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Kate Brown, Governor



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Colt Gill

Director of the Oregon Department of Education

October 12, 2022

BY EMAIL

REDACTED
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Superintendent Paul Coakley
Multnomah Education Service District
11611 NE Ainsworth Circle
Portland, OR 97220

RE: Case #2018-SG-01

Dear REDACTED and Superintendent Coakley:

This letter is the order on the May 9, 2019, appeal filed by REDACTED (Parent) alleging that Multnomah Service 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 review school procedures and make findings of fact to determine whether a violation occurred and what action, if any, should be taken.

Appellate Procedures for Complaints Alleging Discrimination

On appeal, Parent alleges that Multnomah Education Service District discriminated against their child (Student) on the basis of disability. Parent specifically alleges that Multnomah Education Service District's use of criteria to transfer students back to their home school districts discriminated against Student by requiring Student to achieve certain benchmarks before Parent could petition the service district to transfer Student back to their school district, North Clackamas School District.

This appeal will proceed under OAR 581-021-0049, the rule that sets forth the processes by which the department accepts and investigates appeals related to complaints of discrimination.

For purposes of this appeal, it is important to note that the State Board of Education adopted new appeals procedure rules for the department in March 2019.¹ As part of that rule revision, the old appeal procedure for discrimination claims – OAR 581-021-0049 – was repealed. However, because Parent filed their appeal with the department before the new rules were adopted, the appeal procedure found in OAR 581-021-0049 applies.

Pursuant to OAR 581-021-0049, the department is reviewing the matter to determine what action, if any, the department should take. If the department determines that substantial evidence does not exist for the charge of discrimination, it will take no further action.² If the department determines that substantial evidence does exist for the charge of discrimination, the complainant and the district must attempt to reach an agreement through conciliation.³ If conciliation fails, the department will hold a hearing on the complaint.⁴

In this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department's order as to whether discrimination may have occurred.

Procedural Background

Parent filed an appeal with the Oregon Department of Education on July 17, 2018. Parent's appeal pertains to a written decision issued by Multnomah Education Service District on October 2, 2017. In Parent's appeal, Parent alleged that the district "never identified criteria for [Student] to transition back to [North Clackamas School District]."

Parent included in their appeal the original complaint filed by Parent with Multnomah Service District and the service district's written response to that complaint. In Parent's original complaint, Parent wrote,

I have seen what a student has to do to meet [the criteria]. I have told you that [Student] can't possibly meet those goals due to [their] disability. [Student] would not have been able to meet them in second grade when [they] had a fabulous year. Many of the students [attending school in North Clackamas School District] would not be able to meet these goals due to their disabilities. [Student] is not a cash cow for [Multnomah Education Service District] where [their] lack of success means more money for you. There is no incentive for the [service district] to "do right and to do well" by these students.

¹¹ See OAR 581-002-0001 to 581-002-0023.

² OAR 581-021-0049(1)(a).

³ OAR 581-021-0049(1)(b).

⁴ OAR 581-021-0049(2).

In its response, the Multnomah Education Service District wrote that it would “do everything [it] can to help [Student] develop the skills” necessary to meet the applicable criteria. The service district wrote that Student had “made great strides” and that it would “support [Student] in moving forward.”

Parent responded to Multnomah Service District in two subsequent emails. In the first, Parent contested the assertion that Student had made “great strides.” In the second, Parent wrote,

Let’s be a little clearer. For [Student] to leave [they have] to 1) follow directions from all school staff on first request. [Student] has never been able to do that consistently for [their] entire school life and yet, [they] were successful in [North Clackamas School District] for K, 1st grade and 2nd grade. [Student] was in a private Christian pre-school and was able to be successful, 2) follow all school rules – hasn’t ever happened. [Student] will always struggle to follow rules in the home, in school and in the community, 3) recognize and use anger management and problem solving skills (that is very broad and non-measurable). Again [Student] will always struggle with this issue. It is a part of [Student’s] disability . . . 4) use appropriate school conversations with peers and school staff. Well, [Student] has picked up a huge majority of [their] language from [their] peers at school . . . 5) participate appropriately in small and large group activities and [stay] on task during group and individual work assignments. It makes no sense to [Student]. [Student] is highly unmotivated to do well and to [meet the criteria]. [Student] has a very poor ability to attend to a task, especially one [they don’t] care about[.]

