August 7, 2018

**BY EMAIL AND US MAIL**

COMPLAINANT

ADDRESS

ADDRESS

Superintendent Bill Watkins

Marcola School District

PO Box 820

Marcola, OR 97454

Dear COMPLAIANT and Superintendent Watkins:

This letter is the investigatory determination on the appeal of a complaint filed with Marcola School District (District) regarding possible violations of ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly) and OAR 581-021-0047 (prohibiting schools or programs operated by a school district, education service district or public charter school from using a Native American mascot, except under certain circumstances).

## I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

COMPLAINANT (Complainant) alleges that the District violated OAR 581-021-0047 by using a Native American mascot.

The Oregon Department of Education (Department) has jurisdiction to resolve this complaint under OAR 581-021-0049. When a complainant files with the Department an appeal of a complaint alleging discrimination, the Department will initiate an investigation to determine whether discrimination may have occurred. OAR 581-021-0049 (1). After its investigation, the Department will issue an investigatory determination. OAR 581-021-0049 (1)(b). If the Department finds that discrimination may have occurred, the Director of the Oregon Department of Education will require the school district that is the subject of the appeal to attempt to reach an agreement with the complainant through conciliation. OAR 581-021-0049 (1)(b).If the school district cannot reach an agreement with the complainant through conciliation within 30 days, the Director will schedule a hearing for the purpose of determining whether the school district is in compliance with ORS 659.850. OAR 581-021-0049 (2).

If the Director determines after holding the hearing that the school district is not in compliance with ORS 659.850, the Director will issue an order requiring compliance. OAR 581-021-0049 (3). If the school district fails to comply with the order within 30 days, the Director will issue an order imposing an appropriate remedy. OAR 581-021-0049 (3). 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. OAR 581-021-0049 (3)(a) to (d).

On this appeal, the Department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the Department’s investigatory determination on whether discrimination may have occurred.

## II. PROCEDURAL BACKGROUND

On or about June 20, 2018, Complainant filed a complaint with the District superintendent alleging that the District was in violation of OAR 581-021-0047. The District superintendent accepted the complaint and responded to it on June 25, 2018. In his response, the District superintendent found that the District was not in violation of OAR 581-021-0047.

Complainant filed an appeal with the District’s school board on or about July 5, 2018. The school board accepted the appeal and responded to it on July 9, 2018. In its response, the school board found that the District was not in violation of OAR 581-021-0047.

Complainant filed an appeal with the Department on July 10, 2018. The Department accepted the appeal on July 11, 2018.

This letter is the investigatory determination on the appeal.

## III. FINDINGS OF FACT

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

1. The District has adopted as its mascot the mustang horse.
2. The name of the District’s mascot varies. On July 25, 2018, the name of the District’s mascot posted on the District’s website was “Mohawk Mustangs.” However, on the letterhead of the letter sent by the District superintend to Complainant on June 25, 2018, the name of the District’s mascot was “Marcola Mustangs.”
3. The city of Marcola, Oregon, is located along the Mohawk River, in the Mohawk Valley. The Mohawk River and Mohawk Valley are named after the Mohawk River region in New York.
4. The image associated with the District’s mascot is the head and neck of a mustang, posing at a three quarter angle.
5. In all of the images presented to the Department of the District’s mascot, two feathers are attached to and hanging from the horse’s mane in the same manner that a feather earing would hang from a person’s ear if the person were wearing a feather earing.
6. In some, but not all, of the images presented to the Department of the District’s mascot, three stripes are drawn across the mustang’s snout. On July 25, 2018, the image of the District’s mascot posted on the District’s website had the stripes. However, on the letterhead of the letter sent by the District superintend to Complainant on June 25, 2018, the District’s mascot did not have the stripes.
7. The parities stipulate that the District has not entered into any agreement with a Native American tribe under which the District may use the names and images currently associated with their mascot.

## IV. ANALYSIS OF SPECIFIC ALLEGATIONS

Under Oregon law,

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. ORS 659.850 (2).

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.” ORS 659.850 (1).

