



Oregon

Kate Brown, Governor



OREGON
DEPARTMENT OF
EDUCATION

Oregon achieves . . . together!

Colt Gill

Director of the Oregon Department of Education

May 16, 2019

BY EMAIL AND US MAIL

REDACTED
REDACTED
REDACTED

Mr. Bo Yates
Interim Superintendent
Lebanon Community Schools
485 South 5th Street
Lebanon, Oregon 97355

Case Reference Number: 2017003

Dear REDACTED and Interim Superintendent Yates:

This letter is the final order on the appeal of a complaint filed with Lebanon Community Schools (District), regarding possible violations of ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly), OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education), and OAR 581-021-0049 (2018)¹ (requiring school districts to adopt written procedures for the prompt resolution of complaints of discrimination).

I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

REDACTED (Parent) alleges that the district discriminated against her daughter (Student) on the basis of her disability and that Student was subjected to sexual harassment.

¹ The State Board of Education adopted new appeals procedure rules for the Oregon Department of Education (department) in March 2019. See OAR 581-002-0001 to 581-002-0023. As part of that rule revision, the old appeal procedure for discrimination claims, OAR 581-021-0049, was repealed. Parent filed her appeal with the department on February 22, 2017. Because parent filed her appeal before the new rules were adopted, the appeal procedure found in OAR 581-021-0049 (2018) applies. For your convenience, a copy of that rule is included with this order.

The Oregon Department of Education (Department) has jurisdiction to resolve this complaint under OAR 581-021-0049. When a person files an appeal of a complaint alleging discrimination, the department initiates an investigation to determine whether discrimination may have occurred.² The department reviews the school district's procedures and findings of fact to determine whether the proper procedures were followed and what action, if any, should be taken.³ If the department finds that discrimination may have occurred, it issues an investigatory determination and requires the school district to attempt to reach an agreement with the complainant through conciliation.⁴ If the school district cannot reach an agreement with the complainant through conciliation within 30 days, the department schedules a hearing to determine whether the school district is in compliance with ORS 659.850.⁵ If the department determines that the school district is not in compliance with ORS 659.850, it issues an order requiring compliance.⁶ If the school district fails to comply with the order within 30 days, the department issues an order imposing an appropriate remedy.⁷ Appropriate remedies include: (1) withholding all or part of one or more quarterly payments that otherwise would be paid to a school district under ORS 327.095, (2) assessing a daily fine against the school district, (3) forbidding the school district from participation in interschool activities, and (4) any other appropriate remedy.⁸

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

II. PROCEDURAL BACKGROUND

On February 21, 2017, Parent filed a complaint against the district. The details of the complaint pertained to Student's participation in a girl's high school sports program. Parent alleged that the district discriminated against Student based on her disability. Parent also alleged that the district discriminated against Student on the basis of sex, because she was subjected to sexual

² OAR 581-021-0049(1).

³ *Id.*

⁴ OAR 581-021-0049(1)(b).

⁵ OAR 581-021-0049(2).

⁶ OAR 581-021-0049(3).

⁷ *Id.*

⁸ OAR 581-021-0049(3)(a) to (d).

harassment by her team coach (Coach) and an assistant coach.⁹

On March 21, 2017, the district reported the results of its investigation and responded to Parent's complaint. Dissatisfied with the district's response to her complaint, Parent filed this appeal with the department on April 18, 2017.

On May 30, 2017, the department accepted the appeal and sent notice to the district. On June 18, 2017, the district timely responded to the department. The district's response included documents requested by the department in the May 30th notice, copies of relevant district policies, and other supporting documents. The department reviewed the district's response.

On September 12, 2017, and October 24, 2017, the department interviewed Student and her parents. On November 9, 2017, the department conducted on-site interviews with district staff including the Principal of Lebanon High School (Principal), the Director of Human Resources (HR Director), the Athletic Director, the Student's previous Counselor (Counselor 1), the team coach (Coach), and the girls' team Junior Varsity Coach (JV Coach).

III. FINDINGS OF FACT

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

1. Student was a high school senior at Lebanon High School who played varsity sports. Student participated in athletics in all years of high school, including summer leagues. She performed at a high level in athletics and expected to be recruited for college sports.
2. Student's team coach (Coach) was also a teacher at the high school and served as Student's academic advisor.
3. Student had some discipline issues during her sophomore and junior years of high school. REDACTED She received a one-game suspension and was not allowed to start in the following game as a result of that incident. Student's behavior improved after that incident.

⁹ Parent raised several other allegations in her complaint. Specifically, she asserted that: (1) the district violated the provisions of the Family Education Rights and Privacy Act (FERPA) when the Coach discussed Student's grades in front of her team members and when he asked Student to explain what her meeting with the principal was about, making her disclose that the meeting was about her 504 Plan; (2) the district violated the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) when the Coach discussed Student's diagnosis in the presence of team members and when he coerced Student into telling another student about her private medical history; and (3) the Coach engaged in gross misconduct and neglect of duty as a teacher. The department, however, does not have jurisdiction to consider those issues and declines to consider them in this appeal.

