors.
11. The Director emailed the parent again on December 9, 2011 and informed the parent that a staff member at the Oregon Commission for the Blind had said that the student would qualify both for services with the Commission and with Vocational Rehabilitation. The parent wrote back and asked how soon the team could meet to start writing the student’s IEP.
12. On December 15, 2011, the Director wrote to the parent to ask about dates for a meeting to discuss the “referral process.” The parent wrote back the next day and asked why the team needed to meet to discuss the referral process—and was this process the same as an IEP planning meeting? The Director replied to the parent and clarified that the purpose of the meeting was for the team to “review the existing information to determine if additional assessments were necessary in all suspected areas (of disability) and if so what assessments would be completed.” The Director noted the meeting would be a “pre-referral meeting.” The meeting was scheduled for January 9, 2011, at 11:00 a.m.
13. On January 7, 2012, the parent sent the Director two different emails. In the first message, the parent attached the report from Dr. Hoenig, and informed the Director that the student was scheduled to see both optometrists in California during the week of January 12<sup>th</sup>. In the second email, the parent informed the Director that the parent has vision impairment as well and asked if the meeting could be taped so that the parent could listen to it after the meeting<sup>8</sup>
14. The Director replied on January 9, 2012 at 9:02 a.m. and told the parent that the conference line the District used was not set up for taping; and told the parent and student that she was trying to set up a line on which the conference call could be recorded. The Director sent a copy of the pre-referral document to the parent. When the parent asked if there was an agenda for the meeting, the District Director again referred the parent to the pre-referral document. At 9:24 a.m., on January 9<sup>th</sup>, the Director sent an email to the parent and the student with the Parental Rights<sup>9</sup> document attached. At 10:47 a.m., the Director sent the parent and student an email with a new phone number and access code.

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<sup>8</sup> The parent has drusen of the optic nerve, and angioid streaks, in addition to other physical issues. The vision issues make it difficult for the parent to see anything below the visual level or in the periphery. Therefore it is difficult for the parent to participate in the meeting and to take notes at the same time—hence the need for the taping.

<sup>9</sup> The District attached Procedural Safeguards Notice Parental Rights for Special Education (K-18) in a Word format. The District should have sent the Procedural Safeguards Notice Student Rights for Special Education (18-21).

15. When the meeting was to start, the parent, student and the parent's friend did not call the District. So, the Director called the family and pointed out that there was a new phone number and access code. The family and friend called the correct number and the meeting began. All parties were present by telephone line. Three ORCA general education teachers, the ORCA special education coordinator, the national senior director for student services, the national special education manager, the ORCA academic advisor/counselor and Section 504 coordinator, and an ORCA special education teacher all attended the meeting.<sup>10</sup> The ORCA Executive Director also attended by phone. The District special education director conducted the meeting.
16. The District Director opened the meeting by referring to the pre-referral process and stating that the purpose of the meeting was to consider the student for potential special education eligibility. The Director then stated that according to the pre-referral process, the first question in the process is: "(Does) the student's academic profile suggest a discrepancy between expected standards of the classroom and the current performance in: math; reading; social skills/Behavior; written language; or, other: no area of concern related to academics."<sup>11</sup>
17. The District uses a five page document to guide a team through the pre-referral process. After the initial question above, the team is guided to discuss the:
- a) Specific reasons for concern;
  - b) Regular classroom instruction provided to student in areas of concern;
  - c) Repeated assessments used to identify the areas of concern;
  - d) Attempted classroom interventions (include timeline and student's response);
  - e) Whether or not and how the parent was contacted;
  - f) The Parent's comments;
  - g) The student's strengths;
  - h) The areas of concern;
  - i) A summary of all of this discussion; and,
  - j) Whether or not the team agrees to refer the student for an evaluation and the reasons for the decision.
18. This form was partially completed when the meeting started. The Director had summarized the following information:
- a) There were no areas of concern related to academics;
  - b) The parent and student were concerned about changes in vision acuity deficits (sic) and transition to college and adult life;
  - c) The student was currently enrolled in a government and algebra class to complete graduation requirements for a standard diploma; but that due to supportive technology challenges with current mode of curriculum presentation the graduation date had been moved to February 24, 2012;
  - d) The student had made adequate progress in all course work with accommodations through a 504;
  - e) The student has had several laptops with various configurations of AT software; but there have been malfunctions, and inability to load programs correctly and some ordered software was on back order.
19. The District Director explained to the meeting team, that the pre-referral meeting had the purpose to determine whether or not there was reason to suspect a disability, and to plan how to evaluate for

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<sup>10</sup> The meeting notice did not inform the parent that the national Connections Academy staff would participate in the meeting.

