

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION**

In the Matter of Salem-Keizer School )  
District 24J )  
 )  
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FINDINGS OF FACT,  
CONCLUSIONS,  
AND FINAL ORDER  
Case No. 14-054-019

**I. BACKGROUND**

On May 20, 2014, the Oregon Department of Education (Department) received a letter of complaint from legal counsel for the parents (Parents) of a student (Student) residing and attending school in the Salem-Keizer School District (District). The complaint requested a special education investigation under OAR 581-015-2030. The Department provided a copy of the complaint letter to the District by email on May 20, 2014.

Under federal and state law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue a final order within 60 days of receiving the complaint unless exceptional circumstances require an extension.<sup>1</sup> On May 23, 2014, the Department sent a *Request for Response* to the District identifying the specific IDEA allegations in the complaint to be investigated. On June 4, 2014, the Department suspended the investigation timeline pending mediation. On June 17, 2014, the Department learned that the matter did not resolve in mediation. The Department revised the timeline for the District's *Response* to July 2, 2014. On June 30, 2014, the District timely submitted its *Response* to the *Request for Response*, with accompanying documentation. On July 7, 2014, the Parents provided a written *Reply* in this case. On July 30, 2014, the Department extended the investigation timeline in this case by 21 days due to District staff unavailability. This order is timely.

On August 14, 2014, the District provided a correction to the District's *Response* to the Department (correcting the name of the medical professional who signed a January 30, 2014 medical statement). The Department's contract complaint investigator (complaint investigator) determined that on-site interviews were necessary in this case, and on August 18, 2014 (the earliest date of availability for the necessary District staff), the complaint investigator interviewed District staff, including the Principal, two regular education teachers, a special education teacher, a school psychologist, two program administrators and a counselor. The complaint investigator reviewed and considered all of the documents received 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 OAR 581-015-2030 and 34 CFR §§ 300.151-153. The complainant's allegations and the Department's conclusions are set out in the chart below. The Department based its conclusions on the Findings of Fact in Section III and the Discussion in Section IV. This complaint covers the one year period from May 21, 2013, to the filing of this complaint on May 20, 2014.<sup>2</sup>

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<sup>1</sup> OAR 581-015-2030; 34 CFR §§ 300.151-153

<sup>2</sup> OAR 581-015-2030(5)

No.	Allegations	Conclusions
1.	<p><b><u>Child Find; Evaluation and Eligibility Determination</u></b></p> <p>The complaint alleges the District violated the IDEA by failing to identify and evaluate the Student as a child with a disability who, as a result, needs special education and related services.</p> <p>Relevant law: OAR 581-015-2080 and 34 CFR 300.111; 34 CFR 303.302, 34 CFR 301; OAR 581-015-2100 – 581-015-2114 and 34 CFR 300.301, 300.303, 300.304, 30.305; OAR 581-015-2120 and 34 CFR300.306, 300.308, 300.111</p>	<p><b><u>Substantiated in Part</u></b></p> <p>The record does not demonstrate that District could have conclusively had reason to suspect the child was disabled and in need of special education prior to January 2014.</p> <p>However, District did not comply with the initial evaluation requirements specifically related to the Parent’s right to request an initial evaluation for special education services. The District also used Response to Intervention (RTI) as a means to delay IDEA initial evaluation and eligibility procedures. Corrective Action is therefore ordered for these areas of noncompliance.</p>
2,	<p><b><u>Free Appropriate Public Education (FAPE)</u></b></p> <p>The complaint alleges that the District’s failure to evaluate and identify the Student as a child with a disability in accordance with the requirements of IDEA and OAR resulted in a denial of FAPE.</p> <p>Relevant law: OAR 581-015-2040 and 34 CFR 300.101</p>	<p><b><u>Not Substantiated</u></b></p> <p>The Department does not agree that the record indicates Student was denied educational benefit solely as a result of a failure to evaluate and identify the Student as a child with a disability due to other factors including: the child’s young age and maturity level, the fact that the child was previously in a half day kindergarten and then moved to a full day first grade, and the fact that Student had many days of nonattendance at school, including two weeks during the first month of first grade. The evidence also shows that Student made progress and achieved educational benefit in the kindergarten room. For these reasons, the Department does not substantiate the allegation and orders no corrective action.</p>
3.	<p><b><u>Disciplinary Removals of More than 10 Days; FAPE</u></b></p> <p>The complaint alleges the District violated the IDEA by failing to implement an effective individualized behavior plan based on positive interventions and subsequently forced a disciplinary removal of more than 10 consecutive school days without following special education due process procedures,</p>	<p><b><u>Not Substantiated</u></b></p> <p>The Department does not sustain the allegation that the District violated the IDEA by removing the Student more than 10 consecutive school days for disciplinary reasons without following special education procedures. Additionally, the Parent removed Student from school voluntarily on a number of occasions. Finally, a pattern of removals from school did not occur after the</p>

