November 1, 2021

 **BY EMAIL**

REDACTED

RE: Case #2020-SG-02

REDACTED:

This letter is the final order on the June 11, 2020, appeal filed by REDACTED (Parents) against REDACTED.

**APPELLATE PROCEURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

On appeal, Parents allege that REDACTED Charter School and REDACTED School District discriminated against their child (Student). Parents specifically allege that (1) an administrator at REDACTED Public Charter School (Administrator 1) repeatedly harassed Student A on the basis of disability and restrained Student A on one occasion, and (2) REDACTED Public Charter School failed to provide Student A with an equitable complaint process..

I. Appellate Procedures Alleging Discrimination

The Oregon Department of Education has jurisdiction to resolve this complaint as specified in OAR 581-002-00003. When a person files with the department an appeal of a complaint alleging discrimination, the department will initiate an investigation to determine whether discrimination may have occurred.[[1]](#footnote-1)

If the department determines that a violation of a law or rule described in OAR 581-002-0003 occurred, the department must issue a preliminary order to the complainant and the district.[[2]](#footnote-2) The preliminary order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s preliminary findings of fact, and the department’s preliminary conclusions.[[3]](#footnote-3)

If the department issues a preliminary final order, the complainant and district must attempt to reach an agreement on how to resolve the matter through conciliation.[[4]](#footnote-4) If the parties do not reach an agreement through conciliation, the department will issue a final order as described in OAR 581-002-0017.[[5]](#footnote-5) The final order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s findings of fact, the department’s conclusions, and a short explanation of any corrective action required by the district.[[6]](#footnote-6)

II. Appeals of Complaints Originating at Public Charter Schools

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

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

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

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

Because the duty to “identify, locate[,] and evaluate students” with disabilities in this case is a shared responsibility, the department determined that both the district and the school should participate in conciliation.[[10]](#footnote-10) Because conciliation failed, the department will tailor any corrective action so that it is specific to the deficiency of the responsible party. REDACTED School District’s corrective action will be tailored to the areas in which it is deficient and REDACTED Charter School’s corrective action will be tailored to the areas in which it is deficient.

III. Status of Appeal

In this appeal, the department has completed its investigation and issued a preliminary final order in which the department determined that a violation of a law or rule described in OAR 581-002-0003 occurred. Parents, REDACTED Charter School, and REDACTED School District subsequently failed to conciliate.

This letter constitutes the department’s final order setting forth the department’s findings of fact, conclusions of law, and any corrective action to be taken by the school and the district.

**PROCEDURAL BACKGROUND**

This is an appeal alleging discrimination by REDACTED Public Charter School.

On December 20, 2019, one of Student A’s parents (Parent A) approached Administrator 1, requesting to discuss an interaction that had occurred between the administrator and Student A on December 19, 2020. On January 15, 2020, Parents sent a letter of complaint to the board about the December 19th incident, specifying that Administrator I had harassed, intimidated, and bullied Student A on the basis of disability. Parents also alleged that Administrator 1 had engaged in other discriminatory conduct. On January 30, 2020, Parents met with Administrator 1, a teacher at the school (Teacher 1), and a member of REDACTED Public Charter School Board of Directors (Board Member 2) to discuss the December 19th incident and other alleged discriminatory conduct. The school directed Parents to meet with Administrator 1 before appearing before the board in accordance with the school’s complaint process. On February 4, 2020, Parents sent a second letter of complaint to the board reiterating their complaint of harassment, intimidation, and bullying by Administrator 1. As part of their complaint, Parents raised the issue of discrimination on the basis of disability. Thereafter, Parents corresponded with a member of the board (Board Member 1) who communicated to Parents that the school could not find an investigator to investigate Parents’ allegations.

In its response to Parents’ appeal, the district argues that Parents’ complaint was heard by the board at its February 4, 2020, meeting. Parents were not provided with a decision. On multiple occasions, the board communicated to Parents that the school could not find an investigator. In short, the school had actual notice of alleged facts that would constitute, if true, discrimination under Oregon law and rule.[[11]](#footnote-11) The school continued to communicate its intent to investigate Parents’ allegations, but did not do so.

For the reasons articulated above, the department accepted Parents’ appeal on June 11, 2020.[[12]](#footnote-12) The department accepted the appeal pursuant to OAR 581-002-0005(1)(a)(C), under which the department will accept a complaint on appeal if “[t]he district fails to resolve the complaint within 90 days of the initial filing of the complaint.”

On April 19, 2021, the department issued a preliminary final order finding REDACTED Charter School and REDACTED School District may have been deficient on specified grounds.

Following April 19, 2021, the school and the district attempted to reach an agreement with Parents. The parties did not reach an agreement.

For good cause, the department extended the date by which it had to issue this final order until November 1, 2021.

