



African American/Black Student Success Advisory Group

April 19, 2023

Agenda

- Gavel In, Welcome, Roll Call
- OEDI Assistant Superintendent Welcome and Updates
- For the Good of the Order
- Civil Rights Complaints Update
- Break
- Civil Rights Complaints Update Continued
- Public Comment
- Community Announcements & Updates
- Adjourn



OEDI Assistant Superintendent Welcome & Updates

Deb Lange, OEDI Assistant Superintendent



Civil Rights Complaints Update

Mark Mayer, Complaints and Appeals Coordinator ODE, Office of the
Director



ODE Discrimination and Division 22 Complaints and Appeals Processes

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Introduction

My Goals



Goals:

- To provide you with information about ODE's discrimination and Division 22 appeals processes
- To provide you with information about improvements being made to these processes
- To listen and learn
- To brainstorm future solutions



Overview

Overview: Types of Complaints and Appeals

- **Discrimination** (ORS 659.850 & 659.855 and OAR 581-021-0038, 581-021-0045, 581-021-0046, & 581-021-0047)
- **Violations of Division 22 Standards** (ORS 327.006 & 327.103 and OAR Chapter 581, Division 22)
- **Restraint and Seclusion** (ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-570)
- **Educational Retaliation** (ORS 659.852 & 659.855)
- **Religious Entanglement** (ORS 327.109)
- **Sexual Misconduct** (ORS 339.370 to 339.400)
- **Violations of Special Education Law** (federal Individuals with Disabilities Education Act and ORS chapter 343)
- **Violations of Child Nutrition Law** (federal Child Nutrition Act)

Types of Complaints and Appeals (cont.)

Importantly, ODE has fairly broad authority to decide how to process complaints alleging **discrimination, violation of a Division 22 standard, restraint, seclusion, or educational retaliation**. The other types of complaints must be processed in accordance with federal or state statutorily prescribed procedures. Currently, ODE processes these five types of complaints **as appeals**.

Types of Complaints and Appeals (cont.)

Current steps in ODE's appeals process (set forth in OAR 581-002-0001 to 581-002-0023):

- Send notice of acceptance
- Allow school district or other education entity to respond
- Investigate
- Issue final order (if there is insufficient evidence of a violation) **or** preliminary final order (if there is sufficient evidence of a violation)
- If there is sufficient evidence of a violation, give the entity and the complainant an opportunity to conciliate
- If the entity and the complainant fail to conciliate, issue a final order

Types of Complaints and Appeals (cont.)

This presentation primarily focuses on complaints alleging **discrimination** and **Division 22 standards**, with a specific focus on Oregon's anti-discrimination laws and rules and those Division 22 standards that have an equity focus. This presentation *does not* include information on special education law or child nutrition law, both of which are subsets of discrimination law.

Overview: Appeals Numbers

From March 18, 2018, to February 23, 2023, ODE's appeals team received 804 appeals from students, parents, and other district community members. ODE accepted 115 of these appeals, at a rate of accepting one appeal for every seven filed. To date, ODE has completed investigations and issued orders for 89 of the appeals that it has accepted, at a rate of one every three weeks.

Taking Complaints on Appeal

The two reasons that ODE denies an appeal are:

- **ODE lacks subject matter jurisdiction** (such as enforcement of COVID-19 state mandated protocols, which were enforced by Oregon OSHA)
- The complaint is not “ripe,” i.e., the complainant has not exhausted the local complaint process

Appeals Numbers (cont.)



Of appeals accepted, **nearly 70%** allege discrimination. Of the remaining appeals, about half allege violations of Division 22 standards (15% overall) and nearly half allege educational retaliation (11.5% overall) . Only three accepted appeals allege restraint or seclusion (3.5% overall).

Appeals Numbers (cont.)

Of the 89 cases for which ODE has issued an order, ODE has found the education entity deficient 44% of the time. Of those cases, ODE has found education entities deficient on discriminatory grounds **60% of the time**, in violation of a Division 22 standard 40% of the time, and deficient under restraint and seclusion law 50% of the time. ODE has never found that an education entity retaliated against a student under ORS 659.852.

Appeals Numbers (cont.)



Importantly, violations of Division 22 standards self-reported by school districts pursuant to ODE's assurances process *by far* exceed violations of Division 22 standards found by ODE pursuant to the appeals process.

Appeals Numbers (cont.)

