January 6, 2021

 **BY EMAIL**

REDACTED

REDACTED

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RECACTED

Brookings-Harbor School District 17-C

654 Fern Avenue

Brookings, OR 97415

Case: #2019-MM-13

Dear REDACTED and Interim REDACTED:

This letter is the order on the August 6, 2019, appeal filed by REDACTED (Complainant) alleging that Brookings-Harbor School District 17-C violated ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly) and OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education). To ensure compliance with these laws and rules, the Oregon Department of Education will review school district procedures and make findings of fact to determine whether a violation occurred and what action, if any, should be taken.[[1]](#footnote-1)

**APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

On appeal, Complainant alleges that Brookings-Harbor School District 17-C discriminated against multiple students on the basis that the district failed to properly investigate an alleged sexual harassment case.

The Oregon Department of Education has jurisdiction to resolve this complaint as specified in OAR 581-002-0003. When a person files with the department an appeal of a complaint alleging discrimination, the department will initiate an investigation to determine whether discrimination may have occurred.[[2]](#footnote-2) If the department determines that a violation of a law or rule described in OAR 581-002-003 occurred, the department must issue a preliminary order to the complainant and the district.[[3]](#footnote-3) The preliminary order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s preliminary findings of fact, and the department’s preliminary conclusions.[[4]](#footnote-4) If the department determines that a violation of law or rule described in OAR 581-002-003 did not occur, the department must issue a final order as described in OAR 581-002-0017.[[5]](#footnote-5) The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.[[6]](#footnote-6)

In this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department’s order as to whether discrimination may have occurred.

**PROCEDURAL BACKGROUND**

Complainant filed a complaint with Brookings-Harbor School District C-17 on October 10, 2018. Complainant exhausted the district’s complaint process on July 17, 2019, when the district issued a final decision on the matter. On July 21, 2019, Complainant filed an appeal of the complaint with the Oregon Department of Education. On August 6, 2019, the department accepted the appeal under OAR 581-002-0005(1)(a)(A) on the basis that complainant had exhausted the district’s complaint process.[[7]](#footnote-7)