4. During her junior year of high school, Student had been working with a school counselor (Counselor 1). Student often communicated difficulties and frustrations with the Coach to Counselor 1. Counselor 1 provided Student with strategies to improve communications with the Coach. Counselor 1 reported meeting with the Coach during Student's junior year to share Student's struggles and difficulties communicating, and to provide the Coach with insight on how to better communicate with Student.
5. Student was initially diagnosed with REDACTED
6. Student had academic difficulties at times during her high school career, with her grade point average fluctuating dramatically. Toward the end of Student's junior year, in light of her specific diagnoses and their effect on her academic performance, the district began to develop a 504 plan to assist Student.
7. Counselor 1 was transferred to another school before Student's senior year of high school. During her senior year, Student was assigned to a new counselor (Counselor 2). However, Student continued to seek out and confide in Counselor 1, as she had built a rapport with Counselor 1 during the previous years.
8. The Coach had been encouraging Student to participate more in open gyms during the summer. Student previously had not participated much, but during the summer between her junior and senior year, Student frequently participated in open gyms. Additionally, she demonstrated a positive attitude and was showing signs of leadership. Based on those improvements, during her senior year, the Coach made her team captain.
9. Planning meetings for a 504 plan for Student resumed during Student's senior year. Counselor 2 was involved in those meetings. Because Counselor 1 had been transferred to another school, he was not involved in those meetings. As a result, Counselor 1's observations, insights, and experience with Student were not considered in implementing the 504 plan.
10. The 504 plan was implemented during Student's senior year of high school. The materials evaluated in implementing the 504 plan included a written statement by Student's physician. That statement included the observation that Student "requires structure with clear expectations and consistent follow through of consequences. A plan that presents

consequences in a 'neutral' fashion will be most successful. A love and logic approach with collaborative problem solving is recommended. A positive reinforcement plan may be helpful as part of this approach."

11. Student's 504 plan indicated that her disability impacted her in the areas of thinking, concentrating, and learning. Student was provided with accommodations designed to address those areas. The following accommodations were included in Student's 504 plan:
 - a. Allow Student to leave the classroom for a more comfortable setting;
 - b. Allow Student's schedule to offer flexibility in challenging classes;
 - c. Allow Student additional time for assignments;
 - d. Allow tests to be broken down as needed or, alternatively, allow verbal or alternate modes of testing; and
 - e. Allow homework assignments to be condensed to show proficiency.
12. Student's 504 plan did not anticipate that accommodations would need to be applied to extracurricular activities such as Student's athletic participation. The 504 plan only addressed academics.
13. Part way through the athletic season, Student attended a party. Alcohol was present, and students were drinking at the party. Some students attending the party posted videos, photos, and details about the party on social media.
14. The next day, the district became aware of the party. The district's Athletic Director viewed a video from the event that showed a number of students and student athletes present at the party, including Student. On the video, Student could be seen observing another student consume alcohol in response to a bet.
15. The district's code of conduct for student athletes, found in the district's Athletic/Activities Handbook, requires that athletes abstain from alcohol. The handbook further provides that, "[a]thletes that find themselves associating with others that are using, transmitting or possessing alcohol or controlled substances of any kind are expected to leave immediately and self-report to a coach or Athletic Director within 24 hours or be subject to discipline as if they were violating this rule." Students found in violation of the policy are subject to discipline. For the first offense, students face "a 14 calendar day suspension from competition (must attend all practice); suggested meetings(s) with school substance abuse counselor or the appropriate professional

person and a willingness to follow his/her recommendations. The student athlete will be required to comply with the recommendations following the first offense or he/she will be disciplined as though a second offense had been committed.”

16. Student reported her presence at the party within the time period specified by the district’s policy.
17. Although Student self-reported her attendance at the party in accordance with the district’s policy, the Athletic Director found student in violation of the drug and alcohol policy for student athletes. He determined that Student had not left the party immediately when it was apparent that alcohol was present, as the video showed Student socializing with students who were drinking. The video did not show whether Student had consumed alcohol.¹⁰
18. Student and her family met with the Athletic Director regarding the code of conduct violation. Student received a two-week suspension from participating in athletic competition, pursuant to the district policy. During her suspension, Student continued to attend practice.
19. By January 17, 2017, Student had finished her two-week suspension and was looking forward to returning to athletic competition in the game scheduled later that day. That morning at school, the Coach informed Student that she would not be starting in the game and that she would no longer be team captain. The Coach made the determination that Student would no longer be team captain based on her violation of the code of conduct for student athletes.
20. Student became upset upon learning that her violation of the student code of conduct would have additional repercussions beyond the 14-day suspension that she had already served, as that information had not previously been communicated to her.
21. That same day, Student’s parents and the Coach exchanged text messages regarding the decision to remove Student as team captain:
 - a. Student’s parents expressed displeasure and disappointment with the Coach’s decision, noting that it was an additional punishment that had not been communicated to Student earlier.

¹⁰ The video was not shown to Student or Parent due to the confidentiality of the other students visible in the video. The department viewed the video as part of its investigation in this matter to confirm the district’s determination.

- b. The Coach explained that the decision to remove Student as team captain was because Student's actions at the party had not "shown [the] leadership and qualities of captain." The Coach also cited Student's grades and the Coach's perception of Student's work ethic, writing, "she continually puts off even doing the simplest assignments allowing herself to under achieve." The Coach expressed a willingness to discuss the issue and work on a plan for Student to earn back her position.
 - c. Student's parents expressed their concern that Student's grades were affected by her medical condition and recent medication changes and that the Coach's timing in delivering the information to Student about losing the team captain position had further exacerbated Student's REDACTED.
 - d. The Coach responded that it was not his "intent to have [that] happen." The Coach apologized for the timing of when he alerted Student to the change in her position and expressed that he "should have communicated with [Student] earlier" about the team captain position.
22. Later that day, Student's parents met with the Coach and the Athletic Director regarding the Coach's decision to remove Student as team captain. During the meeting, the Athletic Director explained that decisions regarding team positions were up to the Coach. Student's parents were told that Student could work to earn the position back and that the Coach would discuss with Student what she needed to do to be reinstated. No specifics were provided during the meeting as to what Student needed to do to be reinstated.
23. During the meeting, Student's parents also raised questions about Student's 504 plan. The Athletic Director explained that his understanding was that "a 504 does not necessarily apply to athletics and volunteer activities." The Athletic Director went on to explain that accommodations in 504 plans are applied by classroom teachers and are then reflected in the grades that are considered by the athletic program to determine eligibility for participation in extracurricular athletics.
24. Following that meeting and over the next several weeks, Student repeatedly approached the Coach to inquire what she needed to do to be reinstated as team captain. Parent reported that Student was never provided clear answers, guidelines, or steps required to be reinstated as team captain. Instead, when Student would ask what she needed to do, Parent reported that the Coach would tell Student to "quit being selfish" or that he would "think about" whether he would give her the position back.

