



# Oregon

Kate Brown, Governor



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**Colt Gill**

Director of the Oregon Department of Education

May 12, 2021

**BY EMAIL**

REDACTED  
REDACTED  
REDACTED

Superintendent Chris Fritsch  
Pendleton School District  
107 NW 10th Street  
Pendleton, OR 97801

RE: Case #2021-MM-01

REDACTED and Superintendent Fritsch:

This letter is the order on the January 11, 2021, appeal filed by REDACTED (Complainant) alleging that Pendleton 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 review school district procedures and make findings of fact to determine whether a violation occurred and what action, if any, should be taken.<sup>1</sup>

### **Appellate Procedures for Complaints Alleging Discrimination**

On appeal, Complainant alleges that Pendleton School District discriminated against students who have 504 plans and other students with disabilities. Complainant specifically alleges that the district (1) reduced instruction time for students who have 504 plans – including Complainant’s children – in a discriminatory manner, and (2) did not allow students with disabilities to have access to in-person instruction.

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<sup>1</sup> The administrative rules governing the Oregon Department of Education’s appeals process are OAR 581-002-0001 to 581-002-0023.

The Oregon Department of Education has jurisdiction to resolve appeals pertaining to discrimination under OAR 581-002-0003. The department also has jurisdiction to resolve appeals pertaining to unlawful restraint and seclusion, retaliation, and Division 22 standards. The department does not have the jurisdiction to resolve other types of complaint on appeal.

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.<sup>2</sup> 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 educational entity alleged to have committed the discriminatory act.<sup>3</sup> The preliminary order must include a reference to the decision of the educational entity that is on appeal, the procedural history of the appeal, the department's preliminary findings of fact, and the department's preliminary conclusions.<sup>4</sup> If the department determines that a violation of law or rule described in OAR 581-002-003 did not occur, the department must issue a final order as described in OAR 581-002-0017.<sup>5</sup> The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.<sup>6</sup>

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**

This is an appeal alleging discrimination by Pendleton School District.

On March 17, 2020, the Governor issued an executive order to close schools statewide because of the Covid-19 pandemic.<sup>7</sup> On April 23, 2020, the Governor issued an executive order mandating that all schools remain closed.<sup>8</sup> On June 24, 2020, the Governor issued an executive order providing guidance to schools on resuming in-person instruction.<sup>9</sup> As part of the June 24th executive order, the Governor made in-person instruction contingent on following certain guidelines. Pursuant to those orders, the district implemented a comprehensive distance-learning plan that included plans for resuming in-person instruction.

Complainant filed a complaint with the district superintendent (Superintendent) about the plan on October 8, 2020. Complainant also met with Superintendent on October 12, 2020.

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<sup>2</sup> OAR 581-002-0009.

<sup>3</sup> OAR 581-002-0009(3)(a)(A).

<sup>4</sup> *Id.*

<sup>5</sup> OAR 581-002-0009(3)(a)(B).

<sup>6</sup> OAR 581-002-0009(3)(b).

<sup>7</sup> Executive Order 20-18 (2020).

<sup>8</sup> Executive Order 20-20 (2020).

<sup>9</sup> Executive Order 20-29 (2020).

The Oregon Department of Education accepted Complainant's appeal on January 11, 2021. The department accepted the appeal under 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."

The complaint filed with Superintendent on October 8 did not specifically allege discrimination against students, including Complainant's children, on the basis of disability. For that reason, when the department accepted this appeal, the department specified in the notice of acceptance that

[t]he email sent to Superintendent . . . on October 8, 2020, does not specifically allege discrimination against students with disabilities. It is on these grounds that the department is accepting this appeal. If the department finds, during its investigation, that the matter was never brought to the attention of the district, the department will dismiss the case with instructions to the complainant that she first file with the district.

#### **PRELIMINARY FINDINGS OF FACT**

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

1. At times relevant to this appeal, Complainant's children attended schools located in Pendleton School District. Two of Complainant's children had 504 plans.
2. On September 25, 2020, Superintendent emailed parents of students attending school in the district the district's plan for implementing comprehensive distance instruction. The plan included the conditions in which the district would offer in-person instruction.
3. On September 30, 2020, Superintendent emailed parents an update on the district's plan for implementing comprehensive distance instruction, including how the district would provide in-person instruction. As part of that update, the district reduced in-person instruction.
4. On October 3, 2020, Complainant emailed Superintendent and other district staff, informing them that she was dissatisfied with the proposed reductions to in-person instruction. Complainant did not allege that the district was discriminating against students with disabilities in that email.