**PRELIMINARY FINDINGS OF FACT**

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

1. On October 10, 2018, a district counselor (Counselor) reported to the district’s Title IX coordinator (Title IX Coordinator) that a student attending school in the district (Student 1) allegedly had nonconsensual sex with two female students attending school in the district. The female students (Student 2 and Student 6) had reported the incidents to a district teacher (Teacher 1). Counselor further reported that a third female student (Student 5) reported to Teacher 1 an incident involving sexual misconduct by Student 1 that took place in Student 1’s car.
2. On October 12, 2018, the Title IX Coordinator interviewed Counselor about the allegations of nonconsensual sex and sexual misconduct reported on October 10. During the interview, Counselor told the Title IX Coordinator that in the spring of 2017, Student 5 reported to Teacher 1 an incident involving Student 1, where Student 1 made unwanted sexual advances toward her. Counselor informed the Title IX Coordinator that another student attending school in the district (Student 7) had information about the incident. Counselor also reported that Student 1 had attempted to kiss Student 5 in the school parking lot while the two were inside his car. Counselor stated that Student 1 attempted to prevent Student 5 from exiting the vehicle. Counselor finally reported that Student 1 and Student 6 had nonconsensual sex at Student 1’s home.
3. Following receipt of the Counselor’s complaint, the district began sending notification letters to the reporting parties, the responding party, and relevant student witnesses about the commencement of a Title IX investigation. The letters generally contained the same content. The letters informed their recipients that the district was conducting a Title IX investigation, asking to meet with the students, and directing the students to not speak to other students about the investigation.
4. The Title IX Coordinator commenced an investigation of Counselor’s allegations.
5. Prior to the events that are the subject of this appeal, the Title IX Coordinator coached Student 2 and other students involved in the investigation. Student 2 made complaints about the Title IX Coordinator to the district, resulting in the district removing the Title IX Coordinator from their coaching position.
6. Prior to the events that are the subject of this appeal, the Title IX Coordinator employed Student 1 and Student 1’s sibling.
7. On October 17, 2018, the Title IX Coordinator interviewed Teacher 1. According to the district notes taken during the interview, Teacher 1 recounted what Student 2 had told her about Student 1. Teacher 1 stated that Student 2 did not want to have sex with Student 1. Teacher 1 stated that Student 2 only disclosed the events to them after hearing that other female students had similar encounters with Student 1.
8. On October 25, 2018, the district interviewed Student 2. According to the district notes taken during the interview, Student 2 stated that she had previously had consensual sex with Student 1. Student 2 reported that on the date in question, she did not want to have sex with Student 1. Student 1 picked up Student 2 in his car and they went to Student 1’s home. While there, Student 1 requested to have sex with Student 1 multiple times. Student 2 told Student 1 “no” multiple times. Student 2 subsequently had oral sex and sex with Student 1.
9. In October of 2018, the district interviewed Student 6. The only record of this interview is contained in a letter of the district’s investigatory findings sent to Student 6.
10. On October 29, 2018, the district interviewed Student 5. According to the district notes taken during the interview, Student 5 reported that Student 1 had attempted to kiss her on several occasions, making Student 5 uncomfortable. Student 5 decided not to pursue a relationship with Student 1 because of his behavior. Student 1 appeared disappointed each time Student 5 rejected his advances. Toward the end of the 2016-2017 school year, while Student 1 and Student 5 were sitting in Student 1’s car in the school parking lot, Student 1 expressed his desire to have a relationship with Student 5. Student 1 then attempted to kiss Student 5. Student 5 said “no.” Student 5 wanted to exit the vehicle. When she did so, Student 1 attempted to prevent her from exiting. After exiting the vehicle, Student 5 told Student 7 about the incident. After the incident, Student 5 felt uncomfortable around Student 1. The district recorded in its notes taken during the interview that the incident did not disrupt Student 5’s education.
11. Also on October 29, 2017, the district interviewed Student 1. Student 1’s parents attended the interview. The only record of this interview is contained in a letter of the district’s investigatory findings sent to Student 1.
12. On November 6, 2018, the district interviewed Student 7, who had witnessed the incident involving Student 1 and Student 5. According to the district notes taken during the interview, Student 7 alleged that Student 1 would not take “no” for an answer. Student 7 stated that the incident caused Student 5 to have a flashback to another incident involving sexual misconduct. Student 7 stated that Student 5 feared reporting Student 1’s behavior because Student 5 did not want to get Student 1 in trouble. Student 7 stated that the situation caused Student 5 to feel uncomfortable in classes that she attended with Student 1. Student 7 stated that there were rumors that Student 1 had behaved similarly toward other female students.
13. Also on November 6, 2018, the district interviewed Student 3. Student 3’s parents attended the interview. According to the district notes taken during the interview, Student 3 reported that Student 2 had told her about Student 2’s encounter with Student 1 soon after it had occurred. Student 3 described the relationship between Student 1 and Student 2 as “on again off again.” Student 3 stated that Student 2 distanced herself from Student 1 during the previous school year after learning that Student 1 did not have the same feelings for her as she had for him. Student 3 stated that Student 2 suffered an injury during the current school year. The injury limited Student 2’s mobility and prevented her from participating in school athletics. Student 3 stated that Student 1 invited Student 2 to his home to console her. Student 1 picked up Student 2 up and drove her to his home. The two watched a movie. While the movie was playing, the two kissed. Student 1 asked Student 2 to have sex. Student 2 declined and pushed him away. Student 1 tried again and pushed Student 2 down, making the comment ‘let’s just do it one last time.’” Student 2 again declined Student 1’s advances. Student 1 asked Student 2 to have sex a third time. Student 1 and Student 2 had sex. Student 3 stated that Student 1 left hickeys and a bruise on Student 2’s breast. Student 3 also stated that Student 1 made emotionally abusive remarks toward Student 2, telling her that she “was nothing without [him]” and that she was “not worthy” of him. Student 3 stated that Student 1 used body language in public to convey his dominance of Student 2. Student 3 stated that Student 2 had anxiety issues, that Student 1 knew about these issues, and that Student 1 used this knowledge “to keep [Student 2] around.”
14. Also on November 6, 2018, the district interviewed another student attending school in the district (Student 8). Student 8’s parents attended the interview. According to the district notes taken during the interview, Student 8 described himself as being friends with the involved parties. Student 8 stated that Student 2 told him that Student 1 raped her. Student 8 stated that Student 2 did not want to report the incident because she was afraid that she would be further victimized by an investigation. Student 8 reiterated many of the statements made by Student 3 during Student 3’s interview, including the circumstances under which Student 1 and Student 2 had sex and the awkwardness caused by the incident. Student 8 disclosed a text message conversation between himself and Student 1, where they discussed whether Student 2 was honest or “crying wolf.” They also discussed Student 2’s struggles with depression and anxiety.
15. On November 8, 2018, the district interviewed another student attending school in the district (Student 9). According to the district notes taken during the interview, Student 9 reported being aware of a past sexual relationship between Student 1 and Student 2. Student 9 stated that during the incident in question, Student 2 declined sex at least four times before getting tired of saying “no,” after which Student 1 and Student 2 had sex. Student 9 did not know whether Student 1 exhibited any anger or aggression during the incident. However, Student 9 stated that Student 1 bruised Student 2 during the incident. Student 9 stated that Student 2 told Student 9 about the incident two days after it occurred. Student 9 stated that Student 2 did not want to report the incident because Student 2 was afraid that she would affect Student 1’s ability to participate in athletics. Student 2 also was afraid that no one would believe her. Student 8 stated that the incident deeply affected Student 2, exacerbating existing mental health issues. Student 8 stated that Student 2 would panic when she saw Student 1 in school and in the classes that they attended together.
16. On November 14, 2018, the district interviewed another student attending school in the district (Student 10). According to district notes taken during the interview, Student 10 stated that she dated Student 1 for one week during the 2016-2017 school year. Student 10 discontinued the relationship because Student 1 repeatedly asked her for nude photographs of herself. Student 1 persisted in requesting nude photographs, even after Student 1 began dating another student attending school in the district (Student 12). Student 1 threatened to commit suicide if Student 10 did not give him nude photographs. When Student 1 sat next to Student 10 in class, he would touch her, making her feel uncomfortable. During the previous school year, Student 1 asked Student 10 to go on a hike. Student 10 felt uncomfortable going on the hike alone and invited a female family member (Student 11) to join them. During the hike, Student 1 attempted to kiss Student 10. Student 10 told Student 1 “no” and pulled away. During hike, Student 1 also attempted to grab and kiss Student 11. Student 10 also reported that in the spring of 2018, Student 1 grabbed and kissed her in the school parking lot. Student 1 later apologized for his behavior, but again asked Student 10 for nude photographs. Student 10 deleted Student 1 from all of her social media accounts. Student 10 also stated that she reported Student 1’s behavior to a district teacher (Teacher 2). The district recorded in its notes taken during the interview that Teacher 2 did not report the incident to anyone else in the district.
17. Also on November 14, 2018, the district interviewed Student 11. According to district notes taken during the interview, Student 11 recounted what happened during the hike that she and Student 10 took with Student 1. Student 11 did not see Student 1 attempt to kiss Student 10, but Student 11 did witness Student 10 “come running” at one point. Student 11 was interested in Student 1, but he was “handsy” and made her uncomfortable. Student 1 pulled Student 11 toward him by the waist and attempted to kiss her. Student 11 also confirmed that Student 1 requested nude photographs from Student 10 during the hike. Student 11 stated that Student 10 was uncomfortable with the request, causing Student 10 to want to stay home from school. Student 11 also commented on the relationship between Student 1 and Student 2. Student 11 stated that Student 2 felt forced to agree to have sex with Student 1 because Student 1 said that he would kill himself if she did not.
18. On November 15, 2018, the district interviewed another student attending school in the district (Student 4). According to district notes taken during the interview, Student 4 corroborated Student 10’s and Student 11’s description of the hike that they took with Student 1. Student 4 also stated that Student 1 was suicidal. Student 4 stated that there were many rumors about Student 1’s treatment of female students and that other students were approaching Student 1 and making impolite comments about his behavior.
19. Following its investigation, the district provided Student 1, Student 2, Student 5, and Student 6 with letters summarizing the district’s written investigatory findings and conclusions. Each letter was specific to the allegations raised by each reporting party. The letters were not dated. In interviews conducted by the department, students stated that they received the letters in December of 2018.
20. In December of 2018, Student 2 received a letter summarizing the district’s investigatory findings and conclusions with respect to Student 2’s allegations. The letter stipulated that Student 2 disclosed the alleged incidents to Teacher 1 and thereafter formally reported the incidents in October of 2018. The letter stipulated that Student 1 and Student 2 had a prior sexual relationship, that on the day in question Student 2 did not give consent to have sex with Student 1, and that Student 2 objected multiple times to having sex. The letter stipulated that Student 1 had confirmed Student 2’s description of the incident. The letter specified that at “no time did [Student 1] use any type of physical force, violence, or threats of violence to obtain sex [from Student 2].” The letter noted that “some type of incident occurred between [Student 2] and [Student 1] which cause[d] a change in [Student 2’s] mental state.” The letter included the following statement made to the district by Student 1:

You confirmed that you did in fact have sexual intercourse with one party which you believed to be consensual that occurred post consensual oral sex at the end of March/early April of 2017 at your house and that at no point did you attempt to use any type of physical force, violence, or threat[] of violence to obtain sex.