This order constitutes the final order for case #2020-SG-02.

**FINDINGS OF FACT**

For purposes of making its final determination on case #2020-SG-02, the Oregon Department of Education adopts the findings of fact set forth in the preliminary final order issued for that case on April 19, 2021.[[13]](#footnote-13)

**ANALYSIS**

For purposes of making its final determination on case #2020-SG-02, the Oregon Department of Education adopts the analysis set forth in the preliminary final order issued for that case on April 19, 2021.[[14]](#footnote-14)

**CONCLUSIONS**

In consideration of the evidence, the Oregon Department of Education finds that REDACTED Charter School is deficient on the following grounds:

* REDACTED Public Charter School failed to provide Student with equitable relief in violation of federal 504 law and regulation.

The department finds that REDACTED Charter School is not deficient with respect to any other alleged violation.

Accordingly, the department orders REDACTED Charter School to take the following corrective action:

I. Development of Procedures and Notice

1. In consultation with REDACTED School District’s Director of Special Education, the school must develop written procedures outlining the school’s responsibilities to provide a free appropriate public education (FAPE) to qualified individuals with disabilities under Section 504 of the Rehabilitation Act of 1973 and its implementing regulations and Title II of the Americans with Disabilities Act of 1990 and its implementing regulations. The procedures must comply with requirements pertaining to (1) the educational setting for qualified individuals, (2) the identification, evaluation, and placement of qualified individuals, and (3) the procedural safeguards available to qualified individuals, including all due process protections available to qualified individuals.
2. In consultation with REDACTED School District’s Director of Special Education, the school must develop written notice of procedural safeguards to be provided to any student with a Section 504 Plan who is attending the school and any parent or guardian of a student with a Section 504 Plan who is attending the school.
3. In consultation with REDACTED School District’s Superintendent, the school must develop written nondiscrimination policies and discrimination complaint procedures outlining the school’s responsibilities to provide an environment free of discrimination and harassment under ORS 659.850 and OAR 581-021-0045 and all applicable federal nondiscrimination laws. The school must ensure the discrimination complaint procedures expressly state:
	* 1. Complainants may bypass any informal complaint steps and file a formal written complaint with the school’s administrator.
		2. If the administrator is the subject of the complaint, the individual may file the complaint with the school board.
		3. Complaints against the school board as a whole or against an individual board member may be filed with the board’s chair, who may refer the complaint to the school’s attorney. Complaints against the school board’s chair may be filed with the school board’s vice chair.
		4. The complainant – if the complainant is a person who resides in the district, a parent or guardian of a student who attends school in the district, or a student – is not satisfied after exhausting local complaint procedures, the district fails to render a written decision within 30 days of submission of the complaint at any step in the school’s complaint process, or fails to resolve the complaint within 90 days of the initial filing of the complaint, the complainant may file the complaint with the Oregon Department of Education under OAR 581-002-0001 – 581-002-0023.
4. By January 31, 2022, the school will provide the department with a draft of the written procedures, developed pursuant to this order, for the department’s review and approval. If the department orders the school to make any corrections to its procedures, notice, or timeline, the school must make the corrections and resubmit the corrected document to the department not more than 14 calendar days after receiving the order. Once the department approves the procedures, the school must adopt the procedures not more than 14 calendar days after receiving the approval.

II. Notice

1. Not more than 14 calendar days after the district adopts the procedures and notice developed pursuant to this order, the school must send by mail or electronic mail a copy of the procedures and notice to any student with a Section 504 Plan who is attending the school and any parent or guardian of a student with a Section 504 Plan who is attending the school.
2. Not more than 14 calendar days after sending a copy of the procedures and notice to students, parents, and guardians pursuant to this rule, the school must provide the department with the names of, and contact information for, all of the individuals who received a copy of the procedures and notice.
3. Not more than 14 calendar days after the department approves procedures developed pursuant to this order, the school must post a copy of the procedures on a webpage on the school’s website. The school must include a link to the webpage on the homepage of school’s website and in the school’s handbook for the 2022-2023 school year.
4. Not more than 14 calendar days after posting a copy of the procedures to a webpage on the school’s website, the school must notify the department that it posted the procedures.
5. By August 31, 2022 the school must send the department by mail or electronic mail the page from the school’s handbook for the 2022-2023 school year where the school included a link to the webpage.

