



# Oregon

Kate Brown, Governor



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**Colt Gill**

Director of the Oregon Department of Education

November 19, 2018

**BY EMAIL AND US MAIL**

REDACTED  
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REDACTED

Dr. Brian Shumate  
Superintendent  
Medford School District 549C  
815 S. Oakdale Avenue  
Medford, OR 97501

Case Reference Number 2017KM03

Dear REDACTED and Superintendent Shumate:

This letter is the investigatory determination on the appeal of a complaint filed with Medford School District 549C (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 581-029-0049 (requiring school districts to adopt written procedures for the prompt resolution of complaints of discrimination).<sup>1</sup>

## **I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

REDACTED (Parent) alleges that the District discriminated against her daughter (Student) because student was subjected to various forms of sexual harassment from another student and the District failed to remedy the alleged harassment.

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.<sup>2</sup> The department reviews the school district's procedures and findings of fact to determine whether the proper procedures

<sup>1</sup> Case Reference No. 2017KM03.

<sup>2</sup> OAR 581-021-0049(1).

were followed and what action, if any, should be taken.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> If the Department determines that the school district is not in compliance with ORS 659.850, it issues an order requiring compliance.<sup>6</sup> If the school district fails to comply with the order within 30 days, the Department issues an order imposing an appropriate remedy.<sup>7</sup> 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.<sup>8</sup>

On appeal, the Department has completed its investigation. This letter constitutes the Department's investigatory determination as to whether discrimination may have occurred.

## **II. PROCEDURAL BACKGROUND**

On November 7, 2016, Parent filed a complaint with the District. Parent reported that her daughter (Student) was subjected to various forms of sexual harassment at REDACTED (School), including sexual gestures and name calling. Specifically, Parent alleged that, on October 13, 2016, a male student (Student 2) called Student a "bitch" and that he directed "sexual gestures" at Student and other girls. Specifically, she asserted that Student 2 made a sexual gesture using his pencil in the classroom on one occasion and Student 2 took his hot dog, wiggled it "near his privates," and said "this is for you [Student]" in the cafeteria on another occasion. Parent also alleged that, on October 26<sup>th</sup> and 27<sup>th</sup>, Student 2 attempted to put his arm around Student and began referring to Student as his girlfriend in front of other students at school.

On November 21, 2016, the District reported the results of its investigation and responded to Parent's complaint. On November 22, 2016, Parent wrote to the District asking about what she viewed as conflicting statements from a previous phone call from District staff and the District's written response to her complaint. On November 28, 2016, the District issued a revised response, which provided greater detail regarding its investigation of Parent's complaint.

On December 26, 2016, Parent filed a new complaint, alleging that an additional incident involving sexual harassment had occurred at school. Specifically, she alleged that, when Student was sitting in front of the classroom to read a story aloud to the class, Student 2 pointed between her legs toward her "private parts" and said "look at them balls."

On February 2, 2017, the District reported the results of its investigation and responded to Parent's December 26, 2016, complaint. Dissatisfied with the District's response to her complaints, Parent filed this appeal with the Department on May 15, 2017.

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

<sup>4</sup> OAR 581-021-0049(1)(b).

<sup>5</sup> OAR 581-021-0049(2).

<sup>6</sup> OAR 581-021-0049(3).

<sup>7</sup> *Id.*

<sup>8</sup> OAR 581-021-0049(3)(a) to (d).

On July 5, 2017, the Department notified the District of the appeal. On July 26, 2017, the District timely responded to the Department. The District's response included documents requested by the Department in the July 5<sup>th</sup> notice, copies of relevant District policies, and other supporting documents. The Department reviewed the District's response.

On August 28, 2017, the Department interviewed Parent, Student, and another student who was a neighbor of Student. The Department also collected additional materials related to the appeal, including communications between Parent and the District.

Between August 28<sup>th</sup> and August 30<sup>th</sup>, the Department conducted on-site interviews with both school and district staff, including: the District's Director of Elementary Student Achievement (Director), the District's Chief Academic Officer (Chief), the Human Resources Officer, the Principal of REDACTED (School) (Principal), the Administrative Assistant to the Principal for REDACTED (School) (Administrative Assistant), and Student's classroom teachers.

