



Petitioner's Exhibits 101 through 120 were admitted without objection. At the hearing OISRA withdrew documents it had identified as exhibits 2, 3, and 5 through 9 as duplicative of exhibits offered by Petitioners. OISRA Exhibits 1 and 4 were admitted without objection.

### ISSUE

Did OISRA violate state or federal laws or rules of the Department of Education when it denied Petitioners the opportunity to participate in interscholastic activities for the 2005-2006 school year? *See* OAR 581-021-0035.

### FINDINGS OF FACT

1. OISRA is the association that governs skiing competitions among high school students within the state of Oregon. It consists of an Alpine Division and a Nordic Division. The Executive Board of OISRA consists of four members, three of whom are involved with alpine skiing. (Sellens testimony.)
2. Petitioners are students at Summit High School in Bend, Oregon. Joseph Madden is a junior. His cousin, Thomas Smith is a sophomore.
3. Summit High School is a member of OISRA and Petitioners participated in OISRA sponsored interscholastic Nordic skiing for Summit High School in the 2003-2004 season. Petitioners and their parents believe that skiing for their high school gives Petitioners greater opportunities to get to know other students; to be part of a team effort (rather than just individual competitors); and allows them to represent their school. (Joseph Madden testimony; Maria Madden testimony; Gross testimony; exhibit 106.)
4. In addition to being competitors in OISRA sponsored events Petitioners also take part in training and compete in skiing events sponsored by the Mount Bachelor Ski Education Foundation (MBSEF). Joseph Madden also competes in events sponsored by the Pacific Northwest Ski Association and by the United States Ski Association, which is recognized by the United States Olympic Committee as the national governing body for skiing. Competition and training expenses, including travel to competition and training locations throughout the west and that may be across the country, makes skiing an expensive sport at elite levels. Petitioner Madden anticipated total non-OISRA equipment, training, travel and competition expenses of approximately \$5,700 for the 2005-2006 season. (Joseph Madden testimony; Maria Madden testimony; exhibits 104 and 118.)
5. In an effort to defray some of the expenses related to training and travel costs associated with non-OISRA skiing events, Petitioners applied for a scholarship through the Northwest Snow Sports Foundation (NWSSF). The foundation's applications required applicants to provide their high school transcripts; letters of recommendation; parent financial information; anticipated training and competition expenses; and a personal statement outlining goals for the next year's racing season, along with long-term personal goals. (Joseph Madden testimony; Maria Madden testimony; exhibit

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105.)

6. NWSSF evaluated the applications using four criteria: financial need (35 percent); racing achievement (30 percent); academics (25 percent); and personal goals (25 percent). Petitioners were awarded scholarships of \$500 each paid to MBSEF “to be deposited into their trust funds within the Academy and can be used only for entry fees and travel.” (Exhibits 105, 106 and 112.)

7. OISRA rule 8 states, in relevant part:

The purpose of Rule 8 is to preserve harmony among member schools and school districts by preventing not only actual proselytizing, professionalism and participation by other than regular students in good standing, but conduct or circumstances, which may give rise to the appearance thereof. Exceptions to the general rules herein will be narrowly construed to serve that purpose.

\* \* \* \* \*

8-4 Awards: A student becomes ineligible for one (1) calendar year after the date of the report of the violation to the PISRA if at any time the student accepts or enters into any agreement for the purpose of later accepting any compensation or thing of value for or in recognition of athletic abilities, with these exceptions:

8-4-1 A student may not accept monetary compensation in recognition of athletic ability, participation and/or achievement during the Association year. A student may accept non-monetary compensation or items of value solely in recognition of athletic ability, participation and/or achievement if the total value of such non-monetary compensation or items of value, including the actual value of any *gift certificates*, discounts, coupons, etc., does not exceed \$300 in any association year.

NOTE: For the purposes of this rule, "non-monetary compensation or items of value" does not include customary awards of a symbolic nature without resale value such as the school's athletic letter, medals, ribbons, certificates, plaques, trophies and other emblems or *gift certificates as long as they are not convertible to cash*[.] This rule does not regulate or prohibit compensation received by a student athlete for ability, participation and/or achievement in a non-OISRA sport, not does this rule prohibit the acceptance of college scholarships by student athletes.

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8-4-3 A student participating without compensation as a contestant, coach or similar participant in athletic activities may accept the use of necessary equipment and incidental services customarily furnished amateur participants in such activities, may accept reimbursement for direct and necessary expenses for participation (including mileage where the student must drive), and where participation requires absence from home, may accept necessary meals and lodging.

(Exhibit 102.)