Since March, 2018, ODE has tracked a continuous increase in appeals. The main reasons for this increase are:

- Improved accessibility to ODE's appeals process (ODE posted its online appeals form in Spring, 2019)
- Improved communication between ODE and potential complainants about their rights
- Beginning in 2016, substantial increases in reports of protected class harassment and other discriminatory conduct



Ways in Which Our Public Schools Fail Our Protected Class Students

Failures: Indirect Discrimination

Failure to prevent or mitigate protected class bullying and harassment:

- Absence of or inadequate support services and safety measures
 - Requires both (1) support services **and** (2) safety measures
- Untimely Response
 - (1) Formal support and safety measures **vs.** (2) immediate support and safety measures
- Inequitable provision of support and safety measures
 - Does the protected class student bear the burden of implemented safety measures?

Failures: Inadequate Support/Safety Measures

Two elementary school students were best friends. One of the students had a mental disability. The other student was Black. The student with the disability began to draw pictures of Black people hanging, houses burning, and other racially insensitive images. The school's response was to provide increased support to the student with the disability. However, the district failed to provide any specific support to the student who was traumatized by the images.

Failures: Inadequate Support/Safety Measures

Nooses and swastikas were found on school grounds on multiple occasions. Upon finding the nooses and swastikas, the school responded appropriately with respect to removing the images, notifying the community, holding public meetings, and modifying school policy. However, when a parent reported that their Black child was traumatized by these incidents, the school did not offer the student any support services. Eventually, the student transferred schools.

Failures: Inequitable Safety Measures

Several middle school students harassed a minority race classmate, including using racial epithets and subjecting the classmate to acts of hazing. The bullied student fought back, and subsequently all students were disciplined by the school. The school imposed a safety plan that required the harassing students and the classmate they bullied to stay separated on the playground, in the cafeteria, and in other areas of the school. Because the bullied student was outnumbered, this had the effect of ostracizing him from the student body. He often found himself playing alone at recess or sitting by himself at lunch.

Failures: Direct Discrimination

- Deliberate indifference
 - Requires (1) substantial control (2) severe discriminatory harassment (3) actual knowledge **and** (4) deliberate indifference toward protecting protected class students from bullying and harassment
- Unequal access to education services
 - (2) By school staff **or** (2) through the provision of school services
- Targeting or harassment by school staff
 - May lead to indirect discrimination, depending on school's response
- Retaliation
 - Requires (1) report of discrimination (2) adverse action (3) evidence that the adverse action occurred *because* of the protected activity **and** (4) absence of other legitimate reason for the adverse action

Failures: Deliberate Indifference

A student athlete swimmer – who was the son of the swim team’s coach – subjected a Black teammate to constant racial bullying and harassment. In one instance, the student athlete directed the members of the swim team to line up at a pool’s swim blocks according to skin tone, where the student with the lightest skin tone stood at one end of the pool and the student with the darkest skin tone stood at the other end of the pool. The school did nothing upon receiving reports of the bullying and harassment. It did not offer support services to the Black student athlete, create a safety plan for him, or even investigate whether the reports were true.

Failures: Targeting



After a physical education class, when the students were changing in the locker room, one of the students noticed that their wallet was missing. The instructor subsequently instructed a single student, the only minority race student in the class, to strip and hand their clothes over to be searched. The wallet was not found, and the school failed to properly address the discriminatory act when it was reported.

Failures: Retaliation



In the previous example about the Black student athlete swimmer, the student's mother – who worked at the school – reported the racial bullying and harassment. Instead of acting on her report, the school retaliated against her by launching an investigation against her for workplace harassment.



Discrimination Laws and Rules

Discrimination Laws and Rules: Federal

- For discrimination on the basis of race, color, or national origin, **Title VI of the Civil Rights Act of 1964** and its implementing regulations
- For discrimination on the basis of sex, **Title IX of the Education Amendments of 1972** and their implementing regulations
- For discrimination on the basis of disability, **Section 504 of the Rehabilitation Act of 1973** and the **Americans with Disabilities Act of 1990** and their implementing regulations
- **Guidance and orders issued by the United States Department of Education's Office for Civil Rights (OCR)** (very important for Title VI)

Federal Laws and Rules (cont.)

A complainant has the right to file a claim with OCR concurrently with an appeal filed with ODE. However, because OCR is the “administrative investigator of last resort,” OCR would accept and then suspend the concurrent claim until ODE completes its investigation. The complainant then has 60 days from the date of the final order issued by the Oregon Department of Education to re-open the OCR claim.

Discrimination Laws and Rules: State Law

Under ORS 659.850,

A person may not be subjected to discrimination in any public elementary, secondary or community college 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.*

State Law (cont.)

