September 16**,** 2019

**BY EMAIL AND US MAIL**

COMPLAINANT

ADDRESS

ADDRESS

Superintendent Bryan Starr

Harrisburg School District

P.O. Box 208

Harrisburg, OR 97446

Dear COMPLAINANT and Superintendent Starr,

This letter constitutes the investigatory findings and conclusions of the March 25, 2019, appeal filed by COMPLAINANT (Complainant), a parent of a student attending school in Harrisburg School District. On appeal, Complainant alleges that the district violated state laws and rules that prohibit discriminating against a student on the basis of sex and sexual orientation.

## I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

Complainant alleges that Harrisburg School District discriminated on the basis of sex and sexual orientation because the district (1) did not respond appropriately to complaints alleging discrimination, and (2) did not provide a remedy for complaints alleging discrimination.

The Oregon Department of Education has jurisdiction to resolve this complaint under OAR 581-021-0049.[[1]](#footnote-1) When a person files with the department an appeal of a complaint alleging discrimination, the department will initiate an investigation to determine whether discrimination may have occurred.[[2]](#footnote-2) If the department finds that discrimination may have occurred, the department will issue a letter setting forth the department’s findings and conclusions and require the school district to attempt to reach an agreement with the complainant through conciliation.[[3]](#footnote-3) If the school district cannot reach an agreement with the complainant within 30 days, the department will schedule a hearing to determine whether the school district is in compliance with ORS 659.850.[[4]](#footnote-4) If the department determines that the school district is not in compliance with ORS 659.850, the department will issue an order requiring compliance.[[5]](#footnote-5) If the school district fails to comply with the order within 30 days, the department will issue an order imposing an appropriate remedy.[[6]](#footnote-6) Appropriate remedies include: (1) withholding all or part of one or more quarterly payments that otherwise would be paid to a school district under ORS 327.095, (2) assessing a daily fine against the school district, (3) forbidding the school district to participate in interschool activities, and (4) any other appropriate remedy.[[7]](#footnote-7)

On this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department’s investigatory findings and conclusions.

## II. PROCEDURAL BACKGROUND

During the month of February, 2018, Complainant had a conversation with a volunteer at the district. The conversation concerned the book *George* by Kate Pavao. During the conversation, Complainant learned that Harrisburg School District would not make *George* available at its elementary school library. Complainant claims that she subsequently communicated to two district administrators (Administrator I and Administrator II) that she was concerned that the district would not be making *George* available in violation of the law.

Evidence collected by the Oregon Department of Education substantiates Complainant’s version of events. On April 10, 2018, a district staff person and Administrator I exchanged emails. In his email, Administrator I wrote that he had been contacted by Complainant and that Complainant had alleged that the district was violating the law by not making the book *George* available at its elementary school library. Several months later, on January 28, 2019, Administrator I sent an email to Administrator II indicating that Complainant had told Administrator I that the district was committing a civil rights violation by obscuring the image from *George* on the posters promoting Oregon Battle of the Books (OBOB) and by not making *George* available. In response to Complainant’s allegations, Administrator I wrote to Complainant that if a parent wanted his or her child to read *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office.

On March 16, 2019, the department accepted Complainant’s appeal pursuant to OAR 581-021-0049(1), under which “[p]ersons may, after exhausting local grievance procedures or 90 days (whichever occurs first) appeal [a school district’s resolution of a complaint of discrimination] in writing to the Superintendent of Public Instruction.” Although Complainant had not exhausted local grievance procedures, 90 days had passed since Complainant first communicated her concern that the district was in violation of the law.

Furthermore, although Complainant did not file a formal complaint with the district, the district waived that process when it did not direct Complainant to do so. Instead, the district wrote to Complainant that if a parent wanted his or her child to read *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office.

