



# Oregon

Kate Brown, Governor



**OREGON**  
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**Colt Gill**  
Director

May 29, 2020

**BY EMAIL**

[REDACTED]  
[REDACTED]  
[REDACTED]

Dr. Karen Gray, Superintendent  
Lincoln County School District  
P.O. Box 1110  
Newport, Oregon 97365

Re: Case No. 2019-MM-06

Dear [REDACTED] and Superintendent Gray:

This letter constitutes a preliminary order for the following matter: The appeal of a complaint filed by [REDACTED] (Parent) with the Lincoln County School District alleging violations of ORS 659.850 (prohibiting discrimination in an education program, service, school, or activity financed in whole or in part by monies appropriated by the Legislative Assembly) and OAR 581-021-0045 (prohibiting discrimination by school districts in the provision of programs or services to students).

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

Parent alleges that the Lincoln County School District (District) discriminated against her child (Student A) based on race, national origin, and sex when (1) the District allegedly conducted a strip search of Student A, and (2) when the District imposed discipline on Student A for theft of a wallet belonging to Student B.

When a person files an appeal of a complaint alleging discrimination with the Oregon Department of Education (Department), the Department conducts an investigation to determine whether discrimination occurred.<sup>1</sup> If the Department finds that discrimination occurred, the Department will issue a preliminary order to the complainant and the District.<sup>2</sup> The preliminary order will include the Department's preliminary findings of fact and preliminary conclusions.<sup>3</sup> After the Department issues a preliminary order,

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<sup>1</sup> OAR 581-002-0009(2).

<sup>2</sup> OAR 581-002-0009(3)(a)(A).

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

the parties will attempt to reach an agreement through conciliation.<sup>4 5</sup> The conciliation period may not be longer than thirty (30) days unless the parties agree in writing to a longer period.<sup>6</sup> If the parties do not reach agreement through conciliation, the Department will issue a final order.<sup>7</sup> The Department's final order will include: (1) The Department's finding of facts; (2) The Department's analysis and conclusions; and, (3) If a violation was found, a short explanation of any corrective action required by the District and notice that the District may work with the Department in devising and implementing a corrective action plan.<sup>8</sup> If the District does not comply with the final order or implement corrective action in accordance with the terms of a final order, the Department will order appropriate remedies, which may include withholding any distribution authorized under the laws of Oregon from the State School Fund, and any other appropriate remedy.<sup>9</sup>

The Oregon Department of Education has completed its investigation of Case No. 2019-MM-06 to determine whether discrimination may have occurred. This letter constitutes a preliminary order and includes the preliminary findings of fact and conclusions in this matter.

## **II. Procedural Background**

Parent filed an appeal with the Oregon Department of Education alleging that the District discriminated against Student A, based on race, national origin, and sex. The Department accepted the appeal, on June 25, 2019, on the basis that the complainant, Parent, was appealing a final decision from the District.

In a letter, dated May 14, 2019, from the District's School Board Chair (School Board Member) to Parent, the District denied Parent's complaint by stating there was no corroborating evidence to prove that: 1) the head coach (Coach 1) told students that a strip search might be conducted, or that 2) Coach 1 conducted a strip search of Student A. In that same May 14<sup>th</sup> letter, the District stated that strip searches of students is "something we DO NOT allow on our campus-ever." The May 14, 2019, letter constitutes a final decision from the District regarding the allegation of discrimination based on sex.<sup>10</sup>

The District did not respond to parent's allegations of discrimination based on race and national origin. The District did not include a response in its May 14, 2019, letter to Parent, nor did the District investigate and respond after parent raised and discussed those allegations with the District at a meeting on April 24, 2019. The April 24<sup>th</sup> meeting included Student A, Parent, a tribal advocate, and several District Administrators.

Parent's allegation is that the District discriminated against Student A, on the basis of Student A being both a member of the Siletz tribe and Hispanic, when Coach 1 focused suspicion on Student A and reported that suspicion to a responding deputy from the Lincoln County Sheriff's Department (Deputy) after a report was made that a wallet was missing. As a result of that focused suspicion on Student A, Student A was criminally cited for theft and disciplined by the District. The failure of the District to conduct

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<sup>4</sup> OAR 581-002-0011(1).

<sup>5</sup> Conciliation is an alternative out-of-court dispute resolution process. Like mediation, conciliation is a voluntary, flexible, confidential, and interest-based process. The parties seek to reach a dispute settlement or agreement with the assistance of a conciliator, who acts as a neutral third party.

<sup>6</sup> OAR 581-002-0011(2).

<sup>7</sup> OAR 581-002-0011(8).

<sup>8</sup> OAR 581-002-0017(2).

<sup>9</sup> OAR 581-002-0019(2).

<sup>10</sup> See OAR 581-002-0005(1)(a)(A).

an investigation and render a written decision in response to the allegation that Student A was discriminated against, based on race and national origin, constitutes a final decision by the school district. A decision is a final decision if, 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.<sup>11</sup> The district did not provide a written decision regarding the allegation of race and national origin discrimination. In addition, more than 30 days elapsed between the filing of the complaint with the District on April 24, 2019 and the filing of the appeal with the Department in June 10, 2019.

### **III. Findings of Fact**

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

1. At times relevant to this appeal, Student A attended a high school in the Lincoln County School District.
2. Student A has a 504 Plan as part of his educational plan.<sup>12</sup>
3. Student A is a recognized member of an Oregon Tribal Nation.
4. Student A participated in athletics in the District.
5. When Parent made her initial complaint to the District on April 5, 2019, Student A was an athlete in the sport for which Coach 1 was the head coach. At that time, Coach 1 was in his sixth season as head coach and he continues to serve in that role to date.
6. Events of April 4, 2019:
  - a. Student A was at an athletic practice. As practice ended and teammates were preparing to leave for the day, another student (Student B) discovered his wallet was missing.
  - b. Coach 1 suggested that all teammates help Student B look for the wallet. Coach 1, at first, thought the wallet was lost. Teammates, Coach 1, the assistant coach (Coach 2), and the athletic director (Administrator 4) searched the area for the missing wallet. They moved lockers and furniture and searched the area, but the wallet was not found. As part of that initial search, trashcans were also searched. Coach 1 removed trash bags and hung a new trash bag in the practice area. After a period of searching, Coach 1 concluded that the wallet might have been stolen rather than lost.
  - c. The teammates' personal belongings that were within the practice area during practice were accessible only to teammates, Coach 1, and Coach 2.
  - d. Administrator 4, as practice ended, was present near the practice area for a game played by younger students. By that time, some teammates had packed their athletic equipment and had taken their bags to their vehicles.

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<sup>11</sup> See OAR 581-002-005(1)(a)(B).