<sup>11</sup> The District uses a standardized five page document to guide a team through the pre-referral process.

that disability if applicable. The team met twice for a total of almost four hours to discuss these questions.

20. The Director started the discussion by noting that the ORCA staff found no deficits in any areas listed on the form; but that there were definite concerns among staff about the student's vision. When the Director asked the parent what the family's concerns were, the parent noted the need for transition, and for assistive technology. The student described having difficulty in reading materials in specific formats and the parent added concerns about the student's learning disability and other health impairment.
21. The parent then noted that the Director's opening statement about the lack of discrepancy was surprising and asked the Director on what that conclusion was based. The Director told the parent that the conclusion was based on a review of the student's OAKS<sup>12</sup> testing and the student's transcript and then the parent suggested that the team might want to consider other information from other previous evaluations.
22. At this point in the meeting, the parent and the family friend questioned the agenda, saying they had been told in advance there was no agenda; but that it seemed the District had a very specific agenda. The Director explained the pre-referral process and told the parent about the email sent that morning with the pre-referral document attached. The Director moved the discussion on to the issue of the regular instruction provided to the student in the area of concerns; noting the student had not been regularly participating in classes. The student spoke up and clarified that the lack of participation since the fall was due to the lack of materials the student could see. The parent then stated that the District had been on notice the student was having severe vision difficulties since December of 2010.
23. The Director responded that although everyone agreed the student had vision problems, the difficulty which was there seemed to demonstrate very little evidence of any adverse impact for the student—in math, reading, social skills or written language.
24. The family friend spoke up and explained how many different times the friend and others had read aloud to the student, tried to reformat materials so the student could see them, and done other things to support the student in learning. The friend also noted that the district did need to consider the extraordinary effects of outside support when considering eligibility. When the family friend made this comment, no one on the team responded until the Director stated that if there was information about adverse impacts, the team would need to schedule a second meeting after all team members had an opportunity to read and review the information. Finally, the parent offered to send the District a document in which the parent had outlined the many adverse effects the student's vision issues had caused in learning. The District Director accepted this offer and asked the parent to email it to all team members, which the parent subsequently did.
25. The District Director replied that if the parent had additional material to share, the Director would schedule another meeting, after the team had had a chance to review the material. At a subsequent meeting, the document the parent presented about adverse impact was mentioned but not

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<sup>12</sup> A psychological evaluation completed on April 30, 2006 indicated that the student scored in the very superior range; that working memory was average, and that the student scored in the low average range in processing speed. On February 1, 2009, as a 10<sup>th</sup> grader, the student took the Oregon Writing Assessment. The student told the investigator that it took four hours to finish the test, and that the teachers administering the test read much of it to [Student]. The student scored a 40 (Meets) the State Standard for the CIM. On April 17, 2009, the student took the Oregon Reading and Literature, Mathematics, and Science Assessments. The student was given additional time and support during the testing situation because staff agreed that [Student] had reading and writing problems due to [Student's] vision issues. The student achieved a score of 253 (Exceeds) in Reading and Literature; 239 (Meets) in Mathematics; and 253 (Exceeds) in Science.