## III. FINDINGS OF FACT

1. The Oregon Battle of the Books (OBOB) is a voluntary statewide reading competition sponsored by the Oregon Association of School Libraries. To encourage participation in the competition, OBOB provides grants through the Library Services and Technology Act.
2. As part of the competition, students in grades 3 through 12 read books representing a variety of styles and viewpoints. To decide which books to include, OBOB has a selection committee composed of current and former educators and school librarians. The selection committee accepts recommendations from educators, librarians, and other interested persons. The selection committee decides which books to include after considering a variety of factors, including whether the book is a “high quality, well-reviewed, age-appropriate title.”
3. Harrisburg School District participated in the competition during the 2018-2019 school year. The district received a grant for participating in the competition that year. The district obtained books through the grant. The district provided the books to a volunteer at the district (Volunteer) who served as the district’s OBOB coordinator.
4. One of the books included as part of the competition during the 2018-2019 school year was *George* by Kate Pavao, a book about a transgender fourth-grader who learns to be herself and to tell others about her gender identity.
5. Before the beginning of the 2018-2019 school year, the district chose to not make the book *George* available at its elementary school library. The district gave a copy of *George* to the city library.
6. During the month of February, 2018, Complainant had a conversation with Volunteer concerning the book *George*. During the conversation, Complainant learned that the district would not make *George* available at its elementary school library. Complainant subsequently communicated to Administrator I and Administrator II that she was concerned that the district would not be making *George* available at its elementary school library.
7. On March 1, 2018, Administrator I directed Administrator II to ask Volunteer whether the competition included a book about a transgender child.
8. On March 14, 2018, a staff person at the district (Staff Person) forwarded an email from OBOB to Administrator I. The email contained a message regarding the book *George*. The message concerned how the book would be handled in the competition. The message read, in pertinent part:

Please be assured that no content of a mature nature will be used in writing of questions for this book. Those students who participate in OBOB competitions but do not read *George* will not be subject to any content in questions that might reasonably be seen as objectionable for third-grade students.

\*\*\*\*\*

OBOB is a voluntary program. No child is required to read every title. If no member of a particular team reads a title, it does potentially put that team at a competitive disadvantage. Some teams will be able to avoid this by having the upper-level students on their team, or students whose parents support the inclusion of the book, read the title. Other teams may be composed of all third-graders or all children whose parents choose not to have them read this title at this time. This is okay. It may potentially disadvantage such a team in competition, but will not diminish the value of the reading students do, the teamwork they carry out, or the value of the 15 books on the list that they do read.

1. On March 21, 2018, at a meeting attended by Volunteer, Adminitrator I, and Administrator II, Administrator I announced his intention to read the book *George* over spring break.
2. On April 10, 2018, Staff Person I sent Administrator I an email. In the email, Staff Person I asked Administrator I if he had read the book *George*. In response, Administrator I wrote, “I read five chapters worth and it was all I could stomach.” Administrator I also wrote that he had been contacted by Complainant and that Complainant had alleged that the district was violating the law by not making *George* available at its elementary school library and by donating it to the city library.
3. On May 15, 2018, Volunteer forwarded an email from OBOB to Administrator II with attachments concerning the books selected by OBOB for students in grades 3 through 5 and grades 6 through 8. Volunteer also sent Administrator II the following email:

The 3-5 document has the book *George* listed, however we will not include George in our [elementary school] Battle of the Books book section. Should a parent purchase the book *George* and choose to have their child read it, we will not have any conversation and discussion about the book.

1. By the end of the 2018 school year, Administrator I informed Volunteer that the district’s elementary school would not be “housing the book *George*.”
2. On November 7, 2018, Volunteer sent an email to Administrator II. The email contained a list of questions provided by OBOB that could be used to prepare students for the competition. Volunteer wrote, “I will be using these questions with our OBOB students as well. Please not[e] this set has *George* questions included but the set reviewed with our students at [the elementary school] will not include *George* questions.”
3. Posters promoting OBOB for the 2018-2019 school year contained an image from the book *George*. The district hung the posters on district property. Before hanging the posters, the district obscured the image from *George*.
4. On January 28, 2019, Administrator I sent an email to Administrator II indicating that Complainant had told Administrator I that the district was committing a civil rights violation by obscuring the image from the book *George* on the posters promoting OBOB and by not making *George* available at its elementary school library.
5. On January 28, 2019, Administrator I wrote to Complainant that if a parent wanted his or her child to read the book *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office.
6. On February 16, 2019, Complainant notified the Oregon Department of Education of the district’s treatment of the book *George*. Complainant wrote that the district “[was] not allowing this book and whiting it out of posters” because the book featured a transgender child.
7. On March 16, 2019, the department accepted Complainant’s appeal.
8. During an interview with the department, Administrator I expressed that the district’s decisions regarding the book *George* were based on both district staff members’ discomfort with *George’s* plot and the notion that the district school board would withdraw the district from the OBOB competition if *George* was made available at the elementary school library. During the interview, Administrator I expressed that this notion – that the district school board would withdraw the district from the OBOB competition if *George* was made available – was the reason that the district did not provide Complainant with the means to address her complaint. Also during the interview, Administrator I acknowledged that part of the district’s reasoning in not making *George* available – that that if a parent wanted his or her child to read the book *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office – was flawed because information about where a parent a could obtain *George* was not made public.
9. During an interview with the department, Administrator II admitted that obscuring the image from the book *George* on the posters promoting OBOB brought additional attention to the district’s decisions regarding the book. Administrator II admitted that obscuring the image resulted in additional people asking questions about the book and ultimately resulted in the district removing the posters from the elementary school.

