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Colt Gill

Director of the Oregon Department of Education

September 1, 2021


BY EMAIL




Meera Rupp, Director
Bend International School
63034 OB Riley Road
Bend, OR 97703

Dr. Steve Cook, Superintendent
Bend-La Pine School District
520 NW Wall Street
Bend, OR 97703

RE: Case #2020-SG-06

, Director Rupp, and Superintendent Dr. Steve Cook:

This letter is the final order on the June 5, 2020, appeal filed by  (Parent) alleging that Bend International School (which is a public charter school within the Bend-La Pine 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

¹ The administrative rules governing the Oregon Department of Education's appeals process are OAR 581-002-0001 to 581-002-0023.

APPELLATE PROCEURES FOR COMPLAINTS ALLEGING DISCRIMINATION

On appeal, Parent alleges that Bend International School discriminated against her child (Student). Parent specifically alleges that: (1) the school failed to adequately support Student to accommodate Student's disability, (2) the school failed to evaluate Student to determine whether the child needed a 504 Plan or Individualized Education Plan, (IEP); (3) the school excluded Student from participating in certain classes and activities for reasons related to Student's disability, (4) the school implemented shortened school days for Student for reasons related to Student's disability, and (5) the school suspended Student for reasons related to Student's disability.

I. Appellate Procedures Alleging Discrimination

The Oregon Department of Education has jurisdiction to resolve this complaint as specified in 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 If the department determines that a violation of a law or rule described in OAR 581-002-003 occurred, the department must issue a preliminary order to the complainant and the district.³ 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.⁴

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.⁵ If conciliation fails, the department will issue a final order as described in OAR 581-002-0017.⁶ 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.⁷

II. Appeals of Complaints Originating at Public Charter Schools

Because the specific school against which Parent has 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.⁸ 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, Bend-La Pine School District did not have an opportunity to hear Parent's complaint before Parent filed an

² OAR 581-002-0009.

³ OAR 581-002-0009(3)(a)(A).

⁴ *Id.*

⁵ OAR 581-002-0011.

⁶ OAR 581-002-0011(8).

⁷ OAR 581-002-0017(2).

⁸ *See* OAR 581-002-0001(2).

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.”⁹ 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.¹⁰

In this case, after reviewing the charter between Bend La-Pine School District and Bend International 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.¹¹ Because conciliation failed, the department will tailor any corrective action so that it is specific to the deficiency of the responsible party. Bend-La Pine School District’s corrective action will be tailored to the areas in which it is deficient and Bend International School’s corrective action will be tailored to the areas in which it is deficient.

⁹ ORS 338.165(1).

¹⁰ 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.

¹¹ Importantly, if only a school district is deficient in “identifying, locating, and evaluating” students with disabilities, only the school district will be found 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 581-002-003 occurred. Parent, Bend International School, and Bend-La Pine 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 Bend International School.

Parent emailed Bend International School several times over the course of the 2018-2019 and 2019-2020 school years, raising concerns over the alleged conduct.

Throughout both school years, Parent drew attention to the school failing to provide adequate support to accommodate Student's disability in multiple emails.

On November 6, 2018, Parent requested a 504 Plan or IEP for Student for the first time, writing, "I . . . have suggested . . . he become a 504 student or develop an IEP." In that same email, Parent requested that Student not be excluded from being suspended or participating in certain classes and activities, writing, "Please do not threaten him with being kicked out of school or not be a part of PE. His therapist and myself know that this will only cause more problems." Parent also wrote,

He told me he was not allowed to sing or dance because he didn't finish his skeleton from last week. [Student] needs creative outlets, such as singing, dancing, and playing music. Excluding him from these activities because he doesn't finish his writing lessons at school will not improve his behavior. He does not understand long term consequences, and again it won't improve his anxiety or stress, only add to it, which would cause him to lash out again.

On May 19, 2019, Parent requested that Student be able to attend school for the entire school day, writing, "We would like [Student] to be able to go all day as the rest of class does[.]"

In its response to Parent’s appeal, the district argues that Parent never made a “formal complaint” with either the school or the district. The department understands the district’s argument to be that the department should not have accepted Parent’s appeal. The department rejects this argument. Even though Parent did not file a formal complaint, Parent specifically alleged in emails that Student was being discriminated against on the basis of disability. Instead of directing Parent to use its formal complaint process, Bend International School attempted to address Parent’s concerns through email. The department understands why the school did so. The school attempted to resolve Parent’s concerns in the form that Parent submitted them. However, because Parent raised the issue of discrimination on the basis of disability in those emails, Parent’s allegations fall squarely under ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly), OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education), and OAR 581-021-0310 (requiring school districts to develop a complaint process). The school had actual notice of alleged facts that would constitute, if true, discrimination under Oregon law and rule. By attempting to address Parent’s concerns through email, the school impliedly waived any formal complaint process it otherwise used. If the school had wanted Parent to use a formal complaint process, it would have directed Parent to do so.