<sup>12</sup> Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (Sept. 26, 1973), codified at 29 U.S.C. 701 et seq.

- e. Administrator 4 recommended that teammates go back to their cars and retrieve their bags. Administrator 4 observed teammates going to their vehicles and retrieving their athletic equipment bags.
- f. Administrator 4 observed, from his place near the practice area, that only teammates entered the practice area during this relevant time.
- g. Coach 1 requested that teammates empty their bags. Students emptied the contents of their bags in view of Coach 1, Coach 2, and teammates. The missing wallet was not located during this search of the bags.
- h. At some point, during the bag search or right after, one of the teammates announced that he had found the missing wallet in the trash bag that Coach 1 had hung in the practice area. The wallet contained no cash. The other contents of the trash bag consisted of papers from Student A's bag.
- i. Coach 1 conferred with Administrator 4. Administrator 4 remained outside of the practice area. Administrator 4 and Coach 1 decided that contacting law enforcement was the next appropriate step.
- j. Coach 1 then announced to the student teammates that law enforcement would be called if the missing cash was not found. Coach 1 told the team there was a possibility that law enforcement would require the students to be strip-searched or "get naked." At some point, law enforcement was contacted.
- k. Coach 1 observed that several students looked very nervous and uncomfortable during this time. He observed that some of the students began to cry and some students were sweating.
- l. Coach 1 and Administrator 4 conferred and determined that questioning the students would be an appropriate next step. Students were removed from the private practice area.
- m. Coach 2 remained outside the private practice area and observed the teammates as they waited for questioning by Coach 1.
- n. Coach 1 called the students into the practice area, one by one, to be questioned privately. Student A was approximately the third student called in to meet privately with Coach 1.
- o. When Coach 1 questioned Student A, Student A denied he had taken Student B's wallet. Coach 1 had Student A turn out his pockets and remove his shoes to prove that he did not have the missing cash.

- i. Student A reported that after he turned out his pockets and removed his shoes, he then raised his shirt to show he was not hiding anything. Student A reported that Coach 1 then made a hand motion that Student A interpreted to mean that Coach 1 wanted Student A to remove his clothing. Student A, in compliance with the perceived request, dropped his pants and underwear to show he was not in possession of the cash.
  - ii. Coach 1 reported that Student A appeared very nervous. Coach 1 asked each player if he took the money and asked each player to empty his pockets. Coach 1 asked players if they had the money somewhere else, like in their shorts. Coach 1 reported that he did not ask Student A to remove his pants and was surprised that Student A dropped his pants and underwear.
- p. The missing money was not found in Student A's possession.
  - q. After being questioned privately by Coach 1, Student A asked the two players that were questioned before him if they, too, had been required to drop their pants during the private questioning by Coach 1. Those players informed Student A that they had not been required to drop their pants.
  - r. Coach 1 continued calling the teammates in, one by one, to meet with him privately. The missing money was not found and no teammate admitted to taking the wallet.
  - s. The Deputy arrived and spoke with Administrator 4 and Coach 1. The Deputy also questioned the students. Coach 1 told the Deputy that he suspected Student A was responsible for the theft of the missing money.
  - t. The Deputy cited Student A for theft.
  - u. Upon the Deputy's decision to cite Student A for theft, Coach 1 contacted Parent.
  - v. Parent came to the practice area. Parent became visibly upset with Student A and was heard telling Student A and the Deputy that Student A should take responsibility for the theft and that the Deputy should hold Student A responsible if he had taken the wallet.
  - w. Student A's teammates witnessed Parent chastising him and also witnessed the Deputy citing him for theft.
  - x. At some time after returning home, Parent sent a text message to Coach 1 pledging to repay Student B for the stolen money.
  - y. Later that evening, Parent permitted Student A to share his version of what had occurred after the athletic practice that day. Parent then had a different understanding of the events based on Student A's perspective.

7. On April 5, 2019, Parent sent an email to the principal (Administrator 3) inquiring about the search of Student A. Parent wrote, in part, “There is one thing that kind of bothered me about how something transpired and I felt was not per protocol/procedure for your coaches, so per [Student A] he was strip searched all the way down to dropping his underwear without parent or police present. Is that normal protocol/procedure for your coaches? To strip a kid naked?...”
8. On April 5, 2019, Administrator 3 sent the following email response to Parent: “We spoke with [Coach 1]. He said he did not strip search players nor ask them to remove their clothes. He did ask them to empty their pockets and take off their shoes. He said [Student A] was very nervous and [Student A] stated he didn’t have anything in his pants and dropped his clothes including his underwear. Coach [1] was surprised by this and asked him what he was doing. Coach [Coach 1] had an assistant in doorway and said we could ask him and any of the other players. They are at a game at this time and we will follow up with them Monday.” Administrator 3 continued with, “As far as school consequences, let’s call [Student A’s] absence today a suspension and that will be it for this incident as far as school consequences. Due to athletic code of ethics, there may be more athletic consequences but with the coaches gone, we will have that discussion Monday. I will fill out suspension paperwork...” Student A received a one-day suspension for theft.
9. On April 8, 2019, Administrator 3 conducted a phone interview with Coach 1. Administrator 3 noted that he asked Coach 1, “Did you tell kids they were going to be strip searched?” Administrator 3 wrote that Coach 1 provided the following response: “No. I told them something like, I told the team that if the wallet isn’t returned, the sheriff would be called and then people might have to get naked.” Administrator 3, at the end of the phone conversation, told Coach 1 that he should never conduct a search of students without an administrator present.
10. On April 8, 2019, Administrator 4 and Administrator 3 interviewed nine members of the team regarding the events of April 4, 2019. All nine members of the team were asked the following questions:
  - a. “The team was called into the [practice area] together on Thursday afternoon concerned about a wallet and money be [sic] stolen correct? Can you please describe in detail exactly what the coaches said?”
  - b. “What coaches were in the [practice area] as the team was being questioned?”
  - c. “Were you called in individually by your coaches?”
  - d. “What coaches were in the room while they called you individually?”
  - e. “While in the room, what questions were asked?”
  - f. “Did they ask you to pull out your pockets?”
  - g. “Did they ask you to take off your shoes?”
  - h. “Did they ask you to drop your pants or shorts? If yes did you?”
  - i. “At any point did you feel uncomfortable?”
  - j. “Do you know or have an inclination as to who stole the wallet and money in the wallet?”

Six interviewees were asked, “At any point is their [sic] a strip search;” however, three interviewees were not asked that question.

The nine members of the team interviewed included Student A, Coach 1's child, and Coach 2's child.