	<p>despite having knowledge that the Student is a student with a disability. The complaint further alleges that the behavior plan deprived the Student of classroom time and behavioral support the Student needed to make educational and social progress, resulting in a denial of a FAPE.</p> <p>Relevant law: OAR 581-015-2415 and 34 CFR 300.504(a)(3), 300.531, 300.532, 300.533; OAR 581-015-2440 and 34 CFR 300.534; 300.534</p>	<p>District was engaged in IDEA evaluation procedures for Student. The Department does not substantiate this allegation.</p>
4.	<p><b><u>Prior Written Notice (PWN)</u></b></p> <p>The complaint alleges the District violated the IDEA by failing to provide Prior Written Notice (PWN) of the District's refusal to consider eligibility for special education under the category of Other Health Impairment (OHI).</p> <p>Relevant law: OAR 581-015-2310 and 34 CFR 300.503.</p>	<p><b><u>Substantiated</u></b></p> <p>The documentation reveals that the District did not send a Prior Written Notice to accept or reject the Parent's request for an initial evaluation in a timely manner after the Parent's request for initial evaluation was initially made in late November 2013. The Department therefore does substantiate this portion of the allegation.</p>
5.	<p><b><u>Additional Parent Participation Requirements for IEP and Placement Meetings</u></b></p> <p>The complaint alleges that the District violated the IDEA by failing to provide to the Parents a copy of the IEP from the May 1, 2014 IEP meeting.</p> <p>Relevant law: OAR 581-015-2195 and 34 CFR 300.322, 300.500, 300.327, 300.328, 300.501(c).</p>	<p><b><u>Not Substantiated.</u></b></p> <p>The record does not show an IEP was created on this date. District is not required to provide to the Parents a copy of an IEP that does not exist. The Department does not substantiate this allegation.</p>
	<p><b><u>Proposed Corrective Action</u></b></p> <p>The complaint requests the following corrective action:</p> <p>"[T]he Department should order that:</p> <ol style="list-style-type: none"> <li>1. The District provide 180 hours of flexibly scheduled one-to-one instruction;</li> <li>2. The District should provide Extended School Year instruction over the summer;</li> </ol>	<p>See Corrective action.</p>

<p>3. The tutoring should be provided to [the Student] at the [S]tudent's elementary school during the day while school is in session and at [the Student's] home during the summer;</p> <p>4. The District should place [the Student] in the age appropriate class for next year with an IEP."</p>	
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### III. FINDINGS OF FACT

#### Background

1. The Student in this case is presently seven years old and has completed kindergarten at the District. The District has determined that the Student is presently not eligible for special education services, although the District is currently in the process of an evaluation for Student for the eligibility category of Other Health Impairment (OHI).

#### Child Find; Evaluation and Eligibility Determination; FAPE

2. The Student attended kindergarten at an elementary school in the District during the 2012-2013 school year. The Student's report card at the end of the 2012-2013 school year reveals a student with six "areas of concern" ("Student rhymes words", "Student orally blends and takes apart sounds in words", "Student knows letter sounds", "Student reads numerals to 20", "Student writes numerals to 20" and "Student counts forward"), while "developing" or "consistently demonstrates" the remaining assessment areas. The Student received an "excellent" rating in the areas of "Demonstrates respect for classmates, adults, and property" and "Accepts responsibility for own actions, is self-directed" and received "Satisfactory +" ratings in the remaining assessment areas under the category of "Characteristics of Successful Learners". During the 2012-2013 school year the District recorded a total of 18 absences for the Student. The documents provided by the District in this case included "Student Profile Information" from the 2012-2013 school year, including additional data concerning the Student's progress during the 2012-2013 school year. No behavior issues were noted in the foregoing documentation. The Student profile from the 2012-2013 school year did note that the Student "can be quite nervous." Additionally, at an open house before the 2013-2014 school year the Parents reported to the Student's first grade teacher that they were concerned about the Student being new to the elementary school and reported the Student might be nervous and they were not sure how the Student would adjust going from two and one-half hour school days in kindergarten to a full school day in first grade.
3. The Student began first grade at a new District elementary school at the beginning of the 2013-2014 school year. The 2013-2014 school year began on September 4, 2013. The Student attended school for eight days from September 4, 2013 through September 20, 2013. The District then recorded the Student was absent during the third and fourth full weeks of school, from September 23, 2013 through October 4, 2014. District staff reported the Student had missed school due to a hunting trip. District staff reported that on October 7, 2013, the Student "was very resistant" to returning to school following the hunting trip and one of the Student's Parents had carried the Student into school with the Student crying. The Student experienced difficulty the next several weeks at school. District staff reported during the on-site interviews that much of the Student's difficulty at school resulted from the Student's two-week absence and the fact that the Student was

behind on school work. The Student often stated that the school work "was too hard". District staff identified other factors contributing to the Student's difficulties at school, including the Student's academic level on fundamental academic skills, including recognition of letters and sounds and sight words. The Student's first grade teacher reported that the Student recognized only one of twenty sight words during the first week of school. Additional factors noted by District staff included the transition from kindergarten expectations to the expectations placed upon a first grade Student, the change from one elementary school to another when beginning first grade, and the inability to develop relationships with other Students due to the Student's absences.