ORS 659.850 defines “discrimination” 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.

State Law (cont.)

ORS 659.850 further defines “race” to include:

Physical characteristics that are historically associated with race, including but not limited to natural hair, hair texture, hair type and protective hairstyles as defined in ORS 659A.001. (“Protective hairstyle” means a hairstyle, hair color or manner of wearing hair that includes, but is not limited to, braids, regardless of whether the braids are created with extensions or styled with adornments, locs and twists.)

Discrimination Laws and Rules: State Rules

OARs adopted under ORS 659.850 include:

- OAR 581-021-0045 (prohibiting discrimination in general)
- OAR 581-021-0046 (setting forth non-discriminatory program compliance standards)
- OAR 581-021-0038 (requirements related to sexual harassment)
- OAR 581-021-0047 (prohibition against Native American Mascots)

These are not Division 22 standards!

State Rules (cont.)

OAR 581-021-0045 uses the same language as ORS 659.850.

However, the rule further defines “race” to include:

Black, African American, American Indian, Alaska Native, Asian, Native Hawaiian, Pacific Islander, other protected races, and multiracial individuals.

The rule also further defines “national origin” to specify protected classes that are part of the African diaspora, like “Afro-Latinx/a/o.”

State Rules (cont.)

OAR 581-021-0045 also defines district to mean:

A school district, an education service district, a public charter school, a Youth Corrections Education Program under contract with ODE, a Juvenile Detention Education Program under contract with ODE, or one of the programs that receives moneys pursuant to ORS 343.243. (These are all the educational entities that receive state funding.)

State Rules (cont.)

OAR 581-021-0046 prohibits specific types of discrimination, including discriminatory practices related to:

- Access to course offerings
- Access to athletics
- Impact of textbooks or curriculum
- Use of appraisal materials or counseling services
- Development of equal opportunity education plans
 - Requires development and implementation of plans that create an “understanding of the pluralistic realities of . . . society”

Discrimination Laws and Rules: Application



Question: Does discrimination law apply differently to African American and Black students differently than other types of protected class students?

Answer: Yes and no.

Application (cont.)

Discrimination law, insofar as it measures different treatment, applies to all protected classes the same. *However*, discrimination law also requires education entities to respond appropriately to the individual needs of the student who is being discriminated against, such as accounting for the level and type of trauma experienced by the student. The level and type of trauma that an African American or Black student might suffer *is different* than the level and type of trauma experienced by other types of protected classes.

Application (cont.)



From OCR guidance:

Students experiencing harassment may continue to suffer psychological problems, including impaired self-esteem, even after the harassment has ended. Encourage the student and the student's parents to consider treatment, where appropriate. The target of the harassment should be offered school services, such as counseling, or referred to publically available sources of victim assistance, such as rape crisis centers, state victim assistance agencies, and other victims' service agencies in police departments, mental health agencies, and prosecutors' offices.

(OCR, Protecting Student from Harassment and Hate Crimes: A Guide for Schools, 28 (1999)).



Division 22 Laws and Rules

Division 22: Laws

Division 22 standards are educational standards adopted pursuant to ORS 327.006 and 327.103

- ORS 327.006 defines “standard school” to mean a school meeting the educational standards established by the State Board of Education
 - Legislature also may create educational standards by passing a law that states a school must meet a specific statute or statutes to be considered “standard”

Division 22 Laws (cont.)

- ORS 327.103 creates a process by which ODE can determine whether a *school district* is standard and bring the school back into compliance
 - Districts are presumed to be standard unless ODE determines that they are not standard
 - Two ways in which ODE determines districts are not standard: (1) assurances process **and** (2) complaint process
 - If districts are found to be not standard, they develop and implement a corrective action plan
 - If the corrective action plan is not developed or implemented, ODE may withhold State School Fund moneys

Division 22: Rules

Educational standards created by the State Board of Education or legislature are codified at OAR Chapter 581, Division 22. Division 22 standards that have an equity focus include:

- OAR 581-022-2050 (Human Sexuality Curriculum)
- OAR 581-022-2120 (Essential Skill Assessments for English Language Learners)
- OAR 581-022-2308 (Agreements Entered Into With Voluntary Organizations)
- OAR 581-022-2310 (Equal Education Opportunities)
- OAR 581-022-2310 (Every Student Belongs)
- OAR 581-022-2315 (Special Education for Students with Disabilities)

Division 22 Rules (cont.)