Under OAR 581-021-0047 (2),

To ensure that all public schools are in compliance with ORS 659.850 which prohibits discrimination in public schools, on or after July 1, 2017, the use of any Native American mascot by a public school is prohibited. This prohibition includes the use of team names such as “Redskins,” “Savages,” “Indians,” “Indianettes,” “Chiefs,” “Chieftains,” and “Braves,” except as provided in [this rule].

The rule defines “Native American mascot” to mean:

[A] name, symbol or image that depicts or refers to an American Indian Tribe, individual, custom or tradition that is used by a public school as a mascot, nickname, logo, letterhead or team name. OAR 581-21-0047 (1)(b).

In summary, these provisions prohibit a public school from using a name, symbol or image that depicts or refers to an American Indian tribe, individual, custom or tradition that is used by a public school as a mascot, nickname, logo, letterhead or team name.

OAR 581-021-0047 also includes three exceptions to the prohibition. These exceptions include:

* A public school may continue to use the team name “Warriors” under certain circumstances. *See* OAR 581-021-0047 (3)(a).
* A public school may continue to use a mascot if “the mascot depicts an animal or other image that is not an individual.” OAR 581-021-0047 (3)(b).
* A public school may use any mascot otherwise prohibited under the rule if the mascot “is associated with or is significant to a Native American Tribe” and “the public school enters into an approved written agreement with that federally recognized Native American Tribe.” OAR 581-021-0047 (4)(a).

In this proceeding, evidence substantiates that the District uses two different names for its mascot. The District uses both the name “Mohawk Mustangs” and the name “Marcola Mustangs.” The evidence also substantiates that the District uses two different images for its mascot. On all occasions, the District uses an image of the head and neck of a mustang horse, posing at a three quarter angle. On all occasions, the mustang has two feathers hanging from its mane. In some instances, the mustang also has three stripes drawn across its snout. In other instances, the mustang does not.

The Department finds that in two of the four situations described above, the District is using a name, symbol or image that depicts or refers to an American Indian tribe, individual, custom, or tradition. The image of a mustang with two feathers hanging from its mane is an image that refers to the American Indian custom of using decorative feathers. The image of a horse with three stripes drawn across its snout is an image that refers to the American Indian custom of using face paint. The Department necessarily must point out that the use of decorative feathers and face paint by certain American Indian tribes are not specific to individuals. After the Spanish introduced horses to the Americas, certain American Indian tribes, particularly those associated with Great Plains peoples, became renowned horse riders. In certain circumstances, these tribes adorned their horses with feathers and paint. They did so as part of a wider practice of beautifying horses with elaborately decorated saddles, blankets, bridles, and masks.

The District posits that decorative feathers and face paint are associated with many different cultures, not just those of certain American Indian tribes. The Department agrees with the District’s position in principal. However, in this case, where the District continues to use the name “Mohawk,” the image is impliedly connected to the Mohawk people.

In the third and fourth situations, the District is not using a name that refers to an American Indian tribe, custom, or tradition. The name “Marcola Mustang” refers only to a place name and an animal: the city of Marcola, Oregon, and the mustang horse. Although the name “Mohawk Mustang” seemingly refers to an American Indian tribe—the Mohawk people—the facts suggest that in this instance, “Mohawk” refers to a place name as well. The city of Marcola, Oregon, is located along the Mohawk River in the Mohawk Valley, northeast of the city of Eugene. Jacob C. Spores named the river and valley in 1949. *See* Lewis A. McArthur, *Oregon Geographic Names* 654 (7th ed. 2003). Spores was from the Mohawk River region in New York, and the valley reminded him of that area. *Id.*

Arguably, the name “Mohawk Mustang” refers to the Mohawk River band of the Kalapuya people, who lived in the Mohawk Valley before signing the Dayton Treaty and being removed to the Grand Ronde Indian Reservation. However, the name of that band also derives from the place name. The Mohawk River and Mohawk Valley were named first, the band second.

