April 28, 2022

 **BY EMAIL**

REDACTED

REDACTED

REDACTED

Interim Superintendent Dr. Dave Novotney

Newberg School District 29J

741 E 6th Street

Newberg, OR 97132

REDACTED and Interim Superintendent Dr. Dave Novotney:

This letter is the order on the December 9, 2021, appeal filed by REDACTED (Complainant) alleging that Newberg School District violated 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 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education). To ensure compliance with these laws and rules, the Oregon Department of Education will make findings of fact to determine whether a violation occurred and what action, if any, should be taken.[[1]](#footnote-1)

**APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

Complainant alleges that Newberg School District committed a discriminatory act when a district administrator made discriminatory statements at a staff meeting.

The Oregon Department of Education has jurisdiction to resolve this appeal under OAR 581-002-0003. 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 determines that discrimination did not occur, the department must issue a final order as described in OAR 581-002-0017.[[3]](#footnote-3) The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.[[4]](#footnote-4)

If the department determines that discrimination may have occurred, the department must issue a preliminary order to the complainant and the school district.[[5]](#footnote-5) 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.[[6]](#footnote-6)

If the department issues a preliminary final order, the complainant and school district must attempt to reach an agreement on how to resolve the matter through conciliation.[[7]](#footnote-7) If conciliation fails, the department will issue a final order as described in OAR 581-002-0017.[[8]](#footnote-8) 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 school district.[[9]](#footnote-9)

In this appeal, the department has completed its investigation. This letter constitutes the department’s order as to whether a violation of ORS 659.850 or OAR 581-021-0045 may have occurred.

**PROCEDURAL BACKGROUND**

Complainant filed a complaint with Newberg School District on October 15, 2021. In that complaint, Complainant wrote:

This letter is being written as a formal complaint in response to a statement made to . . . staff on Friday[,] September 3[, 2021]. We were called to a stand up meeting at 3:40. [A district administrator (Administrator 1)] told us that we madesocial media regarding staff talking to students about vaccinations. At this meeting, she made many statements, [o]ne of which was, **“you can’t tell kids it’s okay to be trans or gay.”[[10]](#footnote-10)** I am quoting, however the wording could have been . . . you are not allowed to tell kids it’s okay to be trans or gay or you shouldn’t tell kids . . . I am not sure how being trans or gay was linked to vaccines, however the connection was made.

The following Tuesday, I approached [another district administrator (Witness 2)] and [a] supervisor. I asked . . . specifically about the comment made by [Administrator 1]. I was told . . . that [Administrator 1] never made that comment. I asked again and I was told, again, that [Administrator 1] never made that comment. [Witness 2] went further to say that it was probably the cortisol in my body due to my stress levels and that caused me to hear something that was never said. I went to my union rep who was not present at the meeting and [the union rep] showed no sign of concern. This is why you are receiving the complaint directly.

The comment made by [Administrator 1] was troubling. However, to be told that it wasn’t said and that I heard it due to my cortisol levels[] constitutes a dangerous type of gas lighting that must not be allowed to continue. When adults lie to protect other adults rather than tell the truth to protect our students, we have a major breakdown in our leadership.

The district needs to be made aware of the actions of our school leaders and I am wondering if the district supports the statement made by [Adminstrator 1] to a group of professional educators. Is it the district position that staff members cannot tell a child it is okay to be gay or trans? Parents need to know they are sending their LGBTQ+ students to a school with [an administrator] that feels justified in telling . . . staff they are not allowed to support one of the most marginalized and at risk group of students. In closing, the expectation is that the district [should] investigate[] this situation appropriately and in a timely manner.

Complainant subsequently received a written decision from the district, dated October 20, 2021, stating that the district could not substantiate Complainant’s allegations.

The department accepted Complainant’s appeal on December 9, 2021, under ORS 659.850 and 659.855 (stating that “no person may be subject to discrimination”) and OAR 581-002-0005(1)(a) (stating that a complainant may file an appeal with the Oregon Department of Education if the complainant has filed a complaint with a school district and received from the district a final decision).