In the letter, the district concluded there was insufficient evidence of a violation of district policy. The district’s conclusion was based on Student 1 and Student 2’s history of having consensual sex and the absence of the use of physical force, violence, and threat of violence on the day in question. The district’s conclusion also was based on Student 2 giving Student 1 oral sex on the day in question. In the letter, the district recommended designating a guidance counselor to check-in weekly with Student 2 to monitor her academic progress and social and emotional wellbeing.

1. In December of 2018, Student 5 received a letter summarizing the district’s written investigatory findings and conclusions with respect to Student 5’s allegations. The letter stipulated that Student 5 informed the district of Student 1’s inappropriate behavior in June of 2017. The letter stated that the behavior *could have been* a violation of district policy. The letter stipulated that while seated in Student 1’s car in the school parking lot, Student 1 repeatedly asked Student 5 to kiss him. The letter stipulated that Student 1 had touched Student 5 on the arm, leg, and shoulder. The letter stipulated that Student 5 had reported feeling uncomfortable about Student 1’s conduct. The letter specified that Student 5’s discomfort was not caused by Student 1’s behavior, but because of a previous incident involving sexual misconduct. The letter specified that both Student 1 and Student 5 had described this previous incident during their interviews. In the letter, the district concluded there was insufficient evidence of a violation of district policy.
2. In December of 2018, Student 6 received a letter summarizing the district’s written investigatory findings and conclusions with respect to Student 6’s allegations. The letter stipulated that Student 6 reported the alleged violation in October of 2018. The letter stipulated Student 6 had reported having sex with Student 1 at Student 1’s home. The letter stipulated that Student 6 had stated that she did not want to have sex with Student 1. The letter read, in pertinent part,

You admitted that previous encounters of oral sex were consensual, however during the alleged incident in question, you stated you did not consent after being asked multiple times if you wanted to have sexual intercourse but the last time you were asked, you ‘did not say no’ and sexual intercourse occurred. You also stated that at no time did the male student use any type of physical force, violence, or threats of violence in order to obtain sex from you.

The letter specified that Student 1, during his interview, corroborated these details. In the letter, the district concluded there was insufficient evidence of a violation of district policy.

1. In December of 2018, Student 1 received a letter summarizing the district’s investigatory findings and conclusions with respect to Student 2’s, Student 5’s, and Student 6’s allegations. The letter described the incidents involving Student 2 and Student 6 as “unwanted.” The letter specified that Student 1 “cooperated and responded to all questions asked even providing written statements and a timeline of events.” The letter stipulated that the information provided by Student was similar to the information that it received from the reporting parties. The letter specified that Student 1 believed that the sex he had with Student 2 and Student 6 and the sexual advances he made toward Student 5 were consensual. The letter specified, “At no point did [Student 1] attempt to use any type of physical force, violence, or threats of violence to obtain sex.” The letter stipulated that Student 1’s conduct made the reporting parties uncomfortable, but specified, “No additional investigation was conducted” of the reported discomfort. In the letter, the district concluded there was insufficient evidence of a violation of district policy. In the letter, the district directed Student 1 to maintain confidentiality of its investigation and to meet weekly with a district counselor other than Counselor.
2. Each letter issued by the district during December of 2018 contained the following: (1) a “cease and desist” order directed to all parties involved, threatening future disciplinary action if the order was not followed; (2) notice that the district would provide Title IX education to all students starting as early as grade six; and (3) notice that the district would provide district staff with professional development on Title IX.
3. On April 22, 2019, Complainant filed complaints with the district, alleging that the district abdicated its duty under Title IX law and district policy. Complainant specifically alleged that (1) the Title IX Coordinator failed to perform the Title IX Coordinator’s duty to ensure “student safety and wellbeing” and failed to “advocate on behalf of vulnerable populations”; (2) Administrator failed to perform their duty to supervise the Title IX Coordinator and ensure a proper investigation; (3) the district’s conclusion that there was insufficient evidence of a violation of district policy did not give proper weight to evidence at the district’s disposal; and (4) evidence at the district’s disposal demonstrated that a hostile environment existed at the district, and that the district failed to remedy that hostile environment. Complainant also enumerated multiple conflicts of interest by the Title IX Coordinator, arguing that the district should not have allowed the Title IX Coordinator to conduct the investigation. Complainant alleged that the Title IX Coordinator: (1) “had multiple relationships with students involved,” (2) had previously coached Student 2, and had been removed from a coaching position because of a complaint made by Student 2, (3) had coached other students involved, (4) had employed Student 1, (5) had employed a member of Student 1’s family, and (6) had community contacts with students involved.
4. Prior to the district’s investigation, the Title IX Coordinator disclosed that they had employed Student 1. The Title IX Coordinator did not disclose any other conflicts of interest.
5. On May 20, 2019, Complainant met with Administrator to discuss the April 22nd complaint. Complainant, Administrator, Teacher 2, and a district staffer attended the meeting. During the meeting, the participants discussed Complainant’s concerns and potential remedies.
6. On May 31, 2019, Administrator issued a response to the April 22nd complaint. In that response, Administrator wrote,

During our meeting, we discussed concern raised regarding the handling of a Title IX investigation last fall. Due to FERPA considerations, I cannot share any additional information to address your concerns. I can inform you that the district has responded to concerns throughout the school year, by providing professional development, identifying resources, and increasing awareness of potential issues.

The response suggested removing the Title IX Coordinator from their position and providing Title IX training to students, staff, and families.