4. Although not clearly delineated in the District's *Response* in this case, the Student's first grade teacher reported during the on-site interviews that the teacher addressed the Student with the District's "Response to Intervention" (RTI) Team due to concerns about the Student. The District provided notes to the complaint investigator on August 19, 2014, the day after the on-site interviews, from a meeting of the RTI Team dated September 27, 2013 (during the Student's absence on a hunting trip). These notes refer to an "irrational fear" and that the Student is "super low" (academically). On October 8, 2013, the District's counselor called one of the Parents to inquire if the Student possibly had Attention Deficit Disorder (ADD). The Parent advised that the Student had been evaluated by a physician and did not have ADD.
5. District staff reported that the Student's difficulty with the school work in the first grade classroom is believed to be the primary reason the Student began presenting with behavioral issues. Although the Parents had advised the District that changes in weather might result in anxiety on the part of the Student due to a weather-related incident when the Student was younger, District staff reported that the behavior incidents of the Student only rarely coincided with weather and often occurred when the blinds were closed. District staff believes the behavior incidents were related to the Student's academic difficulties in the first grade classroom. The District also reported that Student missing two weeks of school in late September/early October "set [S]tudent back" significantly academically, and delayed the District's ability to determine Student's academic needs. During the on-site interviews in this case, District staff acknowledged the District learned in October of 2013 from the Parents that the Student took medication, that the District believed was for anxiety. However, District staff also reported that the Parents did not provide any information concerning the specifics of this medication or the Student's medical needs to the District.
6. In response to the Student's academic and behavioral difficulties the Student's first grade teacher worked with the Student by modifying school work tasks, having an Instructional Assistant work with the Student, having the Student work in small groups, and having the Student work alone. The Student's first grade teacher explained that the first weeks of first grade always involve assessing each student's abilities and determining whether the student requires interventions. In response to the Student's continued academic difficulties and behavior incidents the District's RTI Team suggested several interventions for the Student in the first grade classroom, including: "Designated thinking spot in the classroom," "Time out in a buddy room to regroup," "alternative seating in classroom – new groupings, individually and with instructional assistant," "An individualized incentive chart to work toward special privileges in the classroom," "individualized time with counselor and with principal," "Meetings and ongoing communication with Parents," "Phone contact with [P]arent during behavioral episodes," "Parent spending the day at school with the [S]tudent," and "Individualized behavior support plan." These interventions are listed in a "Behavioral Support Plan for [the Student]." (BSP).
7. District staff reported that the BSP should not have been so captioned but should have been referred to as an "intervention plan" for Student. However labeled, the BSP states that "the crying episodes, refusal to follow directions, or complete school work, have all negatively impacted the learning environment for [the Student] and the rest of the class." The BSP also states that the listed

interventions have "...had limited success. Behavioral episodes can occur at any point in the day; however the most severe behaviors tend to occur later in the day." The BSP then states that a new intervention will be tried with the agreement of the Parents, and that the new intervention is that the Student is to begin a shortened school day (9:15-11:00 a.m.) on November 18, 2013, in the first-grade classroom.

8. The District required the Student to attend school on a shortened school day in the hopes of improving behavioral concerns.<sup>3</sup> Student attended school from 9:15-11:00 a.m., in the first grade classroom, beginning November 18, 2013. The Student continued to present behavior issues and continued having difficulty, academically, in the first grade classroom even with the shortened school day.
9. In the District's *Response* in this case, the District states that on November 23, 2013, the Parents inquired about the special education process and requested an evaluation. However, during the on-site interviews, District staff clarified that one of the Parents had requested an "IEP" in a discussion with the principal not an evaluation for special education. The principal explained, at this time, the general process of obtaining an IEP, including that interventions were first required and then an evaluation for eligibility for special education could be completed depending on the Student's response to interventions. This information was offered in an explanatory manner and not as a means to delay the evaluation.
10. The District temporarily placed Student back into the kindergarten room on a trial basis on December 2, 2013 in order to see if the Student's behavior improved.
11. The Student continued to have academic difficulties in the first grade classroom and had two behavior incidents which occurred on December 2, 2013 and December 4, 2013.
12. District staff noted immediate improvement both behaviorally and academically following the Student's temporary change to the kindergarten classroom though Student continued to demonstrate some behavioral problems in January. The Student's kindergarten classroom teacher reported during the on-site interviews that the Student is academically a "mid-level" kindergarten student, and that the work is sufficiently challenging to keep the Student interested. Some behavioral incidents were reported by the kindergarten teacher during January of 2014. The notes show that these incidents consisted of: not listening to directions, pushing another student, being off task, not reading during reading small groups, not following along after being asked multiple times, not being focused, shouting during carpet time, being silly, arguing with another student, trouble following directions, crying and throwing classroom objects. The notes were dated January 16, 2014 and January 30, 2014.
13. The District's documentation in this case includes a report card for the Student's 2013-2014 kindergarten progress, and includes data concerning progress in the kindergarten classroom. The report card and progress data are consistent with the Student's kindergarten teacher's statements noted above. The Kindergarten Progress Report dated 2012-2013 showed that there were several "areas of concern" for the Student related to academic areas including: rhyme words, orally blending and taking apart sounds, knowing letter sounds, reading numerals to 20, writing numerals to 20, and counting forward. However, the Student did not have any areas of concern for behavior related areas on this report card, and instead showed satisfactory or excellent marks in all areas related to the "characteristics of a successful learner". These areas related to attention and

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<sup>3</sup> Note that Student had attended a half day kindergarten program prior to entering first grade, so this schedule would be more familiar to the Student based on the prior year's experiences.

behavior and include: focuses attention, listens attentively, demonstrates respect for classmates and adults, and organizes self and belongings.