**PRELIMINARY FINDINGS OF FACT**

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

1. On September 10, 2021, a staff meeting was held at Mountain View Middle School in Newberg School District. The meeting was held because the school had “made social media [and] headline news” for purposes related to COVID-19 protocols and the Newberg School Board’s proposed policies related to sexual orientation, gender identity, and race. Administrator 1 spoke during the meeting. Administrator 1 informed district staff about parent and community concerns regarding the district’s proposed policies and advised staff to come to the school’s administrative staff with any concerns.
2. During the September 10th staff meeting, Complainant heard Administrator 1 make the statement that “it’s not ok to tell kids to be gay or trans.” Complainant also heard Administrator 1 tell staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year.
3. Before the September 10th staff meeting, Administrator 1 received numerous calls from parents and community groups about displaying Pride and Black Lives Matter flags, signs, and similar items. Administrator 1 stated that the calls were getting “more and more aggressive” and some of the calls targeted specific staff members. Administrator 1 became concerned for many staff members in the building, which motivated Administrator 1 to hold the meeting.
4. Before the September 10th staff meeting, on September 9, 2021, Administrator 1 approached a district staffer (Witness 7) about a Pride flag that was displayed in their office. Administrator 1 told Witness 7 that they were concerned, that Witness 7 should consider whether the flag might send the wrong message to parents and community members, and that the flag might damage Witness 7’s reputation. Witness 7 felt that Administrator 1 was pressuring them to remove the flag, which prompted Witness 7 to ask Administrator 1, “Are you saying I need to take down my flag?” Administrator 1 did not tell Witness 7 to remove the flag.
5. During the week of September 13th, 2021, Complainant approached Witness 2 and asked them if they had heard the comment during the September 10th staff meeting. Witness 2 responded that they had not heard the comment.
6. Also during the week of September 13th, 2021, Complainant approached another district staffer (Witness 4) and asked them if they had heard the comment during the September 10th staff meeting. Witness 4 responded that they had “understood the meeting differently.” Complainant was concerned because both Witness 2 and Witness 4 did not remember hearing the comment that Complainant clearly recalled. Complainant remembered seeing Witness 7 at the meeting and decided to ask them about whether they had heard the comment. Witness 7 stated that they remembered hearing the comment and that they had talked to other staff who also heard the comment.
7. On September 15, 2021, Witness 7 recorded their recollection of the staff meeting in an email. In the email, Witness 7 wrote that they heard Administrator 1 say that district staff should not display Pride or Black Lives Matter flags or signs if they had not displayed them during the previous school year. Witness 7 also wrote that they heard Administrator 1 say, “I don’t want any of you telling students its okay to be gay or trans.”
8. On October 15, 2021, Complainant submitted a formal complaint letter to a district administrator (Administrator 2). The complaint stated that Complainant heard Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the September 10th staff meeting. The complaint also stated that Witness 2 told Complainant that Complainant had “heard something that was never said” because of the “cortisol in [their] body due to [their] stress.”
9. On October 15, 2021, the district sent Complainant an email confirming that it had received their complaint.
10. On October 18, 2021, Administrator 2 interviewed Administrator 1. The interview notes state that Administrator 1

advised staff to be careful. [Administrator 1] told them [they were] not asking staff to take down anything (flags, etc.), but didn’t understand why they (staff) would want to put anything up now if they hadn’t before. One staff member asked [Administrator 1] how to handle students who might have questions (about the board policy, gender identity, etc.). [Administrator 1] told the staff member it is ok to be a listener, but to be careful about what advice you offer. [Administrator 1] did ask staff at the end of the meeting, if you have not put something up now, why would you do it now? Again, this is a reference to flags (BLM, Pride)[.]