In conclusion, Parent wrote, “Shame on all of you. This placement is so wrong for [Student].”

The department sent notice that it was accepting Parent’s appeal to the Parent and Multnomah Education Service District on May 9, 2019. The department accepted the appeal on the basis that the service district had failed to resolve the complaint within 90 days.⁵

On May 9, 2019, Multnomah Education Service District responded to Parent’s appeal. As part of that response, the service district argued that its response to Parent’s initial communication was not a final decision. Rather, the service district characterized the communication as an informal exchange about the method used to adjudicate whether Student could transfer back to North Clackamas School District. The department rejects this argument. It is clear from Parent’s communications to Multnomah Education Service District that Parent was making a complaint. In their first communication, Parent wrote, “I have seen what a student has to do to meet [the criteria]. I have told you that [Student] can’t possibly meet those goals due to [their] disability.”

⁵ See OAR 581-021-0049(1).

In their third communication, Parent outlined how Student would not be able to meet the criteria necessary for Student to transfer back to North Clackamas School District. Parent wrote, “Shame on all of you. This placement is so wrong for [Student].” Because Parent made a complaint, the service district had 90 days to resolve that complaint. The service district did not. Thus, the appeal is properly before the department.

Findings of Fact

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

1. During times relevant to this appeal, Student’s home school district was North Clackamas School District.
2. During times relevant to this appeal, school districts referred students to a program run by Multnomah Education Service District (the Program) for students whose behavioral and emotional needs prevented them from succeeding in their home school districts. According to the Program’s webpage,

Students are taught new social and academic skills and strategies that will allow them to be successful in school as well as in the community and work place. [The Program] serve[s] students from Multnomah County and other school districts by contract.

[The Program is] operate[s] on a continuum system. There are four phases with clear academic and behavioral expectations. Students move through the system when they demonstrate that they can meet the requirements at a particular stage over a period of time. The ultimate goal is to return to a regular school placement.

The academic and behavioral requirements for moving from one stage to another stage included following school rules, managing anger appropriately, and staying on task throughout the school day.

3. During times relevant to this appeal, Student had an Individualized Education Plan (IEP).

4. On October 17, 2016, Student's IEP team met to discuss Student's IEP. Parent was at the meeting. The team discussed whether placing Student in a different education setting would benefit Student. The team discussed three types of placement: placement in the home, placement in the district's Structured Learning Center for Behavior, and placement outside of the district. Parent indicated that home placement was not a good option because Student had a history of self-harm. The team discussed how out-of-district placement could best serve Student because of Student's "demonstrated physical aggression at school, which resulted in suspension." The team determined that out-of-district placement was the best option for Student. Parent disagreed that out-of-district placement would best serve Student. However, because the Program would provide Student with a full school day, Parent agreed to the placement. As a result of the meeting, North Clackamas School District referred Student to the Program.
5. Student attended the Program from November 2016 through December 2017.
6. On September 29, 2017, Parent sent an email to an administrator of the Program (Administrator 2), asking for "a list of specific criteria that [Student] has to meet in order to go back to [their] home district."
7. On October 1, 2017, Administrator 2 responded that the Program "works on a levels system in regard to student behaviors." Administrator 2 provided Parent with a list of the timelines and percentages:
 - Level 1 – must have 80% of met days for 15 out of 20 days (does not have to be consecutive).
 - Level 2 – must have 85% of met days for 15 out of 20 days (does not have to be consecutive).
 - Level 3 – must have 90% of met days for 15 consecutive days.
 - Level 4 – must have 95% of met days for 15 consecutive days.

Students may petition to move back to their home district once they have achieved level 3.
8. On October 1, 2017, Parent responded to Administrator 2. Parent wrote,

I have seen what a student has to do to meet a level. I have told you that [Student] can't possibly meet those goals due to [their] disability. [Student] would not have been able to meet them in second grade when [they] had a fabulous year. Many of the students [attending school in North Clackamas School District] would not be able to meet these goals due to their disabilities. [Student] is not a cash cow for [Multnomah Education Service District] where [their] lack of success means more money for you. There is no incentive for the [service district] to "do right and to do well" by these students.