14. The Kindergarten Progress Report dated 2013-2014 indicates that Student missed 35 days of school over the three quarters in the grading period, but Student's grades showed significant progress over the three grading periods. During the end of this year, the Student's grades were all proficient at grade level or were showing developing proficiency.
15. On January 14, 2014, District staff (a Principal, the first grade and kindergarten teachers) and the Parents and an advocate for the Parents met. The District determined it would retain the Student in kindergarten for the 2013-2014 school year, citing considerations including that first grade work was possibly too advanced academically and for the social and emotional "aspects", and citing the results of the "Light's Retention Scale" which indicated the Student as a good candidate for retention.
16. In an "Agreement for Retention" form dated January 21, 2014, a form which the Parents would not sign, District staff stated "Academically & socially & emotionally [the Student] struggled in gr. 1. [The Student] had frequent episodes of crying & refusing to do any work. Since conditionally placing [the Student] in a kinder classroom, we have not had any of these behaviors until Parents spoke to [the Student] about possibly moving back to grade 1." One of the Parents expressed concern with retention in kindergarten for the 2013-2014 school year, because if the Student turns 18 in July before the Student's senior year in high school, the Parents would not be able to legally force the Student to complete high school.
17. At the meeting on January 14, 2014, the Parents stated that the Student had two medical conditions: Post traumatic stress disorder (PTSD) and extreme anxiety, and stated that the Parents wanted an evaluation for special education. The Parents had not apprised District staff of any existing or suspected medical diagnoses until the January 14, 2014 meeting. The District then agreed that the Parents were entitled to an evaluation for special education if there were medical diagnoses.<sup>4</sup>
18. On January 21, 2014 the Parents signed a consent for evaluation. The District's meeting minutes of the January 21, 2014 meeting state the Student will be evaluated "in the area of emotional disturbance", and that ADHD rating scales will be completed. The meeting minutes also indicate the District had not received any medical diagnoses for the Student, but that the Parents stated there was a "possibility" of ADHD. The District also determined that pending completion of the evaluation, the Student would stay in the present placement in the kindergarten classroom. The District advised they would meet again within 60 school days, most likely in April of 2014.
19. The District notes indicate that District asked Parent to sign a release of medical information form for Student in January of 2014, so that District may communicate with Student's doctor. The Special Education teacher called the doctor's office and spoke directly to the Student's doctor. The notes state that the doctor told this teacher that Student had never been diagnosed with PTSD and the doctor was not the type of doctor who could diagnose a person with PTSD. The notes also state that the doctor had given the family a referral to a child psychologist in October, but the family had not followed through. Finally, the doctor stated that when the family brought Student to the doctor following the January 21, 2014 meeting, they asked for another referral which the doctor gave to them.

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<sup>4</sup> Note, parent may request an initial evaluation even without a medical diagnosis pursuant to OAR 581-015-2105(2).

20. The District completed the assessments agreed upon at the January 21, 2014 meeting, including a vision screen, an "Audiometric Report", three ADHD rating scales and an ADHD Parent interview, two "Achenbach Syndrome Scale Scores," a "Woodcock Johnson III – Normative Update Tests of Achievement", a "Behavior Assessment System for children", a Wechsler Intelligence Scale 1V", two observations of the Student in the kindergarten classroom, and a "Summary of Assessment – Confidential Psychological Report." The District also received a medical statement dated January 30, 2014 stating the Student has "Anxiety and probably ADHD."
21. District staff and the Parents next met on May 1, 2014. The meeting minutes of the May 1, 2014 meeting state that the Student's kindergarten teacher reported that the Student has progressed and is presently "on grade level in [the Student's] kindergarten class." Concerning the question of eligibility, District staff was somewhat divided concerning the Student's IDEA eligibility under the category of Emotional Disturbance (ED). Although the assessments completed by a District school psychologist showed "global anxiety difficulties" (as stated by the school psychologist during on-site interviews in this case), the more difficult question is whether this anxiety had an adverse impact on the Student's education. The meeting minutes of the May 1, 2014 meeting state that the Parents stated that they were presently consulting with a new doctor, and that doctor believed that ED was not an appropriate diagnosis, that the Student had a disability of ADHD, and that the Parents wanted more time to discuss with their doctor whether Other Health Impairment (OHI) is the appropriate IDEA eligibility for Student. The District and the Parents agreed to meet again before 60 school days had passed (from the consent for evaluation for the ED and ADHD rating scales, which had been signed on January 21, 2014).
22. On May 5, 2014, District staff and the Parents again met concerning eligibility. The meeting minutes from this meeting state that after consulting with their doctor, the Parents did not believe that the Student should be qualified for IDEA services under an eligibility of ED. The Parents reported their doctor had advised anxiety is part of ADHD, and that ADHD, and the Student's anxiety, could appropriately be included under an eligibility category of OHI. The meeting minutes also state that the "team chose does not qualify [under ED] as there is still information being gathered. Parents signed form and then passed around for everyone else to sign. All signed and marked agree."
23. The Parents signed a new consent for evaluation form dated May 5, 2014 (a "Prior Notice About Evaluation/consent for Evaluation" form), which states the Student will be evaluated "for eligibility determination under the category of Other Health Impairment." This form also states that the assessments are to include "Occupational Therapy assessment" and "ADHD rating scales." The meeting minutes from the May 5, 2014 meeting state that District staff advised that the new evaluations may take up to 60 school days, which "would take us to the middle of October."
24. On May 5, 2014, the District issued a Prior Notice of Special Education Action (PWN) stating the "team decided not to qualify [the Student] for special education services in this area" (the area of ED). On May 19, 2014, the District received a medical statement dated May 15, 2014. This medical statement states that the Student has "health impairments" of "ADHD and Anxiety".