11. On April 8, 2019, Parent sent a more detailed account of the events of April 4, 2019 to Administrator 3 by email. Parent wrote, "So just a recap of the strip search per [Student A's] view. So at the start of this incident the kids were told by [Coach 1] if the wallet/money was not found everyone would be subject to a strip search. When the wallet/money was not found [Coach 1] removed all the kids from the [practice area] and called them in one by one [Student A] was the third to be called in, [Coach 1] then asked [Student A] to remove his shoes and empty his pockets and he did so [Coach 1] then asked [Student A] if he had anything in his underwear [Student A] said "no," [Coach 1] then made hand gestures as in to show him, [Student A] said he stared at [Coach 1] for like 10 seconds and [Coach 1] continued to make the hand gestures as in to show him so [Student A] pulled his underwear down to show [Coach 1] that had nothing in his underwear [Student A] said [Coach 1] looked and said "ok" it was only [Student A] and [Coach 1] in the [practice area], [Coach 2] was standing outside the door with the door closed. When [Student A] went back outside and asked the other 2 boys that went before him if they were striped [*sic*] searched they answered "no." As I stated to you on Friday at our meeting hand gestures speak just as loud as words and I feel this needs not to be taken lightly."
12. On April 8, 2019, Administrator 3 responded to Parent by writing that the District had completed a thorough investigation, the results of which would be shared with the District's Human Resources Department. Administrator 3 also wrote, "I spoke with [Student A] today. He expressed some feelings of being isolated. I told him if anybody gives him a hard time to let me know."
13. On April 8, 2019, in response to Parent asking what sanction Coach 1 would face, Administrator 3 responded that such decisions were confidential personnel matters.
14. On April 9, 2019, Administrator 3 wrote the following to Parent: "Since the Sheriff cited, that is a higher threshold than reasonable suspicion that schools operate under as I explained to you. I am going to document the incident as a one-day suspension for Monday. That will be it as far as school is concerned. I'm sorry I don't have an answer for you on athletics. I need to review the athletic code of ethics and get back to you. Is [Student A] still feeling like he will quit [that season's sport]?" Parent's response indicated that Parent wanted additional information on pursuing the matter with the District.
15. On April 11, 2019, the District produced an "Investigation Conclusion" in which the District concluded that Coach 1 did not ask the players to remove their clothing and that a strip search did not occur during the player interviews with the coach and that the complaint could not be substantiated. In the same "Investigation Conclusion," the District found that "the incident does not meet the definitions of sexual harassment or violate policy through LCSD Policy JBA." The document concludes by stating, "Appropriate personnel and corrective action has been taken." The human resources director (Administrator 2) signed this document.

16. In addition to the one-day suspension, Administrator 4 recommended that Student A be removed from the team so that Student A could participate in the next season's sport. Student A left the team for the remainder of the season due to embarrassment and Administrator 4's recommendation.
17. On April 24, 2019, Parent, along with Student A, Student A's aunt, and a tribal CARE Program advocate, met with the superintendent (Administrator 1), Administrator 2, Administrator 3, and Administrator 4 to discuss what had happened on April 4, 2019. Student A expressed to the group many of the same details that he had shared with Parent regarding his private interaction with Coach 1 on April 4, 2019. Student A expressed that he felt accused and that he felt down on April 4, 2019, when interviewed individually by Coach 1. Administrator 2 reiterated that the allegation of a Title IX violation was not substantiated and that the strip search complaint amounts to "He said, she said." Parent expressed during the meeting that she believed Student A and that she wanted Coach 1 to admit that it had happened. Parent expressed that the District can never allow a child to be interviewed alone with Coach 1 with the door shut. When asked what would make Parent "feel better[,]," Parent answered "Nothing if [Coach 1] cannot man up." The tribal advocate expressed that Student A had been treated like a criminal; that Student A's teammates have not been speaking to him since the incident; and that, as a result of the events of April 4, 2019, Student A no longer wants to play the sport. Parent expressed that she felt that Student A was targeted with suspicion and strip-searched because he is a member of an Oregon Tribal Nation. The tribal advocate discussed ways the District could be culturally sensitive and expressed that tribal children, like Student A in the present matter, are discriminated against way too often in certain schools within the District.
18. On April 26, 2019, Parent sent an email to Administrator 1 writing, in part, "I have lost all faith in our school and our district. Here we have [Coach 1] getting away with strip searching [Student A] because he is not man enough to admit his impulsive behaviors and it becomes a he said she said thing, also that it's not a violation in district policies if that be sexual harassment or whatever it might be should fall under some kind of violation in policies." Parent, in this email, also requested "that list of chain of commands to go to next, so that I can continue the process of making sure [Student A's] voice is heard and so that people do understand that he in fact was strip searched by [Coach 1]."
19. On April 26, 2019, Administrator 1 sent a response email to Parent writing, in part, "He says he didnt [*sic*] and your son says he he [*sic*] did. I can not [*sic*] prove it either way and so I cannot discipline the coach for something there is no proof he did." Administrator 1 went on to ask for Parent's response to the following points (Administrator 1 indicated that these points were brought up at the conclusion of the April 24, 2019, meeting):
  - a. "1. Retrain – what are the changes in practices and/or procedures including trauma-informed care?"
  - b. "2. Consequences (I think the assurance that there are consequences, not what they are)."

- c. “3. Coach – circle back to the child who feels wronged (I’m sorry this situation happened) and making things ‘better’ between the coach and child. [Administrator 3] can facilitate this.”
  - d. “4. Restoration-team, coach, child (so the team and child hears the coach doesn’t ‘hold anything against him’)”
  - e. “5. Formula-given the legal circumstances, there must be a suspension. Is he good for [next season’s sport] if he is out the rest of [this season’s sport]? What are timing aspects to his suspension? “
  - f. “6. Letter of support-could [Administrator 3] or [Administrator 4] write a letter of support to the juvenile court?”
  - g. “7. [This season’s sport]-will the coach welcome [Student A] back to the team next year? A commitment to non-retaliation.”
20. On April 26, 2019, Parent requested, for the second time, “a list of people in chain of commands” so that she could continue with the complaint process. Administrator 1 informed Parent that the next step would be to file a complaint with School Board Member and that the written complaint should be submitted to School Board Member via Administrator 1’s assistant. Administrator 1 also told Parent that “the last place you can complain after that is the Oregon Department of Education.” Upon direction by Administrator 1, the District emailed Complaint Policy KL (Public Complaint Procedure) to Parent.
21. On or about May 2, 2019, Parent filed a complaint with the District on the District Complaint Form. As to “Nature of Complaint,” Parent wrote: “The strip search that resulted in my son pulling his underwear down and having to expose himself to his coach [Coach 1].” Parent also wrote, “There was interviews on the whole [this season’s sport] team that state the coach said there would be a strip search...You should speak to [Student A] about what occurred and he was discriminated/harassed/or singled out as he was the only one striped [*sic*] searched.”
22. On May 3, 2019, Administrator 1’s assistant sent an email to School Board Member that said, in part, “[Administrator 1] has asked that you wait on your response [to Parent] until [Administrator 1] returns from vacation. She is happy to help with crafting the response.”
23. On May 14, 2019, the District provided a written response to Parent’s complaint filed on or about May 2, 2019. School Board Member wrote, in relevant part, “Due to the facts that [Coach 1] reported that he did not ask your son to remove his clothes as part of a search for a missing wallet, and your son said that [Coach 1] did not say to remove his clothes, but rather gestured, and the fact that there is no one that can corroborate that claim, I have to deny your appeal.” School Board Member also wrote, “[Coach 1] was not released [from his coaching position] because he did not do it and no one can prove he did, including [Student A] who said he did not ask him to take his clothes off but was perceived as making a gesture. I was told that it was the Sheriff who said that if someone didn’t confess to stealing the wallet that the students might be strip searched, something we DO NOT allow on our campus-ever.”
24. On June 10, 2019, Parent filed an appeal with the Oregon Department of Education. In her letter requesting appeal, Parent alleges that the District discriminated against Student A based on race,