1. On June 5, 2019, Administrator 1 resigned from the district.
2. On June 19, 2019, the district school board sent a letter to the Title IX Coordinator and Administrator 1, informing them of the outcome of the complaint filed by Complainant. The school board affirmed Administrator 1’s May 31st order and specified that a civil rights specialist from the department would review the district’s Title IX policies and assist the district in modifying those policies. The department subsequently reviewed those policies, but was not informed about the events relevant to this appeal.
3. Also on June 19, 2019, Complaint received a letter from the district school board notifying Complainant of its decisions.
4. On July 21, 2019, Complaint filed an appeal of the district’s decision with the department.
5. On August 6, 2019, the department accepted Complainant’s appeal.
6. Throughout the 2019-2020 school year, a department investigator interviewed Counselor, Teacher 1, Student 2, Student 5, Student 6, and other students attending school in the district. Those interviews corroborated this order’s findings of fact insofar as the findings pertain to the interviewed individual. Complainant and district provided the investigator with the documents described in these findings. The district did not provide notes of Student 1’s October 29th interview or of the documents described in the letter sent to Student 1 summarizing the district’s findings and conclusions. Administrator 1 and the Title IX Coordinator declined to be interviewed by the investigator.
7. During the department’s interview with Student 2, Student 2 confirmed the version of events she told the district during the interview that took place on October 25, 2018. Student 2 also stated that during the day in question, subsequent to declining sex with Student 1 on multiple occasions, she had oral sex with Student 1. During oral sex, Student 1 continued to request to have vaginal sex. Student 2 stated that she had vaginal sex with Student 1. Student 2 stated that she had vaginal sex, in part, because of Student 1’s size and her lack of ambulatory motion. Student 2 further stated that she was uncomfortable with and confused by the Title IX Coordinator’s involvement in the district’s investigation. Before the investigation, the Title IX Coordinator coached Student 2. Student 2 made complaints about the Title IX Coordinator to the district, resulting in the district removing the Title IX Coordinator from their coaching position. Student 2 stated that she was aware that the Title IX Coordinator employed Student 1 and Student 1’s sibling. Student 2 stated that Student 1’s conduct after the day on which they had nonconsensual sex, including his body language and persistent attempts to contact her, affected her academic performance and psychological wellbeing.
8. During the department’s interview with Student 6, Student 6 related to the department the version of events that she had told the district during the interview that took place during October of 2018. Student 6 stated that she had previously had consensual sex with Student 1. Student 6 reported that on the date in question, she did not want to have sex with Student 1. Student 1 picked up Student 6 in his car and they went to Student 1’s home. While sitting in the car at Student 1’s home, Student 1 requested to have sex with Student 6 multiple times. Student 6 told Student 1 “no” multiple times. Student 6 subsequently had oral sex with Student 1. Student 6 reported the incident to the police.
9. During the department’s interview with Student 5, Student 5 confirmed the version of events she told the district during the interview that took place on October 29, 2018. Student 5 also stated that after the day on which Student 1 made sexual advances toward her and attempted to prevent her from exiting his car, she would feel anxious whenever she encountered Student 1 at school.
10. At the time that the department concluded its investigation, the district had not yet provided district staff with professional development on Title IX.

**ANALYSIS**

Under Oregon’s anti-discrimination statute,

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.[[8]](#footnote-8)

For purposes of this prohibition, “discrimination” is defined to mean “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.”[[9]](#footnote-9)

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;

 (e) Aid or perpetuate discrimination by joining or remaining a member of any agency or organization which discriminates in providing any aid, benefit, or service to students or employees; [or]

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

The question on appeal is whether Brookings-Harbor School District C-17 – in consideration of the circumstances at hand – violated either ORS 659.850 or OAR 581-021-0045(3)(c) or (d) by denying Student 2, Student 5, Student 6, Student 10, and Student 11 of an aid, benefit, or service or otherwise limiting their enjoyment of a right, privilege, or opportunity.

**A. Legal Standard under ORS 659.850 for Discrimination Appeals Invoking Sexual Harassment**

In analyzing Brookings-Harbor School District C-17’s duties with respect to complaints alleging discrimination, the Oregon Department of Education relies on the federal anti-discrimination laws known as Title IX[[10]](#footnote-10) 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 has the same intent as ORS 659.850 and OAR 581-021-0045, and because the text of ORS 659.850 and OAR 581-021-0045 allow the statute and rule to be applied broadly, the interpretation of Title IX by federal courts and the Office for Civil Rights is an important tool for the Oregon Department of Education to use in adjudging the application of ORS 659.850 and OAR 581-021-0045.

In interpreting Title IX, the Office of Civil Rights and the federal courts have provided guidance on four key issues related to this appeal.

First, in application, Title IX requires educational institutions[[11]](#footnote-11) to (1) provide students with a learning environment that is free from sexual harassment and (2) 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[.][[12]](#footnote-12)

Notably, “a student may be sexually harassed by a school employee, another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes).”[[13]](#footnote-13)

In short: failure by an educational institution to provide students with a learning environment that is free from sexual harassment — whether the source of that sexual harassment is a school employee, another student, or a non-employee third party — and failure by an educational institution to remedy complaints alleging sexual harassment, constitutes, for purposes of ORS 659.850, subjection to discrimination.

Second, in certain cases involving alleged sexual harassment, educational institutions must determine whether the alleged harassment was welcome conduct or not welcome conduct.[[14]](#footnote-14) In making this determination, educational institutions must adhere to the following principal: an individual does not need to be forced into sexual intercourse for the conduct to constitute sexual harassment.[[15]](#footnote-15) The question is not “whether . . . participation in sexual intercourse was voluntary.”[[16]](#footnote-16) Rather, the question is whether, by reference to the responding party’s conduct, “the alleged sexual advances were unwelcome.”[[17]](#footnote-17)

The essential question at issue when determining whether conduct is welcome or not welcome is whether the reporting party consented to the conduct. For purposes of Title IX law, whether a student consents to the sexual advances of another depends on whether the student affirmatively responds to those advances.[[18]](#footnote-18) The analysis does not hinge on whether a person voluntarily participated in sex. It hinges on the circumstances upon which the sex is predicated. That a person is not forced against their will to participate in sexual activity is not a defense against a claim of sexual harassment.[[19]](#footnote-19)

Third, “for a student to be sexually harassed, the harassment must be “sufficiently serious that it denies or limits a student’s ability to participate in or benefit from” an educational institution’s program or activity.[[20]](#footnote-20) When determining whether conduct constitutes sexual harassment, the Office of Civil Rights considers “all relevant circumstances, i.e., the constellation of surrounding circumstances, expectations, and relationships.”[[21]](#footnote-21) In analyzing conduct, the Office of Civil Rights specifically uses the following factors:

* The degree to which the conduct affected one or more students’ ability to participate in or benefit from an educational institution’s program or activity;
* The type, frequency, and duration of the conduct;
* The identity of the alleged harasser or harassers and the relationship between the alleged harasser or harassers and the subject or subjects of the harassment; and
* Other incidents at the educational institution involving (1) sexual harassment, (2) discrimination that does not constitute sexual harassment or (3) bullying that does not constitute discrimination.[[22]](#footnote-22)

Third, an educational institution’s duty to respond to complaints alleging sexual harassment is an affirmative duty. As explained by the Office for Civil Rights:

A school has notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the [sexual] harassment.

\* \* \* \* \*

A school can receive notice of [sexual] harassment in many different ways. A student may have filed a grievance with the Title IX coordinator or complained to a teacher or other responsible employee about fellow students [sexually] harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs. A teacher or other responsible employee of the school may have witnessed the [sexual] harassment. The school may receive notice about [sexual] harassment in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The school also may have learned about the [sexual] harassment from flyers about the incident distributed at the school or posted around the school. For the purposes of compliance with the Title IX regulations, a school has a duty to respond to [sexual] harassment about which it reasonably should have known, i.e., if it would have learned of the [sexual] harassment if it had exercised reasonable care or made a reasonably diligent inquiry.[[23]](#footnote-23)

The Office for Civil Rights interprets Title IX as requiring an educational institution to take reasonable action to address, rather than neglect, discriminatory acts about which the institution knew or should have known. In other words, for purposes of fulfilling its duty to respond to discriminatory acts under Title IX, an educational institution has a duty, upon receiving actual or constructive notice of the acts, to remedy them.