The names of many other institutions and businesses located in the valley also include the referent “Mohawk,” including Mohawk Valley Meats, Mohawk Tavern, Mohawk General Store, Mohawk Community Church, and Mohawk Valley Rural Fire District. Under these facts, the Department finds that the name “Mohawk Mustang” refers to a place name, not an American Indian tribe.

The Department acknowledges that the root of all of these place names is the Mohawk people for whom the original Mohawk River region in New York was named. The Department acknowledges that many people rightfully find the name “Mohawk Mustang” offensive because of this seeming connection. However, the test under OAR 581-021-0047 (1)(b) is whether a name is logically or factually connected to an American Indian Tribe. *See Webster’s Third New International Dictionary* (defining “refer”). In this instance, the name “Mohawk Mustang” is logically and factually connected to the place names for the Mohawk River and the Mohawk Valley. Those place names, in turn, are logically and factually connected to the Mohawk River region in New York. It is the place name for that region that is logically and factually connected to an American Indian tribe.

As for the two different images of the mustang that constitute a name, symbol or image that depicts or refers to an American Indian tribe, individual, custom, or tradition, the District may use those images only if the use is permitted under one of the three exceptions listed in OAR 581-021-0047.

Of the three exceptions, two clearly do not apply to the circumstances at issue in this proceeding. First, the District does not use the name “Warriors.” Second, the District has not entered into any agreement with an American Indian tribe under which the District may use the names and images currently associated with their mascot.

Under the final exception,

Except as provided in subsection (4) of this section, a public school may continue to use a mascot that may be associated with Native American culture, custom or tradition if the mascot depicts an animal or other image that is not an individual. Examples of such mascots include team names and images such as the “Thunderbirds”, “White Buffalo” and “Eagles.” OAR 581-021-0047 (3)(b).

Under the plain meaning of that provision, the District’s mascot is excepted from the prohibition against using a name, symbol or image that depicts or refers to an American Indian tribe, individual, custom, or tradition because the mascot depicts a type of animal: the mustang horse.

Complainant argues that even if this exception applies, a public school still must enter into an agreement with the American Indian tribe associated with the mascot. Complainant’s argument is based on the phrase “[e]xcept as provided in subsection (4) of this section,” which is a reference to the provision creating an exception for a public school that enters into an agreement with an American Indian tribe.

In response, the District argues that animals are not associated with specific groups of peoples. Once again, the Department agrees with the District’s position in principal. However, because the District uses the name “Mohawk Mustang,” the image is impliedly connected to an American Indian tribe.

For purposes of this order, determining whether discrimination may have occurred requires the Department to interpret the meaning of the phrase “[e]xcept as provided in subsection (4) of this section.”

At the outset, it is important to understand that if an agency’s interpretation of its own rule is plausible, an Oregon court will defer to that interpretation. *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). In deciding whether an agency’s interpretation is plausible, an Oregon court will examine whether the interpretation is “inconsistent with the rule itself, or with the rule’s context, or with any other source of law.” *Id.* Thus, the Department must interpret the phrase “[e]xcept as provided in subsection (4) of this section” in a manner that is the most consistent with the remainder of OAR 581-021-0047 and any other applicable source of law.

First, OAR 581-021-0047 (3)(b) cannot be inconsistent with “any other source of law” because the State Board of Education adopted both the exception and the prohibition to which the exception applies pursuant to its general statutory authority to adopt rules prohibiting discrimination under ORS 326.051, 659.850 and 659.855. Only the exception related to a public school entering into an agreement with an American Indian tribe was adopted pursuant to a specific statutory directive. *See* ORS 332.075 (1)(g) (granting district school boards the right to enter into such agreements).

Second, it should be noted that the plain language of OAR 581-021-0047 (3)(b) clearly applies to using “a mascot that may be associated with Native American culture, custom or tradition if the mascot depicts an animal or other image that is not an individual.” In this case, the District’s mascot is a mustang, not an individual. To interpret the rule differently would be inconsistent with the plain meaning of the exception.