national origin, and sex when: (1) the District strip searched Student A; and (2) the District imposed discipline on Student A for theft of a wallet belonging to Student B.

25. On or about June 11, 2019, Parent received a letter from the Lincoln County Juvenile Department explaining that the District Attorney's office had rejected the allegations in the case due to insufficient evidence. The letter also stated, "In addition, I would like [Student A] to be aware of his rights of expungement. Enclosed you will find a copy of the expungement statute and how to proceed."
26. On June 25, 2019, the Oregon Department of Education accepted Parent's request for appeal. The District provided their response in a timely matter, and the Department ordered an investigation of Parent's allegations.
27. On September 28, 2019, the Department's Investigator interviewed Student A and Parent.
28. On November 20, 2019, the Department's Investigator interviewed Administrator 4, Administrator 3, Administrator 2, and Coach 1 regarding this matter.

#### **IV. Analysis**

Under Oregon's law,

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>[13]</sup>

For purposes of this prohibition, "discrimination" means 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>14</sup>

In applying this prohibition to school districts, OAR 581-021-0045(3) provides the following: "In providing programs or services to students, a school district shall not, on a discriminatory basis...:

- (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;

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<sup>13</sup> ORS 659.850(2). OAR 581-021-0045(2) applies this prohibition to the types of schools regulated by the Oregon Department of Education: "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>14</sup> ORS 659.850(1). OAR 581-021-0045(1) uses an identical definition for "discrimination" for purposes of the Oregon Department of Education's regulatory authority over public elementary and secondary schools.

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

The issues addressed in this appeal are (1) whether the District conducted a strip search of Student A and, if so, whether that strip search violated ORS 659.850 and OAR 581-021-0045; and (2) whether the District discriminated against Student A, on the basis of race and national origin, in violation of ORS 659.850 and OAR 581-021-0045 when the District imposed discipline on Student A for theft of a wallet belonging to Student B.

**(1) Whether Lincoln County School District conducted a strip search of Student A and, if the District did conduct a strip search of Student A, whether that strip search constituted a violation of ORS 659.850 and OAR 581-021-0045?**

**A. Did the District conduct a strip search of Student A?**

The Department concludes that the allegation that Student A was subjected to a strip search by Coach 1 on April 4, 2019 is supported by substantial evidence.<sup>15 16 17</sup> The Department comes to this conclusion after conducting an investigation and reviewing documents provided by Parent and the District. The following findings support the allegation that a strip search of Student A occurred:

1. Coach 1, on April 4, 2019, announced to the team that they may be subjected to a strip search or be required to “get naked” if Student B’s missing cash was not recovered.
2. Shortly after informing the students that they may be required to “get naked” if the missing money was not recovered, Coach 1 began calling the student players, one by one, into a practice area to meet with him privately.
3. Coach 1 told the Deputy that he suspected that Student A took the missing wallet and money.

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<sup>15</sup> United States Department of Education Office for Civil Rights, *Q & A on Campus Sexual Misconduct* (Sept. 2017)(School’s Responsibility: The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard. The standard of review should be consistent with the standard the school applies in other student misconduct cases.)

<sup>16</sup> Preponderance of the Evidence means the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; stronger evidence, however slight the edge may be. Black’s Law Dictionary 9<sup>th</sup> Ed (2009).

<sup>17</sup> Clear and Convincing Evidence means evidence indicating that the thing to be proved is highly probable or reasonably certain; this is a greater burden than preponderance of the evidence, but less than evidence beyond a reasonable doubt. Black’s Law Dictionary 9<sup>th</sup> Ed (2009).

4. During the private meeting between Coach 1 and Student A, Student A denied stealing Student B's money. Upon Coach 1's request, Student A turned out his pant pockets and removed his shoes. Student A then interpreted a gesture by Coach 1 to mean that Coach 1 wanted Student A to drop his pants and underwear to prove that he did not have the missing money hidden there. Student A complied.
5. Both Student A and Coach 1 report that Student A dropped his pants and underwear during the private interview of Student A by Coach 1.
6. After leaving the private meeting with Coach 1, Student A asked the students who were questioned before him if they, too, had been subject to a strip search. Student A felt "down[,]" accused, and isolated when he learned that the previous interviewees had not been asked to remove their pants and underwear. He discovered that he alone had been required to do so.
7. Coach 1 admits that, during the private meetings, he asked each player if they took the money and asked each player to empty their pockets. He then asked, "If they had the money somewhere else, like in their shorts."

In summary, Coach 1 announced to the students that they might be required to "get naked" if Student B's missing money was not found. Coach 1 then subjected each student player to a private questioning by him. Coach 1 suspected that Student A stole the wallet and money. Coach 1 required Student A to empty his pockets during the private interview. Coach 1 asked Student A if he had the money somewhere else, like in his shorts. The Department concludes that, under these circumstances, it is understandable that Student A then interpreted a gesture by Coach 1 to mean that he was supposed to remove his pants and underwear to prove he did not have the stolen money.

The Department finds that Student A's credibility is supported by a consistent telling, over time, of the facts associated with the strip search. His telling of the incident to Parent, to Administrators 3 and 4 on April 8, 2019, to Administrators 1, 2, 3, and 4 on April 24, 2019, and to the Department's Investigator on September 28, 2019, remains consistent in fact and detail.