25. The Coach maintained an open period in his classroom for students to come to study or obtain help with school work. Because Student was struggling academically, the Coach encouraged Student to utilize his open period. Student attended the open period irregularly, as her appointments with her chiropractor were usually scheduled during that same period. At times, the Coach asked Student whether she planned to come to the classroom to work on school work during his open period. The Coach indicated that he asked Student that question to encourage her to communicate her intention with him, not to discourage Student from attending her medical appointments.
26. When the Coach asked Student whether she planned to attend, Student felt pressured to skip her chiropractic appointments to attend the Coach's open period. The Coach did not understand that Student felt compelled to choose between the study period and her medical appointments.
27. On January 27, 2017, Student's team played an away game. During the game, when another player had the ball, Student constantly called for the ball to be returned back to her. The Coach was dissatisfied with Student's play and he limited her playing time during the game. Student was quite distressed by the limitation of her playing time.
28. Following the game, Student returned to the locker room to retrieve something she had forgotten. The Coach and an assistant coach, who were both male, were in the locker room. The coaches talked to Student about her game performance, her former position as team captain, and overcoming life challenges. Student was upset about the Coach limiting her playing time and about her lack of understanding as to why she was not being reinstated as team captain. The Coach expressed that, during this discussion, he was trying to support Student and calm her down after the game, because she was upset.
29. Parent and Student reported that Student requested to leave the locker room multiple times. Student was not allowed to leave until the female JV Coach came in to inform them that all the other students were waiting on the bus. Student's Parents witnessed Student exit the locker room in tears.
30. On February 16, 2017, Student's Parents, Student, Principal, Counselor 2, and the Vice Principal met to review and revise Student's 504 plan. Student's 504 plan was updated with additional accommodations focused on the classroom environment and schedule flexibility, and was generally fine-tuned to respond to the manifestations of Student's

diagnoses.

31. At the conclusion of the 504 meeting, Student announced that, due to the meeting, she would be late to practice and she didn't want to get yelled at by the Coach. The Principal walked Student down to practice and spoke with the Coach to excuse Student from any consequence for arriving tardy. During practice, the Coach asked Student about the reason for the meeting with the Principal. Student informed the Coach that it was a meeting about her 504 plan.
32. The following day, the team played another away game. With only a few remaining games in the season, the Coach had not reappointed Student to team captain. Student wasn't focused on the game and was not playing well. After a few minutes, the Coach pulled her from the game. He told her that if she wanted to continue to play, she could play REDACTED. The Coach also mentioned potentially discussing Student's game performance with her summer league coach during the conversation. Student was upset as a result of the conversation and the Coach's limiting of her playing time during the game.
33. Rather than taking the opportunity that she was provided to play REDACTED, Student left the game with her parents before the end of regulation play.
34. Following that, Student did not return to the team. At Parent's request, Student was transferred to a different academic advisor. She spent the remainder of the academic year focused on improving her academic performance to maximize her attractiveness to college programs.
35. Between the time when Student was removed from the team captain position and when she quit the team, the Coach never communicated the specific steps that would be required for her to be reinstated as team captain.
36. On February 21, 2017, Parent filed complaint with the district raising concerns of bullying, disability discrimination/harassment, sexual harassment, violations of FERPA and HIPPA, violation of Student's 504 plan, and issues surrounding misconduct and neglect of duty as a teacher and the effect these circumstances had on Student's college scholarship opportunities.
37. The district subsequently investigated the complaint. That investigation included

interviews with the Parents, the Coach, the JV Girl's Coach, the Assistant Coach, the Athletic Director, a student at another school, five parents of players on the team, and twelve of Student's team members.

38. On March 21, 2017, the district responded to Parent's complaint. The district found that "being made captain even without passing grades was not a stipulation or accommodation provided by [Student's] 504 plan." The district also found that no discrimination based on Student's disability had occurred. The district explained that the Coach "did not make decisions about playing time based on her disability, but based on her performance in training and games. [Student] was removed from the captaincy due to rules violations and [the Coach] did not find sufficient evidence of her leadership on the basketball court to restore her to the captaincy." Regarding Parents' claim that the Coach and assistant coach sexually harassed Student by keeping her in the locker room after a game against her wishes, the district found that there was no evidence of sexual harassment. The district further found that, after the away game at issue, Student "was upset" and the two coaches were "trying to console her" by talking to her and sharing some "life lesson" stories with her. When she asked to leave, they encouraged her to continue talking. After she asked to leave a second time, "they excused her."
39. During her interview with the department, Parent reported that the Coach was dismissive of Student's medical needs. Despite the fact that the school had been provided with Student's medical records regarding her REDACTED, the Coach did not believe Student when she stated that she was in pain.
40. Parent reported that the Coach yelled at Student during games, often leaving her in tears. Parent further reported that, when Student cried, the Coach would highlight Student's crying in front of her peers. Parent reported that the Coach repeatedly called Student selfish. Parent also reported that the Coach threatened to communicate with the summer tournament coach regarding Student's in-season athletic performance. Parent reported that the Coach's interactions with Student, including the failure to provide clear communication regarding the team captain position, affected Student's confidence, which in turn impacted both her athletic and academic performance.
41. During her interview with the department, The JV Coach expressed that Student was stubborn and difficult to coach. She also indicated that Student had a lack of objectivity regarding her own athletic performance. She explained that Student would think she was performing well, but then would be pulled from a game for poor performance. Student

usually was not aware of the reason why she was pulled out of a game, and she would ask the JV Coach what she did to get pulled. The JV Coach reported that Student often had emotional reactions to the Coach's instructions. It was not unusual for her to cry in response to feedback about her performance. The JV Coach saw this behavior as Student looking for attention. Because Student was often in tears when receiving feedback from the Coach, when the JV Coach came upon Student and the two coaches in the locker room, the scene did not strike her as unusual.