discussed.<sup>13</sup>

26. At the end of the second meeting, the Director suggested that the team attach the document to the revised 504 plan which the student could then use to present to colleges as evidence of a disability and the need for accommodations. The Director stated at one point in the discussion that even though the student had had difficulty in previous classes, the current concern was the two classes the student needed for graduation.
27. Several times during the meetings, the Director noted that once the student had earned a regular diploma, all “IEP processes” or “special education processes” would end. The Director never referred to OAR 581-015-2045(3): “If a school district chooses to provide special education to a student with a regular diploma, that student remains eligible for a Free Appropriate Public Education (FAPE).”
28. Even when the parent and student asked about the availability of career activities and other transition activities after graduation, the Director did not acknowledge that the student could still receive FAPE after earning a regular diploma.
29. At one point, the parent commented that the “law says something different on that topic.” No one on the team responded to the parent’s comment or the District’s policy for this matter.
30. During these two meetings, the general education teachers were silent.
31. Only once in the second meeting did a general education teacher comment about the student’s progress in any academic area; and that was to praise the student for the excellent senior project the student had completed.
32. At 1 hour and 49 minutes into the tape recording of the second meeting, the ORCA special education manager asked if the general education teachers could leave as they had meetings with other students. The Director agreed and the specified teachers left the meeting.
33. When the District Director asked the student about why the student had been involuntarily withdrawn from the Senior Honors English class,<sup>14</sup> the ORCA English teacher who was present made no comments. Similarly, the ORCA social studies teacher did not comment on the student’s progress in the Government class.
34. The student participated in the discussions in both meetings, explaining needs, describing challenges and vision issues, and asking pertinent questions.
35. The parent and the family friend also participated in the same manner.
36. The record showed that the Director listened carefully and asked many clarifying questions.
37. At the end of the meeting the Director stated that the District would evaluate in three possible areas of disability: Vision Impairment, Other Health Impairment, and Specific Learning Disabilities. In addition, the District would conduct academic, cognitive and Orientation and Mobility assessments, all to be completed using a vision protocol.

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<sup>13</sup> In the portions of the tape to which the investigator listened, very few of the charter school staff participated in the discussion regarding this material—most of discussion was conducted by the District Special Education Director.

<sup>14</sup> The student was withdrawn from this class because the student could not see to write the senior research paper. Instead ORCA staff arranged a 0.18 credit in Language Arts for a reading and conference class. The student read the novel *Pride and Prejudice* (Jane Austen) and discussed it with the teacher.

38. The team scheduled several more meetings to meet and to revise the student's 504 plan. On January 23, 2012 the Director sent an email message to the parent and noted that the next steps in the pre-referral plan were to work with a college transition/career counseling package/access; complete a new academic and cognitive assessment with vision impairment protocol; complete a new orientation and mobility assessment; and document the history of accommodations for the ACT/SAT board.
39. On January 25, 2012, the District sent the student a prior notice about evaluation and consent for evaluation form. The District had written that it was planning to evaluate the student "because the student continued to experience a decline and changes in vision acuity deficits and the impairment has continued to challenge the student's levels of participation and access to general education curriculum and transition to college and adult life." Staff also noted that they were "seeking additional assessments for consideration and to potentially determine additional support for the student." The District staff included a medical or health assessment.
40. The student signed the consent to evaluate form on February 2, 2012 with some caveats. The student stipulated that the vision reports from Drs. Hoenig and Bailey would substitute for the health assessment; and that disclosures of confidential information to the assessors was limited to the reports from Drs. Hoenig and Bailey. The parent and the student asked the District to document when "requested information<sup>15</sup> was sent to student and parent; when approval to accept evaluator's credentials was given; and when and how information was given to approved evaluator."
41. On February 29, 2012, the District requested permission from the student for the school psychologist appointed to assess the student to speak with Dr. Hoenig. The student gave consent but again stipulated the conversation was limited to "the vision doctor's reports only."
42. The school psychologist interviewed the parent and student, and conducted two assessments with the student over the weekends of March 3-4 and 10-11, 2012. In addition, the school psychologist consulted with Dr. Hoenig, the Linn Benton Lincoln ESD Vision Specialist and the orientation and mobility specialist hired to assess the student. The school psychologist reviewed the vision reports written by Drs. Hoenig, Bailey, and Smith and the functional vision assessments written by vision specialists from Southern Oregon ESD and a private Vision Specialist the parent had hired in 2011. Finally, the school psychologist read the reports from the Southern Oregon Assistive Technology Specialist who assessed the student in 2009 and 2011 on behalf of the District A School District.
43. The school psychologist administered some sections of the Wechsler Individual Achievement Test – 3<sup>rd</sup> edition (WIAT-III); and of the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV). The school psychologist explained the changes made in the test administration of both tests in order to obtain accurate information without setting the student's vision off. "In summary, to increase the accuracy of the assessment information (to ensure a valid outcome and not to unduly discriminate or focus on vision weaknesses), breaks were provided, testing was conducted over several days, and all testing was verbally administered. The results from these assessments and activities need to be viewed within the context of the testing administration and breaks in standardization, the student's documented vision diagnosis and illness during testing."
44. Pertinent information from the school psychologist's report, dated April 2, 2012, is summarized below:

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<sup>15</sup> The parent and student requested information from the District about the professional credentials of each evaluator the District selected to do the testing.

- a) Teacher Report: the ORCA social studies teacher told the psychologist in an interview that a primary concern was that the teacher had not been able to evaluate the student's writing skills—a "critical skill in Social Studies that most students are expected to demonstrate," also that even though the student's academic performance has been excellent, "courses have been modified to omit all written work."
  - b) Consultation with Dr. Hoenig: "has seen only 10 cases in a 30 year career as a specialist. The student's visual condition is caused by a malfunction in the frontal lobe that causes the muscles that are used for focusing the eyes to spasm, the two eyes to cross, and the student cannot use them together."
  - c) (WIAT-III) Reading comprehension: the subtest was administered by the examiner reading aloud the passages and the student responding orally. The student scored in the Very Superior (155 SS) range.
  - d) (WIAT-III) Math Numerical Operations and Math Problem-Solving: both subtests were administered orally with the examiner reading aloud the math problem and the student answering orally. When it was acceptable for the examinee to use pencil and paper to work the problem, the examiner acted as a scribe and wrote down exactly what the student instructed and read back what had been written down when asked by the student. Administering these subtests took 3—4 times longer than standard administration. The student scored in the above average (121 SS) range on the Numerical Operations subtest and the average skill range (104 SS) in Math Problem Solving.
  - e) (WIAT-III) Written Expression: The student was given the Spelling, Sentence Composition, and Essay Composition subtests of the Written Language section of the test. The student scored in the Low (66 SS) range in spelling; but due to the nature of the breaks in standard administration, scores could not be reported for either the sentence composition or essay composition subtests.
  - f) (WAIS-IV): Due to the visual aspects of many of the subtests on the WAIS, they could not be administered therefore, a full scale IQ score could not be obtained and the only composite score obtained was the Verbal Comprehension scale. The student scores in the Very Superior range (150 SS).
  - g) Adaptive Behavior: **"Through interviews it was determined that the student has the knowledge needed to have age appropriate adaptive skills, but in the impaired (vision) state, the student is not able to apply that knowledge due to vision restrictions."**<sup>16</sup>
45. The student was also evaluated by a Certified Orientation and Mobility Specialist who is also a Certified Vision Rehabilitation Therapist. This individual assessed the student on March 4—5, 2012 at the student's home and in various locations in the community of District A. After observing the student move around the home and the community; and having the student try various visual aids while simulating blindness (a white cane, touch dots, etc.) the specialist concluded:
- a) "This is a very unique case. While at times the vision is normal, life goes on daily. But, when it is 'set-off', life does not go on normally for the student, who stays home and out of touch with the world."
  - b) "If the student had blindness training, the student could utilize it when experiencing episodes of impaired vision, and thus go on with life."
  - c) "Those skills would include: Orientation and Mobility, Daily Living Skills training, Braille, technology and recreation, etc. The student has many areas that need to be addressed."
46. On March 7, 2012, the parent wrote to the Director and asked to see the copy of the report from the Orientation and Mobility specialist. The specialist had told the parent the report was finished. The Director replied that the District's policy was not to send out reports until the report was explained by the specialist at the eligibility meeting.

<sup>16</sup> Bolded text added by original author.