#### **Disciplinary Removals of More than 10 Days; FAPE**

25. The District has not presently, and has at no time prior, determined that the Student is eligible for special education services or in need of special education services, although an evaluation for an Other Health Impairment (OHI) is presently underway for the Student.
26. From the beginning of the 2013-2014 school year to the first documented behavior incident on November 13, 2013, the Principal and counselor would assist the first grade teacher by redirecting the Student, both in and sometimes out of the classroom if needed. The Student usually calmed

down and was able to return to the classroom within five minutes. A District Principal reported that when this was unsuccessful, the District called the Parents, "only a handful of times" before November 13, 2013 and asked the Parents what they wanted to do. Parents normally requested to pick up the Student early. District staff believed these events to be not unusual for a student of this age along with the fact that Student was new to the elementary school, and the Student had difficulty adjusting to a full day of class.

27. The District's documentation includes eleven "Discipline Reports" involving behavior incidents for the Student which occurred on: November 12, 13, 14, 15, 18, 19, 20, 21 and 22, 2013, and on December 2 and 4, 2013. The behavior presented by the Student during these incidents included use of inappropriate language (swearing), not following directions, running in the hall, going under tables, crumpling up paper loudly, flapping the Student's hands, sitting in a chair in an unsafe manner, crying, looking out the window, stating work "is too hard", reaching for other students to get their attention, moving chair around, and not staying on task. Student went home early on November 21, 2013 following a behavioral incident.

**Prior Written Notice (PWN)**

28. The complaint does not identify precisely when the District is alleged to have failed to issue a Prior Written Notice (PWN) concerning a refusal to consider eligibility under OHI for the Student. An evaluation to determine the Student's eligibility under OHI is presently underway based on a signed parental consent dated May 5, 2014.
29. A PWN dated May 5, 2014 was sent to Parent at this time.

**Additional Parent Participation Requirements for IEP and Placement Meetings**

30. The District did not determine at the May 1, 2014 meeting that the Student is eligible for special education services, and no IEP has been developed by any IEP team for this Student.

**IV. DISCUSSION**

**I. Child Find; Evaluation and Eligibility Determination**

The complaint alleges the District violated the IDEA by failing to identify and evaluate the Student for eligibility as a child with a disability who, as a result, needs special education and related services.

OAR 581-015-2080 provides, in part:

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(2) School districts must identify, locate and evaluate all resident children with disabilities, regardless of the severity of the disability, who are in need of \* \* \* special education services \* \* \* \* \*.

Additionally, OAR 581-015-2100 provides that school districts are responsible for evaluating children and determining their eligibility for special education services. OAR 581-015-2105(3)(b) notes that a public agency must designate a team to determine whether an initial evaluation will be conducted. The team must include the parent and at least two professionals, at least one of whom

is a specialist knowledgeable and experienced in the evaluation and education of children with disabilities.<sup>5</sup> An initial evaluation must be conducted to determine if a child is eligible for special education services when a school district suspects or has reason to suspect that the child has a disability that has an adverse impact on the child's educational performance and the child may need special education services as a result of the disability. OAR 581-015-2105(3)(a)(A) and (B). The federal regulations also allow a parent to request an initial evaluation at any time, to determine if a child is a child with a disability.<sup>6</sup> If the District does not suspect the child has a disability, and denies the request for an initial evaluation, the District must provide written notice to parents explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision.<sup>7</sup> If the district does agree that the evaluation is necessary, the district must evaluate the child. The parent must be given notice and must provide informed consent before the district may evaluate the child.<sup>8</sup> Although the IDEA and its implementing regulations do not prescribe a specific timeframe from referral for evaluation to parental consent, it has been the US Department of Education's longstanding policy that a District must seek parental consent within a reasonable time after the referral for evaluation, if the District agrees that an evaluation is needed.<sup>9</sup>

The US Department of Education has stated that it is critical that the identification of children with disabilities, regardless of the severity of the disability, must occur in a timely manner, and that no procedures or practices may occur that result in delaying or denying this identification.<sup>10</sup>

As the District noted that RTI interventions were needed for this Student prior to the special education evaluation process, it is also important to define a general RTI framework for discussion purposes. While the US Department of Education does not subscribe to a particular RTI framework, the core characteristics that underpin all RTI models are: (1) students receiving high quality research based instruction in their general education setting; (2) continuing monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction.<sup>11</sup> Note that grade retention is not a typical RTI intervention.

For this allegation, there are two issues to consider. First, should the District have suspected that the Student had a disability and may need special education services? Second, did District meet IDEA initial evaluation requirements after the Parent requested an IEP and information related to the special education evaluation process in November 2013?

