

<b>SALEM-KEIZER SCHOOL</b>	)	
<b>DISTRICT</b>	)	
	)	<b>NO. 2017-001</b>
<b>v.</b>	)	
	)	
<b>OREGON SCHOOL</b>	)	<b>OPINION</b>
<b>ACTIVITIES ASSOCIATION</b>	)	

**Nature of the Proceeding**

This is a contested case proceeding in which the Salem/Keizer School District (“Salem/Keizer” or “the District”) challenges a decision of the Oregon School Activities Association (“OSAA”) that assigned the District to a “6A”<sup>1</sup> athletic conference that includes five of the District’s six high schools<sup>2</sup> and the three high schools in the Bend/LaPine School District.<sup>3</sup> Salem/Keizer appeals that assignment, asserting that it violates OSAA’s own governing rules because it gives rise to circumstances involving an unacceptable risk to the safety of student

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<sup>1</sup>Oregon high schools that wish to compete in interscholastic athletics are members of OSAA, which the member schools have mutually agreed will supervise athletic and other competitions in several ways. As pertinent here, each high school member of OSAA is assigned to one of six classifications—“1A” through “6A”—based on the school’s average daily attendance (“ADA”), with the “6A” classification being reserved for the largest schools.

<sup>2</sup>The five high schools are McKay, Sprague, McNary, South Salem and West Salem. A sixth high school within the District—North Salem—although it has an average attendance that is above that required for “6A” classification, has for reasons not pertinent here been assigned to a “5A” athletic conference.

<sup>3</sup> The three Bend/LaPine high schools are Bend, Mountain View, and Summit.

athletes and their supporters, unreasonably curtails academic participation of student athletes, and imposes unreasonable costs on the District.<sup>4</sup>

The District's appeal was heard on Monday, January 29, 2018, at the District's offices at 2575 Commercial St., S.E., Salem, Oregon. The hearing commenced at 9:30 a.m. The District was represented by Paul Dakopolos, Salem. OSAA was represented by Jon Radmacher, Portland.<sup>5</sup> Both sides filed pre-hearing declarations of their witnesses, all of which declarations were admitted in evidence at the outset of the proceeding.<sup>6</sup> Witnesses were sworn, testimony was taken, and closing arguments of counsel were heard. The case was taken under advisement on January 29, 2018, at 4:30 p.m.

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<sup>4</sup> OSAA acknowledges that its decision is one with respect to which an appeal is permissible, and has appointed the undersigned to serve as an independent hearings officer to resolve that appeal. *See*, generally, OSAA Rule 9 (prescribing role of hearings officer and otherwise describing appeal process).

<sup>5</sup> I wish to especially acknowledge the professionalism of counsel, both before and during the proceeding. Their approach to the case, to each other, and to me demonstrated the highest standards of professional conduct. My sincere thanks to both.

<sup>6</sup> The statements were admitted without objection, with the exception of a part of the statement of witness Bingham relating to the specifics of certain incidents that occurred on the mountain pass road connecting Salem and Bend. OSAA objected to that testimony, arguing that the evidence was hearsay so specific that it should not be considered without the person who was the source of the information being available to testify, and further arguing that, in any event, Ms. Bingham's testimony amounted to expert testimony which she had not been shown qualified to give. The objection was overruled. Upon further review, I am satisfied that my ruling was correct, and I adhere to it. I also wish to note that I considered the evidence in reaching my decision. Thus, OSAA's objection is preserved, should it wish to raise the matter on any appeal of my decision.

The following constitutes my Statement of Historical Context, Issues Presented, Recital of Pertinent Law, Findings of Fact, Conclusions of Law, Opinion, and Order in this case.

### **Historical and Contextual Setting**

I state my Findings of Fact relating to the precise controversy between the parties below. However, I wish to note at the beginning my general understanding of the high school interscholastic competition model, and the place of OSAA in that model. My statement is based on the evidence, the arguments of the parties, case law, and the general knowledge of the subject that virtually any Oregonian with a modicum of interest in high school activities can be expected to have:

OSAA is chartered by its member schools to govern interscholastic competitions in sports, dance, cheerleading, and other activities. Among its responsibilities is a requirement that its Executive Board establish “classifications” of member schools based generally on school populations and “districts” within which schools of like classification may compete for state championships and other honors. The philosophical justification for this approach is a belief that interscholastic competition fosters better, more responsible students and augments classroom learning. Another—indeed, a co-equal—assumption is that interscholastic competition should be such that participants in competitions governed by OSAA should have at least a reasonable chance to win. Thus, the classification and districting process first divides schools according to size (which is taken to be a rough index of their likelihood of winning against the broad range of schools with varying populations), and then assigns schools to participate in districts (often called “leagues” or “conferences”) with schools of relatively similar size for the purposes of competition.