47. On March 13, 2012, the parent wrote again to the Director and stated that all assessments were completed, and asked how soon the team could meet so that the student could get the help the student needed. The Director wrote back on March 14, 2012. In that email, the Director said the Team meeting would be scheduled once the District received the written report from the school psychologist. The Director also asked, "What do you mean by getting the student the help...we have talked about what special education eligibility means for a student so close to graduation."
48. The parent replied to the Director on March 15, 2012, and asked for clarification on special education eligibility. The Director replied on March 19, 2012, and told the parent that the reason for the comments on special education eligibility was that the Director understood that "current supports are in place for the student to reach graduation requirements in a very short period of time."
49. On March 21, 2012, the parent sent a seven page letter the District, detailing the student's vision difficulties, school history, and asking for a meeting with the superintendent. In the letter the parent also stated the belief that the District had committed multiple 504 and IDEA violations. The parent asked the Director to schedule a meeting to find the student eligible for special education with all possible haste.
50. On March 23, 2012, the Director wrote an email to the parent and asked for possible dates for an eligibility meeting. Between that date and April 18, 2012, the Director sent at least four emails to the parent on the subject of possible meeting dates and the fact that the Director had not yet received both evaluation reports.<sup>17</sup>
51. In mid-March, specific date not known, the student finished the course requirements for the Government and Algebra classes. ORCA recorded the student's graduation date on the transcript as January 26, 2012.
52. On April 18, 2012, the District sent the parent a letter informing the parent and student that since the student had completed the requirements for a standard diploma, the eligibility process had been stopped and the District would not hold an eligibility meeting. The District offered copies of the two evaluation reports to the parent and offered a meeting to discuss the evaluations.
53. The parent filed this complaint on April 30, 2012.

#### **IV. DISCUSSION**

##### **Special Education Evaluations:**

The parent and student allege that the District did not identify and evaluate the student for Special Education Eligibility when the District should have known that the Student was in need of special education services. OAR 581-015-2080(2) states that "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, including:...

(d) Children who are suspected of having a disability even though they are advancing from grade to grade

(e) Children enrolled in public charter schools;"

After July 1, 2011, child find, evaluation, re-evaluation, eligibility determination, provision of FAPE and

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<sup>17</sup> The Director read the reports, once received, and then sent them back to the evaluators for correction (grammar, spelling, etc.).

related special education requirements for children in the Oregon Connections Academy Charter School were the responsibility of District B School District. Residency for all students enrolled in charter schools is the district in which the charter school is located, regardless of parental residency or residency of the adult student. Prior to these changes in Oregon residency rules, these charter school students were the responsibility of the respective resident district. Therefore, the District had an obligation to evaluate this child for special education when the legal obligation for FAPE transferred on July 1.<sup>18</sup>

Additionally, State evaluation and reevaluation rules exist which would apply in this case. OAR 581-015-2110 (4) requires that:

- “(d) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
- (e) The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; and
- (f) The evaluation includes assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.”

When the 2011-2012 school year started, the student was still of an age to qualify for special education and related services under the IDEA, and had not yet been awarded a regular diploma. After the student sent an email to the District requesting an evaluation in September of 2011, the District contacted the student's attorney, but never directly contacted the student or the parent to follow up or for clarification about the evaluation that was requested.<sup>19</sup> Over the period of approximately 50 school days from September 8, 2011 to November 22, 2011 the student continued to exhibit signs of vision impairment and to struggle with academic assignments due to an inability to read complex visual material. In fact, the record showed that no one in the District or in the charter school asked the student or parent for more specific information about the student's request for evaluation. Of additional concern is that most of the charter school staff who were working with the student at this time had attended eligibility meetings held by the resident district in May 2011, and expressed the opinion at those meetings that the student was visually impaired.