Finally, although there is no exact formula for what an educational institution must do to provide students with a learning environment that is free from sexual harassment, it is clear that an educational institution is responsible for discriminatory conduct under its control, particularly where the institution has the authority to take remedial action.[[24]](#footnote-24)

The law does establish a few guideposts for educational institutions to follow. For instance, to the extent possible, an educational institution must coordinate with a Title IX coordinator. Under the law, an educational entity must designate at least one employee to serve as a Title IX coordinator.[[25]](#footnote-25) The Title IX coordinator is responsible for investigating Title IX complaints and coordinating the educational entity’s efforts to comply with Title IX responsibilities.[[26]](#footnote-26) The Title IX coordinator has the duty to

comply with and carry out [an educational institutions] responsibilities [under Title IX law and regulations implementing Title IX law], including any investigation of any complaint communicated to [the educational entity] alleging noncompliance with [Title IX law or the regulations implementing Title IX law] or alleging any actions which would be prohibited by [Title IX law or the regulations implementing Title IX law.[[27]](#footnote-27)

In fulfilling their duties, a Title IX coordinator must be unbiased and free of conflicts of interest.[[28]](#footnote-28) The Title IX coordinator also must maintain a log of sexual harassment complaints to ensure that an educational institution can identify alleged violators who have multiple complaints filed against them and resolve recurring problems.[[29]](#footnote-29)

Another guidepost for educational institutions pertains to the use of interim measures. During an investigation, an educational institution must take interim measures to protect reporting parties when protection is merited or appropriate.[[30]](#footnote-30)

It may be appropriate for [an educational institution] to take interim measures during [an] investigation of a complaint. For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or different housing arrangements on a campus, pending the results of the school’s investigation.

In consideration of the Office for Civil Rights’ interpretation of Title IX, an educational institution subjects a person to unreasonable treatment on the basis of the person’s sex or sexual orientation in violation of Oregon’s anti-discrimination statute, if the person was subject to sexual harassment and the institution did not recognize the act as discriminatory or make a reasonable inquiry as to whether the act was discriminatory.[[31]](#footnote-31) Under these circumstances, the educational institution would be denying the person an aid, benefit, or service in violation of OAR 581-021-0045(3)(c) otherwise limiting their enjoyment of a right, privilege, or opportunity in violation of OAR 581-021-0045(3)(d).

**B. Whether Student 1’s Conduct Was Welcome**

The first issue on appeal is whether Student 1’s conduct was welcomed by Student 2, Student 5, Student 6, Student 10, and Student 11.

*1. Student 1’s Conduct Toward Student 2*

Student 2 reported that on the date in question, she did not want to have sex with Student 1. Student 1 picked up Student 2 in his car and they went to Student 1’s home. While there, Student 1 requested to have sex with Student 2 multiple times. Student 2 told Student 1 “no” multiple times.

Student 3 corroborated Student 2’s version of events, reporting that Student 2 told her about the events shortly after they occurred. Student 3 reported that Student 1 and Student 2 were watching a movie at Student 1’s home. While the movie was playing, the two kissed. Student 1 asked Student 2 to have sex. Student 2 declined and pushed him away. Student 1 tried again and pushed Student 2 down, making the comment ‘let’s just do it one last time.’” Student 2 again declined Student 1’s advances. Student 1 asked Student 2 to have sex a third time.

Student 8 and Student 9 also corroborated Student 2’s version of events. Student 8 reported that Student 2 told him that Student 1 raped her. Student 8 reported Student 2 declined Student 1’s advances multiple times. Student 9 reported that Student 2 declined Student 1’s advances multiple times.

Subsequent to Student 2 declining Student 1’s advances, Student 1 and Student 2 had oral sex. Subsequent to Student 1 and Student 2 having oral sex, they had vaginal sex. Student 2 stated that she had vaginal sex with Student 1 because he continued to request to have vaginal sex during oral sex and because of his size and her lack of ambulatory motion.

Under the law, Student 1’s sexual advances were unwelcome. Student 2 did not affirmatively respond to Student 1’s sexual advances. Rather, Student 2 rejected Student 1’s advances multiple times. Even though Student 6 was not forcibly compelled to have sex with Student 1, Student 2 clearly did not welcome the conduct.

*2. Student 1’s Conduct Toward Student 5*

Student 5 reported that Student 1 attempted to kiss her on several occasions, making Student 5 uncomfortable. Student 5 decided not to pursue a relationship with Student 1 because of his behavior. Student 5 reported that Student 1 appeared disappointed each time Student 5 rejected his advances. Toward the end of the 2016-2017 school year, while Student 1 and Student 5 were sitting in Student 1’s car in the school parking lot, Student 1 expressed his desire to have a relationship with Student 5. Student 1 then attempted to kiss Student 5. Student 5 said “no.” Student 5 wanted to exit the vehicle. When she did so, Student 1 attempted to prevent her from exiting.

Student 7, who witnessed the incident involving Student 1 and Student 5, corroborated Student 5’s version of events, alleging that Student 1 would not take “no” for an answer.

Finally, with respect to whether Student 1’s conduct toward Student 5 was welcome, the district stipulated to that finding in the letter that it sent to Student 1 summarizing the district’s investigatory findings in December of 2018. In that letter, the district stipulated that the incident involving Student 5 was “unwanted.”

Under the law, Student 1’s sexual advances were unwelcome. Student 5 did not affirmatively respond to Student 1’s sexual advances. Rather, Student 2 rejected Student 1’s advances. When Student 5 exited Student 1’s car, Student 1 attempted to prevent her exiting.

*3. Student 1’s Conduct Toward Student 6*

Student 6 reported that on the date in question, she did not want to have sex with Student 1. Student 1 drove Student 6 to his home. While there, Student 1 requested to have sex with Student 6 multiple times. Student 6 told Student 1 “no” multiple times.

Subsequent to Student 6 declining Student 1’s advances, Student 1 and Student 6 had sex.

Finally, with respect to whether Student 1’s conduct toward Student 6 was welcome, the district stipulated to that finding in the letter that it sent to Student 1 summarizing the district’s investigatory findings in December of 2018. In that letter, the district stipulated that the incident involving Student 6 was “unwanted.”

Under the law, Student 1’s sexual advances were unwelcome. Student 6 did not affirmatively respond to Student 1’s sexual advances. Rather, Student 6 rejected Student 1’s advances multiple times. Even though Student 2 was not forcibly compelled to have sex with Student 1, Student 6 clearly did not welcome the conduct.

*4. Student 1’s Conduct Toward Student 10*

Student 10 reported that Student 1 repeatedly asked her for nude photographs of herself, threatening to harm himself if she did not comply. Student 1 persisted in requesting nude photographs, even after Student 10 began dating Student 12. When Student 1 sat next to Student 10 in class, he would touch her. When Student 1 and Student 10 went on a hike, Student 1 attempted to kiss her. Student 10 reported that in the spring of 2018, Student 1 grabbed and kissed her in the school parking lot. Student 1 later apologized for his behavior, but again asked Student 10 for nude photographs.