First, we will discuss if District should have suspected that Student had a disability and may need special education services, thus having a requirement to initiate an evaluation or the referral process for special education. The Student's records from the prior school year, 2012-2013, reflect that Student had no behavior problems in the half day kindergarten program. The record does indicate a number of "areas of concern" for the Student related to elements of reading and mathematical skill. However, there does appear to be progress for the Student academically and socially during that school year. There is no indication of attention or emotional problems in these reports, rather they reveal that Student was demonstrating the qualities of a successful learner along with grade level peers. Finally, the record reveals that Student missed 18 days of

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<sup>5</sup> OAR 581-015-2105(3)(b)(A)

<sup>6</sup> 34 CFR 300.301(b)

<sup>7</sup> 34 CFR 300.503(a) and (b)

<sup>8</sup> 34 CFR 300.503 and 504

<sup>9</sup> Assistance to States for the Education of Children with Disabilities and Preschool Children with Disabilities, Final Rule, 71 Fed. Reg., 46540,46637 (August 14, 2006).

<sup>10</sup> US Department of Education, Office of Special Education and Rehabilitative Services, OSEP Letter 11-07

<sup>11</sup> OSEP Letter 11-07, Id.

kindergarten and had 5 tardies during the 2012-2013 school year. School staff expressed concern over Student's attendance record and high number of absences in both kindergarten and first grade.

When the Student enrolled in the first grade at the school in question, the Parent filled out a school questionnaire and did not express any concerns related to disability or anxiety for the Student. Additionally, District reported that Parent did not reveal any concerns about Student disability during the early fall of 2013. District noted Parent removed Student from school for two full weeks during late September and early October for a family trip, and Student was very resistant to returning to school after this trip. District noted that Student was behind in the first grade class due to missing these two weeks of instructional time.

The District provided pre-referral interventions for Student to assist with the behavior and academic concerns from September 2013 to January 2014, prior to the Parent's signing a consent for evaluation on January 21, 2014. These interventions were selected because the Student was behind classmates academically because of absences, Student had not yet developed relationships with peers, and the Student was a young first grader given the Student's July birthday.

While the record does show some signs that District may have had cause to suspect a disability in Student during the fall of 2013, the record also reflects that District staff followed up with Parents quickly on these matters and were reassured by Parent that Student did not have a disability. For example, on October 8, 2013 the school counselor called Parent regarding Student's behavioral difficulties at school, and asked Parent if Student had an Attention Deficit Disorder (ADD). However, the Parent told the counselor that the Student had been evaluated by a physician and did not have ADD. The Parent reports that they told District staff that Student was on medication to address behaviors on October 10, 2013. There is no documentation in the record to support either Parent or District statements in relation to this argument; however, District notes do indicate that school staff was aware of an undisclosed medication that Student was taking in October on 2013. However, the use of an unspecific medication alone does not put the District on notice of the need for special education services. Additionally, District reported that when other school staff contacted Parent about Student's anxious behaviors in class, the Parents said that the behavior was merely due to "a weather related experience child had when younger" and a subsequent fear associated with weather changes as opposed to a disability. The school was not made aware of the Student's medical diagnosis until the team met with Parent in January of 2014 to discuss a referral for special education. So while District was aware of Student's behavior and academic problems as early as September of 2013, there is no evidence in the record that District would have had reason to believe that these problems were solely rooted in a disability rather than one of the following variables, which could also impact the behavior and performance of this Student: the age and maturity level of the child, the ten days of missed instructional time near the beginning of the first grade school year, the difficulty level of the Student's work in the first grade compared to the difficulty of the work in kindergarten, or the transition to a full day instructional program from the previously attended half day program. All of these factors could have contributed to the Student's difficulties during the fall of 2013, and without clear directions from Parent related to a perceived disability; District would not be likely to suspect a disability in the Student that would warrant special education services.

Next, the Department will analyze the allegation as related to the Parent's reported request to the school for special education services, which occurred in November of 2013. The District in their reply, note that the Parent requested a special education evaluation at the November 23, 2013 meeting, but the District did not provide Parent with a consent for evaluation form until a meeting which was scheduled on January 21, 2014. During this timeframe Student continued to display behavior problems in the reduced day first grade classroom, and the Student was even moved back

to kindergarten on December 2, 2013, prior to the meeting with Parent where the consent form would be offered. The District waited for 24 school days spanning over almost two calendar months to provide the Parent with the consent form for the special education evaluation which was requested on November 23, 2013. No Prior Written Notice was submitted from November or December nor was there an explanation from District as to why so much time was needed to provide Parent with the consent form.

District staff also expressed that RTI type interventions were being used to delay the special education evaluation process. Specifically, the Student's Principal reported in interviews that the Parent "asked for an IEP in October" but the Parent was instead told about the interventions that were being utilized for the Student, summarily dismissing the Parent's request for special education services or evaluations at that time. In the District's response, they indicate that this was not a formal dismissal and that instead they agreed to meet with Parent again in January to discuss an evaluation for special education, again waiting over 24 school days and almost two calendar months to officially respond to Parent's request for an initial evaluation.

Based on the foregoing, the Department does not sustain the allegation that the District violated the Child Find provisions in this case, as the District was not clearly on notice that Student had special education needs prior to January of 2014. However, the Department does find that District violated the initial evaluation requirements related to Parent request for a special education evaluation due to the amount of time that was taken to provide Parent with a consent form after the request for evaluation, and the unnecessary delays in starting the special education referral, evaluation and associated eligibility process. See Corrective Action.