- OAR 581-022-2325 (Identification of TAG students)
- OAR 581-022-2500 (Programs for TAG students)
- OAR 581-022-2445 (Universal Screenings for Risk Factors for Dyslexia)
- OAR 581-022-2510 (Suicide Prevention Plan)

Because of local control, the *specific language* of each law or rule controls ODE's regulatory reach!

Division 22 Rules (cont.)

OAR 581-022-2308 prohibits districts (defined the same as in the discrimination rules) from entering into agreements with organizations that administer interscholastic activities (like OSAA) unless the organization:

- Implements and adheres to equity focused policies, including policies that prohibit discrimination
- Has a complaint process
- Sanctions districts, parents, and students that violate the rule
- Performs an annual survey of students and their parents

Division 22 Rules (cont.)

OAR 581-022-2310 makes adoption of policies for purposes of implementing OAR 581-021-0045 and OAR 581-021-0046 a Division 22 standard.

Division 22 Rules (cont.)

OAR 581-022-2312 requires school districts to prohibit symbols of hate and adopt policies for the purpose of addressing bias incidents and symbols of hate. For purposes of the rule:

- Symbols of hate are nooses, symbols associated with neo-Nazi ideology, and the battle flag of the Confederacy
- Bias incidents are hostile expressions of animus toward another person on the bases of that person's protected class status, including derogatory language and behavior



Civil Rights Complaints Update, Continued

Mark Mayer, TITLE



Taking Complaints on Appeal

Taking Complaints on Appeal: Why?

- Provides school districts and other education entities with an opportunity to correct deficiencies
 - **Pros:** (1) Gives education entities an opportunity to correct their own mistakes and (2) recognizes school districts as independent governing bodies
 - **Con:** Not responsive to violations that need immediate state intervention

Taking Complaints on Appeal: Why?

- With respect to the majority of discrimination appeals, ODE necessarily must evaluate how school districts and other education entities **respond** to reports of discrimination
 - **Pro:** Allows ODE to properly evaluate district action
 - **Cons:** (1) Not all violations require evaluating how education entities respond to discrimination, such as most violations classified as direct discrimination, and (2) lengthy appeals procedures are not necessary to evaluate responsiveness

Taking Complaints on Appeal: Why? (cont.)

- When ODE consolidated its complaint processes in 2019, it used existing discrimination appeals processes as the starting point
 - **Pro:** Making all appeals processes as similar as possible alleviates some of the difficulty associated with navigating those processes
 - **Con:** Over time, ODE has identified instances where changing our processes is necessary to better address the type of violation that is being alleged
- ODE does not have the staff necessary to take complaints in the first instance

BREAKOUT SESSION



What are some reasons why a student suffering discrimination may not complete the local complaint process?

Do these reasons reflect barriers to equitable access to the law?

Are there better ways to enforce discrimination law and Division 22 standards than withholding State School Fund moneys?

In what other ways is the law inadequate in addressing African American and Black students' needs?

Break



BREAKOUT SESSION



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Listening Sessions

Listening Sessions

During the summer of 2022, ODE held eight separate listening sessions. A total of 44 invitees attended the sessions. Invitees included students, parents and caregivers, advocacy groups, administrators from nine school districts, COSA, OSBA, and members of other education related organizations. The purpose of the listening sessions was to gather input from the community about ODE's appeals processes and to elicit suggestions for improvement.

Listening Sessions (cont.)

Positive feedback:

- The fairness of ODE's determinations
- The quality of ODE's work
- The support provided by ODE *in response* to parent and student requests
- The validation felt by individuals who had been discriminated against upon ODE issuing an order
- The support provided by ODE during conciliation

Listening Sessions (cont.)

Negative feedback:

- The amount of time that ODE takes to investigate an appeal and issue an order
- The lack of ODE *initiated* communication during the lengthy investigation process



Recent Rule Changes

Rule Change: Notice of Anti-Discrimination Law

Amended ORS 581-021-0045 to require education entities to include notice of nondiscrimination. Notices must:

- Be available on the entity's website, posted in multiple locations, and included in a variety of documents
- Be available in the languages of the communities served by the entity

Notice of Anti-Discrimination Law (cont.)

- Be disseminated annually to staff, students, and families of students
- Contain statement of non-discrimination, contact information of staff designated to respond to questions related to discrimination, and a web address for the district's discrimination complaint process

Rule Changes: Dress Codes



Amended OAR 581-021-0046 to ensure that dress codes are nondiscriminatory and, among other things, racially affirming. Further amended to ensure that any revisions to a dress code are made only after receiving input from affected protected classes.