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8. This rule and exception, like many of OISRA's rules, is modeled on rules of the Oregon Schools Activities Association (OSAA). (Sellens testimony; *see* exhibit 103.)
9. During the summer of 2005 Richard Sellens, President of OISRA, learned that Petitioners had been awarded \$500 scholarships by NWSSF. OISRA took no action until November 5, 2005, immediately prior to the ski season when student participation/application fees were due. When Petitioners' applications to participate in OISRA competitions were submitted, OISRA declined those applications for the 2005-2006 season based on their violation of OISRA rule 8-4-1. (Sellens testimony; exhibit 107.)
10. On November 10, 2005 the coach of the Summit High School Nordic Ski team filed a letter asking that the OISRA Board review the November 5, 2005 decision denying Petitioners' ability to participate in OISRA activities. (Exhibit 108.)
11. The OISRA Nordic Executive Committee and General meetings were held on November 13, 2005. During those meeting both bodies determined that Petitioner's circumstances fell under the exception of 8-4-3 and that the students should retain their edibility. (Exhibits 113 and 114.)
12. On November 14, 2005 the Vice Principal of Summit High School made a written appeal to the Board of Directors. (Exhibit 109.)
13. Before the Board met President Sellens consulted with OSAA officials to get their opinions regarding OSAA's rule 8 and OSAA's probable action regarding circumstances similar to those presented by Petitioners. The officials President Sellens talked with agreed with his interpretation. On December 2, 2005, the full Board of Directors of OISRA met and determined that receipt of the NWSSF scholarships constituted monetary assistance that made Petitioner's ineligible for OISRA competition on the grounds cited by President Sellens in the November 5, 2005 letter. (Sellens testimony; exhibit 110.)
14. OISRA Bylaws require the Board to act on appeals "in all haste, or within a maximum of ten (10) days." (Exhibit 120.)
15. On December 8, 2005 Thomas Achterman, Vice Principal of Summit High School, filed an appeal on behalf of Petitioners and their parents with the State Superintendent of Public Instruction. That letter stated Petitioners' disagreement OISRA's decision denying Petitioners' eligibility for interscholastic activities sponsored by the association. (Exhibit 111.)

### **CONCLUSIONS OF LAW**

OISRA did not violate state or federal laws or rules of the Department of Education when it denied Joseph Madden and Thomas Smith the opportunity to participate in interscholastic activities.

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## OPINION

The Proposed Order cited OAR 581-021-0035 and Petitioners' failure to allege or prove that OISRA violated state or federal statutes, or rules of the Board as grounds for reversal of the decision. Examination of the appeal (exhibit 111) shows no allegation that OISRA's determination of ineligibility violates state or federal law or an administrative rule of the Board of Education. Rather, it alleges that the factual circumstances of Petitioners' cases "do not violate rule 8 of the OISRA By-laws" and that application of the rule "would work an undue hardship on them." Assuming, without deciding, that an appeal insufficient on its face is sufficient to move this proceeding forward notwithstanding the failure to include "[a]n allegation that the determination of ineligibility is in violation of a state or federal law or an administrative rule of the State Board of Education," OAR 581-021-0035(2)(c), Petitioners failed to prove a violation requiring reversal of OISRA's decision.

Petitioners appealed OISRA's eligibility determination and have the burden of proving by a preponderance of the evidence that the decision violated state or federal law or rules of the Board of Education. *See* ORS 183.450(2) and (5); *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the finder of fact is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). They did not meet their burden.

First, the Proposed Order correctly stated that Petitioners' position at hearing seemed to seek redetermination of OISRA's initial decision. Proceedings before the Superintendent are not *de novo*. *See Josephine Co. Sch. Dist. v. OSAA*, 15 Or App 185, (1973); *OSAA v. Stout*, 71 Or App 405, 410-411 (1984). They are a hybrid, within which the Superintendent is required to afford parties certain statutory rights set out in the Administrative Procedures Act, ORS 183.310 to 183.550, including the right to cross-examine witnesses and to present additional evidence that will aid the Superintendent in her decision. Consideration of new evidence does not, however, permit the Superintendent to substitute her judgment for that of the association. As noted by the Superintendent in *In the Matter of the Eligibility of Jennifer M. Hughes to Participate in Interscholastic Activities*, Case No. 581-021-0034-1-04, there is “\* \* \* no authority that would support de novo review by the Superintendent, and such review would appear to be outside the range of discretion of the Superintendent.” *Id.* At 8-9.

Review is limited by the enabling statute, ORS 339.430<sup>1</sup>, and rules implementing that statute, including OAR 581-021-0034 and 0035.<sup>2</sup> OAR 581-021-0035 requires that Petitioners prove that

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<sup>1</sup> "(6) A voluntary organization's decisions concerning interscholastic activities may be appealed to the board, which may hear the matter or by rule may delegate authority to a hearing officer to hold a hearing and

OISRA violated state or federal laws or rules of the Board of Education. Implicit within that requirement is an understanding that violation of state and federal constitutional principals by school activities associations constitutes a violation of state or federal law. *See e.g. Josephine County School District No. 7 v. Oregon School Activities Association*, 15 Or App 185, 195 (1973); *Cooper v. Oregon School Activities Association*, 52 Or App 425, 433 (1981).