Coach 1, during an investigative interview on November 20, 2019, stated that he asked only three questions of each student during their private meetings with him on April 4, 2019. Coach 1 said he asked each student, "Did you take the wallet? What did you do with the money? Do you have the money?" He stated that he asked each student "nothing more or nothing less." However, when interviewed by Administrator 3 on April 8, 2019, Coach 1 stated that, in addition to asking each player if he took the money, he asked each player to empty his pockets and then asked each player if he had the money somewhere else, like in their shorts. While this inconsistency in Coach 1's reporting of the questioning could be related to memory fade over time, it does raise concern.

In addition, the Department finds the District's response to Parent concerning. In a written response, dated May 14, 2019, the District infers that Coach 1 was not the person who threatened the students with the possibility of a strip search. This misinformation was included in the District's response despite the District's knowledge that Coach 1 admitted to making the threat of a possible strip search when Administrator interviewed him on April 8, 2019.

The Department concludes that the allegation that Student A was subjected to a strip search by Coach 1 on April 4, 2019 is supported by substantial evidence.

**B. Did the District violate ORS 659.850 and OAR 581-021-0045 and subject Student A to hostile environment sexual harassment (i.e., denied Student A of an aid, benefit or service and limited Student A in the enjoyment of a right, privilege, advantage or opportunity) when the District conducted a strip search of Student A?**

The Department concludes that the allegation that the District subjected Student A to hostile environment sexual harassment when the District conducted a strip search of Student A on April 4, 2019 is supported by substantial evidence to indicate that the District may have violated ORS 659.850 and OAR 581-021-0045.

Under Oregon’s anti-discrimination statute and administrative rule, a person may not be subjected to discrimination on the basis of sex.<sup>18</sup> In analyzing the District’s duty, under that statute and rule, to provide Student with an environment free from sexual harassment, the Department relies on the federal anti-discrimination laws known as Title IX<sup>19</sup> and the interpretation of those laws by federal courts and the United States Department of Education’s Office for Civil Rights (OCR). Because Title IX has the same intent as ORS 659.850 and OAR 581-021-0045 and because the text of ORS 659.850 and OAR 581-021-0045 allow the statute and rule to be applied broadly, the interpretation of Title IX by federal courts and the OCR is an important tool for the Department to use in the application of ORS 659.850 and OAR 581-021-0045.

In interpreting Title IX, the OCR has provided guidance pertinent to the issue raised in this appeal. In application, Title IX requires schools to provide students with a learning environment that is free from sexual harassment and to remedy complaints alleging sexual harassment.<sup>20</sup> As defined by the OCR:

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. Sexual harassment of students is therefore, a form of sex discrimination prohibited by Title IX.<sup>21</sup>

In other words, failure by an educational institution to provide students with a learning environment that is free from sexual harassment, and failure by an educational institution to remedy complaints alleging sexual harassment, constitute violations of ORS 659.850.

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<sup>18</sup> ORS 659.850; OAR 581-021-0045.

<sup>19</sup> Education Amendments of 1972, Public Law No. 92-318, Title IX, Sections 901-907 (codified at 20 U.S.C. 1681 *et seq.*)

<sup>20</sup> United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 10 (2001). Refer to the Guidance online at: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

<sup>21</sup> *Id.* at 8.

Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.<sup>22</sup> Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.<sup>23</sup> Conduct of a sexual nature that can support a sexual harassment claim under Title IX varies greatly.<sup>24</sup>

Sexual harassment of a student by a teacher or other school employee can be discrimination in violation of Title IX.<sup>25</sup> Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence.<sup>26</sup> A school also may be responsible for remedying the effects of the harassment on the student who was harassed.<sup>27</sup> The extent of a school’s responsibilities, if an employee sexually harasses a student, is determined by whether or not the harassment occurred in the context of the employee’s provision of aid, benefits, or services to students.<sup>28</sup>

Schools generally provide aid, benefits, and services to students through the responsibilities they give to employees.<sup>29</sup> If an employee who is acting in the context of carrying out these responsibilities over students engages in sexual harassment, generally, this means harassment that is carried out during an employee’s performance of his or her responsibilities in relation to students.<sup>30</sup> If the harassment denies or limits a student’s ability to participate in or benefit from a school program on the basis of sex, the school is responsible for the discriminatory conduct.<sup>31</sup> The school is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence.<sup>32</sup>

OCR considers a variety of related factors to determine if a hostile environment has been created, *i.e.*, if sexually harassing conduct by a school employee is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s programs based on sex.<sup>33</sup> OCR considers the conduct from both a subjective and objective perspective.<sup>34</sup> OCR directs us to consider all relevant circumstances.<sup>35</sup> Relevant circumstances are defined as “the constellation of surrounding circumstances, expectations, and relationships.”<sup>36</sup> Schools are given eight (8) factors to use to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does

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<sup>22</sup> United States Department of Education Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying*, page 2 (Oct. 26, 2010); *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999).

<sup>23</sup> *Id.*

<sup>24</sup> *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992).

<sup>25</sup> United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 14 (2001).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

not rise to that level.<sup>37</sup> The Department evaluates the conduct in this case, a strip search of Student A, utilizing the eight (8) factors as follows:

1. Factor 1: The degree to which the conduct affected one or more student’s education.

OCR assesses the effect of the harassment on the student to determine whether it has denied or limited the student’s ability to participate in or benefit from the school’s program.<sup>38</sup>

In the present case, the strip search resulted in Student A feeling accused, “down”, and isolated. These feelings, along with Administrator 4’s recommendation that Student A be removed from the team, resulted in Student A leaving the team for the remainder of the season. Therefore, the strip search denied or limited Student A’s ability to continue to participate in or benefit from the school’s sports program.

2. Factor 2: The type, frequency, and duration of the conduct.

In most cases, a hostile environment will exist if there is a pattern of harassment, or if the harassment is sustained and nontrivial.<sup>39</sup> The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.<sup>40</sup>

In the present case, the strip search of Student A occurred on one occasion and was not recurring conduct. The conduct did not involve Coach 1 touching Student A. Although Coach 1 did not touch Student A, the strip search of a high school student constitutes relatively severe conduct; therefore, there is less need to show a repetitive series of incidents.