42. During his interview with the department, the Coach indicated that Student called home crying about something multiple times per week. He indicated that Student often cried when she was overloaded. After he informed her that she was losing the team captain position, Student was upset and she called home to cry about the Coach's decision. The Coach indicated that, in hindsight, he should have talked to Student about losing the team captain position earlier and in a different way.
43. The Coach knew that Student had REDACTED. He expressed that Student's issues with injuries and pain were a daily obstacle. The Coach explained that Student would complain of injuries one moment, but the next moment she would be running or playing at maximum capacity with no problem. For that reason, the Coach viewed Student's physical injuries as her just making excuses.
44. The Coach reported that Student's athletic performance suffered progressively following her two-week suspension and loss of the team captain position. The Coach noted that, during that time, Student's confidence was failing and her quality of play had significantly deteriorated. The Coach also noticed that her communication, interaction with teammates, and interaction with coaches had suffered following her suspension.
45. The Coach described Student as "a mess mentally" and observed what he described as selfishness with regard to her athletic performance. Due to the reduced quality of Student's performance, the Coach had limited Student's playing time at times.
46. The Coach found Student's singular focus on the team captain position to be an additional reason that Student did not display the qualities of a team captain. The Coach indicated that he had wanted Student to focus on improving her athletic performance rather than exclusively focusing on earning back the team captain position. He further indicated that, he was not sure that returning to the position of team captain was even an option for Student.

47. The Coach admitted that he had mentioned talking to the summer tournament coach about Student's athletic performance, but he explained that his comment was meant in a positive, not negative, manner.

48. During an interview with the department, Counselor 1 indicated that the transition from junior to senior year is generally an anxious time for students, but especially for Student due to her diagnoses of REDACTED, REDACTED, REDACTED, and REDACTED. Counselor 1 observed that Student "lived" her sport. Much of Counselor 1's work with student focused on communication issues, including communication with the Coach. Counselor 1 noted that Student's 504 plan should have been designed to address communication issues. Counselor 1 felt that Student needed time to process communications as she tended to take things very personally. Counselor 1 believed a strategy of communicating feedback with Student off to the side and then allowing her time to process the information and resulting emotions would have been most effective for her. Counselor 1 observed that the Coach's unique manner of communication, speech pattern, and use of sentence fragments exacerbated Student's difficulty processing the Coach's communications with her. Counselor 1 further observed that Student did not understand how to please the Coach or how to obtain clear answers from him. Counselor 1 also indicated that the Coach did not understand Student's REDACTED. Counselor 1 indicated that Student's decision to quit the team, despite her love of the game, reflected Student reaching a point where quitting the team presented less pain and frustration for her than remaining on the team.

49. Student received scholarship offers from 20 different schools.

IV. ANALYSIS

In her appeal to the department, Parent alleged that the district discriminated against Student by subjecting Student to harassment based on her disability. Parent also alleged that Student was subjected to sexual harassment by the Coach and an assistant coach when they kept her alone in a locker room after an away game, despite the fact that she repeatedly asked to leave.

Under Oregon 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.^[11]

OAR 581-021-0045 applies this prohibition specifically to the types of schools regulated by the department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.”¹² Additionally, a school district may not “provide any course or otherwise carry out any of its educational programs or activities on a discriminatory basis or require or refuse participation therein by any of its students on such basis.”¹³ 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.”¹⁴

In applying this prohibition to school districts, OAR 581-021-0045(3) specifically states that a school district may not:

- (a) Treat one person differently from another in determining whether such person satisfies any requirement of condition for the provision of such aid, benefit, or service;
- (b) Provide different aid, benefits, or services; or provide aids, benefits, or services in a different manner;
- (c) Deny any person such aid, benefit, or service;
- (d) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

* * * * *

¹¹ ORS 659.850(2).

¹² OAR 581-021-0045(2).

¹³ OAR 581-021-0046(1).

¹⁴ ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the department’s regulatory authority over public elementary and secondary schools.

(f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.^[15]

As seen above, under Oregon’s anti-discrimination statute and rule, a person may not be subjected to discrimination on the basis of sex or a disability.¹⁶ The legislative history of ORS 659.850 suggests that the Oregon Legislative Assembly adopted ORS 659.850 in consideration of federal anti-discrimination law. For that reason, in analyzing the district’s duty to provide Student with an environment free from discrimination, the department relies on federal anti-discrimination law. For disability discrimination claims, the department relies on: Section 504 of the Rehabilitation Act of 1973 (Section 504); Title II of the Americans with Disabilities Act (Title II); regulations implementing both Section 504 and Title II; federal case law interpreting those provisions; and guidance issued by the United States Department of Education’s Office for Civil Rights (Office for Civil Rights) pertaining to Section 504 and Title II.¹⁷ Section 504 prohibits disability discrimination by entities receiving federal financial assistance, including school districts.¹⁸ Similarly, Title II prohibits state and local governments, including school districts, from discriminating against persons with disabilities.¹⁹ For sex discrimination claims, the department relies on Title IX²⁰ and its interpretation by federal courts and the Office for Civil Rights. Because Section 504, Title II, and Title IX have 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 Section 504, Title II, and Title IX by federal courts and the Office for Civil Rights is an important tool for the department to use in adjudging the application of ORS 659.850 and OAR 581-021-0045 to disability and sex discrimination claims.