Petitioners first assert that OISRA's decision violates ORS 659.865. That statute states:

(1) No public or private organization or individual:

(a) Shall infringe in any manner on the right of an athlete to compete in or train for any athletic event duly sanctioned by the national governing body for that sport as recognized by the United States Olympic Committee.

(b) Shall levy any form of punishment or sanction against any athlete for participating in any athletic event duly sanctioned by the national governing body for that sport as recognized by the United States Olympic Committee.

(2) This section applies only to those sports under the jurisdiction of the United States Olympic Committee and known to be "Olympic" sports.

OISRA contends that its events are not sanctioned by any national body or otherwise fall within the scope of the Oregon statute, and that nothing it has done or has the authority to do infringes upon the right of individuals to compete in or train for events covered by an applicable national body. OISRA also contended that the reading of ORS 659.865 put forward by Petitioners runs counter to standards established by the federal government in 36 U.S.C. 36 § 220526, which states in relevant part:

(a) **Exclusive Jurisdiction.** — An amateur sports organization that conducts amateur athletic competition shall have exclusive jurisdiction over that competition if participation is restricted to a specific class of amateur athletes, such as high school students, college students, members of the Armed Forces, or similar groups or categories.

I agree with OISRA on both counts. OISRA's decision that Petitioners are ineligible for participation in OISRA events does not infringe upon Petitioners' right to participate or train for an Olympic sport. It prohibits Petitioners from participating in events sponsored by OISRA for reasons

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enter a final order under ORS chapter 183. Such decisions may be appealed under ORS 183.482."

<sup>2</sup> Newly adopted OAR 581-021-0042, to which the Hearings Officer referred counsel prior to reopening the hearing record, does not apply to this proceeding. Neither OAR 581-021-0034 nor 0035 were amended or repealed. Also, the caption to OAR 581-021-0042, which was not included in the copy the Hearings Officer provided counsel, states its title as "Interscholastic activity organization appeals in cases other than student eligibility." The legal standard set out in OAR 581-021-0042 is, however, essentially identical to that used for review under OAR 581-021-0035.

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unrelated to participation or training for an Olympic sport – Petitioners’ receipt of funds greater than the amount allowed under rule 8. Also, even if ORS 659.865 were to be construed as Petitioners wish it to be, the statute runs counter to the clear federal mandate that high school organizations have “exclusive jurisdiction” over their competitions.<sup>3</sup>

In their exceptions to the Proposed Order Petitioners contended that that the evidence showed "improper discrimination" by OISRA. Additional evidence and argument adduced at the reopened hearing reasserted that claim, and provided additional statutory and constitutional argument in support of that claim. Petitioners raise issues under the privileges and immunities clause of the Oregon Constitution<sup>4</sup> and equal protection arguments under the Constitution of the United States.<sup>5</sup>

The Oregon Supreme Court has recognized that the scope of Art I, § 20 and that of the federal Equal Protection Clause are generally the same. *Cooper v. Oregon School Activities Association*, 52 Or. App. 425 (1981); *City of Klamath Falls v. Winters*, 289 Or 757, 769 n 10 (1980). Oregon courts have discussed the impact of the Oregon Constitution’s privileges and immunities clause in the following language:

"[T]he clause 'forbids inequality of privileges or immunities not available upon the same terms, first, to any citizen, and second, to any class of citizens.'" (fn4) *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998) (quoting *State v. Clark*, 291 Or 231, 237, 630 P2d 810, cert den 454 US 1084, 102 S Ct 640, 70 L Ed 2d 619 (1981)). Article I, section 20, distinguishes between true classes, which are protected in varying ways against discrimination, and pseudo-classes, which are not. Pseudo-classes are those that are created by the challenged law and that have no existence apart from it, whereas true classes are based on "antecedent personal or social characteristics or societal status." *Id.* at 521 \* \* \* Among true classes, cases construing Article I, section 20, have further distinguished between suspect classes and nonsuspect classes and have required a higher level of scrutiny by courts of laws discriminating against suspect classes. *Id.* at 522-23. Although there is not yet any overarching definition of a "suspect class," it has been established that "the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically

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<sup>3</sup> The Supremacy Clause of the United States Constitution, Article VI, clause 2, invalidates state or local laws "interfering with, and being contrary to," federal law. *Gibbons v. Ogden*, 22 US (9 Wheat) 1, 210, 6 L Ed 23 (1824); see also *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516-17 (1992) (state law that conflicts with federal law is "without effect").