Administrator 1 also stated that they had told Witness 7 they were “worried” for Witness 7, who was displaying a Pride flag in their office. Administrator 1 stated that they “did not instruct [Witness 7] to take it down but rather to think it through.”

1. On October 18, 2021, Administrator 2 interviewed a district staffer who attended the September 10th staff meeting (Witness 1). The interview notes state that Witness 1 reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 1 also stated that Administrator 1 told staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year.
2. On October 18, 2021, Administrator 2 interviewed Complainant. The interview notes state that Complainant reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Complainant also stated that Administrator 1 told staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year. Complainant stated that Administrator 1 told staff “don’t poke the bear.”
3. On October 18, 2021, Administrator 2 interviewed Witness 2. The interview notes state that Witness 2 did not hear Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 2 stated “more like [Administrator 1] saying it would be ok to let students come to us [as educators] rather than educators asking students.” Witness 2 reported hearing Administrator 1 tell staff “don’t poke the bear.” Witness 2 stated that Administrator 1 told staff to be careful about what they display in their rooms if they had not previously displayed it because doing so “might not send the best message.” Witness 2 stated that Administrator 1 told staff that if they had displayed something previously, there was no need to take it down.
4. On October 19, 2021, Administrator 2 interviewed a fourth district staffer who attended the September 10th staff meeting (Witness 3). The interview notes state that Witness 3 reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 3 also stated that Administrator 1 said, “[I]f you didn’t have a pride flag last year, why do you have one now?”
5. On October 19, 2021, Administrator 2 interviewed a fifth district staffer who attended the September 10th staff meeting (Witness 4). The interview notes state that Witness 4 “interpreted the language differently than is in the complaint.” Witness 4 reported hearing Administrator 1 telling staff to not engage in or start any conversations about sexuality and to “not poke the bear.” Witness 4 believed that Administrator 1 seemed frustrated with staff displaying Pride flags if they had not previously done so.
6. On October 19, 2021, Administrator 2 interviewed a sixth district staffer who attended the September 10th staff meeting (Witness 5). The interview notes state that Witness 5 did not hear Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 5 reported hearing Administrator 1 say, “[I]f you didn’t have certain things hung up in your room, you shouldn’t have them now.”
7. On October 19, 2021, Administrator 2 interviewed a seventh district staffer who attended the September 10th staff meeting (Witness 6). The interview notes state that Witness 6 reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 6 also stated that Administrator 1 told staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year.
8. On October 19, 2021, Administrator 2 interviewed an eighth district staffer who attended the September 10th staff meeting (Witness 7). The interview notes state that Witness 7 reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans” at the meeting. Witness 7 also stated that Administrator 1 told staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year. Witness 7 stated that Administrator 1 told staff “don’t poke the bear.”
9. On October 20, 2021, Administrator 2 issued a written decision to Complainant detailing the district’s findings. The decision stated that the district had interviewed nine individuals who were present at the meeting. The decision stated that “approximately half remember hearing [Administrator 1] make the [alleged] statement, and the other half do not.” In the decision, the district found that it was “unable to prove whether or not [Administrator 1] made the [alleged] statement based on what attendees can remember.” The decision also stated that “it does seem clear some staff members heard comments which made them uncomfortable and/or unclear about how they can support transgender and gay students.” The decision stated that Administrator 2 would meet with Administrator 1 to discuss the comments. The decision stated that Administrator 2 would direct Administrator 1 to clarify for district staff the district’s stance on equity at the next available opportunity.
10. On October 21, 2021, Administrator 1 posted a message to in a weekly school bulletin. Administrator 2 approved the message before Administrator 1 posted it. The message said,

It has been brought to my attention that some statements I made or language I used on September 3 has caused confusion. It was shared that I *said it is not OK for us educators to tell students it's OK to be trans or gay[[11]](#footnote-11)*. What I did say was we need to support all students and understand at this point in time these students and parents do not know us. Be supportive, be a listener[,] and know that the community has already made perceptions of [our school] because of the comments being posted on social media. If students confide in you and see you as a trusting adult, that is great. Many of our gay and trans students are needing that support[,] especially during these tough times. If you believe that I was telling you what to say to students or how to act, that was not my intent at all. If that was your impression, I am sorry. I have written to the board and continue to advocate that all students are important to us at [our school]. In fact, I shared the message I wrote to the board on September 11 that stated, “I stand for treating all individuals - no matter his/her color, race, or gender - with dignity and respect.”