### **III. FINDINGS OF FACT**

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

1. Student was a third grade student in the District.
2. During certain times relevant to the issues in this appeal, Student and Student 2 were in the same class at the school, which was a classroom with REDACTED boys and REDACTED girls.
3. On October 13 and 14, 2016, Parent notified the Principal that Student 2 was sexually harassing her daughter. On October 13<sup>th</sup>, Parent told the Principal that Student 2 had called Student a "bitch." On October 14<sup>th</sup>, which was an in-service day, Parent informed the Principal that Student 2 also had made sexual gestures toward Student on two occasions. She asserted that, on one occasion in the classroom, Student 2 made a sexual gesture using his pencil and, on another occasion in the cafeteria, Student 2 took his hot dog, wiggled it "near his privates," and said "this is for you [Student.]"
4. After receiving notice of Parent's concerns, the Principal conducted a thorough investigation of the alleged incidents. That investigation included interviews with Student 2, other students in the classroom, and the classroom teacher. Student 2 denied the allegations. Neither the students nor the teacher witnessed any of the incidents that Parent alleged had occurred. Based on her investigation, the Principal was not able to verify that the October 13<sup>th</sup> incidents had occurred.
5. On November 3<sup>rd</sup>, Parent notified the Principal's Assistant that additional incidents involving Student 2 had occurred. Specifically, Parent alleged that, on October 26<sup>th</sup>, Student 2 had tried to put his arm around Student and, on October 27<sup>th</sup>, Student 2 had stated that Student was his "girlfriend."

6. Upon learning about Parent's report, the Principal investigated the allegations. Among other things, the Principal interviewed Student 2, staff members, and other students who might have witnessed the incidents.
7. On November 7, 2016, Parent filed a formal complaint with the District. In her complaint, Parent reiterated her concerns about the incidents that she alleged had occurred on October 13<sup>th</sup> and October 26<sup>th</sup>-27<sup>th</sup>. REDACTED
8. On November 8<sup>th</sup>, the Superintendent for Medford School District (Superintendent) emailed Parent to notify her that the District had received her complaint. The District also notified Parent that the District's Director of Elementary Student Achievement (Director) would be following up on her complaint.
9. The Director subsequently investigated Parent's allegations for the District.
10. On November 9<sup>th</sup>, the Director had a phone conversation with Parent. During that conversation, the Director told Parent, among other things, that she had spoken to the Principal about the incidents Parent alleged had occurred on October 13<sup>th</sup> and that the Principal had been unable to corroborate the incidents. The Director indicated that the District would do its best to investigate Parent's allegation, but that it might be challenging for the District to get information from witnesses about the incidents, as it had been about a month since the alleged incidents had occurred. The Director also stated that, if "this was brought to [the District] sooner, it would have been easier to investigate from the district level."
11. On November 21, 2016, the District issued its written response to Parent's complaint. The District made the following findings and conclusions:
  - a. Regarding the incidents that allegedly occurred on October 13<sup>th</sup>, the District reported that the Principal had investigated the allegations and had been unable to verify the incidents. The Principal spoke to the Director "the next day" and reported her initial findings. Although the Principal ultimately was unable to verify that the incidents had occurred, she immediately took "several proactive steps" to ensure Student's safety after receiving notice of the alleged incidents. A supervision plan had been implemented for the students for both inside and outside the classroom. The Principal increased her observations of Student's classroom. A seating change was made in the classroom in order to separate Student and Student 2. Finally, a conference was held with Student 2 and his parents/guardians.
  - b. Regarding the incidents that allegedly occurred on October 26<sup>th</sup> and 27<sup>th</sup>, the District reported that it had interviewed Student 2, staff members, and other students who might have been witnesses to the incidents. Student 2 denied the allegations. Staff members reported that they did not overhear or observe the interactions. Of the students who were interviewed regarding the incidents, one student reported that Student 2 had called Student his girlfriend. Another student reported witnessing

Student 2 put his arm around Student. That student also reported that when Student told Student 2 to stop, Student 2 stopped the behavior.