## IV. ANALYSIS

Under Oregon’s anti-discrimination statute,

A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.[[8]](#footnote-8)

For purposes of this prohibition, “discrimination” is defined to mean “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”[[9]](#footnote-9)

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

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

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

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

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

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

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

Additionally, under OAR 581-021-0046, a school district may not “provide any course or otherwise carry out any of its educational programs or activities on a discriminatory basis or require or refuse participation therein by any of its students on such basis.”[[10]](#footnote-10)

The issue addressed in this appeal is whether the Harrisburg School District violated ORS 659.850 and OAR 581-021-0045 or 581-021-0046 on the basis that the district (1) did not respond appropriately to complaints alleging discrimination, and (2) did not provide a remedy for complaints alleging discrimination.

### A. Whether Harrisburg School District Responded Appropriately to a Complaint Alleging Discrimination

On appeal, Complainant argues that Harrisburg School District did not respond appropriately to her complaint alleging discrimination. Complainant argues that the district limited her enjoyment of a “right, privilege, advantage, or opportunity” in violation of OAR 581-021-0045(3)(f).

According to Complainant, during the month of February, 2018, she had a conversation with Volunteer. The conversation concerned the book *George*. During the conversation, Complainant learned that Harrisburg School District would not make *George* available at its elementary school library. Complainant claims that she subsequently communicated to Administrator I and Administrator II that she was concerned that the district would not be making *George* available in violation of the law.

Evidence collected by the Oregon Department of Education substantiates Complainant’s version of events. On April 10, 2018, Staff Person and Administrator I exchanged emails. In his email, Administrator I wrote that he had been contacted by Complainant and that Complainant had alleged that the district was violating the law by not making the book *George* available at its elementary school library. Several months later, on January 28, 2019, Administrator I sent an email to Administrator II indicating that Complainant had told Administrator I that the district was committing a civil rights violation by obscuring the image from *George* on the posters promoting the Oregon Battle of the Books (OBOB) and by not making *George* available. In response to Complainant’s allegations, Administrator I wrote to Complainant that if a parent wanted his or her child to read *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office.

The district has adopted several policies that are applicable to Complainant’s situation. The district has policies for instructional resources and materials,[[11]](#footnote-11) complaints,[[12]](#footnote-12) sexual discrimination and harassment,[[13]](#footnote-13) and equal opportunity in education.[[14]](#footnote-14) Under its policy for equal opportunity in education, the district must “investigate complaints communicated to the district” alleging “exclusion from participation in, [denial] of benefit of[,] or subjected to[,] discrimination under any educational program or activity conducted by the district.”[[15]](#footnote-15) Furthermore, under the policy the district must adopt and publish grievance procedures “providing for prompt and equitable resolution” of such complaints.[[16]](#footnote-16)

Complainant alleges that in lieu of using any one of these policies to resolve her complaint, the district intimated that further complaints would result in the district withdrawing from the OBOB competition. Complainant’s allegation is substantiated by evidence gathered during departmental interviews. During an interview with the department, Administrator I expressed that the district’s decisions regarding the book *George* were based on both district staff members’ discomfort with *George’s* plot and the notion that the district school board would withdraw the district from the competition if *George* was made available at the elementary school library. Administrator I expressed that this notion – that the district school board would withdraw the district from the OBOB competition if *George* was made available – was the reason that the district did not direct Complainant to file a formal complaint. In short, because the district feared withdrawal from the competition, the district decided to (1) not make *George* available without reference to its policies and (2) not provide Complainant with a process for determining whether not making *George* available is a violation of Oregon’s anti-discrimination statute and related rules.

Other evidence substantiates that the district chose not to follow its policies and complaint processes. During another interview with the department, Administrator II admitted that obscuring the image from the book *George* on posters promoting OBOB brought additional attention to the district’s decisions regarding the book. Administrator II admitted that obscuring the image resulted in additional questions being asked about the book. In turn, those additional questions resulted in the district removing the posters from the elementary school.