5. On October 3, 2020, Complainant emailed Pendleton School District's school board, informing the board members that she was dissatisfied with the proposed reductions to in-person instruction and the district's overall management of comprehensive distance learning. Complainant did not allege that the district was discriminating against students with disabilities in that email.
6. On October 7, 2020, Superintendent emailed Complainant, thanking her for emailing him about her concerns. Superintendent also thanked Complainant for advocating to reopen schools.
7. On October 8, 2020, Complainant filed a complaint with Superintendent, alleging that the district was not providing adequate in-person instruction. Superintendent responded, explaining the logic behind the district's plan to provide in-person instruction and noting that the Governor's executive order, as explained in guidance issued by the Oregon Department of Education, only allowed the district to "operate emergency daycare for targeted groups." The Superintendent also provided Complainant with resources for her to use when advocating to reopen schools. Superintendent also invited Complainant to an in-person meeting to discuss her concerns.
8. On October 12, 2020, Complainant and Superintendent met to discuss Complainant's dissatisfaction with the manner in which the district was providing in-person instruction.
9. On October 12, 2020, Superintendent emailed Complainant a copy of the district's application form for to apply for district daycare. One of the criteria for applying for district daycare was that student's parent must be an essential worker as defined in Executive Order 20-29 (2020).
10. On December 17, 2020, Complainant emailed Superintendent, alleging that district staff refused to provide her with an application form that essential workers could use to apply for district daycare. Complainant wrote,

I have asked for an application to the program as I am an essential worker according to the definition set forth by the ODE and I was denied an application. You have no criteria for identifying who is able to enter the day camps. This is misuse of public funds. Children like I speak of are not able to sign up for a waitlist. I personally asked to get on the waitlist and was denied by you.

Complainant also wrote, "I have on video, your secretary denying access to the daycamp program for anybody except for essential medical first responders."

11. On December 17, 2020, Superintendent responded to Complainant's email:

Thank you for sharing this story and thank you for doing your part. The schools are working with families and doing what they can. The day camps have limited capacity and as an opening occurs, they are identifying students that may be interested. When we started in CDL and as I have told you on numerous occasions, we don't have the resources to provide what is needed of all our students and families. We will continue to serve the best we can.

12. On December 18, 2020, Complainant emailed Superintendent again. In that email, Complainant stated that she had sought legal advice. Complainant wrote, "It was confirmed that your day camp program is violating the state law by having no criteria and not being available to essential workers."

13. On December 29, 2020, Complainant emailed Superintendent again, inquiring about the criteria used to select students for district daycare. Complainant wrote,

When we met in October you provided me with a criteria of the program [showing that it] was for teachers, hospital workers, cops, first responders, and ESD employees. You said you were going off a childcare survey to fill any additional spots. [Y]ou denied my children access to a waitlist. I have since found this criteria to be inconsistent to the testimony from families with children in the day camps. I have a video of [district staff] at the middle school saying it is for first responders and teachers only. [S]he says that they absolutely do not admit children to the daycamp program for failing school. [S]he proceeded to tell us that 40% of the district is failing.

Complainant also wrote specifically about her children:

I have two children with 504 plans, I am an essential worker, I need childcare, and my children have suffered at the hands of our school district by keeping them out of school for this long. I have been denied access to applications, waitlist[ed], and I have also been denied access to a standard operating

procedure or criteria that is fair and equitable. My last email request for an updated criteria also went unanswered.

14. On December 29, 2020, Superintendent emailed Complainant, responding to her concerns. Superintendent wrote,

There are limited spaces at each site for [students] that have been previously discussed. In addition, each site has created limited spots for students who were not connecting either for technology deficiencies (wifi/internet) [and] academic, social and emotional issues . . . If the students [selected by the district] to participate choose not to [participate], then [the district works] off the list that each site has created.

15. On December 30, 2020, Complainant emailed Superintendent, explaining that she had called one of the schools in the district to communicate her dissatisfaction with the district's provision of daycare. Complainant alleged that the district was allowing certain students to attend daycare who were not eligible. Complainant alleged that the district was allowing low income students, disabled students, minority race students, and LGBTQ+ students to attend daycare instead of students of parents who are essential workers. Complainant wrote, "If my children's names ever came to the front of the line for the daycamp I will not morally be able to accept . . . My family can thankfully afford supplemental private learning for our youngest child . . . I have a highschooler who can babysit her." Complainant further wrote,

[A]nother friend of my daughters . . . is struggling with classes, a routine, and her disability. This child has a parent who is a first priority responder, a 911 dispatch officer. This family was never informed of the day camp being available. [T]hey have expressed to me that it would have been a helpful program and that they were not informed of it even though they are a 911 dispatcher.