Of course, and even in the best of circumstances, the foregoing approach only approximates its intended outcome: some schools, whatever their size, never seem to win; others almost always do. Moreover, community sentiment may alter the balance by creating an expectation of winning, even to the point that a disproportionate effort may be aimed at that outcome, rather than at schools' broader goals of education in general.<sup>7</sup> But no model for human behavior ever survives actual human touch for long, and the Oregon model at least appears to be aimed at the right outcomes for the right reasons.

Classification and districting are done on a quadrennial basis. Although, as noted, the ultimate decision belongs to the OSAA Executive Board, OSAA Constitution Article 6.1.3., everyone seems to agree that much of the hard work of the classification and districting process is done by a "Classification and Districting Committee" (the "CDC"). OSAA Constitution Article 6.1.1.

During the year that precedes reclassification and redistricting by the Board, the CDC meets frequently to review data, take testimony, recommend the range of student populations for each level of classification, and recommend the district assignments for each of its members. If anything, the CDC meetings during 2017 that preceded the districting decision at issue here were more complex than usual. That is because, instead of merely adjusting the numbers that set the boundaries of each of the six classifications—which had been the number of classifications used by OSAA since 2005—a question was raised and debated within the CDC whether to shrink the number of classifications from six to five, either on an across-the-

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<sup>7</sup> This view of the process was illustrated by the testimony of certain witnesses from both sides, and especially so by the testimony of one athletic director whose testimony was focused on keeping her schools in a league in which those schools could continue their historic domination of other league members.

board basis or for all competitions except football. Those circumstances led the CDC during the year of its deliberative process to propose nineteen different models of classification and districting, the last of which was the Committee's official recommendation to the Board. The Board made its decision at its October 16, 2017 meeting—a decision that, because it varied slightly from the CDC's last proposal, constituted a twentieth outcome of the classification and districting process.

In its decision, the Board chose to leave the number of classifications at six, although the conversation concerning that decision had taken up a significant amount of CDC time, energy, and attention. Having officially disposed of the issue of five versus six classifications, the Board then turned to the proposed districting assignments within each classification. As pertinent here, the Board agree with the CDC's nineteenth draft and created a district composed of five Salem/Keizer schools and the three Bend/LaPine schools.

During a significant part of the year-long CDC discussion, Salem/Keizer had favored reducing the number of classifications from six to five. Part of the justification for its advocacy was the likelihood that, with only five classifications, the Salem/Keizer schools would be assigned to a district that was limited to schools west of the Cascade Mountains.<sup>8</sup> The District preferred this arrangement, because it believed that it would be more favorable to student and fan safety,

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<sup>8</sup> Historically, the District had for a time been involved in a conference that had one member—Redmond High School—from east of the Cascade Mountains. However, Redmond was not an issue in the latest CDC discussions, because the Redmond School District had built a second high school that reduced the population of each of its two schools to a level below the “6A” classification.

would lessen the loss of class time, and would be less expensive. I turn now to the points of contention between the parties in the present case.

### **Issues presented**

Salem/Keizer first attacks the Board's order by asserting that the Board did not give the District sufficient notice that a possible outcome of the classification and redistricting process would be that Salem/Keizer would be placed in a district that included the three Bend/LaPine high schools—a notice requirement that Salem/Keizer considers to be inherent in Article 9.1.2.(a) of the OSAA Constitution. Salem/Keizer also argues that the CDC failed to follow the requirements of Article 9.2.1.(d), in that it did not follow the direction of that Article to give primacy to its consideration of the safety of students, fans, and school personnel (Article 9.2.1.(d)(1)(a)), its consideration of minimizing loss of student instructional time (Article 9.2.1.(d)(1)(b)), or to its consideration of the additional expenses imposed on Salem/Keizer as a result of its districting (Article 9.2.1.(d)(1)(c)). I address each of those issues separately.<sup>9</sup>