Taken together, the evidence suggests that the district made decisions regarding the book *George* without reference to its policies. The evidence further suggests that when a parent raised concerns about those decisions, the district did not provide Complainant with a process for determining whether not making *George* available is a violation of Oregon’s anti-discrimination statute and related rules. For that reason, the department finds that discrimination based on sex and sexual orientation may have occurred in violation of OAR 581-021-0045 (3)(f).

### B. Whether Harrisburg School District Remedied a Complaint Alleging Discrimination on the Basis of Sex and Sexual Orientation

On appeal, Complainant argues that Harrisburg School District did not remedy her complaint alleging discrimination on the basis of sex and sexual orientation. Complainant argues that by doing so, the district denied her “an aid, benefit, or service” in violation of OAR 581-021-0045(3)(c).

In response, the district argues that it felt that the book *George* was inappropriate for “7 -11 year old students” because it contained adult subject matter, not because it contained subject matter related to sex and sexual orientation. The district also argues that if a parent wanted his or her child to read *George*, the parent could purchase the book, check a copy of the book out at the city library, or request a copy of the book from Administrator I, who keeps a copy of the book in his office. The district finally argues that OBOB is a voluntary competition and, thus, it has the discretion to make decisions about its involvement in the competition.

With respect to the district’s first argument, the evidence indicates that the district did not make its decisions regarding the book *George* wholly because it contained adult subject matter. The evidence indicates that the district made its decisions regarding *George* in part because it contained subject matter related to sex and sexual orientation. On April 10, 2018, when Staff Person sent Administrator I an email asking him if he had read *George*, Administrator I responded, “I read five chapters worth and it was all I could stomach.” Furthermore, during an interview with the department, Administrator I expressed that the district’s decisions regarding *George* were based on both district staff members’ discomfort with *George’s* plot and the notion that the district school board would withdraw the district from the OBOB competition if *George* was made available at the elementary school library.

With respect to the district’s second argument, the evidence indicates that the district had made the decision to wholly exclude the book *George* from the OBOB competition, not simply restrict student access to the book. On May 15, 2018, Volunteer forwarded an email from OBOB to Administrator II with attachments concerning the books selected by OBOB for students in grades 3 through 5 and grades 6 through 8. Volunteer also sent Administrator II the following email:

The 3-5 document has the book *George* listed, however we will not include *George* in our [elementary school] Battle of the Books book section. Should a parent purchase the book *George* and choose to have their child read it, we will not have any conversation and discussion about the book.

Furthermore, on November 7, 2018, Volunteer sent an email to Administrator II that contained a list of questions provided by OBOB that could be used to prepare students for the competition. Volunteer wrote, “I will be using these questions with our OBOB students as well. Please not[e] this set has *George* questions included but the set reviewed with our students at [the elementary school] will not include *George* questions.”

Finally, during an interview with the department, Administrator I acknowledged that part of the district’s reasoning in not making *George* available – that that if a parent wanted his or her child to read the book *George*, the parent could either purchase the book or request a copy of the book that Administrator I kept in his office – is flawed because information about where a parent a could obtain *George* was not made public.

The district’s third argument necessitates an analysis of the legal standard at issue in this case. Under Oregon’s anti-discrimination statute, a person may not be subjected to unreasonable treatment on the basis of the person’s sex or sexual orientation. Under OAR 581-021-0045(3)(c), a school district may not “deny any person . . . an aid, benefit, or service” on the basis of the person’s sex or sexual orientation. With respect to analyzing the District’s duty to remedy complaints alleging discrimination, the Oregon Department of Education relies on the federal anti-discrimination laws known as Title IX[[17]](#footnote-17) and the interpretation of those laws by federal courts. Because Title IX has the same intent as ORS 659.850 and OAR 581-021-0045, and because the text of ORS 659.850 and OAR 581-021-0045 allow the statute and rule to be applied broadly, the interpretation of Title IX by federal courts is an important tool for the department to use in adjudging the application of ORS 659.850 and OAR 581-021-0045.