The issues addressed on appeal are whether the district violated ORS 659.850 and OAR 581-021-0045 by: (1) discriminating against Student based on her disability or failing to provide Student with a learning environment that was free from disability harassment; and (2) failing to provide Student with a learning environment free from sexual harassment.

A. Whether the district discriminated against Student on the basis of her disability or failed

¹⁵ OAR 581-021-0045(3)(a)-(d) and (f).

¹⁶ ORS 659.850; OAR 581-021-0045.

¹⁷ 29 U.S.C. § 794 (Section 504); 34 C.F.R. Part 104 (Section 504 implementing regulations); 42 U.S.C. §12131-12134 (Title II); and 28 C.F.R. Part 35 (Title II implementing regulations).

¹⁸ Section 504 provides: “No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794(a); *see* 34 C.F.R. § 104.4(a).

¹⁹ Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132; *see* 28 C.F.R. § 35.130(a).

²⁰ *See* Education Amendments of 1972, Public Law No. 92-318, Title IX, §§ 901-907 (codified at 20 U.S.C. §1681 *et seq.*).

to provide her with a learning environment that was free from disability harassment.

Parent alleges that Student was subjected to disability harassment and/or discrimination. Parent highlights a number of issues between the Coach and Student which caused Student a great deal of consternation and frustration and which had the effect of triggering tremendous emotional responses in Student. Specifically, Parent points to the interactions between Student and the Coach following the Coach's decision to remove Student as team captain and the resulting weeks of failed communication surrounding the Coach's expectations of what would be required for Student to be reinstated to the position. Parent alleges that those interactions had the effect of traumatizing Student and ultimately driving her away from participation in athletics.

1. Applicable law

As indicated above, a school district may not discriminate against a person on the basis of a disability.²¹ Disability discrimination is prohibited in all programs and services provided by a school district, including extracurricular activities and athletics.²² Under Section 504, in providing a program or service, a school district may not provide a person with a disability an opportunity to participate in or benefit from the program or service that is different, not equal to, or not as effective as that which is given to those without disabilities, nor can a district "[o]therwise limit" a person with a disability "in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of a disability.²³

The requirement to provide students with disabilities an equal opportunity for participation also applies to extracurricular services and activities, including extracurricular athletics.²⁴ To ensure the provision of an equal opportunity for participation in extracurricular athletics, a school district "must afford [a person with a disability] equal opportunity to obtain the same

²¹ ORS 659.850; OAR 581-021-0045; OAR 581-021-0046(1); *see also* 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a).

²² ORS 659.850(2) (discrimination prohibition applies to programs, services, and activities); OAR 581-021-0045(2) (same); 34 C.F.R. § 104.37(a) and (c)(1) (discrimination prohibited in extracurricular services and activities, including physical education and athletics).

²³ 34 C.F.R. § 104.4(b)(1)(ii) – (b)(1)(iv), and (b)(1)(vii); *see also* 34 C.F.R. § 104.4(b)(2) (to be equally effective, programs and services must provide a person with a disability "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement[.]"); Dear Colleague Letter: Prohibited Disability Harassment, July 25, 2000, available at <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> (educational institutions "have a responsibility to ensure equal educational opportunities for all students, including students with disabilities").

²⁴ 34 C.F.R. § 104.37(a) and (c)(1); Dear Colleague Letter: Students with disabilities in extracurricular athletics, January 25, 2013, pp 2-4, 6-11, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html> (school district that offers extracurricular athletics must do so in a manner that provides students with disabilities an equal opportunity).

result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."²⁵ That means that a district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to meet the individual needs of the student with a disability.²⁶

Section 504 also requires school districts to provide a free and appropriate public education to each qualified person with a disability, regardless of the nature or severity of the person's disability.²⁷ As part of that requirement, a student who is disabled within the meaning of the statute is entitled to receive regular or special education services that are designed to meet his or her individual educational needs.²⁸ A school district must provide those services in a manner that meets the individual needs of the student with a disability "as adequately" as the school district meets the needs of students who do not have disabilities.²⁹

Similarly, under state law, in the provision of programs or services, including extracurricular athletics, a school district may not "deny any person such aid, benefit, or service," "[p]rovide different aid, benefits, or services," or "otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of a disability.³⁰ And, in providing extracurricular athletics, a school district must provide an equal opportunity to those with disabilities.³¹

State law further prohibits districts from acting in a manner that is "fair in form but discriminatory in operation."³² By not providing education services designed to meet the individual needs of a student with a disability and, thereby, failing to meet the needs of that student as adequately as it meets the needs of students who do not have disabilities, a school district has provided educational services in a manner that is "fair in form but discriminatory in operation" under ORS 659.850(1). Likewise, by failing to ensure that a student with disabilities has an equal opportunity to participate in its programs and services, including extracurricular athletics, a school district also has provided services or programs in a manner that is "fair in form but discriminatory in operation" under ORS 659.850(1).

²⁵ 34 C.F.R. §104.4(b)(2).

²⁶ *Alexander v. Choate*, 469 US 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program to ensure meaningful access to a person with a disability). A district, however, is not required to make a modification if the particular modification would result in a fundamental alteration of the nature of the extracurricular athletic activity. *Id.*

²⁷ 34 C.F.R. § 104.33(a).

²⁸ 34 C.F.R. § 104.33(b)(1).

²⁹ *Id.*

³⁰ OAR 581-021-0045(3)(b), (c) and (f).

³¹ OAR 581-021-0046(4).