1. On or about December 9, 2021, Complainant filed an appeal of the district’s October 20th written decision with the Oregon Department of Education. On December 9, the department issued notice to Complainant and the district that it was accepting the appeal.
2. On January 4, 2022, the district responded to the appeal and provided the department with documentation of its investigation.
3. On February 14, 2022, the department interviewed Complainant. During the interview, Complainant confirmed the facts alleged in their October 15th complaint and October 18th district interview.
4. On February 17, 2022, the department interviewed Witness 6. Witness 6 confirmed the version of events shared with the district in their October 19th district interview. Witness 6 stated that Administrator 1’s comment that district staff should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year was particularly concerning to first-year teachers who had not yet had the opportunity to display flags or signs. Witness 6 stated that they believed, on the basis of this comment, that they should not display Pride and Black Lives Matter flags and signs. Witness 6 stated that they discussed the comment with a small group of staff members after the September 10th staff meeting, and that everyone in the group had heard the statement.
5. On February 22, 2022, the department interviewed Witness 4. Witness 4 confirmed the version of events shared with the district in their October 19th interview. Witness 4 confirmed that they had not heard Administrator 1’s comment. Witness 4 also stated that Administrator 1 “may have said that, and I may have not heard it.” Witness 4 stated that they left the September 10th staff meeting with the impression that sexual orientation and gender identity were not to be discussed in the classroom, and that if students were discussing sexual orientation or gender identity, district staff should “shut down” the conversation.
6. On February 23, 2022, the department interviewed Witness 7. Witness 7 confirmed the version of events shared with the district in their October 19th interview. Witness 7 also stated that they discussed Administrator 1’s comment with other district staff members immediately after the September 10th meeting, and that everyone with whom Witness 7 discussed the comment had heard it. Witness 7 stated that they knew a few first-year teachers who were afraid to wear shirts supporting the LGBTQ+ community and Black Lives Matter movement following the meeting. Witness 7 also stated that they had written down their recollection of the September 10th meeting shortly after the meeting in an email. That email was dated September 15, 2021.
7. On February 23, 2022, the department interviewed Administrator 1. Administrator 1 confirmed the version of events shared with the district in their October 18th interview. Administrator 1 also stated that the September 10th staff meeting was held to ensure that district staff knew about Mountain View Middle School making “social media [and] headline news” for purposes related to COVID-19 protocols and the school board’s proposed policies related to sexual orientation, gender identity, and race. Administrator 1 stated that they wanted district staff to be prepared for parental concerns. Administrator 1 stated that they believed that their comments were being taken out of context. Administrator 1 stated that even though they had never stated that staff members must take down Pride or Black Lives Matter flags or signs, their comments could have been misinterpreted that way.
8. On February 24, 2022, the department interviewed Administrator 2. Administrator 2 stated that they were in frequent communication with district legal counsel about Complainant’s complaint. Administrator 2 described Complainant’s allegations as a “he-said-she-said” situation. Administrator 2 stated that it would require an “overwhelming” amount of evidence to substantiate those allegations. Administrator 2 stated that “about half” of the district staff members interviewed had heard Administrator 1’s comment. For that reason, Administrator 2 was unable to “conclusively state one way or another” that Administrator 1 made the comment.
9. On March 1, 2022, the department interviewed Witness 2. Witness 2 confirmed the version of events shared with the district in their October 18th interview. Witness 2 is part of Mountain View Middle School’s administrative team and was aware that the school had been receiving multiple communications from parents about the district’s current and proposed policies. Witness 2 assisted Administrator 1 with planning the September 10th staff meeting. Witness 2 stated that the meeting was held to inform district staff about parent and community concerns and to encourage staff to contact district administrators if they had questions. Witness 2 stated that they did not hear Administrator 1’s comment. Witness 2 stated that they were confident that if Administrator 1 made the comment, they would have intervened. During the meeting, Witness 2 assisted with logistics while Administrator 1 spoke.
10. On March 2, 2022, the department interviewed Witness 1. Witness 1 confirmed the version of events shared with the district in their October 18th interview.
11. On March 7, 2022, the department interviewed Witness 5. Witness 5 confirmed the version of events shared with the district in their October 19th interview. Witness 5 stated that they did not interpret Administrator 1’s comments as opinions. Witness 5 stated that they believed Administrator 1 merely was passing along information that Administrator 1 had received from the district. Witness 5 also stated that after the September 10th staff meeting, several staff members were upset. Another staff member asked, “So they said it’s not ok to be gay?” Witness 5 told the staff member that Administrator 1 was supportive of all students. As an example, Witness 5 shared a poster that Administrator 1 had approved. That poster contained a fist and a rainbow flag and said, “Every Student Belongs – Newberg Education Association.” Witness 5 said that many teachers were displaying the poster in their classrooms and that Administrator 1 supported the teachers’ decision to do so.
12. In an email to the department on March 11, 2022, a third district administrator (Administrator 3) confirmed the district’s investigatory framework:

A lot of the issue was the perception or intent of [what Administrator 1] said. Several folks took her statements as reminding them to think about their actions and, in turn, how someone may perceive it[,] while a couple took it as a directive of sorts. So in weighing in all of the statements we did not find that it was most likely that [Administrator 1] intended it as a directive [and,] therefore[, it was] not discriminatory.

**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.[[12]](#footnote-12)

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, gender identity, national origin, marital status, age or disability.”[[13]](#footnote-13)

The question on appeal is whether Administrator 1, acting in their official capacity as an employee of Newberg School District, made discriminatory statements in violation of Oregon’s anti-discrimination statute.

Before proceeding with its analysis, the department necessarily must clarify the scope of this order. This order only pertains to whether Administrator 1 made discriminatory comments at the staff meeting held at Mountain View Middle School on September 10, 2021. Specifically, whether Administrator 1 said that “it’s not ok to tell kids to be gay or trans” and told staff members that they should not display Pride and Black Lives Matter flags and signs, and if Administrator 1 did make those comments, whether they were discriminatory. This order does not pertain to Newberg School Board’s previously proposed or current policies related to sex, sexual orientation, gender identity, and race.

The department also must clarify that this order does not pertain to whether the district violated district staff members’ free speech rights as guaranteed by the First Amendment to the United States Constitution and Article I, section 8, of the Oregon Constitution. If the department finds that Administrator 1 made discriminatory comments at the September 10th staff meeting, any corrective action ordered by the department would be limited to that finding.

The department first finds that Administrator 1 said, “[I]t’s not ok to tell kids to be gay or trans,” and instructed district staff to not display Pride or Black Lives Matter flags or sign under certain circumstances at the September 10th staff meeting.

Of the nine district staff members interviewed by the district, including Complainant, five reported hearing Administrator 1 say that “it’s not ok to tell kids to be gay or trans.” Five also reported hearing Administrator 1 instruct staff members to not display Pride or Black Lives Matter flags or signs unless they had displayed them during the previous school year. The department subsequently confirmed the district’s investigatory findings during its own investigation.