### **Pertinent OSAA Rules**

The role of the CDC, and the final authority of the Board, are stated in Article 6 (“Classification of Schools”) of the OSAA Constitution:

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<sup>9</sup> The District also asserts, at least in passing, that ORS 329.025 provides a basis for challenging OSAA's districting decision respecting the Salem/Keizer high schools. I have considered that statute, but do not find it helpful. It is a statement of aspirations for Oregon schools that all of us doubtless would endorse. However, it is not clear to me that the statute would provide standing to a party to sue a school district, and it certainly does not appear to me that the statute could be a proper vehicle for an action against OSAA. I hold that the law pertinent to the present case is that set out in OSAA's Constitution and Rules, and I confine my consideration of this case accordingly.

“A Classification and Districting Committee shall be established to gather information and make recommendations to the Executive Board regarding classifications and districts for the [next] four-year time block. \* \* \*”

Article 6.1.1.

“When initially assigning a school to a classification at the beginning of a four-year time block, the Executive Board may consider evidence submitted by the school concerning its potential enrollment during the four-year time block. \* \* \*.”

Article 6.1.2.

“The Executive Board shall approve or disapprove all classification changes at its quadrennial October Classification and Districting meeting. Classification changes will become effective at the start of the [following four-year time block]. \* \* \*.”

Article 6.1.3.

The rules applicable to CDC deliberations are set out more fully in Article 9 of the OSAA Constitution:

“9.2. Classification and Districting Committee.

“9.2.1. Charge. The Committee shall make recommendations to the Executive Board regarding classifications and districts for the upcoming four-year block. The duties and responsibilities of the Committee shall be:

“(a) To hold public hearings and provide correspondence to interested parties regarding classifications and districts for the upcoming four-year time block.

“(b) To receive testimony from any school or other interested party, including information on the numbers of students currently enrolled in grades 8, 7 and 6.

“(c) To make recommendations to the Executive Board regarding classifications and districts and enrollment limits for the upcoming four-year time block.

“(d) To consider the following criteria, among any others they deem relevant, for recommending placement of schools in athletic districts:

“(1) The Committee must first consider and address the following four criteria before considering supplemental criteria:

“a) Safety of student participants and spectators, parents and other spectators, and school and other personnel;

“b) Minimizing loss of student instructional time;

“c) Minimizing the expenditure of school district and student and parent participant funds; [and]

“d) School enrollment data.

“(2) The Committee may also consider the following criteria, in addition to any others they deem relevant:

“a) School preference;

“b) Creation of similar sized leagues;

“c) Placement of schools within the same school district and classification in the same league;

“d) Scheduling problems;

“e) Athletic district history;

“f) Move as few schools as possible.

“\* \* \* \* \*”



## Findings of Fact

I have grouped my Findings of Fact under headings that correspond to the various arguments advanced by the District. I find the following facts to be true, by a preponderance of the evidence:

### First Argument: Lack of Notice

The District first argues that it was not forewarned of the possibility that the Board would assign Salem/Keizer to a league that included three schools that were over three hours' travel, and a dangerous mountain pass, away from the District's own schools. The District asserts,

“As the classification and districting process was nearing its completion, the latest drafts being considered provided a clear and strong signal of shared priority to put student safety first, by not placing the Bend schools in the same league with Salem-Keizer schools. The ‘Final Recommendation’ suddenly reversed this; it was introduced at the last possible moment and was swiftly adopted by the Classification and Districting Committee and the Executive Board. This effectively shut down any meaningful input that could have been given by 3,900 student athletes and their parents, except at the last meeting [of the Executive Board] when the final voting occurred. This has resulted in a deep mistrust of the process; it is nearly impossible to expect that parent and community input is taken seriously when it is overshadowed on the same agenda by a final vote.”

### Findings of Fact:

(1) Much of the discussion in the CDC throughout its process involved a desire by larger schools, and 6A schools in particular, to reduce the number of classifications to five.

(2) On October 25, 2016, the CDC issued two draft classification and districting proposals (“Draft #1” and “Draft #2”). The former was a 6-classification proposal; the latter, a 5-classification one. Both proposals placed the Bend/LaPine high schools and the Salem/Keizer high schools in the same district.

