August 19, 2019

 **BY EMAIL AND US MAIL**

FATHER

ADDRESS

ADDRESS

Kristin Macy, Principal

Cascade Heights Public Charter School 15301 SE 92nd Ave.

Clackamas, OR 97015

Matt Utterback, Superintendent

North Clackamas Schools

12400 SE Freeman Way

Milwaukie, OR 97222

Dear FATHER, Principal Macy, and Superintendent Utterback:

This letter is the order on the June 4, 2019, appeal filed by FATHER (Father) alleging that North Clackamas Schools discriminated against his son (Student) because it did not excuse absences related to Student observing religious holy days. The objective of this order is to determine whether the district is in compliance with ORS 659.850 and OAR 581-021-0045. If the district is in compliance with both ORS 659.850 and OAR 581-021-0045, then this case is closed pursuant to OAR 581-002-0009 and 581-002-0017. If the district is not in compliance with either ORS 659.850 or OAR 581-021-0045, then Father and the district must attempt to reach an agreement through conciliation as required by OAR 581-002-0011.

## PROCEDURAL BACKGROUND

This is an appeal alleging discrimination by North Clackamas Schools. Father filed his original complaint with the district on January 10, 2019. The district responded to Father’s complaint on February 25, 2019. In its response, the district denied Father’s appeal to the district. The district directed Father to file an appeal with the Oregon Department of Education if he wanted to pursue further legal action. Father filed an appeal with the department on June 4, 2019. The department accepted the complaint on the basis that 90 days had passed since Father initially filed his complaint with the district.[[1]](#footnote-1)

## FINDINGS OF FACT

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

1. Student is the child of Father and his mother (Mother).
2. Father and Mother divorced pursuant to a General Judgment of Dissolution. The judgment was entered by the Domestic Relations Division of Clackamas County Circuit Court on March 6, 2014. The judgment included a parenting plan.
3. Under the judgment’s parenting plan, Mother was awarded custody of Student.
4. Father and Mother do not share the same religious beliefs.
5. Student wanted to observe the “religious customs and holy days” that are a part of Father’s church. Full observance of those customs and holy days would require a number of absences from school. Many of the absences would be related to observing the Feast of Tabernacles, which spans an entire school week.
6. During dissolution proceedings, Mother proposed to limit Student’s observance of the Feast of Tabernacles to two days because he had demonstrated “learning difficulties” in the past. The court accepted Mother’s proposal. Under the judgement, Student may be excused from school two days per year to observe the Feast of Tabernacles.
7. On September 11, 2017, Father and Mother modified the judgement’s parenting plan in a “Holiday/Holy Day Plan.” Under the modified plan, Student may be excused from school seven days per year to observe Holy Days, including all of the Holy Days occurring during the week-long Feast of Tabernacles.
8. On January 10, 2019, Father filed a complaint with Cascade Heights Public Charter School alleging that the school had discriminated against Student on the basis of religion because it had not excused absences related to Student observing the Feast of Tabernacles.
9. In the January 10th complaint, Father acknowledged that Cascade Heights had excused absences related to Student observing the Feast of Tabernacles during the 2017-2018 school year.
10. In the January 10th complaint, Father argued that the school should have excused absences related to Student observing the Feast of Tabernacles in excess of two days per year during school years predating the 2017-2018 school year.
11. On January 23, 2019, Cascade Heights responded to Father’s complaint. In its response, the public charter school wrote:

In your recent letter, you requested that we change the “unexcused” absences prior to 2017 to “excused.” This is not possible a this time due to the parenting plans that we have in place prior to 2017 that clearly state that only two school days are permissible. A parenting plan is a court order and we are required to adhere to it by law unless instructed otherwise by the courts.

Upon sending this email I will instruct Mrs. Marlatt to verify that two absences per year were coded as “excused.” She will likely have to request the change since it is after year-end.

All absences that are after 9/11/2017 for religious observance will be coded as “excused” as long as there is prior notice given to the office.

\* \* \*

I want to reiterate to you that none of this is discriminatory on the part of myself or Cascade Heights. We have a responsibility to follow the guidelines given to us and also support your child and family. I respect your religious freedom [and Student’s religious freedom] and want to do all I can to help you navigate this.

**APPEALS UNDER ORS 659.850 and OAR 581-021-0045**

## I. Oregon’s Anti-Discrimination Law

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.[[2]](#footnote-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.”[[3]](#footnote-3)

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.

The issue addressed in this appeal is whether North Clackamas Schools violated ORS 659.850 and OAR 581-021-0045 on the basis that it did not excuse absences related to Student observing religious holy days.