Even though the phrase “[e]xcept as provided in subsection (4) of this section” seemingly indicates that OAR 581-021-0047 (3)(b) is excepted by the provision requiring a public school to enter into an agreement with an American Indian tribe, there is no language in OAR 581-021-0047 (4) that specifically pertains to a mascot depicting an animal or other image that is not an individual. In other words, there is an absence of language that excepts from any provision of OAR 581-021-0047 (4) the circumstances described in OAR 581-021-0047 (3).

For the phrase “[e]xcept as provided in subsection (4) of this section” to have any meaning, the entirety of OAR 581-021-0047 (4) would have to apply to a mascot depicting an animal or other image that is not an individual. Such a result would be nonsensical. In law and rule, exceptions are provisions that limit the application of other more general provisions. Applying the entirety of OAR 581-021-0047 (4) to OAR 581-021-0047 (3)(b) creates the absurd result of negating the entirety of OAR 581-021-0047 (3)(b). The Department finds that it is more likely that the phrase “[e]xcept as provided in subsection (4) of this section” is a scrivener’s error than that it negates the sentence to follow.

The hearings of the State Board of Education at which the phrase was introduced and adopted support the Department’s interpretation. The rulemaking was introduced at the May 21, 2015, board meeting.[[1]](#footnote-1) The rulemaking was adopted at the December 10, 2015, board meeting.[[2]](#footnote-2) At both meetings, proffered testimony concerned the negative psychological effects of mascots depicting Native American “culture” and “individuals.” The proffered testimony did not indicate an intent to change the exception created by OAR 581-021-0047 (3)(b).

At the December 10, 2015, board meeting, the State Board of Education also adopted a resolution.[[3]](#footnote-3) That resolution supports the contention that the State Board of Education did not intend to eliminate the exception created by OAR 581-021-0047 (3)(b). The resolution specifically casts the negative impacts associated with Native American mascots as culturally inaccurate “images of Native Americans,” “stereotypical imaging of American Indians,” “[a] single narrow representation of a male warrior,” and as a representation of “race-based mascots.” These descriptions are all specific to the depiction of an individual, not an “animal.”

Finally, one other part of the rulemaking process indicates that the phrase “[e]xcept as provided in subsection (4) of this section” is a scrivener’s error and has no substantive effect: in the first version of the draft, written on January 30, 2015, the qualifier “individual” was included as part of the text setting forth the exception for a public school that enters into an agreement with an American Indian tribe.[[4]](#footnote-4) Under the original text, “[a] public school may only enter into an agreement with a Native American Tribe for the use of a mascot that depicts an individual if the name of the . . . [tribe] is included in the name of the mascot.” In subsequent versions, that provision was eliminated from the proposed rule and the qualifier “individual” was moved into the text of OAR 581-021-0047 (3)(b). As currently written, the exception does not just apply to animals, but to any “other image that is not an individual.” In the Janaury 30 draft, the phrase “[e]xcept as provided in subsection (4) of this section” served a purpose. In the current rule, the phrase does not.

## VI. CONCLUSION

In conclusion, the Department finds that the District did not violate OAR 581-021-0047.

Sincerely,

Mark Mayer

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1. *Available at* [*https://www.youtube.com/watch?v=cC9yB\_SfQ9o&feature=youtu.be*](https://www.youtube.com/watch?v=cC9yB_SfQ9o&feature=youtu.be). [↑](#footnote-ref-1)
2. *Available at* [*https://www.youtube.com/watch?v=dWs1SdL-23M&feature=youtu.be*](https://www.youtube.com/watch?v=dWs1SdL-23M&feature=youtu.be). [↑](#footnote-ref-2)
3. *Available at* [*https://www.oregon.gov/ode/about-us/stateboard/Documents/6.b\_-1-native-american-mascot-resolution-11-20-15.pdf*](https://www.oregon.gov/ode/about-us/stateboard/Documents/6.b_-1-native-american-mascot-resolution-11-20-15.pdf). [↑](#footnote-ref-3)
4. This document is not publicly posted, but can be made available upon request. [↑](#footnote-ref-4)