16. On January 4, 2021, Complainant emailed Superintendent and other district staff, communicating dissatisfaction with the district's approach to advertising daycare opportunities.

17. On January 12, 2021, Complainant emailed the department, describing the complaints that she had filed with the district as pertaining to students with disabilities. Complainant specifically alleged that students with disabilities did not have the same access to district programs as other students.

18. On March 2, 2021, the department’s complaints and appeals investigator interviewed Complainant. During that interview, Complainant alleged that the district refused to provide her with an application for the district’s daycare. Complainant alleged that the district declined to recognize her job as essential as defined in Executive Order 20-29 (2020). Complainant alleged that the district was not adhering to her children’s 504 plan. Complainant alleged that the district’s selection process for daycare was not fair or equitable.
19. On May 3, 2021, the department’s complaints and appeals investigator interviewed Superintendent. As part of the interview, the investigator asked Superintendent about their meeting with Complainant on October 12, 2020. Superintendent stated the Complainant’s primary concern during the meeting was whether her job made her children eligible for district daycare. Superintendent recalled Complainant’s assertion that her job fell within the definition of essential worker as defined in Executive Order 20-29 (2020). Superintendent also stated that Complainant never asserted that her children’s disabilities impaired their distance learning. Superintendent explained that if Complainant had communicated this concern, he would have referred Complainant to her children’s case workers, the district’s special education director, or another district special education expert.

## **ANALYSIS**

Under Oregon’s anti-discrimination statute,

A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.<sup>10</sup>

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.”<sup>11</sup>

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<sup>10</sup> 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.”

<sup>11</sup> 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.

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.

Complainant argues that under the circumstances at hand, Pendleton School District violated ORS 659.850 or OAR 581-021-0045 by denying her children and other students with disabilities a benefit, aid, or service or by limiting their in the enjoyment of a right, privilege, advantage, or opportunity.

However, before answering that question, the Oregon Department of Education necessarily must answer whether Complainant ever brought the matter to the attention of the district before filing her appeal with the department.

Under OAR 581-002-0005,

A complainant may appeal a final decision of a complaint [alleging discrimination] if the appeal meets the following criteria:

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[T]he appeal must be from a final decision by a district. A decision is final if:



- (A) The complainant has exhausted the district's complaint process except as otherwise allowed by statute;
- (B) In a complaint process with more than one step, the district fails to render a written decision within 30 days of the submission of the complaint at any step, unless the district and complainant have agreed in writing to a longer period of time;
- (C) The district fails to resolve the complaint within 90 days of the initial filing of the complaint, regardless of the number of steps in the district complaint process, unless the district and complainant have agreed in writing to a longer time period.

In short, a complainant may file an appeal alleging discrimination with the department *only if* the complainant has received a final decision *of a complaint* from the district.<sup>12</sup> If a complainant never files a complaint with the district, the district does not have an opportunity to issue a final decision on the matter and the department may not accept the appeal.

It is also important to note that the department may only take certain types of complaints on appeal. Under OAR 581-002-003, the department may only accept the following types of appeals:

- (1) A violation of ORS 339.285 to 339.303 or OAR 581-021-0570 (Restraint and Seclusion);
- (2) A violation of ORS 659.850 or OAR 581-021-0550 to 581-021-0570 (Discrimination);
- (3) If the entity against whom the complaint filed is a school district, a violation of OAR 581-021-0046 (Program Compliance Standards for Purposes Related to Discrimination);
- (4) If the entity that is the subject of the complaint is a school or program operated by a school district, education service district, or public charter school, a violation of OAR 581-021-0047 (Prohibition Against Using Native American Mascots);
- (5) If the entity against whom the complaint is filed is a school district, an education service district, a Youth Corrections Education Program provider under contract with the department, or a program that receives moneys pursuant to ORS 343.243 (3) or (4), a violation of ORS 659.852 (Retaliation); or
- (6) A violation of the Oregon Administrative Rules, chapter 581, division 022 (Division 22 Standards).

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<sup>12</sup> The Oregon Department of Education will accept (1) formal complaints filed with a school district pursuant to OAR 581-022-2370, and (2) informal complaints filed with a school district if the school district impliedly waives its complaint process by attempting to resolve the matter without referring the complainant to its complaint process.