3. Factor 3: The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.

A factor to be considered, especially in cases involving allegations of sexual harassment of a student by a school employee, is the identity of and relationship between the alleged harasser and the subject or subjects of the harassment.<sup>41</sup> For example, due to the power a professor or teacher has over a student, sexually based conduct by that person toward a student is more likely to create a hostile environment than similar conduct by another student.<sup>42</sup>

In the present case, the alleged harasser, Coach 1, has power over Student A; therefore, the strip search conducted by Coach 1 of Student A is more likely to create a hostile environment than similar conduct by a student.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 12.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

4. Factor 4: The number of individuals involved.

An individual or a group can commit sexual harassment.<sup>43</sup> In some cases, verbal comments or other conduct from one person might not be sufficient to create a hostile environment, but could be sufficient if done by a group.<sup>44</sup> Similarly, while harassment can be directed toward an individual or a group, the effect of the conduct toward a group may vary, depending on the type of conduct and the context.<sup>45</sup> For certain types of conduct, there may be “safety in numbers.”<sup>46</sup> For example, following an individual student and making sexual taunts to him or her may be very intimidating to that student, but, in certain circumstances, less to a group of students.<sup>47</sup>

In the present situation, the sexually harassing conduct comes from one individual, Coach 1, and the strip search was directed at one individual, Student A. Student A felt “down” and isolated upon learning that other players were not subjected to strip searches. In the circumstances presented in this case, the effect of being of being the only one targeted for a strip search appears to have upset Student A more than if his team members had been subjected to a strip search too. It is important to note, however, that although Student A was ultimately the only player subjected to a strip search, all the players in attendance were threatened with the possibility of a strip search on April 4, 2019.

5. Factor 5: The age and sex of the alleged harasser and the subject or subjects of the harassment.<sup>48</sup>

In the present situation, an adult coach is conducting the sexually harassing conduct upon a high school student, a minor.

6. Factor 6: The size of the school, location of the incidents, and context in which they occurred.

Depending on the circumstances of a particular case, fewer incidents may have a greater effect at a small college than at a large university campus.<sup>49</sup> Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers.<sup>50</sup> Harassing conduct in a personal or secluded area can have a greater effect than would similar conduct in a more public area.<sup>51</sup> On the other hand, harassing conduct in a public place may be more humiliating.<sup>52</sup> Each incident must be judged individually.<sup>53</sup>

In the present matter, the high school has an enrollment of just under 200 students; therefore, it is a relatively small school environment. An individual incident of sexual harassment in this small school setting is likely to have a greater effect than an incident at a large high school campus. The humiliation of Student A may have been reduced somewhat because the strip search was conducted in a private location

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

rather than a public place. However, the strip search was conducted in a private room with the door closed; so it was not possible for Student A to avoid Coach 1 and the harassing conduct. The only people in the room were Student A and Coach 1. Student A, in this situation, did not have access to another adult for assistance, nor could Student A rely on other students *i.e.*, there was no “safety in numbers” opportunity available to Student A.

7. Factor 7: Other incidents at the school.

A series of incidents at a school, not involving the same students, could, taken together, create a hostile environment, even if each by itself would not be sufficient.<sup>54</sup>

In the present matter, the Department is not aware of other incidents of sexual harassment at this particular school.

8. Factor 8: Incidents of gender-based, but nonsexual harassment.

Acts of verbal, nonverbal or physical aggression, intimidation, or hostility based on sex, but not involving sexual activity or language, can be combined with incidents of sexual harassment to determine if the incidents of sexual harassment are sufficiently serious to create a sexually hostile environment.<sup>55</sup> Incidents of racial or national origin harassment directed at a particular individual may be aggregated with incidents of sexual or gender harassment directed at that individual in determining the existence of a hostile environment.<sup>56</sup>

In the present matter, Student A was subjected to the nonverbal aggression, intimidation, and hostility of a strip search while possibly also being subjected to racial or national origin harassment.<sup>57</sup>

In addition to consideration of the eight factors above, OCR considers whether the sexual harassment was welcome or unwelcome.<sup>58</sup> Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”<sup>59</sup> On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome.<sup>60</sup> Schools should be particularly concerned about the issue of welcomeness if the harasser is in a position of authority.<sup>61</sup> The student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections he or she will be singled out for harassing comments or retaliation.<sup>62</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.*; See *Jeffries v. Harris County Community Action Ass’n*, 615 F.2d 1025, 1036 (5<sup>th</sup> Cir. 1980); See also *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415-16 (10<sup>th</sup> Cir. 1987) (concluding that harassment based on sex may be discrimination whether or not it is sexual in nature).

<sup>57</sup> See Section IV(2) of this preliminary order where the Department concludes that there is substantial evidence to support the allegation that discrimination, on the basis of race and national origin, may have occurred.

<sup>58</sup> United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 13 (2001).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

In the present matter, there is substantial evidence that Student A did not welcome the strip search conducted by Coach 1 when the following circumstances are considered: Student A was reluctant to drop his shorts when Coach 1 gestured in a way that Student A interpreted as meaning that he should drop his shorts. After the strip search, Student A immediately asked his teammates if they, too, had been subjected to a strip search and then felt “down[,]” accused, and isolated when he learned that he alone was subjected to a strip search. On the evening of the incident, Student A reported to Parent that he was subjected to a strip search. Parent then immediately reported the strip search to Administrator 3, voiced objection, and asked if it was normal protocol/procedure for coaches to “strip a kid naked.”

Where, in the present matter, the Department finds that:

1. The strip search of Student A significantly affected Student A;
2. The strip search of Student A, although not a repetitive incident, constitutes relatively severe conduct;
3. Coach 1, a school employee and a person with power over Student A, conducted the strip search of Student A.;
4. Student A became particularly upset upon learning that he was the only team member subjected to a strip search by Coach 1;
5. Coach 1, the person conducting the sexually harassing conduct, is an adult while Student A is a minor in high school;
6. The high school, where the sexually harassing conduct occurred, is a relatively small school. Coach 1 conducted the strip search in a room with the door closed and no one else was present except Coach 1 and Student A. Although this private setting reduced the risk of public humiliation, it also prevented Student A from seeking assistance from another adult or from seeking any “safety in numbers” support from his teammates;
7. The Department is not aware of other incidents of sexual harassment at this high school;
8. The strip search of Student A, a nonverbal act of sexual harassing intimidation, combined with the possibility of racial and national origin discrimination<sup>63</sup> directed at Student A by the District, produced a sexually hostile environment; and
9. The strip search of Student A by Coach 1 was unwelcome conduct from Student A’s perspective;

the Department concludes that the strip search of Student A by Coach 1 was unwelcome, humiliating, sexually intrusive conduct, and with this conduct, the District discriminated against Student A on the basis of sex (Sexual Harassment in violation of Title IX and ORS 659. 850). In subjecting Student A to a sexually hostile environment, the District denied Student A the benefit of bodily autonomy and the benefit of playing on the school’s sports team. In addition, Student A, due to the strip search, lost the enjoyment, privilege, advantage, and opportunity of bodily autonomy and of being a player on the school’s sports team (Sexual Harassment in violation of Title IX, OAR 581-021-0045 3(a), and OAR 581-021-0045 3(f)).