With respect to instructional materials and resources, Title IX law does not require or prohibit the use or abridgment of curricular materials.[[18]](#footnote-18) However, when interpreting Title IX law in the context of choosing curricular materials, the United States Supreme Court has found that school districts are limited in their discretion to choose curricular materials if their motive was discriminatory.[[19]](#footnote-19) If the motive behind choosing curricular materials is to deny access to ideas with which a school district disagrees, and if this motive is the decisive factor in the school district’s decision, then the school district has exercised its discretion in violation of the law.[[20]](#footnote-20)

In this case, the evidence supports the contention that Harrisburg School District had the motive of denying access to ideas with which it disagreed and that that motive was the decisive factor in the decision to not make the book *George* available at the district’s elementary school library. On March 1, 2018, Administrator I directed Administrator II to ask Volunteer whether the competition included a book about a transgender child. On April 10, 2018, Staff Person I sent Administrator I an email. In the email, Staff Person I asked Administrator I if he had read *George*. In response, Administrator I wrote, “I read five chapters worth and it was all I could stomach.” By the end of the 2018 school year, Administrator I informed Volunteer that the district’s elementary school would not be “housing the book *George*.” Finally, during an interview with the department, Administrator I expressed that the district’s decisions regarding *George* were partly based on district staff members’ discomfort with *George’s* plot. Under these facts, as well as the entire history of the district’s decision regarding the availability of *George*, there is sufficient evidence to find that the district disagreed with the content of the book insofar as it told the story of a transgender fourth grader. There is also sufficient evidence to find that the district’s motive in limiting access to the book *George* was because of that disagreement.

In consideration of the facts on appeal, the Oregon Department of Education finds that the district may have denied Complainant “an aid, benefit, or service” in violation of OAR 581-021-0045 (3)(c) when it did not make the book *George* available at the district’s elementary school library.

##  V. CONCLUSION

In conclusion, the Oregon Department of Education finds that Harrisburg School District may have violated Oregon’s anti-discrimination statue and OAR 581-021-0045(3)(c) and (3)(f) because: (1) the district made decisions regarding the book *George* without reference to its policies, and when a parent raised concerns about those decisions, the district did not direct the parent to use one of several applicable complaint processes; and (2) because the district limited access to *George* on the basis that the district disagreed with the content of the book insofar as it told the story of a transgender fourth grader.

Accordingly, the Department encourages Complainant and the district to reach an agreement through conciliation. If Complainant and the district cannot reach an agreement through conciliation within 30 days, the department will schedule a hearing for the purpose of determining whether the District is in compliance with ORS 659.850.

If Complainant or the district wishes to use the department as a resource during conciliation, Complainant or the district may contact the department. [[21]](#footnote-21)

If the department schedules a hearing for the purpose of determining whether the district is in compliance with ORS 659.850, the scope of the hearing will be limited to the issues addressed in this appeal.

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Coordinator

Office of the Department

Mark.Mayer@state.or.us

1. The State School Board repealed OAR 581-021-0049 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Complainant’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-1)
2. OAR 581-021-0049(1). [↑](#footnote-ref-2)
3. OAR 581-021-0049(1)(b). [↑](#footnote-ref-3)
4. OAR 581-021-0049(2). [↑](#footnote-ref-4)
5. OAR 581-021-0049(3). [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. OAR 581-021-0049(3)(a) to (d). [↑](#footnote-ref-7)
8. ORS 659.850(2). OAR 581-021-0045(2) applies this prohibition specifically to the types of schools regulated by the Department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.” [↑](#footnote-ref-8)
9. ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools. [↑](#footnote-ref-9)
10. OAR 581-021-0046(1). [↑](#footnote-ref-10)
11. Harrisburg School District 7, Instructional Resources/Instructional Materials, IIA. [↑](#footnote-ref-11)
12. Harrisburg School District 7, Public Complaint Procedure, KL-AR(1). [↑](#footnote-ref-12)
13. Harrisburg School District 7, Sexual Harassment, GBN/JBA. [↑](#footnote-ref-13)
14. Harrisburg School District 7, Equal Education Opportunity, JB. [↑](#footnote-ref-14)
15. *Id*. [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. *See* Education Amendments of 1972, Public Law No. 92-318, Title IX, §§ 901-907 (codified at 20 U.S.C. §1681 *et seq.*). [↑](#footnote-ref-17)
18. 13 C.F.R. 113.455. [↑](#footnote-ref-18)
19. *Board of Education v. Pico*, 457 U.S. 853, 871 (1982). [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. The Department’s Title IX expert is Karin Moscon. She may be reached at 502-947-5706 or at Karin.moscon@state.or.us. [↑](#footnote-ref-21)