Under the law, Student 1’s sexual advances were unwelcome. Student 10 did not affirmatively respond to Student 1’s sexual advances. Rather, Student 10 rejected Student 1’s advances. Despite these rejections, Student 1 persisted in making sexual advances toward Student 10.

*5. Student 1’s Conduct Toward Student 11*

Student 11 reported that Student 1 pulled her toward him by the waist and attempted to kiss her. Student 11 described Student 1 as “handsy” and that his conduct made her feel uncomfortable.

Under the law, Student 1’s sexual advances were unwelcome. Student 11 did not affirmatively respond to Student 1’s sexual advances. Instead, Student 1’s conduct made Student 11 uncomfortable.

**C. Whether Student 1’s Conduct Constituted Sexual Harassment**

The second issue on appeal is whether Student 1’s conduct toward Student 2, Student 5, Student 6, Student 10, and Student 11 constituted sexual harassment. In consideration of all relevant circumstances — that is, the constellation of surrounding circumstances, expectations, and relationships — the department finds that Student 1’s conduct constituted sexual harassment.

*1. The Degree to Which Student 1’s Conduct Affected Other Students’ Ability to Benefit from School*

All of the reporting parties in this case reported that Student 1’s conduct made them feel uncomfortable. Student 8 reported that Student 2 would panic when she saw Student 1 in school and in the classes that they attended together. Student 7 stated that the incident in Student 1’s car caused Student 5 to have a flashback to another incident involving sexual misconduct. Student 7 also reported that the incident between Student 1 and Student 5 caused Student 5 to feel uncomfortable in classes that she attended with Student 1. When Student 1 sat next to Student 10 in class, he would touch her, making her feel uncomfortable. Additionally several students reported that there were rumors circulating at school about Student 1’s treatment of female students.

It is evident that Student 1’s conduct severely affected Student 2’s ability to benefit from school. It is also evident that Student 1’s conduct made Student 5 and Student 10 uncomfortable at school. Finally, the evidence suggests that Student 1’s conduct toward female classmates was so pervasive, and that so many students knew about his behavior, that Student 1’s conduct affected other students’ ability to benefit from school.

*2. The Type, Frequency, and Duration of Student 1’s Conduct*

The evidence suggests that Student 1’s conduct constituted nothing less than the constant goading of female classmates to engage in sexual activity, including sexual intercourse, the frequent inappropriate touching of female classmates, and the sexual degradation of those that he had slept with.

The evidence substantiates that while at his home, Student 1 asked Student 2 to have sex with him multiple times. Student 2 declined several times. After one such rejection, Student 2 physically pushed Student 2 down and commented, “Let’s just do it one last time.”

The evidence substantiates that subsequent to Student 1 and Student 2 having oral sex, they had vaginal sex because Student 1 continued to request to have vaginal sex during oral sex and because of his size and Student 2’s lack of ambulatory motion.

Student 1 also made emotionally abusive remarks about Student 2 in public, telling her that she “was nothing without [him]” and that she was “not worthy” of him. During her interview with the district, Student 3 stated that Student 2 had anxiety issues, that Student 1 knew about these issues, and that Student 1 used this knowledge “to keep [Student 2] around.” During her interview with the department, Student 2 stated that Student 1’s conduct affected her academic performance and psychological wellbeing.

The evidence substantiates that while sitting in his car at his home, Student 1 asked Student 6 to have sex with him multiple times. Student 6 declined several times. Student 1 and Student 6 subsequently had sex, after which Student 6 felt so violated that she reported the incident to the police.

The evidence substantiates that while Student 1 and Student 5 were sitting in Student 1’s car in the school parking lot, Student 1 expressed his desire to have a relationship with Student 5. Student 1 then attempted to kiss Student 5. Student 5 said “no.” Student 5 wanted to exit the vehicle. When she did so, Student 1 attempted to prevent her from exiting. During her interview with the department, Student 5 stated that afterward, she felt anxious whenever she encountered Student 1 at school.

The evidence substantiates that Student 1 repeatedly asked Student 10 for nude photographs of herself. Student 1 persisted in requesting nude photographs, even after Student 1 rejected his request multiple times. Student 1 also touched Student 10 in class making her feel uncomfortable. During a hike that Student 1, Student 10, and Student 11 took together, Student 1 attempted to kiss Student 10. He also grabbed and kissed her in the school parking lot.

Finally, the evidence substantiates that during the hike taken by Student 1, Student 10, and Student 11, Student 1 was “handsy” with Student 11, and that Student 1 pulled Student 11 toward him by the waist and attempted to kiss her.

In consideration of these facts, alone, Student 1’s conduct constituted sexual harassment.

*3. Student 1’s Identity and Relationship With the Reporting Parties*

Student 1 was the peer of Student 2, Student 5, Student 6, Student 10, and Student 11. However, Student 1 was also employed by and had a relationship with the Title IX Coordinator. During her interview with the department, Student 2 stated that because she knew about this relationship, she was uncomfortable with and confused by the Title IX Coordinator conducting the district’s investigation. Whether the Title IX Coordinator’s favoritism for Student 1 was real or merely perceived, that favoritism made Student 2 apprehensive about reporting Student 1’s conduct.

*4. Other Incidents at the Brookings-Harbor School District C-17 Involving Sexual Harassment*

Any of the incidents involving Student 2, Student 5, Student 6, and Student 10, on their own, would constitute sexual harassment absent the other incidents. The incident involving Student 11, in consideration of Student 1’s pattern of behavior, also constitutes sexual harassment. Taken together, these incidents demonstrate a pattern of behavior that was predatory in nature. Student 1, using implorations, unwanted physical touching, and confinement, sought out female classmates for sex and only would cease his behavior short of forcible compulsion.

**D. Whether Brookings-Harbor School District 17-C Failed to Take Affirmative Action upon Receiving Notice of Sexual Harassment**

The third issue on appeal is whether Brookings-Harbor School District 17-C failed in its duty to respond to complaints alleging sexual harassment.

On October 10, 2018, the district received actual notice of Student 1’s conduct toward Student 2, Student 6, and Student 5. In accordance with its legal obligations, the district launched an investigation of those complaints.

With respect to Student 10 and Student 11, the district failed in its duty to respond. With a respect to a complaint filed by Student 5 prior to October 10, 2018, the district also failed in its duty to respond.

During the district’s investigation, it received actual notice of Student 1’s conduct toward Student 10. On November 14, 2018, the district interviewed Student 10. According to district notes taken during the interview, Student 10 reported that Student 1 repeatedly asked her for nude photographs of herself. Student 10 also reported that when Student 1 sat next to her in class, he would touch her, making her feel uncomfortable. Student 10 reported that during the previous school year, Student 1 asked Student 10 to go on a hike. During the hike, Student 1 attempted to kiss Student 10. Student 10 told Student 1 “no” and pulled away. Student 10 finally reported that in the spring of 2018, Student 1 grabbed and kissed her in the school parking lot.