The Department concludes that there is substantial evidence to support the allegation that the District may have violated ORS 659.850 and OAR 581-021-0045 when the District conducted a strip search of Student A on April 4, 2019.

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<sup>63</sup> See Section IV(2) of this preliminary order where the Department concludes that there is substantial evidence to support the allegation that discrimination, on the basis of race and national origin, may have occurred.

It is important to note that the **threat alone of a possible strip search**, targeted at high school athletes, can be considered a violation of Title IX, ORS 659.850, and OAR 581-021-0045 if the threat, by a school employee, is sufficiently serious to create a hostile environment *i.e.*, the threat denies or limits a student's ability to participate in or benefit from a school's program.<sup>64</sup>

- **Additional Concerns:**

- 1. Title IX Coordinator**

The Title IX regulations require that recipients designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulations, including investigations.<sup>65</sup> The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.<sup>66</sup> The Title IX position may not be left vacant and an educational institution that receives federal financial assistance must have at least one person designated and actually serving as the Title IX Coordinator at all times.<sup>67</sup> The Title IX Coordinator's primary responsibility is to coordinate the recipient's compliance with Title IX, including the recipient's grievance procedures for resolving Title IX complaints.<sup>68</sup> The educational institution needs to ensure that the Title IX Coordinator is sufficiently knowledgeable about Title IX and the recipient's policies and procedures.<sup>69</sup>

"A recipient [school district] must post a notice that questions regarding Title IX may be referred to the Title IX Coordinator and to OCR."<sup>70</sup> The notice must be included in any bulletins, announcements,...distributed to the school community."<sup>71</sup> "The name, office address, telephone number, and email address of the Title IX Coordinator and a notice of nondiscrimination must be provided to students and employees."<sup>72</sup> "The Title IX Coordinator's contact information must be widely distributed and should be easily found on the recipient's website and in various publications."<sup>73</sup> "By publicizing the functions and responsibilities of the Title IX Coordinator, the recipient [school district] demonstrates to the school community its commitment to comply with Title IX and its support of the Title IX Coordinator's efforts."<sup>74</sup>

In the present matter, it is unclear if the District provided Student A or Parent with contact information for a Title IX Coordinator. The Department finds it concerning that, as of May 23, 2020, there is no contact information for a Title IX Coordinator on the District's website. There is no person designated as Title IX

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<sup>64</sup> See *Burlington v. Ellerth*, 524 U.S. 742 (1998) & *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(Court rules employers are liable for sexual harassment by employees even if threats and favors aren't carried out. Employers have grounds for defending themselves if they can prove they took prompt action to prevent or respond to complaints of harassment.)

<sup>65</sup> 34 CFR 106.8(a).

<sup>66</sup> United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 23 (2001).

<sup>67</sup> United States Department of Education Office for Civil Rights, *Dear Colleague Letter: Title IX Coordinators*, page 2 (April 24, 2015).

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> 34 CFR 106.9

<sup>74</sup> United States Department of Education Office for Civil Rights, *Dear Colleague Letter: Title IX Coordinators*, page 5 (April 24, 2015).

Coordinator on the online staff directory. There is no Title IX Coordinator contact information included on the Lincoln County School District's *Sexual Harassment Policy* (Code: JBA/GBN, Readopted 9/11/18), *Sexual Harassment Complaint Procedure* (Code: JBA/GBN-AR(1), Revised/Reviewed 1/15/19) or on the *Written Notice to Complainants re: Sexual Harassment Complaints* (Code: JBA/GBN-AR(3), Readopted 1/11/19).

## 2. Thorough and Impartial Investigation

Regardless of whether the student who was sexually harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student's behalf, the school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.<sup>75</sup> In all cases, the inquiry must be prompt, thorough, and impartial.<sup>76</sup>

In the present matter, the Department is concerned about three elements of the District's investigation that may represent a real or perceived lack of thoroughness, fairness, and impartiality. The three elements of concern are as follows:

- 1) Administrator 4 was present and involved in events and discussions, immediately before and after the strip search of Student A by Coach 1, on April 4, 2019. Despite this involvement, the District permitted Administrator 4 to conduct the investigative questioning (along with Administrator 3) of the sports team players on April 8, 2019. Administrator 4 being involved in the investigation may present a real or perceived lack of impartiality.
- 2) The record indicates that Administrator 4 and Administrator 3 interviewed nine members of the team on April 8, 2019, regarding the events of April 4, 2019. It is unclear, from the information provided by the District, why only six of the nine interviewees were asked the question, "At any point is their [sic] a strip search?" A fair, thorough, and impartial investigation requires that all team interviewees have an opportunity to answer the same or very similar investigative questions.
- 3) When Administrator 4 and Administrator 3 interviewed nine members of the team on April 8, 2019, they asked each teammate, "Do you know or have an inclination as to who stole the wallet and money in the wallet?" In light of the fact that the teammates witnessed Student A being cited by the Deputy for the theft on April 4, 2019, this was not a fair or impartial question. The Lincoln County District Attorney's Office later rejected the theft allegations against Student A due to insufficient evidence.

## 3. Student A's 504 Plan

A district has a responsibility to provide students' 504 Plans to sport coaches and sport coaches have an obligation to understand and follow that 504 Plan.<sup>77</sup> A 504 Plan is likely to include important information

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<sup>75</sup> United States Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 19 (2001); ORS 342.704(1)(c).

<sup>76</sup> *Id.*

<sup>77</sup> United States Department of Education, Office for Civil Rights, *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics*, 2-4, 6-11 (Jan. 25, 2013).

regarding appropriate and effective ways to communicate with a particular student. A 504 Plan will also include important information regarding the limitations of a student.

Although the record indicates that Student A had a 504 Plan as part of his educational plan, Coach 1, in his interview with the Department's investigator on November 20, 2019, denied having knowledge of Student A's 504 Plan.

- **Additional Point of Importance:**

- **Searches of Students**

The District's Student Searches Policy (Code: JFG-AR(1), Adopted 6/14/16, 1/24/19) includes that "a strip search,' requiring a student to remove clothing down to the student's underwear or including underwear **is prohibited** by the district." Under this policy, a District employee should never conduct a strip search of a student nor should a District employee ever threaten a student with the possibility of a strip search.

**(2) Whether the District discriminated against Student A, on the basis of race and national origin, in violation of ORS 659.850 and OAR 581-021-0045, when the District imposed discipline on Student A for theft of a wallet belonging to Student B?**

The Department concludes that there is substantial evidence to support the allegation that Student A was subjected to discrimination, on the basis of race and national origin, when Coach 1 focused suspicion on Student A and reported his suspicion to the Deputy, resulting in Student A's citation for theft. The District subsequently imposed discipline on Student A, and failed to remedy the situation resulting in Student A quitting the team due to embarrassment and Administrator 4's recommendation that Student A quit.