The IDEA gives states the ability to determine timelines for evaluations and reevaluations if those timelines were in effect at the time IDEA 2004 became law.<sup>20</sup> Oregon law requires that generally evaluations and reevaluations under IDEA must be conducted within 60 school days of written consent.<sup>21</sup> Here, the adult student consented to an evaluation by making the request to the District on September 8, 2011 consistent with rights afforded to adult students under 34 CFR 300.301 and 34 CFR 520(a)(ii). However, the District did not commence any sort of evaluation within 60 days of the request or send a Prior Written Notice at this time explaining the denial of the request as required by State law.<sup>22</sup> Prior Written Notice should be sent within a reasonable amount of time.<sup>23</sup> The district did not evaluate the child or send a Prior Written Notice for the evaluation until January 25, 2012, which is well in excess of the 60 school day state requirement for the completion of evaluations.<sup>24</sup> The Department has held that when districts do not

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<sup>18</sup> ORS Chapter 338

<sup>19</sup> Under Oregon law, when the statutory changes about residency became effective, the District had the obligation to provide the following information to the student's parent, guardian, or person in parental relationship: (A) The school district's responsibility to identify, locate and evaluate to determine a student's need for special education and related services and to provide those special education services in the public charter school; and (B) The methods by which the school district may be contacted to answer questions or provide information related to special education and related services (OAR 581-015-2075).

<sup>20</sup> 34 CFR 300.301(c)(2)(ii) and 34 CFR 300.303

<sup>21</sup> OAR 581-015-2110(5)

<sup>22</sup> OAR 581-15-2310(1)

<sup>23</sup> *Id.*

<sup>24</sup> OAR 581-015-2110(5)

properly determine whether to conduct an evaluation, and do not provide parents with Prior Written Notice either agreeing to conduct an evaluation or refusing to conduct the evaluation, that those errors result in undue delay in initiating an evaluation.<sup>25</sup> The failure to contact the student, combined with the incorrect information about IDEA responsibilities provided by the charter school, did not quickly define for the student and the parent which responsibilities had shifted from District A to District B over the summer. However, the District eventually proceeded with its evaluation process.

Once the District communicated with the family about the evaluation request, the District gathered pre-referral information, read the medical reports the family sent, and conducted a file review; finally holding a meeting to discuss the “pre-referral” process in January 2012. Eventually, a school psychologist and a Certified Orientation and Mobility specialist assessed the student in March and April 2012. However, the District never completed this drawn out eligibility process—instead canceling their process in the middle, after the student finished the required course work and the charter school recorded graduation with a regular diploma on the student’s transcript, thus ending any potential eligibility under IDEA pursuant to State law.<sup>26</sup> It is important to note that District staff was aware of the fact that the student was going to graduate shortly, and referenced this to the parent in numerous conversations surrounding the completed evaluations which had not been shared (due to the claimed necessity of another pending meeting), in March 2012. District staff even questioned why the parent wanted to help the child at this time “so near graduation.” Neither IDEA nor State law claim that an impending graduation is a reason to delay or prevent IDEA evaluations or eligibility. Nor does this fact negate the District’s responsibilities under State and Federal law. Additionally, over six months lapsed between the time this student requested an evaluation and when the evaluation request was eventually terminated due to the student’s graduation. Although, in light of the exceptional nature of this case, State law would have permitted the District to provide FAPE to the child post graduation with a regular diploma.<sup>27</sup> Noteworthy here is the fact that the District did not even mention this option to the parent or adult child, or explain any district policies on the matter, despite the fact that adult student specifically asked about continued FAPE services and the student was so near graduation.

At various points along the process, it is evident that District staff believed the student would never be eligible for special education under the IDEA because there was no demonstrated “adverse impact.” The District Director stated this several times in the pre-referral meeting held on January 9, 2012. At the same time, the student was passing classes with good grades but without completing any written assignments; and the school psychologist was able to get valid assessment results on the student only by breaking the standard test administration protocol into sections which would not aggravate the student’s visual condition. The social studies teacher noted concerns with the fact that no evaluation of the student’s writing skills were possible, which is unusual for a senior in high school. Finally, the District was in possession of a written report by an optometrist informing them that the student had a rare visual condition caused by a malfunction in the frontal lobe. The District had many reasons to suspect a disability which would have warranted an evaluation under the IDEA. As similarly reasoned in Case No. 12-054-011, In the Matter of District A School District; the federal Office of Special Education Programs opined in *Letter to Redacted*, dated January 13, 2010, that while IDEA is silent regarding “twice exceptional” students, “it remains the Department’s position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations.” Also in *Letter to Redacted*, OSEP stated, “Moreover, it has been the Department’s long-standing position that, in general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child’s current academic achievement reflects the service augmentation, and not what the child’s achievement would be without such help.” Here, even though the student made good grades based on

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<sup>25</sup> Oregon Due Process 06-054-023

<sup>26</sup> OAR 581-015-2045(2)

<sup>27</sup> OAR 581-015-2045(3)

[Student's] cognitive and verbal skills, Student could have been eligible for special education or related services under the IDEA had a proper evaluation and eligibility discussion timely occurred.