<sup>4</sup> Article 1, Section 20. "Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

<sup>5</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.* at 523.

*In re Marriage of McGinley*, 72 Or. App. 717, 723 (2001).

Petitioners concede that their claim does not rise to a level of a discrimination against a "suspect class," so it does not require the strict scrutiny required for such classifications. They contend, however, that OISRA has created classes based on economic status. Petitioners failed to show the existence of a classification scheme, whether explicit or implied, resulting in harm to Petitioners. Rule 8-4 applies to all participants. If OISRA participants accept compensation or anything of value for or in recognition of their athletic abilities they are ineligible for one year after receipt of those funds is reported, unless an exception applies. The rule in question treats all OISRA participants equally and does not create even a pseudo-class, as defined by the Supreme Court. It violates neither federal nor state constitutional requirements. Even if the rule as applied created a distinction between individuals who are able and unable to afford to participate in elite levels of skiing without the benefit of financial aid, Petitioners did not contend and the evidence did not establish that they were unable to participate in elite skiing without the scholarships. Rather, the scholarships provided minor relief from the economic burden of elite skiing.

Petitioners' contend that OISRA's failures to act immediately following the discovery of Petitioner's scholarships, its failure to apply the exception allowed under Rule 8, and its failure to act on Summit High School's appeal within ten days were arbitrary or capricious. The actions of President Sellens and the OISRA Board and the timing of those actions were neither arbitrary nor capricious and, to the extent they are unexplained, did not rise to a level protected by the constitutions of the United States or the State of Oregon.

Mr. Sellens credibly testified that he did not act on information that Petitioners had received \$500 scholarships until after registration material was sent to participating high schools in September and October and the Northern League of the Nordic Ski Division had failed to return forms certifying non-receipt of compensation by all OISRA participants. It was neither arbitrary nor capricious for OISRA to delay inquiry into circumstances surrounding Petitioners' receipt of the scholarships until it was apparent or likely that these student athletes intended on competing in OISRA sponsored events. Also, the rule states that student-athletes will be suspended for one year after receipt of disqualifying funds is reported. Neither Petitioners nor their coach reported receipt of these funds until after OISRA inquired, based on Mr. Sellens independent knowledge of Petitioners' receipt of these scholarship funds. Considering the circumstances and OISRA's rule, the delay was neither arbitrary nor capricious.

I reach a similar conclusion regarding OISRA's decision that the exceptions in rule 8 do not apply to Petitioners' circumstances. The rule clearly states the consequences for accepting compensation. The \$300 exception of rule 8-4-1 clearly does not apply. I was particularly impressed by Mr. Sellens's testimony that tried to assure consistency in interpreting rule 8 and its exceptions by

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contacting the Oregon School Activities Association (OSAA), the interscholastic activities association whose rule was the model for OISRA's rule 8, and that OSAA had concurred with his reading of rule 8. President Sellens and OISRA went out of their way to assure that application of Rule 8 was reasonable and not in conflict with OSAA's reading of its rule upon which OISRA's rule was based. Disagreement with the Board's decision by a subordinate committee within OISRA does not establish that the decision was arbitrary or capricious. The Board's decision was based on the plain language of its rule and its determination that exceptions do not apply was neither arbitrary nor capricious. Even if the Superintendent disagreed with the decision there is no authority suggesting that she may substitute her judgment for the reasoned decision of the OISRA Board.

Finally, to the extent that OISRA may have failed to act within timelines required by its rules, there is no evidence that the delay had any impact on Petitioners ability to participate in OISRA events or that the outcome would have been different if the Board had made a speedier resolution if this issue. The delay, while unexplained, had no negative impact on substantive rights available to Petitioners. After reviewing the evidence and argument in this contested case proceeding:

**IT IS HEREBY ORDERED** that Oregon Interscholastic Ski Racing Association did not violate state or federal laws or rules of the Department of Education when it denied Joseph Madden and Thomas Smith the opportunity to participate in interscholastic activities.

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Vickie Fleming, Deputy Superintendent  
Oregon Department of Education

**NOTICE TO PETITIONER**

**APPEAL RIGHTS: If you are dissatisfied with this Final Order you may, not later than sixty (60) days from the date of this Order, file a petition for review in the Oregon Court of Appeals for review of this case under ORS 183.480 - 183.497. The Department of Education cannot help you with an appeal to the Court of Appeals and you should seek legal advice.**

**IF YOU DO ASK FOR REVIEW BY THE COURT OF APPEALS WITHIN THE PROPER TIME LIMITS, YOU WILL LOSE YOUR RIGHT TO APPEAL FROM THIS ORDER.**

Date of Service:

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