³² ORS 659.850(1).

Finally, students with disabilities are protected from disability harassment. A school district may violate provisions prohibiting disability discrimination where harassment based on a disability is “sufficiently serious that it creates a hostile environment” and the harassment is not adequately addressed by a school district.³³ A school district may violate those provisions whether the harassment comes from peers, teachers, school employees or personnel, or third parties.³⁴ “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.”³⁵

2. Analysis

At the outset, the department notes that there does not appear to be any dispute that Student has a disability.³⁶ Student was initially diagnosed with REDACTED, REDACTED, and REDACTED. Later, she was also diagnosed as REDACTED. In addition, Student had REDACTED which resulted in REDACTED. Student’s REDACTED, at times, required her to seek chiropractic care during the school day. In light of Student’s specific diagnoses and their effect on her academic performance, the district ultimately implemented a 504 plan to assist her. That 504 plan indicated that she had a disability that impacted her in the areas of thinking, concentrating, and learning.

Because there is no dispute that Student has a disability, the question on appeal is whether the district subjected Student to discrimination or harassment on the basis of her disability. The Coach and Student had ongoing communication difficulties that came to a head following Student’s suspension from athletic competition and her removal from the team captain position.

As explained above, in order to provide a student with a disability an equal opportunity to participate in athletics, a district needs to provide services designed to meet the individual needs of the student with the disability. The evidence substantiates that, because of her disability, Student needed both clear expectations and clear communication. Student’s physician indicated that Student required “clear expectations and consistent follow through” with consequences. And, based on his observations and interactions with Student, Counselor 1 indicated that, due to the communication difficulties that had been ongoing between Student and the Coach, Student’s 504 plan should have addressed communication issues. Among other things, Counselor 1

³³ Dear Colleague Letter: Harassment and Bullying, October 26, 2010, pp 1-2, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

³⁴ *Id.* at 1.

³⁵ *Id.* at 2.

³⁶ A person with a disability is a person who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 U.S.C. §705(9)(B), (20)(B); 42 U.S.C. §12102(1).

indicated that it would be best for Student if information that might potentially upset her be communicated to her privately, and that Student needed to be given time to process communications and the resulting emotions. It was apparent during the department's interviews with district staff that Counselor 1's observations about Student's needs had not been communicated to Counselor 2. Because those observations were never passed on to Counselor 2, they ultimately were not factored into the accommodations that the district included in Student's 504 plan.

The district also was under the mistaken belief that it was only required to provide accommodations in academic settings. When asked about Student's 504 plan during the meeting about her loss of the team captain position, district personnel informed Student's parents that 504 plans apply to academics, not athletics. But, as explained above, the prohibition against discrimination extends to all programs and services offered by a district, including extracurricular athletics, and requires a district to provide those accommodations that are necessary to meet the individual needs of a student with a disability.³⁷ As a result of the district's mistaken belief, the 504 plan that was crafted for Student did not include accommodations specifically designed to assist Student with difficulties she was experiencing during extracurricular activities, such as athletics.

The lack of accommodations designed to assist Student in extracurricular athletics resulted in the district failing to meet Student's individual needs and in district personnel taking actions that exacerbated the symptoms of her disability. There are numerous examples in the record where the district failed to meet Student's needs for clear expectations and communication. For example, rather than providing clear expectations to Student by communicating the loss of the team captain position to her as part of her punishment for violating the student conduct code, the Coach waited to communicate that to Student until the first game day after her suspension was over, when Student was anxious to return to athletic competition as team captain and believed that she had already completed her punishment for the student conduct code violation. Understandably, that communication, coming when it did, caused Student distress as it came as a complete surprise to her. That interaction substantiates that Student's need for clear expectations was not being met. That conclusion is further supported by the Coach's own statements. During his interview with the department, the Coach admitted that, in hindsight, he should have communicated the loss of the team captain position to Student earlier and in a different manner.

³⁷ Dear Colleague Letter: Students with disabilities in extracurricular athletics, January 25, 2013, pp 2-4, 6-11, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>.

The district also sent Student mixed messages and failed to clearly communicate to her regarding whether and how she could be reinstated to the team captain position. First, the Coach failed to provide clear expectations and clearly communicate with Student as to whether reinstatement as team captain would even be a possibility. While it was repeatedly suggested to Student that she could earn the position of team captain back, when the department asked the Coach what steps Student would have needed to take to be reinstated, the Coach informed the department that he was not sure that earning the position back was even an option for Student. Second, while the Coach and the Athletic Director both informed Student that the Coach would provide her with information about what steps she needed to take to be reinstated as team captain, the Coach never provided Student with any information about what steps she needed to take, despite the fact that she repeatedly asked for that information. With no clear communication from the Coach on what she needed to do to be reinstated, Student perseverated on the team captain issue. And, instead of providing Student with information that might have helped her move forward, the Coach viewed Student's fixation on the team captain issue as more evidence that she was unworthy of the position of team captain. That evidence further substantiates that student's needs for clear expectations and clear communications were not being met. Had Student's need for clear expectations and communication been addressed in her 504, it is likely that the district would have better understood her need for clear communication surrounding what was happening with the team captain position and would have better addressed her needs.

Parent asserts that the Coach threatened Student after he removed her from a game, telling her that he would discuss her performance with the off-season coach. The Coach admitted making a statement to that effect, but explained that his comment about discussing Student's performance with the off-season coach was meant in a positive, not negative, manner. The department finds that the Coach's statement was not intended as a threat. However, the department also finds that, given the timing of when the statement was made, Student's interpretation of that statement was reasonable. Because the statement came after the Coach pulled Student from a game due to his dissatisfaction with her athletic performance, Student reasonably understood from that statement that the Coach was going to report something negative to the off-season coach about her. That interaction between the Coach and Student also demonstrates that Student's need for clear communication was not being met.