The District clearly did not consider any information about the outside or extra learning support its own charter school provided the student or the time which family and friends provided to aid the student. Given the amount of time the District took to respond to the student's request for evaluation, the knowledge it had about the student's disability during this timeframe, the failure to provide a PWN explaining decisions to not evaluate, and the fact that District summarily and unilaterally cancelled any consideration of IDEA eligibility, the Department finds a violation and orders Corrective Action.

### **Parental Participation:**

The parent and student allege that the District did not provide the adult student with the opportunity to participate in meetings held in January 2012, referred to by District as "pre-referral" meetings, by

- a. not considering evaluations and information provided by the adult student; and
- b. predetermining the outcome of the meeting.

The IDEA does not specifically address "pre-evaluation meetings," nor does State law consider these meetings to be IEP meetings *per se*. The student came into the District on a 504 plan, and was not on an IEP while in the District. There was never an IEP meeting specifically for the student while attending this District. However, IDEA and State law<sup>28</sup> require that the parent have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE.<sup>29</sup>

While the IDEA does not specifically define or address this sort of "pre-referral meeting," districts may not use referral or pre-referral processes, including RTI, as a means of denying students evaluations or coverage under the IDEA. Therefore, applicable IDEA analysis of this form of "pre-referral meeting" is better addressed in the previous section.

The District labeled the meetings as other than an IEP meeting, and the student never had an IEP while in the District. The adult student would have the parental rights in this case pursuant to State law.<sup>30</sup> For IEP meetings, Districts should consider the results of any independent educational evaluations, discuss placement options, and answer parents' questions.<sup>31</sup> The District provided tapes of several lengthy meetings with the adult student, parent, and District staff. The results of independent educational evaluations were apparently presented and considered during these meetings, and the parent was allowed to ask questions which the District appeared to answer most of the time. While the record shows that the District should have employed better practices in terms of communication with the student and family, and that there were often moments of awkward or potentially forced silence at the meetings, the District did present evidence of at least considering the provided information by the parent. However, the District also maintained an ill guided notion of IDEA ineligibility throughout all of the meetings and taped conversations. While affording the student and parent with opportunities to share information it is unclear how much the district considered this information in their determinations, but procedurally there is no concrete evidence of predetermination as the independent evaluations were viewed by the team and parent's questions were answered by District staff. However, during the pre-referral meetings, very little of this information provided by parent was actually discussed. When the Director asked for information about the student's progress in current classes at the meeting, classroom teachers did not speak up which could add to parent or student concern regarding "predetermination." Also adding to the parent's concern of "predetermination" is at the beginning of the meeting, the Director strongly noted that no one

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<sup>28</sup> 34 CFR 300.501; OAR 581-015-2190

<sup>29</sup> OAR 581-015-2190(1)

<sup>30</sup> See OAR 581-015-2000(1)

<sup>31</sup> L.M. v Capistrano Unified Sch. Dist., 50 IDELR 181 (9th Cir. 2009)

on the ORCA staff had concerns about the student’s academic progress or skills. The Director used a standardized format to lead a discussion on the student’s strengths, challenges, current academic situation and need for accommodations. In short, much could have been done to improve the overall substantive quality of this meeting and avoided parental concerns of predetermination. While falling just short of an evident IDEA violation for parent participation, the District could have easily improved its practices by offering more in terms of communication with all parties. Instead, the Director appeared to run the meetings almost unilaterally and often did not appear to put the student first. The Director did finally offer to help write a 504 plan which could address transition and career issues for the student; and to conduct the academic, cognitive, and orientation and mobility evaluations.