If the Oregon Department of Education determines on appeal that the district has not discriminated against Student, the department will issue a final order to the complainant and the program and close the appeal.[[4]](#footnote-4)

If the department determines on appeal that the district has discriminated against Student, the department will issue a preliminary order to the complainant and the district.[[5]](#footnote-5) As part of that preliminary order, the department will order the complainant and the district to attempt to reach an agreement through conciliation.[[6]](#footnote-6) If the complainant and the district fail to reach an agreement, the department will issue a final order.[[7]](#footnote-7) If the department determines in the final order that the district has discriminated against Student, the final order will include notice that the district must complete a corrective action plan.[[8]](#footnote-8) A school district must complete corrective action by the beginning of the school year next following the date of the final order.[[9]](#footnote-9) If a school district does not complete corrective action by the beginning of the school year, the department may order appropriate remedies, including an order withholding distributions otherwise required under the laws of this state to be made from the State School Fund.[[10]](#footnote-10)

## II. Appeals of Complaints Originating at Public Charter Schools

Because the specific school against which Father 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.[[11]](#footnote-11) 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, the North Clackamas Schools had an opportunity to hear Father’s complaint.

It should be noted that the district may delegate any duty to Cascade Heights Public Charter School that is otherwise required by law to be met by the district, including the duty to process complaints originating in the public charter school and the duty to not discriminate against a student on the basis of religion. As part of its response to this appeal, the district provided the department with documentation that it had delegated to Cascades Heights those duties.[[12]](#footnote-12) The district also provided the department with documentation specifying the role that it plays in overseeing whether a public charter school is fulfilling its duty to not discriminate against students on the basis of religion.[[13]](#footnote-13) To provide that oversight, the district conducts investigations of alleged violations.[[14]](#footnote-14) If the district determines that a violation occurred, the district has the authority to order a public charter school to take corrective action.[[15]](#footnote-15) If a public charter school fails to take corrective action, the district has the authority to initiate dispute resolution proceedings with the public charter school or even terminate its agreement with the public charter school.[[16]](#footnote-16)

It should also be noted that this order is issued to the district, not Cascade Heights. This does not mean that the district will be required to attempt to reach an agreement with Father through conciliation if the department determines that there is a deficiency, or that the district will be required to undergo any corrective action if conciliation fails. Because the district delegated to Cascade Heights the duty to not discriminate against a student on the basis of religion, the district’s responsibilities would be limited to any deficiency related to its oversight of Cascade Heights. For example, the district could be found deficient if the oversight it provided was discriminatory in nature. It cannot be found deficient for the actions of Cascade Heights.

## III. Arguments Presented

In this appeal, Father alleges that North Clackamas Schools discriminated against Student by not excusing absences related to Student observing religious holy days.

In accepting the appeal, the Oregon Department of Education stated that its investigation would focus on four questions. Those questions are:

* Did Cascade Heights Public Charter School violate ORS 659.850 [or OAR 581-021-0045] by not excusing absences related to attending a program giving instruction in religion?
* Did Cascade Heights violate ORS 339.420? If so, does that statute establish the basis for nondiscriminatory conduct in Oregon involving excusing absences for attending a program giving instruction in religion?
* Is there a court order that affects the operation of ORS 659.850 and 339.420 [and OAR 581-021-0045] in this instance?
* If there is a court order that restricts the operation of ORS 659.850 and 339.420 [and OAR 581-021-0045] in this instance, did Cascade Heights act in accordance with that court order?

As a preliminary matter, it is important to note that the department’s second question is irrelevant. The facts of this case concern the excuse of absences related to the observance of religious holy days, not the excuse of absences related to attending a program giving instruction in religion. ORS 339.420 specifically mandates excusing absences related to attending a program giving instruction in religion. The statute does not apply to excusing absences to observe religious holy days where that observance does not include attending a program giving instruction in religion. In responding to Father’s allegations, the district noted that

[ORS 339.420] relates specifically to a request for a student to be excused from a portion of a school day . . . for ongoing religious instruction, and excused absences for such are mandatory “upon application by the parent and the guardian.” Here, Father is requesting whole-day absences for Holy Days and similar observances, not for religious instruction.[[17]](#footnote-17)

The department agrees with the district. ORS 339.420 simply does not apply to the circumstances on appeal. That said, the remainder of the department’s questions, insofar as they relate to ORS 659.850 and OAR 581-021-0045, remain relevant.

In response to the department’s first question, the district argued that Cascade Heights did not violate ORS 659.850 or OAR 581-021-0045 because the school “complied with the applicable parent plans by appropriately designating absences pursuant to a court order.”

In response to the department’s third question, the district affirmed that a court order affected the operation of ORS 659.850 and OAR 581-021-0045 in this case. In support of its response, the district provided the department with a copy of the original General Judgment of Dissolution and a copy of the Holiday/Holy Day Plan. The district noted that the judgment’s original parenting plan applied to school years predating the 2017-2018 school year. The district further noted that the Holiday/Holy Day Plan, which modified the judgement’s parenting plan, applied to the 2017-2018 school year and subsequent school years.

In response to the department’s final question, the district provided evidence that Cascade Heights excused absences in accordance with the original judgment and the Holiday/Holy Day Plan. With respect to the former, the district noted that Father never alleged that Cascade Heights did not excuse absences in accordance with the judgment’s parenting plan. Rather, Father alleged that Cascade Heights should have excused absences related to Student observing the Feast of Tabernacles in excess of two days per year during school years predating the 2017-2018 school year. With respect to the latter, the district noted that Father acknowledged in the January 10th complaint that Cascade Heights had excused absences related to Student observing the Feast of Tabernacles during the 2017-2018 school year.