- c. As a result of the information obtained during the investigation, the District implemented increased supervision for Student 2 at all recesses. The District also communicated to school staff to be on the alert and to report any inappropriate behaviors Student 2 directed toward Student or any other student immediately. The District also significantly increased behavioral supports for Student 2.
  - d. The District concluded that the Principal and staff at the school had “handled each situation quickly with the appropriate corrective action to prevent any further incidences of this nature.” The District further reported that the support strategies it had put in place appeared “to be working well.” The District asked Student to report any new incidents immediately, so that staff could quickly respond to any inappropriate behaviors. Finally, the District offered Parent the option of increased support services for Student, including: (1) having regular check-ins with a designated adult; (2) creating a safety plan for Student; and (3) teaching Student specific strategies for handling situations involving harassment-type behaviors.
12. The District reported that Parent initially was satisfied with the District’s findings. She was pleased that the District had offered Student additional support services and had expressed interest in those services.
13. On November 22, 2016, Parent sent the District an email asking for clarification about the District’s response and expressing dissatisfaction with that response. Parent asked the District for clarification of what it had meant when it said that the Principal had contacted the District “the next day.” Parent also indicated that she felt that the District had provided her with conflicting information. Parent alleged that the District had told her in a phone call that the Principal had not contacted the District about the incidents involved in her complaint and that the District’s written response had indicated that the Principal had contacted the District the next day.
14. In response to Parent’s November 22<sup>nd</sup> request for clarification, the District revised its response to provide more information to Parent about the timeline of events. It issued the revised response on November 28, 2016. The revised response added a bit more information and also specified what events occurred on what dates. The District’s revised response indicated that:
- a. The Principal had met with Student 2 on October 13, 2016, to inquire about the allegation that Parent had reported that day and Student 2 had denied the allegation. The Principal also spoke with a possible student witness that same date. But, that witness had not witnessed any interaction between Student and Student 2 that day.
  - b. After meeting with Parent on October 14<sup>th</sup> and being notified about Parent’s additional concerns, the Principal contacted the Director to discuss Parent’s

allegations and the investigation that had been conducted at the school up to that point. The Principal informed the Director that she would be unable to conduct further investigation of the allegations that day, as it was an in-service day and no students were present.

- c. Regarding the October 26<sup>th</sup> and 27<sup>th</sup> incidents, the District indicated that the Principal was unaware of those incidents until after Parent reported them to the Administrative Assistant on November 3<sup>rd</sup>. Shortly after that, the District received Parent's formal complaint. The District conducted an investigation, which included interviewing the witnesses that Student had identified as individuals who may have observed or overheard the incidents.
  - d. The District concluded that the October 26<sup>th</sup> and 27<sup>th</sup> incidents did not create a hostile learning environment for Student. The District's remaining findings and conclusions were the same as those that had been included in its previous response.
- 15. Parent subsequently declined the District's offer to implement additional support services for Student. Parent further requested that the Director have no further contact with her or her family.
  - 16. In December 2016, Parent requested a classroom change for Student to move her to a classroom away from Student 2.
  - 17. On December 26, 2016, Parent filed a second complaint with the District. Parent alleged that, when Student was sitting in front of the classroom reading a story to the class, Student 2 pointed between her legs toward her "private parts" and said "look at them balls." In addition, Parent requested that: (1) Student be given a new classroom placement away from Student 2; (2) the District review its response dated November 21<sup>st</sup> and its revised response dated November 28<sup>th</sup> and admit that the Director, who had issued those responses, lied in those reports; (3) the Director no longer be involved in any concerns regarding her family; and (4) the District take disciplinary action against the Director and the Principal, including terminating the Principal.
  - 18. The District acknowledged receipt of Parent's complaint on December 30<sup>th</sup>. It indicated that the District's Chief Academic Officer (Chief) would be handling Parent's complaint.
  - 19. The District proceeded to investigate Parent's concerns reported in her December complaint. The Principal interviewed the teacher and all of the students that Parent and Student had identified as possible witnesses. No one who was interviewed recalled hearing or observing the incident that had been reported.
  - 20. Although the District was unable to verify that incident, the District made arrangements for Student to move to a new classroom away from Student 2, pursuant to Parent's request. Student was moved REDACTED in January 2017. To help support Student in that new placement, the District added an additional full-time teacher to the classroom to

work closely with Student. Student started in the new classroom on January 11<sup>th</sup>.