Of the three witnesses that did not hear Administrator 1 make those comments, one stated that even though they did not hear the comments, they heard other comments along similar lines. During the department’s February 22nd interview, Witness 4 stated, with respect to the alleged comment, that Administrator 1 “may have said that, and I may not have heard it.” Witness 4 also stated that they left the meeting with the impression that sexual orientation and gender identity were not to be discussed in the classroom, and that if students were discussing sexual orientation or gender identity, district staff should “shut down” the conversation.

Another of the three witnesses that did not hear Administrator 1 make the alleged comments stated that Administrator 1 made similar comments. During the district’s October 18th interview, Witness 2 stated that Administrator 1 was not prohibiting district staff from interacting with students who initiated a discussion, but was instructing staff to not initiate one: “[It’s] more like [Administrator 1] saying it would be ok to let students come to us [as educators] rather than educators asking students.” Witness 2 also stated that Administrator 1 told staff to be careful about what they display in their rooms if they had not previously displayed it because doing so “might not send the best message.”

Administrator 1 also admitted to making comments similar to the alleged comment. During the department’s February 23, 2022, interview, Administrator 1 stated that they believed that their comments were being taken out of context. Administrator 1 stated that even though they had never stated that district staff must take down Pride and Black Lives Matter flags and signs, their comments could have been misinterpreted that way.

Finally, only one district staff member memorialized the comments that were made at the September 10th staff meeting, and that district staff member was one of the five staff members who reported hearing the alleged comments. On September 15, 2021, Witness 7 recorded their recollection of the staff meeting in an email. In the email, Witness 7 wrote that she heard Administrator 1 say that district staff should not display Pride or Black Lives Matter flags or signs if they had not displayed them during the previous school year. Witness 7 also wrote that she heard Administrator 1 say, “I don’t want any of you telling students it’s okay to be gay or trans.”

The district posits that there is inconclusive evidence that Administrator 1 made the alleged comments. In the district’s October 20th written decision, the district wrote that “approximately half [of the nine individuals interviewed as a part of this investigation] remember hearing [Administrator 1] make the [alleged] statement, and the other half do not.” On the basis of that evidence, the district found that it could not substantiate what was said at the September 10th staff meeting.

During the department’s February 24th interview, Administrator 2 made a similar argument about why the district could not substantiate that Administrator 1 made the alleged comments. Administrator 2 described Complainant’s allegations as a “he-said-she-said” situation. Administrator 2 stated that it would require an “overwhelming” amount of evidence to substantiate the allegations. Administrator 2 stated that “about half” of staff members interviewed heard Administrator 1’s comment. Administrator 2 reasoned that on the basis of the evidence, he was unable to “conclusively state one way or another” that Administrator 1 made the comment.

Finally, in the district’s March 11th email to the department, the district wrote that it could not substantiate “that it was most likely” that Administrator 1 made discriminatory comments during the meeting.

In consideration of the evidence, it appears that the district uses a different evidentiary standard than the department. During the department’s February 24th interview, Administrator 2 indicated that he would need conclusive evidence to substantiate discriminatory conduct. In the March 11th email, the district indicated that it uses a “most likely” evidentiary standard. The department does not require conclusive evidence when making a determination about whether discriminatory conduct occurred. The department uses a preponderance of the evidence standard, which requires the department to determine that it is more likely than not that discriminatory conduct occurred.[[14]](#footnote-14) In consideration of the evidence, the department finds that it is more likely than not that at the September 10th staff meeting Administrator 1 stated that “it’s not ok to tell kids to be gay or trans” and instructed staff members that they should not display any Pride or Black Lives Matter flag or sign if they had not displayed them during the previous school year.

The department further finds that the statement “it’s not ok to tell kids to be gay or trans” and the instruction to not display Pride and Black Lives Matter flags and signs are discriminatory. Oregon’s anti-discrimination statute clearly defines discrimination as “any act that unreasonably differentiates treatment, intended or unintended, [that] . . . is based on race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, age or disability.”[[15]](#footnote-15) Instructing staff that they should not tell students that it is not “ok to be gay or trans” differentiates certain students on the basis of their sex, sexual orientation, and gender identity. Instructing teachers to not display Pride or Black Lives Matter flags or signs, even under limited circumstances, differentiates certain students on the basis of their sex, sexual orientation, gender identity, and race.