The district received actual notice of Student 1’s conduct toward Student 11 during its investigation. On November 14, 2018, the district interviewed Student 11. According to district notes taken during the interview, Student 11 reported that Student 1 was “handsy” and made her uncomfortable. Student 11 reported that Student 1 pulled her toward him by the waist and attempted to kiss her.

The district also received actual notice of Student 1’s conduct toward Student 10 before its investigation. Student 10 had reported Student 1’s behavior to Teacher 2, who did not report the conduct to anyone else in the district.

Finally, the district received actual notice of the incident where Student 1 made unwanted sexual advances toward Student 5 in the spring of 2017, more than a year before receiving notice of the incident again on October 10, 2018. Student 5 had reported to Teacher 1 what had occurred during that earlier time.

Despite receiving notice of these allegations, there is no evidence on the record that the district took any reasonable action to address, rather than neglect, Student 1’s conduct toward Student 10 and Student 11 or Student 5 prior to October 10, 2018. The district treated Student 10’s and Student 11’s reports as evidence of Student 1’s behavior for purposes of investigating his conduct toward Student 2, Student 6, and Student 5. The district did not investigate the incident involving Student 5 until much later, after there also were reports of nonconsensual sex. In short, the district failed to exercise “reasonable care” or make a reasonably diligent inquiry” as required by Title IX law.[[32]](#footnote-32)

**E. Whether Brookings-Harbor School District 17-C Failed to Provide a Learning Environment Free From Sexual Harassment**

The evidence presented above, alone, demonstrates that Brookings-Harbor School District 17-C failed in its duty to provide a learning environment free from sexual harassment. The district had notice of Student 1’s persistent sexual advances toward five female classmates and the violation of two female classmates by subjecting them to nonconsensual sex. The district had notice that this behavior affected not only the reporting parties, but also the student body at large. The district had notice of rumors circulating at school about Student 1’s treatment of female students. However, the district did little to alleviate the environment created by Student 1. The district made a recommendation to designate a guidance counselor to check-in with Student 2 weekly to monitor her academic progress and social and emotional wellbeing. The district promised to provide district staff with professional development on Title IX, a promise that was not kept. And the district had a civil rights specialist from the department review its Title IX policies, although the district did not inform the department during the review about the events relevant to this appeal. However, the district did not provide adequate protection or support services. In essence, the district attempted to obfuscate what had occurred.

There is evidence of contributing factors to this failure. First, the Title IX Coordinator was not unbiased and free of conflict of interest. Prior to conducting the investigation, the district’s Title IX Coordinator coached Student 2 and other students involved in the investigation. Student 2 made complaints about the Title IX Coordinator to the district, resulting in the district removing the Title IX Coordinator from their coaching position. Also prior to the investigation, the Title IX Coordinator employed Student 1 and Student 1’s sibling. In consideration of this evidence, it was inappropriate for the Title IX Coordinator to conduct the district’s investigation.

Furthermore, the district had actual notice of these conflicts of interest. Prior to the district conducting its investigation, the Title IX Coordinator disclosed that they had employed Student 1. In the April 22nd complaint, Complainant enumerated the conflicts of interest, including that the Title IX Coordinator: (1) “had multiple relationships with students involved,” (2) had previously coached Student 2, and had been removed from a coaching position because of a complaint made by Student 2, (3) had coached other students involved, (4) had employed Student 1, (5) had employed a member of Student 1’s family, and (6) had community contacts with students involved. Despite receiving this notice, the district affirmed the findings of the Title IX Coordinator’s investigation.

In a violation of federal law, the district failed to maintain a log of sexual harassment complaints. Specifically, the district did not maintain a record of its October 29th interview with Student 1, any of the evidence provided by Student 1 to the district, or of its October interview with Student 6.

Finally, the district failed to use interim measures to protect Student 2, Student 5, Student 6, and Student 10. As is clear from guidance issued by the Office of Civil Rights, a school district has a duty to provide reporting parties and other subjects of sexual harassment with appropriate protection during an investigation.[[33]](#footnote-33) When a student alleges that they were sexually assaulted by another student, as in this case, it is appropriate for the district, at a minimum, to place the students in separate classrooms. There is no evidence on the record that the district employed interim measures in this case.[[34]](#footnote-34)

**F. Whether Brookings-Harbor School District 17-C Failed to Remedy an Environment Not Free From Sexual Harassment**

The ultimate yardstick by which a school district will be judged when accused of failing in its duties under Title IX is whether the school district remedied an environment not free from sexual harassment. In consideration of the evidence presented on appeal, the department finds that Brookings-Harbor School District 17-C failed in this duty.

The evidence demonstrates that the district had actual notice of sexual harassment by Student 1 toward Student 2, Student 5, Student 6, Student 10, and Student 11.

The evidence demonstrates that the district had actual notice of Student 1 having nonconsensual sex with Student 2 and Student 6.

The evidence demonstrates that the district had actual notice that Student 1’s actions affected not just his victims, but also other students attending school in the district.

The evidence demonstrates that the district had actual notice of a compromised investigation, given that the Title IX Coordinator had multiple conflicts of interest.

The evidence demonstrates that the district did little to remedy these failures with respect to the victims, except making a recommendation to designate a guidance counselor to check-in with Student 2 weekly to monitor her academic progress and social and emotional wellbeing.

In fact, the evidence demonstrates that the district attempted to justify Student 1’s behavior, blame the reporting parties, and obfuscate its investigation.

In the letter received by Student 2 summarizing the district’s written investigatory findings and conclusions, the district concluded there was insufficient evidence of a violation of district policy. The district’s conclusion was based on Student 1 and Student 2’s history of having consensual sex and the absence of the use of physical force, violence, and threat of violence. The district’s conclusion was also based on Student 2 giving Student 1 oral sex on the day the incident occurred.

In the letter received by Student 6 summarizing the district’s written investigatory findings and conclusions, the district concluded,

You admitted that previous encounters of oral sex were consensual, however during the alleged incident in question, you stated you did not consent after being asked multiple times if you wanted to have sexual intercourse but the last time you were asked, you ‘did not say no’ and sexual intercourse occurred. You also stated that at no time did the male student use any type of physical force, violence, or threats of violence in order to obtain sex from you.

In the letter received by Student 5 summarizing the district’s written investigatory findings and conclusions, the district concluded that Student 5’s discomfort with Student 1 was not caused by Student 1’s behavior, but because of a previous incident where Student 5 was the victim of unwanted sexual misconduct.

As is apparent from the district’s findings and conclusions in each of these letters, the district gave greater weight to previous sexual encounters and the absence of forcible compulsion than it gave to multiple attempts by female students to reject Student 1’s advances, flee from his vicinity, and outright avoid his presence.