21. On January 20<sup>th</sup> Parent informed the District that the new class placement was working well and that Student was feeling more comfortable and safe in the new placement.
22. On February 1, 2017, Parent sent an email to the District expressing that Student was not happy with her experience at the school.
23. On February 2, 2017, the District issued its written response to Parent's December 26<sup>th</sup> complaint. The District made the following findings and conclusions:
  - a. Parent had requested a classroom change for Student and that that request was approved by the District.
  - b. Parent had requested that the District review the Director's written responses to Parent's November 7<sup>th</sup> complaint. The District indicated that it appeared that the Director had added additional details to the second written response and noted that it understood that those changes "may have caused confusion." The District found that the Director did not have any ill intent in making those changes. The District also noted that Parent had requested that the Director have no contact with her family and that, pursuant to that request, the Chief had been designated as her new District contact.
  - c. Regarding Parent's request that the Principal be terminated, the District indicated that it had conducted a review of the Principal's investigation into Parent's complaints and that it would not be taking any action on Parent's request to have her removed as Principal. The District would continue to supervise the Principal.
  - d. Regarding Parent's December 26<sup>th</sup> complaint, the District noted that it had conducted an investigation surrounding the incident identified in the complaint. The teacher and the students who were identified as potential witnesses to the event were interviewed. The District found no evidence of the reported incident. The District also noted that Student had been moved to a new classroom and additional supports had been put in place for Student.
24. Parent communicated dissatisfaction with the District's response and again requested that the Principal be removed from the school.
25. The District offered to meet with Parent and facilitate a meeting between the Principal and Parent. The District made several attempts to set up a meeting time with Parent to discuss her concerns. Parent ultimately declined to have a meeting with the District.
26. On February 28, 2017, Parent officially unenrolled Student from the school.

#### **IV. ANALYSIS**

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.<sup>[9]</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>10</sup>

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

(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;

\* \* \* \* \*

(f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.<sup>[11]</sup>

The issues addressed on appeal are whether the District violated Oregon’s anti-discrimination statute and OAR 581-021-0045 by: (1) failing to appropriately respond to Parent’s complaints; and (2) failing to provide Student with a learning environment free from sexual harassment.

**A. Whether the District responded appropriately to complaints alleging discrimination**

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<sup>9</sup> ORS 659.850(2). OAR 581-021-0045(2) applies this prohibition specifically to the types of schools regulated by the Department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.”

<sup>10</sup> ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools.

<sup>11</sup> OAR 581-021-0045(3)(b)-(d) and (f).



Parent filed two discrimination complaints with the District. In her November 7th complaint, Parent alleged that on October 13<sup>th</sup>: (1) Student 2 called Student a “bitch;” (2) Student 2 made an inappropriate sexual gesture toward Student in the classroom using his pencil; and (3) Student 2 made an inappropriate sexual gesture toward Student in the cafeteria by taking his hot dog, wiggling it “near his privates,” and saying “this is for you [Student.]” In that complaint, Parent also alleged that Student 2 had tried to put his arm around Student on October 26<sup>th</sup>, and that Student 2 had called Student his girlfriend on October 27<sup>th</sup>. In her second complaint, filed December 26<sup>th</sup>, Parent alleged that Student 2 had pointed between Student’s legs toward her “private parts” and said “look at them balls.”

The District maintains policies prohibiting discrimination,<sup>12</sup> providing for the investigation of complaints alleging discrimination,<sup>13</sup> prohibiting sexual harassment,<sup>14</sup> and providing for the investigation of complaints alleging sexual harassment.<sup>15</sup> Those policies require that the District promptly investigate any complaints of sexual harassment or discrimination and notify the complainant of the District’s findings regarding the complaint.

Parent asserts that the District failed to respond appropriately to her complaints. Specifically, Parent alleges that the District engaged in “unprofessional behaviors” by lying in its written responses to her complaints. Parent’s complaint appears to center around what she claims is a discrepancy between what the District told her over the phone and what the District said in its written responses to her initial complaint. Parent alleges that, in a phone conversation that occurred on November 9<sup>th</sup>, the District told her that it was having trouble verifying the October 13<sup>th</sup> incidents, because the Principal had not contacted the District about those incidents and they were now almost a month old. But, in the District’s written responses, it had stated that the Principal contacted the District “the next day,” which would have been the day after the incidents occurred.

The Department understands Parent’s viewpoint. Upon first glance, it appears that there is a discrepancy between what Parent says the District told her over the phone and what the District stated in its written responses to Parent’s initial complaint. However, upon further review, the evidence suggests that what Parent views as a discrepancy and as the District lying in its reports, is merely a misunderstanding or misinterpretation of the information she was provided over the phone on November 9<sup>th</sup>.

Parent initially reported concerns about Student 2’s behavior to the Principal on October 13<sup>th</sup>. Parent had a follow-up meeting with the Principal on October 14<sup>th</sup> and she reported additional behavioral concerns about Student 2 on that day. Pursuant to District policy, upon receiving notice of Parent’s concerns, the Principal immediately began an investigation into those concerns.<sup>16</sup> During the course of her investigation, she spoke to Student 2 about the incidents and interviewed other potential student witnesses and the classroom teacher about the incidents. The District indicates that the Principal

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<sup>12</sup> Medford School District 549C, Nondiscrimination, Policy AC.