The record shows the parent and adult student were given the opportunity to present information at these meetings and to participate. There was not substantial evidence of predetermination at these meetings and the District could show that the parent and adult student attended and participated in the meetings. This allegation is not substantiated.

### CORRECTIVE ACTION<sup>32</sup>

*In the Matter of District B School District  
Case No. 12-054-015*

Actions	Submissions <sup>33</sup>	Due By
<p>Policy, Procedure, and Practice Review:</p> <p>1. The District is responsible for the oversight of schools within the district, including charter schools, and for the provision of special education services. To ensure the District’s policies and procedures used for these purposes are aligned with IDEA, the District must:</p> <p>a. For the areas listed below, identify the existing District and school<sup>34</sup> policies, administrative regulations (AR), internal procedures, staff directives, and information</p>	<p>a. Submit to ODE copies of existing<sup>35</sup> documents listed in Action 1.a. for review and approval. Identify which documents apply district wide, to</p>	<p><b>July 13, 2012</b></p>

<sup>32</sup> 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)).

<sup>21</sup> Corrective action plans and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone — (503) 947-5722; e-mail: [raeann.ray@state.or.us](mailto:raeann.ray@state.or.us) fax number (503) 378-5156.

<sup>34</sup> Including charter schools and information from the National Connections Academy

<sup>35</sup> This request is for currently existing documents only; no new documentation needs to be created. If the District believes it previously submitted a requested item as part of the response to the complaint, please identify which document ODE should consider in its review.

<p>provided to parents/adult students:</p> <ul style="list-style-type: none"> <li>•Child Find</li> <li>•Evaluation/reevaluation</li> <li>•Eligibility Determination and Termination of Eligibility</li> <li>•Transfer of Procedural Rights at Age of Majority</li> <li>•Procedural Safeguards including, but not limited to: <ul style="list-style-type: none"> <li>-parent (adult student) participation with respect to the identification, evaluation, educational placement, or provision of FAPE to students with disabilities;</li> <li>-prior written notice; and</li> <li>-responding to parent/adult student requests for evaluation/reevaluation.</li> </ul> </li> </ul> <p>2. Upon ODE approval of documents, provide training to staff all staff regarding documents in 1.a.</p> <p>3. The District has previously submitted a signed assurance of compliance with IDEA in conjunction with its application to ODE for its IDEA funds.</p>	<p>include the charter schools, or whether a document is charter specific, and whether the document was in effect in the July 1, 2011 – June 30, 2012 year.</p> <p>Documents may be submitted electronically or in paper copy.</p> <p>2.a. Distribute the documents to staff by e-mail, copied to ODE.</p> <p>2.b. Provide training on the approved documents in 1.a. and submit verification of training including:</p> <ul style="list-style-type: none"> <li>• A signed roster of participants, including name, position, and location;</li> <li>• Date(s) of training;</li> <li>• Presenter; and</li> <li>• Material presented in the training session(s).</li> </ul> <p>2.c. Submit evidence of completed training, including the documentation listed in submission 2.b. above.</p> <p>3. Upon review and ODE approval of documentation submitted in 1.a, submit a signed assurance that these documents are in effect district wide, including in both charter schools. Attach a copy of the policies.</p>	<p><b>August 30, 2012</b></p> <p><b>September 30, 2012</b></p> <p><b>September 30, 2012</b></p> <p><b>September 30, 2012</b></p>
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<p>4.ODE monitoring of District's responses to requests for evaluation from October 2012 to January 2013.</p>	<p>4. Using secure file transfer, submit copies of parental requests for evaluation/re-evaluation and district responses to those requests received since the prior date. For October 15, submit those requests submitted since the first day of school.</p>	<p><b>Due Dates</b>  <b>October 15, 2012</b>  <b>November 15, 2012</b>  <b>December 15, 2012</b>  <b>January 15, 2013</b></p>
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Dated: July 6, 2012

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

Mailing Date: July 6, 2012

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

Additionally, pursuant to OAR 581-015-2030(14)(b), the Department of Education will not reconsider complaints after a Final Order has been issued.