## II. FAPE

The complaint alleges that the District's failure to evaluate and identify the Student as a child with a disability in accordance with the requirements of IDEA and OAR resulted in a denial of FAPE.

The legal requirement regarding free appropriate public education (FAPE) can be found in OAR 581-015-2040 and 34 CFR 300.101. School districts must provide special education and related services to all resident school-aged children with disabilities. In determining whether a District has denied Student a FAPE, there is a two-part test. First, the District must comply with the procedures set forth in the IDEA, and second the Student's IEP must be reasonably calculated to enable the Student to receive educational benefits.<sup>12</sup> While harmless procedural errors do not constitute a denial of FAPE,<sup>13</sup> "...procedural inadequacies that result in the loss of educational opportunity...clearly result in the denial of FAPE."<sup>14</sup>

Here, it is important to note that Student has not yet been found eligible for special education nor in need of special education services to receive an educational opportunity. While District did make procedural errors in terms of initial evaluation and eligibility requirements that are discussed above, the District is currently engaged in the IDEA evaluation and eligibility process with Parents. The District first conducted evaluations of the child based on the anxiety and PTSD diagnosis under the eligibility category of Emotional Disturbance (ED). Due to the Parent's request, mixed team opinions about Student eligibility, and Parent's new medical information for Student, the eligibility team declined this ED eligibility and is now in the process of evaluation of the Student for the category of Other Health Impaired (OHI). The District has continued to implement a multitude of interventions

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<sup>12</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (U.S. 1982)

<sup>13</sup> L.M v Capistrano Unified Sch. Dist., 556 F.3d 900, 910 (9<sup>th</sup> Cir. 2008)

<sup>14</sup> Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072, 1079 (9<sup>th</sup> Cir. Ariz. 2003)

for the Student based on Student's academic and behavioral needs. Finally, the record shows Student made progress in kindergarten and received educational benefit.

Finally, the Department's discussion of the issues of Child Find above, also dispose of the allegation that the failure to evaluate and identify the Student as a child with a disability resulted in a denial of FAPE on this basis.

The Department does not sustain this allegation.

### **III. Disciplinary Removals of More than 10 Days; FAPE**

The complaint alleges that the District violated the IDEA by failing to implement an effective individualized behavior plan based on positive interventions and subsequently forced a disciplinary removal of more than 10 consecutive school days without following special education due process procedures, despite having knowledge that the Student is a student with a disability. The complaint further alleges that the behavior plan in place for Student deprived the Student of classroom time and behavioral support that the Student needed to make educational and social progress, resulting in a denial of a FAPE.

The IDEA provides that a district may remove a student with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 consecutive school days provided the same change of placement would be made in the case of a student without a disability.<sup>15</sup> Generally, a special education student who has been suspended for not more than 10 days receives no special protection under IDEA even if the misconduct is related to the student's disability.<sup>16</sup> A change of the location in which a student receives the educational program is not a change in placement and, as a result, does not trigger the obligation to conduct a manifestation determination review.<sup>17</sup> In the Parents' *Reply* in this case, the Parents argue that the District improperly abandoned the plan to reintegrate the Student into the first grade classroom. The Parents also challenge the District's assertion that the intervention of placing the Student in the kindergarten classroom, and the eventual retention of the Student in kindergarten during the remainder of the 2013-2014 school year "was very successful."

The Department must first note that these arguments do not relate to the relevant laws for IDEA disciplinary removals. Changing location of services or instruction for a general education student is not covered by IDEA discipline protections. Next, the Department finds that the documentation provided does not support the Parents' argument that the District planned to retain the Student in kindergarten all along. Rather, the District worked with Student in a variety of ways to assist with the academic and behavioral concerns. This included shortening the first grade school day to more closely align with the school day the Student had during kindergarten and moving the Student to the kindergarten classroom. The retention decision is beyond the scope of this complaint, in that the decision to retain a regular education student in kindergarten following an unsuccessful attempt at first grade, does not implicate the IDEA.

Additionally, the Department does not sustain the allegation that the District violated the IDEA by removing the Student for more than 10 consecutive school days for discipline reasons without following special education procedures. The fact is that the Student has not yet been determined to

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<sup>15</sup> 34 CFR 300.530(b)

<sup>16</sup> 34 CFR 300.530(b)

<sup>17</sup> *M.N. v. Rolla Pub. Sch. Dist.* 31, 59 IDELR 44 (W. D. Mo. 2012)

be eligible for special education as a student with a disability when the Student was moved to kindergarten, nor did District suspect Student had a disability at that time. Also, as noted above, the moves to the kindergarten room were not disciplinary in nature but were instead employed as an intervention to see if Student's behavior would improve, or if that grade level was more suitable for Student. Also, Student was not "sent home" for behavior concerns, but rather Parents chose to take Student home on a number of occasions when adverse behavior episodes occurred at school. The Department thus does not sustain this allegation.

#### IV. Prior Written Notice (PWN)

The complaint alleges that the District violated the IDEA by failing to provide PWN of the District's refusal to consider eligibility for special education under the category of OHI.