<sup>13</sup> Medford School District 549C, Discrimination Complaint Procedure, Policy AC-AR.

<sup>14</sup> Medford School District 549C, Sexual Harassment, Policy JBA/GBN.

<sup>15</sup> Medford School District 549C, Sexual Harassment Complaint Procedure, Policy GBN/JBA-AR.

<sup>16</sup> Medford School District 549C, Sexual Harassment Complaint Procedure, Policy GBN/JBA-AR, provides, in part, that a sexual harassment complaint can be presented to the “building principal, compliance officer or superintendent” and that “[t]he district official receiving the information or complaint shall promptly initiate an investigation.”

contacted the District on October 14<sup>th</sup>, after her follow-up meeting with Parent, to inform the District about Parent's concerns and about the investigation that was in progress at the school regarding those concerns.

On November 7<sup>th</sup>, Parent filed her formal complaint with the District, in which she raised the same concerns about Student 2's behavior with the District. In response to that complaint and pursuant to the District's policies,<sup>17</sup> the District then began its own investigation into the alleged incidents, separate from or in addition to the investigation that was already occurring at the school level. Among other things, the District had a phone conversation with Parent about the incidents on November 9<sup>th</sup>. The District's log of the November 9<sup>th</sup> phone call indicates that, during that phone call, the District asked Parent whether there were "any witnesses to the incidents that occurred." The District also "shared what [it had] found so far in talking with [the Principal]." It indicated that the Principal had been "unable to corroborate" the incidents. The District "told [Parent that] if this was brought to [the District] sooner, it would have been easier to investigate from the district level[.]" but "it might be a challenge to get information from witnesses" for "an incident from a month ago[.]" The District expressed that it still would investigate Parent's allegations and "would try" to find witnesses who might recall the October 13<sup>th</sup> incidents.

The evidence suggests that the Principal informed the District of Parent's concerns and the fact that an investigation regarding those concerns was underway at the school level shortly after those concerns were first raised by Parent. And, when the District informed Parent that it would have been easier to investigate Parent's allegations "from the district level" if "this was brought to [the District] sooner," it appears that the District was referring to the filing of Parent's November 7<sup>th</sup> complaint, which is the action that triggered the District's obligation to investigate the allegations.

In any event, even assuming that Parent is correct about there being a discrepancy between the statements made in the phone call from the District representative and the District's written responses, the evidence substantiates that the District appropriately investigated and responded to Parent's complaints.

The Department finds that, after Parent notified the Principal about her concerns on October 13<sup>th</sup> and 14<sup>th</sup>, the Principal immediately began an investigation, which included interviewing students who might have been witnesses to the incidents, the classroom teacher, and Student 2. Student 2 denied the allegations and neither the students nor the teacher were able to verify that the incidents from October 13<sup>th</sup> had occurred. Despite the fact that the Principal had been unable to verify that the incidents had occurred, the District immediately implemented several safeguards to help ensure Student's safety and to prevent any further incidents from occurring. Specifically, the District implemented: (1) a supervision plan for the students for both inside and outside the classroom; (2) increased observations of the classroom by the Principal; and (3) student seating changes in the classroom to move Student and Student 2 apart. The Principal also held a conference with Student 2 and his parents/guardians to address the concerns.

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<sup>17</sup> *Id.*

Likewise, after Parent's reports about the October 26<sup>th</sup> and 27<sup>th</sup> concerns, the Principal conducted an investigation. She interviewed Student 2, other students who might have been witnesses to the incidents, and staff members regarding the allegations. Student 2 again denied the allegations. Staff members reported that they did not overhear or observe the interactions. One student had witnessed Student 2 try to place his arm around Student. That student also reported that, as soon as Student asked Student 2 to stop, Student 2 immediately stopped the behavior. Another student confirmed that Student 2 had referred to Student as his girlfriend.

Following its investigation, the District implemented even more safeguards to help ensure Student's safety. The District increased supervision of Student 2 during all recesses. It communicated with staff to be on the alert regarding Student 2's behavior and to immediately report any inappropriate behavior toward Student or any other student at the school. Finally, the District significantly increased the behavioral supports being provided to Student 2.

In addition to those safeguards, the District also offered additional support to Student. Specifically, the District offered to: (1) designate a trusted adult for regular check-ins with Student; (2) create a safety plan for Student; and (3) provide Student with instruction about strategies for handling harassment-type situations. While Parent initially expressed interest in those supports, ultimately she declined those supports for Student.