(3) Moving forward, further drafts continued to assign most Salem/Keizer schools to a league with Bend/Lapine.

(4) In addition to the CDC’s on-going, collective drafting process, many schools offered their own views. One of those views (Ex. 15) came from Salem/Keizer. It specifically supported a 5-classification model that had the Salem/Keizer schools and one Bend/LaPine school—Summit—in the same district.<sup>10</sup>

(5) A later suggestion from the Salem/Keizer athletic directors (Ex.21) supported a proposed 5-classification model (“#13”) that would have once again combined the three Bend/LaPine and five Salem/Keizer schools.

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<sup>10</sup> The other two Bend/LaPine schools—Bend and Mountain View—were placed in a 4A conference.

(6) One CDC proposal from February 3, 2017, continued to propose linking the Salem and Bend schools.

(7) Two CDC proposals circulated March 2, 2017, continued to have most or all of the Salem schools paired with the Bend schools.

(8) As noted, on March 22, 2017, the CDC circulated a proposal (“#13”) for a five-classification alignment that once again combined Bend and Salem. The next proposal (“draft #14”), circulated on April 14, 2017, reflected this same arrangement for a five-classification model.

(9) On April 24, 2017, after a meeting of athletic directors at SunRiver, the CDC voted to proceed with a six-classification model only.

(10) On May 4, 2017, the CDC circulated a new proposal (“#15”) that placed Salem/Keizer into a six-team league that also included McMinnville High School. The proposal placed the Bend/Lapine schools in a 6-team league with Gresham and Barlow High Schools in east Multnomah County and Hermiston High School in Umatilla County.<sup>11</sup>

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<sup>11</sup> As matters have developed, Hermiston High School is no longer in the OSAA “mix”: It has elected to take part in interscholastic athletics with a Washington conference of schools that is centered in Pasco, Kennewick, and Richland, Washington.

(11) On May 24, 2017, the CDC circulated two further proposals. One (“draft #16”) re-united the Bend and Salem schools. The other (“draft #17”) joined the Salem schools to Canby and West Albany, while it assigned the Bend schools to a league that included the soon-to-be-lost Hermiston, as well east Multnomah County schools Barlow, Gresham, and Reynolds, and with Sandy High School in Clackamas County.

(12) On June 23, 2017, the CDC circulated a further proposal (“draft #18”). In that proposal, the Salem schools were re-united with McMinnville High School, along with West Albany. The Bend schools were moved to a league that included three schools in Eugene, plus South Medford, Roseburg, and Grant’s Pass.

(13) On August 31, 2017, the CDC circulated its “draft #19,” which once again joined the Salem and Bend schools in a single conference.

(14) At its quadrennial classification and districting meeting on October 16, 2017, the Board (as pertinent to this proceeding) adopted the CDC’s “draft #19.”<sup>12</sup>

(15) An official of the District served on the CDC and, thus, was aware as soon as anyone could be of changes that the Committee made that could affect Salem/Keizer’s situation.

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<sup>12</sup> Because the Board made certain adjustments or additions, it is perhaps most fair to refer the final, adopted version as “draft” (or “version”) “#20.”

Second Argument: Failure to Properly Consider or Weigh Factors Listed in Article 9.2.3

In this argument, the District asserts that the choice of Salem/Keizer to be joined in a league with the Bend/LaPine high schools demonstrates that the CDC (and, therefore, the Board) cannot have taken into consideration at least three of the elements that it is directed by Article 9.1.2(d) to consider, *viz.*, safety, loss of instructional time, and cost.

Findings of Fact:

(16) There is, in fact, a danger inherent in crossing the Cascades between Salem and Bend that would not be present for student athletes, student spectators, adult spectators, or school personnel if the District's high schools were placed in a league whose other schools are located entirely within the Willamette Valley.

However, the difference is not subject to an arithmetical reduction.

(17) Because a trip to Bend takes between two and three hours, and must be made sufficiently before a scheduled athletic or other contest to permit the participating students to prepare for the contest after arrival, assigning the District's schools to a league with Bend/LaPine schools presents a challenge to student athletes to keep up with their studies while participating.

(18) The loss of time in going to games in the Bend area is doubled, because the athletes (and others) must return home afterward. Returns after midnight are likely to be commonplace.