Parent also alleged that the Coach pressured Student into skipping her chiropractic appointments because he wanted Student to use that time to come to his open period and work on school work to improve her grades. The Coach maintained an open period in his classroom for students to come study or obtain help with school work. Because Student was struggling academically, the Coach encouraged Student to utilize his open period to work on her school work. Student did

not attend the open period regularly, as her appointments with her chiropractor were usually scheduled during that same time period. At times, the Coach asked Student whether she planned to come to his open period to work on school work. The Coach indicated that he asked Student that question to encourage her to communicate her intention with him, not to discourage Student from attending her medical appointments. But, when the Coach asked Student whether she planned to attend, Student felt pressured to skip her chiropractic appointments to attend the Coach's open period. The Coach did not understand that Student felt compelled to choose between the study period and her medical appointments. That interaction is another instance where Student's needs for clear communication were not being met by the district.

In addition, the accommodations that the district included in Student's 504 plan that might have assisted Student in her extracurricular activities, were not applied to non-academic settings by the district, due to the district's mistaken belief that 504 plans only applied to academics. For example, as formulated, Student's 504 plan required that she be allowed to leave the classroom for a more comfortable setting when needed due to the symptoms of her disability. If that accommodation had been applied to the extracurricular athletic setting, district personnel likely would have understood that the incident where the Coach and an assistant coach cornered Student in the locker room following an away game and required her to stay so that they could discuss her game performance and other issues, despite the fact that she was visibly upset and repeatedly requesting to leave, was, at best, problematic given her disability. Under the accommodations provided in Student's 504, she should have been allowed to step away from that situation that was causing her to feel anxious or upset to allow her time to process her emotions.

Finally, the evidence substantiates that district personnel sometimes viewed the manifestations of Student's disability as her being stubborn or difficult, or as her seeking attention or making excuses. Parent asserted that, despite the fact that the Coach knew about Student's REDACTED, when Student complained of pain, he did not believe her. The evidence supports parent's assertion. In his interview with the department, the Coach indicated that, because Student cycled between complaining of her injury and playing at maximum capacity, he felt that when she complained of her injuries, she was just making excuses.

In addition, due to her disability, Student often had mood swings and emotional responses to feedback that she received regarding her athletic performance. Instead of understanding that Student's emotional responses were manifestations of her disability, district staff indicated that Student was difficult to work with, describing that extreme emotional reactions were common for her. The Coach described Student as "a mess mentally." He explained that she often cried

when she was feeling overloaded and that that happened several times per week. He found it hard to work with Student because of her mental highs and lows. The JV Coach also indicated that Student was difficult to coach and that she often had emotional reactions to the Coach's feedback. The JV Coach saw Student's emotional reactions as ploys for attention.

Because Student's 504 plan did not address her needs for clear expectations and clear communication, because the district failed to apply her 504 plan to extracurricular athletics, and because the district did not otherwise meet Student's disability-based needs regarding clear expectations and clear communication, the district failed to provide Student with education services that were designed to meet her individual needs as adequately as the needs of a nondisabled student are met. For that reason, the district provided Student with services that were "fair in form but discriminatory in operation" under ORS 659.850(1).

In addition, the district's conduct created a hostile environment for student based on her disability. That is, the conduct was sufficiently severe, pervasive, or persistent such that it interfered with or limited Student's ability to participate in the programs and services offered by the district. As explained above, the evidence substantiates that the district repeatedly failed to appropriately respond to Student's disability-based needs and viewed the manifestations of her disability as Student making excuses or being difficult, which affected district personnel's treatment of her. The evidence further substantiates that the district's treatment of Student surrounding her participation in extracurricular athletics impacted both her athletic and academic performance. Ultimately, it impacted her to such a degree that she felt compelled to cease her participation in extracurricular athletics altogether. As such, the district's treatment of Student interfered with her ability to participate in the district's programs or services and it limited her "enjoyment of [a] right, privilege, advantage, or opportunity," specifically participation in extracurricular athletics.³⁸

During both the district's and the department's investigation, no malice was detected on the part of the Coach in his interactions with Student. It is clear that, in his interactions with Student, the Coach was intending to help her with both her academics and her athletic performance. But, an intent to discriminate is not required for finding the existence of disability harassment or discrimination.³⁹

For the reasons explained above, the department finds that discrimination on the basis of disability may have occurred. In reaching that conclusion, the department does not mean to suggest that the district was required to keep Student in the team captain position following her

³⁸ OAR 581-021-0045(3)(f).

³⁹ ORS 659.850(1) (discrimination includes acts that differentiate treatment on a prohibited basis whether "intended or unintended" and acts that are "fair in form but discriminatory in operation").

breach of the district's student code of conduct for athletes, nor that it was required to reinstate Student to the position of team captain after removing her from that position. To the contrary, as long as the decisions to remove her from the team captain position and to not reinstate her to that position were not based on discriminatory criteria, the district was allowed to make those decisions.⁴⁰ Here, the evidence substantiates that the Coach made those decisions based on nondiscriminatory criteria, specifically Student's violation of the code of conduct by remaining at a party where it was apparent that other students were consuming alcohol. Given student's prior behavioral issues, the decision to remove her from the team captain position and to not reinstate her following this latest disciplinary issue certainly was reasonable.

B. Whether the district failed to provide student with a learning environment that was free from sexual harassment

Parent alleges that Student was subjected to sexual harassment as a result of the incident when Student was in the locker room with the Coach and an assistant coach at an away game. Parent asserts that Student was alone with the two male coaches during this time, and that Student, who was visibly upset, asked to leave twice, but was not allowed to leave the locker room.