A district must provide parents with Prior Written Notice whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.<sup>18</sup> Upon request for an initial evaluation, the district must either: (1) provide the parent with a Prior Written Notice of the school district's proposal to conduct an initial evaluation, and obtain written parental consent for the evaluation or (2) Provide the parent with Prior Written Notice of the district's refusal to conduct an initial evaluation.<sup>19</sup> Providing parents with verbal notice as a substitute for written notice does not fulfil the Prior Written Notice requirements of IDEA, regardless of whether the verbal notice is substantively proper.<sup>20</sup> Relatedly, districts must also provide parents with notice of the procedural safeguards that the IDEA establishes upon parental request for evaluation of the child.<sup>21</sup>

The Parents' *Reply* in this case makes no argument on this issue nor lists dates or incidents when PWN was allegedly not received. However, the District did not provide a copy of any Prior Written Notice (PWN) documents from November or December of 2013 after the Parent's request for an "IEP" on November 23, 2013 and the subsequent discussions related to IDEA evaluation and eligibility that occurred with the Principal that day. District should have issued a Prior Written Notice at that time which clearly indicated if District would or would not commence the evaluation process with a description of applicable rationale.

However, there is no evidence in the record that District refused the OHI eligibility without sending a Prior Written Notice. The District was able to provide copies of Prior Written Notice sent to Parent on January 21, 2014 which details District's decision to complete an initial evaluation of the child which details parental consent for a variety of evaluations. The District also submitted a copy of a PWN dated May 5, 2014 which details that District would evaluate Student for OHI eligibility. The Parent indicated they consented to such evaluations on this form. District is therefore still within the permissible evaluation period for the OHI eligibility and there is no evidence District failed to consider eligibility in this area. To the contrary, the evidence indicates that District is currently considering OHI eligibility and is in the midst of the requisite evaluation process.

District also submitted a Prior Written Notice dated May 5, 2014 which indicated that District refused to identify Student as a student eligible for services with an emotional disturbance. However, this form is silent in regard to Other Health Impairment and does not indicate that eligibility was denied. Finally, District submitted a PNW dated May 28, 2014 that indicates Student's educational records were corrected due to one error.

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<sup>18</sup> 34 CFR 300.503(a)(1) through 34 CFR 300.503(a)(2)

<sup>19</sup> ODE Final Order 06-054-023

<sup>20</sup> *Union Sch. Dist. v. Smith*, 20 IDELR 987 (9<sup>th</sup> Cir. 1994).

<sup>21</sup> 34 CFR 300.504(a)

The Department does sustain this allegation.

**V. Additional Parent Participation Requirements for IEP and Placement Meetings**

The complaint alleges that the District violated the IDEA by failing to provide to the Parents a copy of the IEP from the May 1, 2014 IEP meeting.

The School District must give Parents a copy of their child's IEP at no cost to the Parent.<sup>22</sup>

The Parents' *Reply* in this case makes no argument on this issue. Further, documentation in this case reveals that the District did not determine at the May 1, 2014 meeting that the Student is eligible for special education services, and no IEP was developed by any IEP team for this Student at that time. Under these circumstances, the District is not required to provide to the Parents a copy of an IEP that does not exist. The Department does not sustain this allegation.

**CORRECTIVE ACTION<sup>23</sup>**  
*In the Matter of Salem-Keizer School District*  
 Case No. 14-054-019

	Action	Submission	
1.	<p><b><u>Policy and Procedure Review</u></b></p> <p>Prepare for District/ODE review of current policies, administrative regulations, directions to district staff, and information provided to parents related to:</p> <ul style="list-style-type: none"> <li>a. Deciding which children need an evaluation to determine special education eligibility;</li> <li>b. Responding to a request from a parent or teacher for an evaluation for special education eligibility;</li> <li>c. The role of Response to Intervention (RTI) procedures in evaluation for special education eligibility.</li> </ul> <p>Review with ODE the district's current policies, administrative regulations, directions to district staff, and information provided to parents related to:</p>	<p>Submit copies of, or links to, documentation addressing topics listed in 1 (a, b, c).</p> <p>Contact ODE to schedule time and method of review (conference call, etc.).</p> <p>Submit email to ODE verifying meeting participation.</p>	<p>September 25, 2014</p> <p>September 25, 2014</p> <p>October 10, 2014</p>

<sup>22</sup> 20 USC 1414(d)(1)(B)(i) and 34 CFR 300.322(f)

<sup>23</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)).

	<ul style="list-style-type: none"> <li>a. Deciding which children need an evaluation to determine special education eligibility;</li> <li>b. Responding to a request from a parent or teacher for an evaluation for special education eligibility;</li> <li>c. The role of Response to Intervention (RTI) procedures in evaluation for special education eligibility.</li> </ul>		
2	<p><b><u>Policy and Procedure Revision</u></b></p> <p>Based upon joint ODE/district review, make any necessary revisions. Note any timelines needed by district policy or state law for district adoption of changes.</p>	Submit original versions with revisions/edits visible. These may be submitted electronically.	October 31, 2014
3	<p><b><u>Staff Training</u></b></p> <p>Upon ODE approval, provide training to administrators and special educators who may be responsible for providing information to parents and distributing revised information for referrals for evaluation through District website.</p>	Agenda, Attendance verification sheet (signatures, date, position).	January 15. 2015

Dated this 3rd Day of September 2014



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

Mailing Date: September 3, 2014