(19) The foregoing disadvantages to the burden of travel are exacerbated by the fact that, for a number of months during the school year, the pass over which teams must travel is snowy, icy, or both.

(20) In addition to the dangers associated with travel, and the class time necessarily lost due to that travel, the District does not consider its own school bus fleet to be sufficiently reliable to be used for the trip. The District thus faces a significant cost in hiring private transport to make the trip. Figures vary, but the cost to the District is claimed by one witness to be \$700,000 per year, or \$2.8 million for the four-year period. Other evidence puts the figure lower, but it is still a very significant amount. The evidence provided did not permit me to make an informed decision as to the correct amount. However, it unquestionably is correct that the alignment adopted by OSAA will carry a large transportation price tag for the District.

In arguing its own case, the District does not purport to throw any other district under a bus. Instead, the District argues that the OSAA was wrong in selecting a six-, rather than a five-level classification system, because even the

CDC recognized that a five-level classification system would entail less travel and probably would prove more stable in the long run. The proper remedy in this case, the District asserts, is to suspend the OSAA's decision and require it to come up with a new classification and districting scheme that does not require the kind of travel, loss of instructional time, and additional expense inherent in the present scheme.

### **Conclusions of Law**

1. This Hearings Officer has jurisdiction over this proceeding by virtue of the consent of the parties and pursuant to OSAA Rule 9.

2. The District's arguments concerning lack of notice are not well taken.

3. The choices made by the Board, in consultation with the CDC, respecting classifications are quasi-legislative and, thus, discretionary. The District has not shown that discretion to have been abused.

4. The choices made by the Board, in consultation with the CDC, respecting assignment of schools to districts also are discretionary, but the exercise of that discretion is guided by, *inter alia*, Article 9.1.2.(d) of the OSAA Constitution which is set out *supra*. Any exercise of discretion involves three issues of law: (1) Did the party purporting to exercise discretion actually have the legal right to

choose between two or more options? (2) Did the party actually make such a choice? (3) Was the choice within the permissible range?

5. The party purporting to exercise discretion—OSAA—actually had discretion under the classification and districting model presently used by the OSAA and its member schools.

6. OSAA actually did purport to exercise discretion in selecting Salem/Keizer, rather than any of the three other possible groups of schools, to place in a league with Bend/LaPine.

7. The choices that OSAA made were within the permissible range.

### **Opinion**

This is not a happy case, and the apparent good will and honesty of the competing parties do not make it one. High school athletics are, in Oregon as in most of the rest of the country, as much a part of American life as breathing. Indeed, it seems to me to be particularly notable that not even Salem/Keizer, which brings to the table powerful arguments against the regime that OSAA has imposed on interscholastic classification and districting over the forthcoming four-year period, has threatened to discontinue interscholastic athletics until what it would regard as satisfactory improvements to the system are made. In so noting, I do not



in any sense criticize the leadership of Salem/Keizer, or of any other school district. Athletics and the other activities governed by OSAA are considered by most of us to be too valuable to be discontinued.

And there lies the rub. If competition is that valuable, then it needs to be available everywhere—in cities and towns, in large schools and small. And, if it is to exist everywhere, it needs an umbrella organization that is dedicated to governing it. OSAA's mission is to try to achieve that goal, however thankless the effort may be.

The present case seems to me to break down into three pieces: First, there is the question whether the District was somehow denied notice. If it was, constitutional considerations might require that OSAA at least take the case of Salem/Keizer under advisement again, and make a decision in light of whatever arguments proper notice produced.<sup>13</sup> But I find that the District had plenty of notice: Whether with respect to a five- or a six-tiered classification system, Salem/Keizer was aware virtually from the outset of the CDC's work that there

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<sup>13</sup> I should here note in passing that I reject an argument made by OSAA that its decision concerning Salem/Keizer was “quasi-legislative,” and therefore entitled to deference. In my view, it was not: The decision to classify schools into six, rather than five, classifications undoubtedly was “quasi-legislative,” in just the sense that a legislative decision to tax \$1 million in income at a different rate than \$1 thousand is legislative. But the determination whether a specific taxpayer in fact belongs in one camp or the other is quasi-judicial, and is not entitled to deference.

were those who believed that a joint league of Salem/Keizer and Bend/LaPine schools was appropriate. Indeed, at least half of the proposals circulated on behalf of the CDC during that Committee's year-long labors placed the two school districts together in one league. Moreover, two different proposals from the District to the CDC appeared to accept that idea. It may be that, as the process neared its end, Salem/Keizer believed that it was no longer in danger of being placed in such a league, but there was no guarantee of that. The outcome was well within the range of possibilities, and thus is not objectionable on grounds of lack of notice.