As specified in that rule, the department may take on appeal a complaint alleging discrimination. However, the department may not take on appeal a complaint alleging that a school district is not allowing essential workers to enroll their children in district daycare.

On October 3, 2020, Complainant emailed Superintendent and other district staff, informing them that she was dissatisfied with proposed reductions to in-person instruction. That same day, Complainant emailed Pendleton School District's school board, informing the board members that she was dissatisfied with the reductions and the district's overall management of comprehensive distance learning.

On October 8, 2020, Complainant filed a complaint with Superintendent, alleging that the district was not providing adequate in-person instruction.

On October 12, 2020, Complainant and Superintendent met to discuss Complainant's dissatisfaction with the manner in which the district was providing in-person instruction. Complainant has no proof that she alleged the district was discriminating against disabled students at that time. During an interview with the department, Superintendent stated the Complainant's primary concern during that meeting was whether her job made her children eligible for daycare. Superintendent recalled Complainant's assertion that her job was essential as defined in Executive Order 20-29 (2020). Superintendent also stated that Complainant never asserted that her children's disability impaired their distance learning. Superintendent explained that if Complainant had communicated this concern, he would have referred Complainant to her children's case worker, the district's special education director, or another district special education expert.

On December 17, 2020, Complainant emailed Superintendent, alleging that district staff refused to provide her with an application form that essential workers could use to apply for district daycare. Complainant also communicated her dissatisfaction with how the district selected students for district daycare on December 18, 29, and 30.

On January 4, 2021, Complainant emailed Superintendent and other district staff, communicating dissatisfaction with the district's approach to advertising daycare opportunities.

Even during her interview with the department's complaint and appeals investigator, Complainant reiterated that the district refused to provide her with an application for district daycare and that the district declined to recognize her job as essential as defined in Executive Order 20-29 (2020).

In this case, the evidence indicates that Complainant only mentioned her child's 504 plan on one occasion, in her December 29th email, in which she wrote, "I have two children with 504 plans, I am an essential worker, I need childcare, and my children have suffered at the hands of our

school district by keeping them out of school for this long.” The evidence also indicates that Complainant only mentioned other students with disabilities on one occasion, in her December 30th email, in which she wrote, “[A]nother friend of my daughters . . . is struggling with classes, a routine, and her disability. This child has a parent who is a first priority responder, a 911 dispatch officer. This family was never informed of the day camp being available.” The evidence indicates that Complainant’s core complaint was that the district, despite the fact that she and another parent were essential workers, was not allowing their children to enroll in district daycare.

The department cannot accept on appeal Complainant’s core complaint, which falls outside of the department’s jurisdiction. Furthermore, there are two problems with the December 29th and December 30th emails serving as the basis for Complainant’s appeal despite mentioning 504 plans and students with disabilities.

First, the department accepted Complainant’s 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.” The department accepted the appeal on January 11, 2021. The department accepted the appeal on the basis that Complainant filed a complaint with the district on October 12, 2020, when she met with Superintendent. On January 11, 90 days had passed since October 12. In contrast, 90 days had not passed since December 29, the date on which Complainant first mentioned her children’s 504 plans. Nor had 90 days passed since December 30, the date on which Complainant mentioned another student’s disability. In other words, Complainant had not received a final decision of any complaint that she may have filed pertaining to her children’s disabilities or other any other student’s disability.

Second, in both the December 29th and December 30th emails, Complainant never specifically alleges that the district was discriminating against her children or other students on the basis of disability. She mentioned that her children were on 504 plans. She also mentioned that another student was struggling because of disability. But in both emails, she argued, yet again, that she and others were being denied district daycare despite being essential workers. She mentioned that her children and another student needed daycare. But she never specifically alleged that the district’s practices were discriminatory toward students with disabilities. Under the circumstances at hand, the district was not at fault for interpreting Complainant’s complaint as being confined to denying her children and other students district daycare despite their parents being essential workers.

In consideration of the facts, the department is dismissing this case. If Complainant wishes to pursue her complaint alleging that the district is discriminating against students with disabilities, she first must file with the district.

## CONCLUSION

In conclusion, the Oregon Department of Education does not make a finding as to whether Pendleton School District is deficient in this case. The department instead is dismissing this case for procedural reasons. Complainant never filed a complaint with the school district alleging discrimination against students with disabilities. If Complainant wishes to pursue her complaint, she first must file with the district.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Mayer', is centered below the word 'Sincerely,'.

Mark Mayer, Complaint and Appeals Specialist  
Government and Legal Affairs  
Mark.Mayer@state.or.us