For the reasons articulated above, the department accepted Parent’s appeal on June 5, 2020. 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 June 4, 2021, the department issued a preliminary final order finding Bend International School and Bend-La Pine School District may have been deficient on specified grounds.

Following June 4, 2021, the school and the district attempted to contact Parent to reach an agreement through conciliation. The school and the district made a reasonable attempt to locate Parent; however, Parent did not respond to any communications made by the school or the district. As a result, conciliation failed.

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

This order constitutes the final order for case #2020-SG-06.

FINDINGS OF FACT

For purposes of making its final determination on case #2020-SG-06, the Oregon Department of Education adopts the findings of fact set forth in the preliminary final order issued for that case on June 4, 2021.¹²

¹² For the convenience of the parties, the preliminary final order is attached to this correspondence.

ANALYSIS

For purposes of making its final determination on case #2020-SG-06, the Oregon Department of Education adopts the analysis set forth in the preliminary final order issued for that case on January 6, 2021.¹³ Additionally, the department finds that it is more likely than not that the Bend-La Pine School District shares the responsibility for failing to identify Student's disability.¹⁴

CONCLUSIONS

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

- Bend International School failed to adequately support Student to accommodate Student's disability and, thereby, failed to provide Student with a free and appropriate education as required by Section 504, denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and limited Student's enjoyment of rights, privileges, advantages, or opportunities in violation of OAR 581-021-0045(3)(f);
- Bend-International School failed to evaluate Student to determine whether he needed a 504 Plan or IEP, as required by federal law, and, thereby, denied Student an aid, benefit, or service in violation of OAR 581-021-0045(3)(c);
- Bend-International School excluded Student from participating in certain classes and activities for reasons related to Student's disability and, thereby, provided Student with different aids, benefits, or services in violation of OAR-581-021-0045(b), denied Student aids, benefits, and services in violation of OAR 581-021-0045(3)(c), and subjected Student to different rules of behavior or treatment in violation of OAR 581-021-0045(3)(d); and
- Bend-International School suspended Student for reasons related to Student's disability and, thereby, denied Student a service in violation of OAR 581-021-0045(3)(c).

The department finds that Bend International School is not deficient with respect to the following:

- Bend-International School did not implement a shortened school day for Student for reasons related to Student's disability.

¹³ For the convenience of the parties, the preliminary final order is attached to this correspondence.

¹⁴ The department acknowledges, as it did in the preliminary final order, that it is difficult to determine the degree to which the district shares this responsibility.

With respect to Bend-La Pine School District, the department finds that the district is deficient on the following grounds:

- Bend-La Pine School District failed to fulfill its duty to “identify, locate[,] and evaluate students” with disabilities enrolled in Bend International School.

Accordingly, the department orders Bend International School to take the following corrective action:

I. Development of Procedures and Notice

- a. In consultation with Bend-La Pine School District’s Directors 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.
- b. The school will develop a structured timeline by which the school will document any student identified as having a behavioral or special need, any periodic intervention provided to such a student, and the periodic evaluation of whether such a student is a qualified individual with a disability. The school must make a visual chart of this timeline and share the chart with families of students attending the school.
- c. In consultation with Bend-La Pine School District’s Directors 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.
- d. By October 31, 2021, the school will provide the department with a draft of the written procedures, written notice, and timeline 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

- a. 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.
- b. 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.
- c. 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.
- d. 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.
- e. 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

- a. The school must conduct a training on the procedures, notice, and timeline 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 timeline. 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.

- b. Not later than November 30, 2021, 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.
- c. By January 21, 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. Bend-La Pine School District Involvement

- a. The school must meet with Bend-La Pine School District Directors 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.
- b. By October 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 Bend-La Pine School District to take the following corrective action:

- a. The district must provide feedback on, and work collaboratively with Bend International 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 the school on developing, 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.
- c. The district must meet with Bend International School staff 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.

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

If Bend International School or Bend-La Pine 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

If you have any questions, please contact me.

Sincerely,



Mark Mayer
Government and Legal Affairs
Mark.Mayer@state.or.us

¹⁵ The department’s 504 expert is Winston Cornwall. He may be reached at: Winston.Cornwall@ode.state.or.us.