Under ORS 659.850, "discrimination" means 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>78</sup>

The allegation by Parent is that discrimination, based on Student A being a member of the Siletz tribe and Hispanic, occurred when Coach 1 focused suspicion on Student A and reported that suspicion to the responding Deputy. Because of that focused suspicion on Student A, Student A was criminally cited for theft and disciplined by the District. Parent raised this allegation during a meeting on April 24, 2019 with Administrator 1, Administrator 2, Administrator 3, Administrator 4, Parent, Student A, Student A's aunt, and a tribal Care Program advocate in attendance. The District did not investigate this allegation of discrimination based on race and national origin and did not respond to the allegation.

Parent and the tribal Care Program advocate raised concerns that Student A, as the only student of color on the team, was treated differently by the District because Student A is a member of the Siletz tribe and Hispanic. During the Department Investigator's interview with Student A, Student A was asked how the Deputy came to cite Student A for theft despite the finding that Student A was not in possession of the missing wallet nor the missing cash. Student A and Parent both explained that they were confused by this. During the Investigator's interviews, Coach 1 stated that several students, including Student A, appeared

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<sup>78</sup> ORS 659.850(1). OAR 581-021-0045(1) uses an identical definition for "discrimination" for purposes of the Oregon Department of Education's regulatory authority over public elementary and secondary schools.

nervous to him, with some even crying during the search process. Coach 1 also stated that some students were talking to each other in a manner that led him to believe they were suspect. Despite Student A dropping his pants and underwear and showing no possession of the missing cash, Coach 1 suspected Student A more than his teammates. Coach 1 pointed to the fact that a player said he found the wallet in a hung trash bag and that the only other items in the bag appeared to be discarded papers belonging to Student A. Administrator 4 explained to the Investigator that some students had already removed their bags from the practice area and had placed them in their vehicles when Student B announced that his wallet was missing. Despite a student, other than Student A, announcing that he had “found” the wallet, Coach 1 focused his suspicion on Student A. Despite teammates and their belongings coming into and going from the practice area during the search period, Coach 1 focused his suspicion on Student A. Despite Student A providing more evidence than any other student that he was not in possession of the missing cash (strip search), Coach 1 continued to focus his suspicion on Student A.

The Department understands that Parent’s initial strong response and chastisement of Student A when informed, at the scene, that Student A was a suspect likely obscured understanding and the investigation of Student A’s culpability. As part of Parent disciplining Student A, Parent communicated to Coach 1, on the evening of April 4, 2019, an offer to repay Student B for the missing money. Parent acknowledges that, only later, did she listen to Student A’s version of events whereupon Parent sent an email to the District that included her complaint and questions.

In addition to the one-day suspension imposed by the District, Administrator 4 recommended that Student A be removed from the team so that Student A could participate in the next season’s sport, a sport in which all agreed that Student A showed great ability. Student A left the team for the remainder of the season due to embarrassment and Administrator 4’s recommendation.

For the above reasons, the Department finds that there is substantial evidence to support the allegation that discrimination, based on race and national origin, may have occurred when Coach 1 targeted his suspicion on Student A and reported that suspicion to the Deputy resulting in Student A being criminally cited for theft. Coach 1 treated Student A, who is a member of the Siletz Tribe and Hispanic, differently than the other students on the team. According to ORS 659.850, this unreasonable differential treatment, whether it was intentional or unintentional, constitutes discrimination.

Student A was channeled by the District into the criminal justice system without evidence of a crime, misconduct, or a violation of the athletic code of conduct, based only on Coach 1’s suspicion. As a result, Student A experienced the denial of aids, benefit, or service in violation OAR 581-021-0045(3)(c) when the District failed to investigate the allegation of discrimination based on race and national origin. Student A experienced being subject to separate or different rules of behavior, sanctions, or other treatment in violation of OAR 581-021-0045(3)(d) when Coach 1 focused suspicion on Student A, and reported that suspicion to the Deputy, despite the fact that there was as much or more evidence pointing to other teammates. Student A experienced being subject to separate or different rules of behavior, sanctions, or other treatment in violation of OAR 581-021-0045(3)(d) when the District imposed a disciplinary suspension on Student A and recommended that Student A be removed from the team. Student A experienced a limiting of enjoyment of right, privilege, advantage and opportunity in violation of OAR 581-021-0045 (3)(f) when he left the sports team due to the focused suspicion on him by Coach 1, embarrassment over being accused, and the District’s recommendation that he leave the team.

## V. Conclusion

The Department concludes that the allegation that Student A was subjected to a strip search by Coach 1 on April 4, 2019, is supported by substantial evidence.

The Department also finds that there is substantial evidence to support the allegation that the strip search of Student A by the District was unwelcome, humiliating, sexually intrusive conduct, and with this conduct, the District discriminated against Student A on the basis of sex (Sexual Harassment in violation of Title IX and ORS 659. 850). In subjecting Student A to a sexually hostile environment, the District denied Student A the benefit of bodily autonomy and the benefit of playing on the school's sports team. In addition, Student A, due to the strip search, lost the enjoyment, privilege, advantage, and opportunity of bodily autonomy and of being a player on the school's sports team (Sexual Harassment in violation of Title IX, OAR 581-021-0045 3(a), and OAR 581-021-0045 3(f)).

Finally, the Department finds that there is substantial evidence to support the allegation that discrimination, based on race and national origin, may have occurred when Coach 1 focused suspicion on Student A and reported that suspicion to the Deputy resulting in Student A being criminally cited for theft. Student A was denied aids, benefit, or service in violation OAR 581-021-0045(3)(c) when the District failed to investigate the allegation of discrimination based on race and national origin. Student A was subjected to separate or different rules of behavior, sanctions, or other treatment in violation of OAR 581-021-0045(3)(d) when Coach 1 focused suspicion on Student A, and reported that suspicion to the Deputy. Student A also was subjected to separate or different rules of behavior, sanctions, or other treatment in violation of OAR 581-021-0045(3)(d) when the District imposed a disciplinary suspension on Student A and recommended that Student A be removed from the team. Finally, the District limited Student A's enjoyment of a right, privilege, advantage or opportunity in violation of OAR 581-021-0045 (3)(f) when he left the sports team due to the focused suspicion on him by the District, the District's recommendation that he leave the team, and the embarrassment of being accused.

The Department encourages the school to reach an agreement with Parent through conciliation. The Department can be a resource for the District and Parent during conciliation. If the school cannot reach an agreement with Parent through conciliation within 30 days, the Department will issue a Final Order that will include corrective action required by the District.

Sincerely,



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