## IV. Analysis

Whereas North Clackamas Schools provided evidence that Cascade Heights had complied with the original General Judgement of Dissolution and the subsequent Holiday/Holy Day Plan, Father provided no evidence that Cascade Heights had not done so. Rather, Father’s argument rests on his allegation that Cascade Heights should have excused absences related to Student observing the Feast of Tabernacles in excess of two days per year during school years predating the 2017-2018 school year. For that reason, the entirety of this appeal rests on whether the district violated ORS 659.850 and OAR 581-021-0045 because it adhered to the terms of the General Judgment of Dissolution entered by the Domestic Relations Division of Clackamas County Circuit Court on March 6, 2014.

Whether a court order limiting the number of days that a student may be excused from public school to observe religious holy days impermissibly restricts the student’s First Amendment right to exercise religion is a complicated question. However, the department does not need to answer that question for purposes of adjudicating this appeal. The department has no authority over Clackamas County Circuit Court. The department only has authority over school districts and other types of education programs. The question the department must answer *is not* whether North Clackamas Schools discriminated against Student by not excusing absences related to the observance of religious holy days, *but* whether North Clackamas Schools discriminated against Student by adhering to the terms of a court order.

On these grounds, the department finds that the school district did not discriminate against Student. A school district, or any other education program for that matter, simply cannot be found to have violated ORS 659.850 or OAR 581-021-0045 when it follows the terms set forth in a court order. This is not to say that the terms of a court order are always non-discriminatory. The terms of a court order may be discriminatory. But in such cases, the proper course of action would be to seek legal recourse from the court order, not the school district or other education program implementing the order.

The department’s finding does not leave the Father with no legal recourse. However, that legal recourse is against Clackamas County Circuit Court, which entered the General Judgment of Dissolution, not the district, which merely adhered to it. It was the court that entered the judgment limiting the number of days that Student may be excused from public school to observe religious holy days. If Father wants to answer the question of whether such a judgment impermissibly restricts Student’s First Amendment rights, he should seek the legal advice of counsel qualified to provide him with an answer.

## CONCLUSION

In conclusion, the Oregon Department of Education finds that North Clackamas Schools did not discriminate against Student in violation of ORS 659.850 or OAR 581-021-0045.

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Coordinator

Office of the Director

Mark.Mayer@state.or.us

503-602-0421

1. *See* OAR 581-002-0005(1)(a)(C). When Father filed his appeal, he provided proof that 90 days had passed since the complainant initially filed his complaint with the district. He did not provide proof of having received a final written decision from the district. Because Father received a final written decision from the district, the department also could have accepted his appeal under OAR 581-002-0005(1)(a)(A). [↑](#footnote-ref-1)
2. 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-2)
3. 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-3)
4. OAR 581-002-0009(3)(a)(B) and 581-002-0017(1)(a). [↑](#footnote-ref-4)
5. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-5)
6. OAR 581-002-0011. [↑](#footnote-ref-6)
7. OAR 581-002-0017(1)(b). [↑](#footnote-ref-7)
8. OAR 581-002-0017(1)(e). [↑](#footnote-ref-8)
9. OAR 581-002-0019(1). [↑](#footnote-ref-9)
10. OAR 581-002-0019(2). [↑](#footnote-ref-10)
11. *See* OAR 581-002-0001(2). [↑](#footnote-ref-11)
12. The charter agreement between the district and Cascade Heights contains two provisions that specifically pertain to discrimination. Under the first,

The educational program of CHPCS [Cascade Heights Public Charter School] shall be nonreligious and nonsectarian. CHPCS shall not limit student admission based on race, ethnicity, sex, national origin, religion, disability, sexual orientation, income level, proficiency in the English language or athletic ability, but may limit admission to students within a given age group or grade level.

Under the second,

CHPCS shall comply with all federal and state laws regarding nondiscrimination, including, without limitation, statutory and constitutional provisions prohibiting discrimination on the basis of disability, age, race, creed, color, sex, national origin, religion, ancestry, marital status, political beliefs and/or affiliations, or sexual orientation. [↑](#footnote-ref-12)
13. In its response, the district wrote,

The [a]greement [between the district and CHPCS] does not include a specific provision related to the manner in which the [d]istrict will address discrimination complaints; however, the [d]istrict’s practice is to investigate and address those complaints that would constitute a breach of the [a]greement. A complaint that CHPCS engaged in discriminatory conduct falls into the category of complaint addressed by the [d]istrict. If the [d]istrict substantiated a discrimination complaint against CHPCS, it would notify CHPCS of the violation and request that CHPCS take corrective action to address the violation. If CHPCS did not do so, the [a]greement provisions related to [d]isppute [r]esolution . . . and [t]ermination . . . may be utilized to ensure compliance with state and federal discrimination laws. [↑](#footnote-ref-13)
14. *See supra* note 4. [↑](#footnote-ref-14)
15. *See supra* note 4. [↑](#footnote-ref-15)
16. *See supra* note 4. [↑](#footnote-ref-16)
17. Citations omitted. [↑](#footnote-ref-17)