The second piece of the case lies in Salem/Keizer's theory that the CDC (and, therefore, the Board) failed to follow its own rule—*viz.*, Article 9.1.2.(d) of the OSAA Constitution. There are two difficulties with the District's argument, however. The first has to do with its scope: The District asserts that the record affirmatively establishes that the CDC did not even begin to address the four criteria set out in Article 9.1.2.(d) until it made its final classification and districting recommendation to the Board. But that argument reads Article 9.1.2.(d) too broadly: By its terms, the Article applies only to the *districting*, not the *classification*, of schools. Subsection (d) state, with particularity, that the Committee is required

“[t]o consider the following criteria, among any others they deem relevant, for recommending placement of schools in athletic districts:

(Emphasis added.) It follows that, to the extent that the District is complaining that the CDC did not consider the subsection (d) criteria in making its *classification* recommendation to the Board, the argument has a false premise and is not well taken.

The District also makes the same argument concerning the consideration of the four subsection (d) criteria in placing its schools in a league with the Bend/LaPine schools. The difficulty with this argument, however, is the way it is made: The District has marshalled a very significant amount of material and information that suggests that the OSAA would have been better advised to decide the present case in some other way—a way that was less hazardous, more protective of instructional time, and/or less invasive of the District’s budget for travel. In fact, for me at least, the District’s arguments are such that I might be persuaded by one or more of them, if it were my role to decide this case on its merits. But that is not my role, nor should it be. It is OSAA’s task to make these decisions. My only task is to assure that the choice that OSAA makes is one among many that it has a right to make. Here, its choice is precisely that.

The foregoing statement is easily illustrated. The establishment of classifications, as already explained, was a quasi-legislative decision that lies outside the scope of my review: it is a given. It also is a given that, within that system, Salem/Keizer's schools are class 6A schools. Finally, it is a given that there are going to be athletic leagues in this state, and that OSAA is required to regulate them. So understood, the question boils down to whether, taking into account the concerns about safety, study, and expense already explained, OSAA nonetheless could decide to join Salem/Keizer and Bend/LaPine in a league.

It could. All the concerns that Salem/Keizer so artfully describes are bound to be shared, to a large degree, by the other three groups of schools which were caught up in the unfortunate "contest" to be joined with Bend/LaPine. All three districts are farther from Bend than is Salem. All three face roads at least as treacherous—and longer—than those faced by Salem. All three face at least an equal if not a greater loss of class time than does Salem. And all three will face added transportation costs—whether those costs are to their own fleet of busses or whether, like Salem, the other schools choose to hire separate transportation. Choosing among the four groups of schools was a thankless task, but it was a choice that OSAA could not refuse to make. The factors that I have just cited show that, whatever choice OSAA might have made, its selection would in all

likelihood have been equally sustainable. Again, Salem/Keizer's arguments to the contrary, while well made, are not well taken.<sup>14</sup>

It follows from the foregoing that I do not find any of the District's arguments to be well taken and that I therefore have no legal basis on which I can sustain the District's appeal. It is dismissed.

**Order**

Based on the foregoing Findings of Fact, Conclusions of Law, and Opinion, the decision of the OSAA in this case is AFFIRMED. The Appeal of the Salem/Keizer School District is DISMISSED.

ENTERED this 22nd day of February, 2018.



W. Michael Gillette

Hearings Officer

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<sup>14</sup> One other point deserves mention: Salem/Keizer, both in its formal argument and through one of its witnesses, appears to assert that there is something impermissible in the Board's structure, with member schools being given equal voting privileges without regard to their size. But that is an argument against the formulation and structure of OSAA itself, and Salem/Keizer needs to take it to its fellow members of OSAA, who collectively have constituted OSAA as their organization to regulate various extra-curricular activities. Any power to somehow "reform" OSAA, whether by imposing a "one student, one vote" regime or otherwise, lies within OSAA's own constituency, not elsewhere.