Rule Changes: District Complaint Procedures



Amended OAR 581-022-2370 so that “any person who alleges that they have been subjected to discrimination, or a third party representing such persons or group of persons” may file a complaint with a school district. (Previous language only referred to “a person who resides in the district” and “any parent of guardian of a student who attends school in the district.”)

Rule Changes: Definition of “Complaint”

Amend OAR 581-002-0001 to add a definition of “complaint” to the rules to clarify that ODE will accept appeals when complainants make informal grievances with education entities, including oral complaints alleging discrimination, unless the education entity **directs the complainant to file a formal complaint.** (“Complaint” includes any written report of wrongdoing or written grievance that a complainant emails, mails, or otherwise communicates to a district or district staff member, or any verbal report of discrimination, that is not filed in accordance with a district’s complaint process unless the district, within 10 days of receiving the report or grievance, directs the complainant, in writing in the complainant’s preferred language, to file the report or grievance in accordance with the district’s complaint process.)

Rule Changes: Conciliation

Amend OAR 581-001-0005 so that when ODE finds a violation of a Division 22 standard, the complainant and the education entity no longer have an opportunity to resolve the matter through conciliation before ODE issues a final order. Instead, ODE will issue a final order immediately. The theory behind the change is that whereas other types of violations, like discrimination, concern individuals, violations of Division 22 standards are public complaints involving the entire student body.

Rule Change: Notice of Compliance

Amend OAR 581-002-0005 so that when ODE finds that an education entity *did not* commit a violation, ODE *may* issue notice of compliance as opposed to a final order. The theory behind the change is that ODE can be more responsive to violations and provide students, when there is a violation, with a more timely response.



Proposed Statutory Changes

Statutory Changes: HB 2281

Requires school districts to designate one or more civil rights coordinators for the school district. Civil rights coordinators must:

- Monitor, coordinate, and oversee district compliance with discrimination law
- Oversee investigations of complaints alleging discrimination
- Assist district staff on civil rights issues
- Satisfy any training requirements prescribed by the State Board of Education by rule
- Comply with certain other rules adopted by the board

House Bill 2281 (cont.)

- House Committee on Education held a public hearing on January 23, 2023
- A work session was held on March 29, 2023
- House passed the bill on April 10, 2023
- Referred to Senate Committee on Education on April 11, 2023
- A public hearing and work schedule has not yet been scheduled by the Senate Committee on Education

Statutory Changes: SB 215, section 9

- **Grants ODE subpoena power for the purpose of conducting investigations** (this would allow ODE to order education entities to provide the department with documents relevant to investigations)
- **Exempts from public disclosure information pertaining to a pending case** (once the case is closed, the information is once again subject to public disclosure law)

SB 215 (cont.)

- Senate Committee on Education held a public hearing on January 19, 2023
- A work session was held on March 30, 2023
- Bill failed to pass Senate on April 12, 2023
- Referred to Committee on Rules on April 13, 2023

Statutory Changes, Senate Bill 291

With respect to discrimination, restraint and seclusion, educational retaliation, and religious entanglement:

- Directs ODE to investigate possible noncompliance when it determines that there is evidence of noncompliance (as well as taking complaints)
- Increases ODE's enforcement authority
- In cases where ODE finds that discrimination occurred, authorizes ODE to order student specific services

Senate Bill 291 (cont.)

- The Senate Committee on Education held a public hearing on February 7, 2023
- A work session was not scheduled and the bill died in committee
- There continues to be interest in the content of the bill



Internal Agency Processes

Internal Agency Processes

- Develop and disseminate an easy-to-follow flow chart of appeals processes (available at <https://www.oregon.gov/ode/about-us/Pages/Complaints.aspx>)
- Develop a mechanism by which automated emails will be sent once every two months to complainants and education entities, informing them of the progress of their case and inviting them to contact departmental staff (in progress)
- Create resource lists to disseminate to parents and students in need (in progress)

Internal Agency Processes (cont.)

- Develop checklists for investigators to use when investigating certain types of alleged discrimination (in progress)
- Allocate more time to encouraging and assisting pre-investigatory conciliation (successfully did so with 10% of 2022 case load)
- **Add two full time student advocates to ODE staff**

DISCUSSION/BREAKOUT



Are these recent and upcoming rule changes and legislative ideas sufficient to address African American and Black students' needs?

How can these changes and ideas be improved?

In what other ways can our rules and laws change in order to better address African American and Black students' needs?



For the Good of the Order



Community Announcements & Updates