1. Background

The department interviewed the Coach, Student, and the female JV Coach who briefly entered the locker room during the time frame of the allegation regarding this incident. The Coach indicated that he and the assistant coach were in the locker room talking when Student returned to the locker room to retrieve a forgotten item. The Coach had limited Student's playing time during the game, because he felt she was neglecting the duties of her position. The Coach took the opportunity in the locker room to discuss Student's game performance with her. He and the assistant coach also attempted to provide life skill advice that they felt would assist her. The Coach noted that Student "didn't seem to be present" during the conversation and that she repeatedly said that she needed to leave. He further noted that she was hysterical and in tears during the incident.

Student described that it was not usual for a student to be in the locker room with only the coaches. During the meeting with the coaches, Student became upset both because the Coach had limited her playing time in the game and because she did not understand why she was not being reinstated to the team captain position. Student described the coaches talking to her

⁴⁰ See Dear Colleague Letter: Students with disabilities in extracurricular activities, January 25, 2013, pp 3, 7, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html> (school districts may require a student to have a certain level of skill or ability to participate in a selective or competitive program or activity, so long as the criteria for selection are not discriminatory).

about difficult times in their own lives and how they overcame those difficulties. She described that she felt an overwhelming desire to leave the locker room. She explained that she requested to leave on several occasions, but her requests to leave were denied. After the female JV Coach came into the locker room and informed them that the other students were waiting on the bus, Student finally was allowed to leave.

The female JV Coach described that it was not unusual for Student to be in tears. Therefore, when she came upon the scene in the locker room after the away game, it did not strike her as unusual. She went on to describe that Student often had an emotional reaction to the Coach correcting her game play. This was described as resulting from Student's lack of objectivity with regard to her athletic performance. The female coach expressed the opinion that Student is stubborn and therefore difficult to coach.

2. Analysis

Under Oregon's anti-discrimination statute and rule, a person may not be subjected to discrimination on the basis of sex.⁴¹ As explained above, 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 Title IX and the interpretation of that law by federal courts and the Office for Civil Rights.

In interpreting Title IX, the Office of Civil Rights has provided guidance pertinent to the issues 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. As explained by the Office for Civil Rights:

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 [that otherwise would be available to the student]. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX.^{42]}

⁴¹ ORS 659.850; OAR 581-021-0045.

⁴² United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, p 2 (2001), available at: https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref6. See *Franklin v. Gwinnett County Public School*, 503 U.S. 60, 63 (1992) (finding kissing and sexual intercourse to be sexual harassment and subject to protections of Title IX). See

In other words, for purposes of ORS 659.850, a student is subject to discrimination based on sex if an educational institution fails to provide the student with a learning environment that is free from sexual harassment and fails to remedy complaints alleging sexual harassment.

Importantly, only events that are of a “sexual nature” can rise to the level of sexual harassment.⁴³ The adults present during the encounter describe the incident as an attempt to coach and mentor Student, who was struggling with her athletic performance following her suspension and the loss of the team captain position. Student describes the event similarly, explaining that the coaches discussed handling life challenges with her while they were in the locker room. Everyone interviewed about the incident agreed that Student was visibly upset during and after the encounter. But, the mere fact that Student was alone with two male coaches and that she was upset do not, by themselves, render the encounter a sexual one.

The female JV Coach entered the locker room during the time of the incident. She did not interpret the exchange as harassing, demeaning, or based on sex or gender. Student’s own statement that the coaches talked to her about life’s challenges also supports the interpretation that the encounter was not of a sexual nature. While it may be argued that the incident had an impact on Student that was severe enough to limit Student’s ability to participate in or benefit from the district’s athletic program, the source of that impact was not harassment based on sex.

As explained above, the single incident in the locker room did not amount to sexual harassment. However, the district staff’s descriptions of Student’s reaction evince an additional instance where having insight into the manifestations of Student’s disability would potentially have alerted district staff that such communications with Student would not be constructive in light of her disability and that the situation would further exacerbate the symptoms of her disability.

also *Davis v. Monroe County Board of Education*, 526 U.S. 629, 653 (1999) (finding “numerous acts of objectively offensive touching” to be sexual harassment and subject to protections of Title IX).

⁴³ United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, p 2 (2001), available at: https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref6 (sexual harassment is unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature); *Franklin*, 503 U.S. at 63 (kissing and sexual intercourse constituted sexual harassment under Title IX); *Davis*, 526 U.S. at 653 (“numerous acts of objectively offensive touching” constituted sexual harassment under Title IX).

For the reasons explained above, the department does not find that sex-based discrimination occurred in this matter.

V. CONCLUSION

In conclusion, the department finds that the district did not discriminate against Student on the basis of sex, because no sexual harassment occurred in this matter. However, the department finds that the district may have discriminated against Student on the basis of her disability, because substantial evidence supports the allegation that the district's actions, while fair in form, were discriminatory in operation and that the district's actions amounted to disability harassment. Furthermore, the district's actions limited Student's enjoyment of a "right, privilege, advantage, or opportunity," specifically, extracurricular athletic participation, in violation of OAR 581-021-0045(3)(f).

Accordingly, the department encourages the district to reach an agreement with Parent through conciliation. If the district cannot reach an agreement with Parent through conciliation within 30 days, the Deputy Superintendent will schedule a hearing for the purpose of determining whether the district is in compliance with ORS 659.850. If Parent or the district wishes to use the department as a resource during conciliation, either party may contact the department.⁴⁴

Sincerely,

Stacey Guise
Office of Government and Legal Affairs
stacey.guise@state.or.us
503-947-5628

⁴⁴ The department's Civil Rights Education Specialist, Winston Cornwall, may be reached at 503-947-5675 or at winston.cornwall@state.or.us.