Regarding Parent's complaint filed at the end of December, the District conducted an investigation immediately after classes resumed following winter break. That investigation included interviews with several students and the teacher. None of the individuals interviewed recalled observing the behavior or hearing the comments that had been reported in the complaint. Despite finding no evidence that the incident had occurred, the District granted Parent's request to move Student to a new classroom away from Student 2. REDACTED REDACTED To help support Student in the new classroom placement, the District added an additional full-time teacher to work closely with Student. Parent reported that the new class placement was working well and that Student was feeling "more comfortable[,] "more safe[,] "and "less stressed" in her new classroom. Shortly after that, however, Parent withdrew Student from the school.

The Department finds that the District investigated and responded appropriately to Parent's complaints. The District followed its policies and procedures in addressing both of Parent's complaints. Each incident that Parent reported was fully investigated. Specific to the October 13<sup>th</sup> incidents, regardless of when the District first learned about Parent's concerns about Student 2's behavior on that day, the evidence substantiates that an investigation of those concerns occurred immediately after those concerns were initially reported to the Principal. The evidence further substantiates that, regardless of whether or not the District was able to confirm that the incidents occurred, it implemented numerous safeguards to ensure that Student was provided with a safe learning environment.

**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 a hostile learning environment, because Student was subjected to repeated incidents of sexual harassment from Student 2 at school. Parent further alleges that the District failed to remedy that environment for Student.

Under Oregon's anti-discrimination statute and 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 (Office for Civil Rights). Because 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 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.

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.<sup>20]</sup>

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 students with a learning environment that is free from sexual harassment and fails to remedy complaints alleging sexual harassment.

The evidence substantiates that, after investigating the allegations in Parent's complaints, the District was unable to confirm the majority of the incidents that Parent had reported. Out of six incidents that Parent reported, only two incidents were confirmed. The District's investigation confirmed that Student 2 had

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

<sup>19</sup> See Education Amendments of 1972, Public Law No. 92-318, Title IX, §§ 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*, 2 (2001), available at: [https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#\\_ednref6](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 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).

tried to put his arm around Student on one occasion. Notably, when Student told Student 2 to stop, Student 2 immediately did so and there is no evidence that this behavior continued beyond that isolated incident. The District also was able to confirm that Student 2 had, on one occasion, called Student his girlfriend. The District did not find that those two relatively minor incidents were sufficient to create a hostile learning environment for Student.

Although the District was unable to verify the remaining allegations and it did not believe that the two incidents that it was able to confirm were sufficient to create a hostile learning environment for Student, the District still proceeded to take several proactive steps toward protecting student and ensuring that she had a safe learning environment. After Parent's initial report of the October 13<sup>th</sup> incidents, the District: (1) instituted a supervision plan for both inside and outside the classroom; (2) increased the Principal's observations of Student's classroom; (3) made student seating changes within the classroom to separate Student and Student 2; and (4) held a conference with Student 2 and his parents/guardians regarding the allegations. After Parent's report about the October 26<sup>th</sup> and 27<sup>th</sup> incidents, the District implemented additional safeguards, including: (1) increasing Student 2's supervision level at all recesses; (2) communicating with staff to be on the alert regarding inappropriate behavior directed at Student or any other student and to immediately report any observations of inappropriate behavior; and (3) increasing the behavioral supports in place for Student 2. In addition to implementing all of those safeguards, the District also offered Student the following additional support: (1) providing Student with a regular check-in with a designated adult; (2) creating a safety plan for Student; and (3) teaching Student strategies for handling harassment-type behaviors and situations. Parent, ultimately, declined those supports for Student. Finally, after Parent filed her December complaint, the District moved Student to a new classroom away from Student 2 and added an additional full-time teacher to help support Student in that new placement.

The Department finds that, in each of the instances reported by Parent, the school responded immediately with an investigation that included interviewing all potential witnesses among students and staff. The investigations conducted by the school and by the District did not reveal that a hostile environment existed for Student. Most of the incidents were unable to be verified by the District, despite the fact that the incidents, as alleged, would have occurred in front of witnesses in the classroom or the cafeteria. In each instance reported, the District took measures to ensure Student a safe learning environment and responded to requests from Parent to provide an alternative placement for Student.

## **V. CONCLUSION**

The Department finds that the District appropriately investigated and responded to Parent's concerns in conformity with the District's policies. The Department finds that the District provided safeguards and support to ensure that a safe learning environment existed for Student. The Department does not find that discrimination occurred in this matter.

Sincerely,

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