9. On October 2, 2017, Administrator 2 responded to Parent. Administrator 2 wrote that it would "do everything [it] can to help [Student] develop the skills" necessary to meet the applicable criteria. The service district wrote that Student had "made great strides" and that it would "support [Student] in moving forward."
10. On October 2, 2017, Parent responded to Administrator 2. Parent wrote that "[Student] hasn't made great strides." Parent wrote that Student was not as aggressive as they had been at North Clackamas School District because the Program was not taking certain disciplinary action toward Student. "[Student] hasn't learned anything. [Student] would not have been able to meet your level 3 when [they have] had [their] best year in second grade."
11. On October 2, 2017, Parent sent a subsequent email to Administrator 2:

Let's be a little clearer. For [Student] to leave [they have] to
1) follow directions from all school staff on first request. [Student] has never been able to do that consistently for [their] entire school life and yet, [they] were successful in [North Clackamas School District] for K, 1st grade and 2nd grade. [Student] was in a private Christian pre-school and was able to be successful, 2) follow all school rules – hasn't ever happened. [Student] will always struggle to follow rules in the home, in school and in the community, 3) recognize and use anger management and problem solving skills (that is very broad and non-measurable). Again [Student] will always struggle with this issue. It is a part of [Student's] disability . . . 4) use appropriate school conversations with peers and school staff. Well, [Student]

has picked up a huge majority of [their] language from [their] peers at school . . . 5) participate appropriately in small and large group activities and [stay] on task during group and individual work assignments. It makes no sense to [Student]. [Student] is highly unmotivated to do well and to [meet the criteria]. [Student] has a very poor ability to attend to a task, especially one [they don't] care about[.]

12. On November 17, 2017, Student's IEP team met to discuss Student's placement. The team discussed Student's physical aggression toward the Program's staff. The team documented that Student's behavior escalated when Student was in a classroom environment and deescalated when Student was not in the proximity of other students. The team notified Parent that Student required a higher level of aids and services than North Clackamas School District could provide. The team had determined that Student should remain in the Program.
13. In December 2017, Student transitioned out of the Program and no longer attended school in Multnomah Education Service District.
14. On September 17, 2019, an investigator for the Oregon Department of Education interviewed Parent. During that interview, Parent posited that the requirements for meeting the Program's levels are not individualized as required by the Individuals with Disabilities Education Act (IDEA). Parent posited that the levels subjected Student to generalized rules of behavior that discriminated against Student on the basis of disability.
15. On March 22, 2021, the department's investigator interviewed an administrator of the Program (Administrator 3). Administrator 3 provided evidence that Multnomah Education Service District reviews the interventions attempted by a school district before accepting a student into the Program. If the interventions failed to provide the student with an appropriate education, the Program would accept the student. Administrator 3 explained that all students entering the Program start at level 1. However, the Program implements behavior plans for each student to assist them in reaching each level and uses student IEPs as a basis for crafting that behavior plan.

Analysis

A. Oregon's Anti-Discrimination Statute

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.⁶

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."⁷

In applying this prohibition to school districts, including any public charter school located within a school district, OAR 581-021-0045(3) specifically states that a 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]

⁶ 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."

⁷ 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.

(f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

The question on appeal is whether Multnomah Education Service District – under the circumstances at hand – violated either ORS 659.850 or OAR 581-021-0045(c) by using behavioral criteria to adjudge whether Student could transition back to North Clackamas School District.

B. Alternative Placement of Students with Disabilities

Under Oregon law, “[S]chool districts must ensure that a continuum of alternative placements is available to meet the individual special education and related services needs of all children with disabilities for whom the district is responsible pursuant to [Oregon law.]”⁸ “The continuum must . . . include as alternative placements[] instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions.”⁹ To the “maximum extent appropriate,” school districts must ensure that “children with disabilities, including children in public or private institutions or other care facilities, are educated with children who do not have a disability[.]”¹⁰ “Special classes, separate schooling or other removal of children with disabilities from the regular educational environment” should be used “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹¹

Placement of a disabled student must be made by the student’s IEP team and in conformity with the student’s IEP.¹² Placement also must be made in accordance with provisions of the federal Individuals with Disabilities Education Act (IDEA) requiring disabled students to be educated in the least restrictive environment.¹³

The provisions of IDEA requiring disabled students to be educated in the least restrictive environment do not prevent an IEP team from determining that a student should be placed outside of the student’s home district.¹⁴ Rather, the use of alternative placement ensures that a student with a disability is served in a setting where the student can be educated successfully.¹⁵ When placement in the regular classroom is unsuccessful, placement in a special class or school may be necessary to ensure that student can be educated successfully.¹⁶

⁸ OAR 581-015-2005(1)(a).

⁹ OAR 581-015-2245(1).

¹⁰ OAR 581-015-2240(1).

¹¹ OAR 581-015-2240(2).

¹² OAR 581-015-2250(1).

¹³ *Id.*

¹⁴ *Least Restrictive Environment*, 71 Fed. Reg. 46586 (August 14, 2006).

¹⁵ *Continuum of Alternative Placements*, 71 Fed. Reg. 46587 (August 14, 2006).

¹⁶ *Id.*

C. Whether Multnomah Education Service District violated either ORS 659.850 or OAR 581-021-0045(c) by using behavioral criteria to adjudge whether Student could transition back to North Clackamas School District

Before addressing whether Multnomah Education Service District discriminated against Student, it is important to understand the scope of this order. This order does not address whether the service district violated the provisions of IDEA or rules promulgated by the Oregon Department of Education to implement IDEA. This order does not address whether placing Student in the Program, or failing to transition Student out of the Program, violated the terms of Student's IEP. This order does not address whether the Program failed to meet the terms of Student's IEP or to provide Student with the least restrictive environment. Those types of allegations are adjudicated in accordance with the provisions of IDEA and departmental rules implementing those provisions. This order – which is adjudicated pursuant to ORS 659.850 and departmental rules implementing that statute – only addresses the broader question of whether the Program discriminated against Student by using behavioral criteria to adjudge whether Student could transition back to North Clackamas School District.

In consideration of the scope of this order, the department finds that Multnomah Education Service District did not discriminate against Student.

The department first finds that the Program operates as part of “a continuum of alternative placements” necessary “to meet the individual special education and related services needs” of disabled children.¹⁷ The department also finds that North Clackamas School District placed Student in the program because the severity of Student's disability “is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁸ Further, placement of Student in the Program was made by Student's IEP team in consideration of Student's IEP.¹⁹

Importantly, Student demonstrated improved behavior at the Program. Student was placed in the Program, in part, because of Student's “demonstrated physical aggression at school, which resulted in suspension.” While at the Program, Student's behavior improved. Parent acknowledged as much, writing on October 2, 2017, that Student was not as aggressive as they had been at Student's home district because the Program was not taking certain disciplinary action toward Student.

Equally important, the decision for Student to remain in the Program was not made solely in consideration of predetermined behavioral criteria. The Program implements behavior plans for each student to assist them in achieving the criteria and uses student IEPs as a basis for crafting those plans. Further, Student's IEP team met after Student had been enrolled in the Program for approximately one year to specifically discuss Student's placement. The team discussed Student's physical aggression toward the Program's staff and documented that Student's behavior

¹⁷ OAR 581-015-2245(1).

¹⁸ OAR 581-015-2240(2).

¹⁹ See OAR 581-015-2250(1).

escalated when Student was in a classroom environment and deescalated when Student was not in the proximity of other students. In consideration of these observations, the team determined that Student required a higher level of aids and services than North Clackamas School District could provide.

In consideration of the evidence, the department finds that Multnomah Education Service District did not discriminate against Student.

Conclusion

In conclusion, the Oregon Department of Education finds that Multnomah Education Service District did not violate either ORS 659.850 or OAR 581-021-0045(c) by using behavioral criteria to adjudicate whether Student could transition back to North Clackamas School District.

Case #2018-SG-01 is closed.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Mayer', is centered within a light gray rectangular box.

Mark Mayer, Complaint and Appeals Specialist
Office of the Director
Oregon Department of Education
Mark.Mayer@state.or.us