The district posits that the comments – if Administrator 1 said them – are not discriminatory because they were not intended to be. In the district’s October 20th written decision, the district wrote that “it does seem clear some staff members heard comments which made them uncomfortable and/or unclear about how they can support transgender and gay students.” In the message that Administrator 1 posted on October 21st, Administrator 1 wrote, “If you believe that I was telling you what to say to students or how to act, that was not my intent at all. If that was your impression, I am sorry.” In the district’s March 11th email to the department, the district wrote, “So in weighing in all of the statements we did not find that it was most likely that [Administrator 1] intended [the comment] as a directive [and,] therefore[,] it was not discriminatory.”

The district misunderstands what constitutes discrimination under the law. Under Oregon’s anti-discrimination statute, discrimination is “any act that unreasonably differentiates treatment, *intended or unintended*, [that] . . . is based on race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, age or disability.”[[16]](#footnote-16) It does not matter whether Administrator 1 intended their comments to differentiate on the basis of sex, sexual orientation, gender identity or race. All that matters is whether Administrator 1’s comments *did* differentiate on the basis of sex, sexual orientation, gender identity or race. Administrator 1’s comments clearly articulated that teacher conduct toward students belonging to certain protected classes should be different than conduct toward other students. Administrator 1’s comments clearly subjected teacher support for the Pride and Black Lives Matter movements to different rules than support for other movements.

In consideration of the evidence, the department finds that it is more likely than not that the district may have violated ORS 659.850 and 659.855.

**PRELIMINARY CONCLUSIONS**

In conclusion, the Oregon Department of Education finds that Newberg School District may have violated ORS 659.850 and 659.855 because Administrator 1, acting in their official capacity as an employee of the district, made discriminatory statements at a staff meeting held at Mountain View Middle School on September 10, 2021.

Accordingly, the department encourages the district to reach an agreement with Complainant through conciliation. If the district cannot reach an agreement with Complainant through conciliation within 30 days, or at a time otherwise agreed to by the parties, the department will issue a final order on the matter.

If Complainant or the district wishes to use the department as a resource during conciliation, Complainant or the district may contact the department.[[17]](#footnote-17)

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Coordinator

Office of the Director

Mark.Mayer@state.or.us

1. The administrative rules governing the Oregon Department of Education’s appeals process are OAR 581-002-0001 to 581-002-0023. [↑](#footnote-ref-1)
2. OAR 581-002-0009. [↑](#footnote-ref-2)
3. OAR 581-002-0009(3)(a)(B). [↑](#footnote-ref-3)
4. OAR 581-002-0009(3)(b). [↑](#footnote-ref-4)
5. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. OAR 581-002-0011. [↑](#footnote-ref-7)
8. OAR 581-002-0011(8). [↑](#footnote-ref-8)
9. OAR 581-002-0017(2). [↑](#footnote-ref-9)
10. Emphasis in original. [↑](#footnote-ref-10)
11. Emphasis in original. [↑](#footnote-ref-11)
12. 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-12)
13. 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-13)
14. The preponderance of evidence evidentiary standard requires evidence that a district is deficient to be more credible and convincing than evidence that a district is not deficient, i.e., evidence that shows that the deficiency is more probable than not. *See Merriam Webster* at <https://www.merriam-webster.com/legal/preponderance%20of%20the%20evidence>. [↑](#footnote-ref-14)
15. ORS 659.850(1). [↑](#footnote-ref-15)
16. *Id.* Emphasis added. [↑](#footnote-ref-16)
17. The department’s conciliator for this case is Patricia Stoneroad. She may be reached by email at patricia.stoneroad@ode.state.us or by phone at (503) 947-5915. [↑](#footnote-ref-17)