III. Training

1. The school must conduct a training on the procedures, notice, and procedural safeguards developed pursuant to this order for any school staff that may have responsibility for implementing the procedures or who otherwise have a responsibility related to the procedures, notice, or procedural safeguards. The training must include: (1) the school’s responsibilities for providing FAPE to qualified students with disabilities under Section 504 of the Rehabilitation Act of 1973 and its implementing regulations, and (2) the full range of services that can be provided under Section 504 of the Rehabilitation Act of 1973, including special education and related aids and services.
2. The school must conduct a training on the nondiscrimination policy and discrimination complaint procedures developed pursuant to this order for any school staff that may have responsibility for implementing the policy or who otherwise have a responsibility related to the procedures. The training must include: (1) the school’s responsibilities for providing an environment free of discrimination and protected class harassment under ORS 659.850 and OAR 581-021-0045, and (2) the full range of services that can be provided under Section 504 of the Rehabilitation Act of 1973, including special education and related aids and services.
3. The school must conduct an annual training on mandatory reporting, which may be provided through PACE (Oregon School Boards Association).
4. The school must conduct a training on learning disabilities and trauma informed care.
5. Not later than February 28, 2022, the school must provide a copy of all materials that it intends to use to conduct the training required by this order to the department for approval. If the department orders the school to make any corrections to the materials, the school must make the corrections and resubmit the corrected materials to the department not more than 14 calendar days after receiving the order.
6. By March 31, 2022, the school must provide the department with confirmation that the school conducted the training required by this order by sending the department, by mail or electronic mail, a copy of a sign-in sheet containing the date on which the training was conducted and the names and titles of all school staff members who attended the training.

IV. REDACTED School District Involvement

1. The school must meet with REDACTED School District’s Director of Special Education to draft an agreement about when district staff – including, but not limited to, behavior specialists, occupational/physical therapists, school psychologists, clinical social workers, and child development specialists – must be contacted for consultation by, or included on, the school’s pre-referral and eligibility teams. The agreement must comply with requirements pertaining to (1) the educational setting for qualified individuals, (2) the identification, evaluation, and placement of qualified individuals, and (3) the procedural safeguards available to qualified individuals, including all due process protections available to qualified individuals.
2. By January 31, 2021, the school will provide the department with a draft of the agreement reached between the school and the district pursuant to this order. If the department orders the school and the district to make any corrections to the agreement, the school and district must make the corrections and resubmit the corrected agreement to the department not more than 14 calendar days after receiving the order.

The department also orders REDACTED School District to take the following corrective action:

a. The district must provide feedback on, and work collaboratively with REDACTED Public Charter School on developing, written procedures outlining the school’s responsibilities to provide FAPE to qualified individuals with disabilities.

b. The district must provide feedback on, and work collaboratively with REDACTED Public Charter School on developing, written procedures outlining the school’s responsibilities to provide an environment free of nondiscrimination and protected class harassment.

Upon request, the department will extend for good cause any of the timelines set forth in this order.

If REDACTED Charter School or REDACTED School District wishes to use the department as a resource in fulfilling the terms of this final order, the school or the district may contact the department.[[15]](#footnote-15)

If you have any questions, please contact me.

Sincerely,



Mark Mayer

Government and Legal Affairs

Mark.Mayer@state.or.us

1. OAR 581-002-0009. [↑](#footnote-ref-1)
2. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. OAR 581-002-0011. [↑](#footnote-ref-4)
5. OAR 581-002-0011(8). [↑](#footnote-ref-5)
6. OAR 581-002-0017(2). [↑](#footnote-ref-6)
7. *See* OAR 581-002-0001(2). [↑](#footnote-ref-7)
8. ORS 338.165(1). [↑](#footnote-ref-8)
9. There are strong public policy considerations for why ORS 338.165 should be read only as a proactive duty and not as a prohibition on delegation. Because a public charter school has continuous direct contact with the students attending the public charter school, the school district may need the public charter school to report to the school district students that it has identified as having a disability. A reading of the statute that would impose upon the school district a unilateral duty would result in an absurd interpretation of the statute, under which a public charter school may decide to simply not report that it has identified a student with a disability or even obfuscate any attempt by a school district to identify such students, making the school district strictly liable for actions not within its control. [↑](#footnote-ref-9)
10. Importantly, if only a school district is deficient in “identifying, locating, and evaluating” students with disabilities, only the school district will be found deficient. [↑](#footnote-ref-10)
11. *See* ORS 659.850 (prohibiting discrimination on the basis of disability in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly) and OAR 581-021-0045 (prohibiting discrimination on the basis of disability in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education). [↑](#footnote-ref-11)
12. The department also sent the district notice of an appeal on May 6, 2020. The department subsequently amended the notice to correct any deficiencies. The sent the amended notice on June 11, 2020, making that the official date of notice. [↑](#footnote-ref-12)
13. For the convenience of the parties, the preliminary final order is attached to this correspondence. [↑](#footnote-ref-13)
14. For the convenience of the parties, the preliminary final order is attached to this correspondence. [↑](#footnote-ref-14)
15. The department’s 504 expert is Winston Cornwall. He may be reached at: Winston.Cornwall@ode.state.or.us. [↑](#footnote-ref-15)