There also is evidence that the district ignored evidence of sexual misconduct. For instance, the district considered Student 2’s mental state not for the purpose of determining the effect that Student 1’s conduct had on Student 2, but for the purpose of explaining away Student 2’s reaction to the conduct. Lamentably, the consideration of Student 2’s mental state is in stark contrast to the district’s consideration of Student 1’s mental state. With respect to the former, the district sought a way to dismiss Student 2’s victimhood. With respect to the latter, the district sought a way to justify Student 1’s inappropriate behavior.

Similarly, the district outright dismissed Student 1’s effect on Student 5, determining in the October 29th interview of Student 5 that the incident between her and Student 1 did not disrupt her education. As noted earlier, disruption of education is not the only yardstick by which a school district must judge an act of alleged sexual harassment. The required analysis is whether a student is denied *any* aid, benefit, or service or otherwise limited in the enjoyment of *any* aid, benefit, or opportunity.[[35]](#footnote-35)

As discussed above, during its investigation, the district failed to employ merited and appropriate interim measures. Student 2, Student 5, and Student 6 reported conduct that constitutes sexual assault. Yet there is an absence of evidence on the record that the district did anything to protect them during its investigation. At a bare minimum, the district should have placed Student 1 in separate classes than the reporting parties.

After its investigation, the district gave Student 1’s victims the same treatment as or less treatment than it gave Student 1. Student 1 received counseling. Student 2 received counseling. Student 6 received no benefit. Student 5 received no benefit. And in each of the letters received by the students, the district imposed upon them the same restriction: each student – perpetrator and victims alike – received a “cease and desist” order, along with the threat of future disciplinary action if that order was not followed.

The district was also not forthcoming about its findings and conclusions. In the district’s May 31st response to Complainant’s April 22nd complaint, Administrator stated that they could not “share any . . . information to address your concerns . . . due to FERPA considerations.” Administrator made a guarantee that “the district has responded to concerns throughout the school year.” In essence, Administrator used FERPA as a shield to obfuscate its investigation, without considering how to simultaneously comply with FERPA and provide Complainant with a legitimate response.

Further, when the department was conducting this investigation, the district could not produce documents required to be maintained by law and essential to the department’s investigatory efforts. The district could not produce records of: (1) its October interview with Student 6, (2) its October 29th interview with Student 1, or (3) any of the evidence provided by Student 1 to the district.

In consideration of the evidence, the district not only did not remedy an environment not free from sexual harassment, it actively worked to justify acts of sexual harassment and either actively or negligently worked to obfuscate its investigation.

**PRELIMINARY CONCLUSIONS**

In conclusion, the Oregon Department of Education finds that the district may have denied Student 2, Student 5, Student 6, Student 10, and Student 11 an aid, benefit, or service in violation of OAR 581-021-0045(3)(c) or otherwise limited their enjoyment of a right, privilege, or opportunity in violation of OAR 581-021-0045(3)(d) by doing the following:

* Failing to provide a learning environment free from sexual harassment;
* Failing to remedy a learning environment not free from sexual harassment; and
* Failing to conduct a Title IX investigation in accordance with federal law and regulation by:
	+ Failing to investigate sexual harassment upon receiving actual notice of alleged sexual harassment;
	+ Failing to conduct an unbiased investigation;
	+ Failing to keep proper records of sexual harassment investigations; and
	+ Failing to employ merited and appropriate interim measures.

Accordingly, the department encourages the district to reach an agreement with Complainant through conciliation. If the district cannot reach an agreement with Complainant through conciliation within 30 days, the department will issue a final order on the matter.

If Complainant or the district wishes to use the department as a resource during conciliation, Complainant or the district may contact the department.[[36]](#footnote-36)

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Coordinator

Office of the Department

Mark.Mayer@state.or.us

1. The administrative rules governing the Oregon Department of Education’s appeals process are OAR 581-002-0001 to 581-002-0023. [↑](#footnote-ref-1)
2. OAR 581-002-0009. [↑](#footnote-ref-2)
3. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. OAR 581-002-0009(3)(a)(B). [↑](#footnote-ref-5)
6. OAR 581-002-0009(3)(b). [↑](#footnote-ref-6)
7. *See* OAR 581-002-0005(1)(a)(A) (“[A]n appeal must be from a final decision by a district. A decision is a final decision by a district if . . . [t]he complainant has exhausted the district’s complaint process.”). [↑](#footnote-ref-7)
8. 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.” [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. *See* Education Amendments of 1972, Public Law No. 92-318, Title IX, §§ 901-907 (codified at 20 U.S.C. §1681 *et seq.*). [↑](#footnote-ref-10)
11. This order cites multiple federal laws, regulations, judicial opinions, and documents published by the Office of Civil Rights interpreting those laws, regulations, and documents. Those sources of law and documents use different terms to describe schools and the other educational entities to which they apply. This order uses the term “educational institution” in lieu of those terms in order to communicate the content of the laws, regulations, and documents in an easy to understand manner. [↑](#footnote-ref-11)
12. 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), a*vailable 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 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). [↑](#footnote-ref-12)
13. *Id.* [↑](#footnote-ref-13)
14. Meritor Savings Bank v. Vinson, 477 U.S. 57, 86 (1986). [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *Id.* at 62. [↑](#footnote-ref-18)
19. *Id.* at 68. [↑](#footnote-ref-19)
20. Office for Civil Rights, *Revised Sexual Harassment Guidance* at 5. [↑](#footnote-ref-20)
21. *Id.* (internal quotation marks omitted). [↑](#footnote-ref-21)
22. *Id.*at 6. The Office of Civil Rights also uses other factors when determining whether conduct is sexual harassment. This order does not list those factors because they are not pertinent to this appeal. [↑](#footnote-ref-22)
23. Office for Civil Rights, *Revised Sexual Harassment Guidance* at 13 (internal quotation marks omitted). [↑](#footnote-ref-23)
24. *See* Davis, 526 U.S. at 644 (explaining that an educational institution “cannot be directly liable” where “it lacks authority to take remedial action”), [↑](#footnote-ref-24)
25. 34 C.F.R. § 106.8. [↑](#footnote-ref-25)
26. *Id*. [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Vol. 65, Fed. Reg., 66100 (Nov. 2, 2000). [↑](#footnote-ref-28)
29. *Id.* [↑](#footnote-ref-29)
30. Office for Civil Rights, *Revised Sexual Harassment Guidance* at 16. [↑](#footnote-ref-30)
31. It is important to note that not correctly identifying the complaint has significant consequences. A school district’s response to a discrimination complaint may be appealed to the Oregon Department of Education. *See* OAR 581-002-0001 to 581-002-0023. A school district’s response to a bullying and harassment complaint may not. *See* ORS 339.345 and OAR 581-022-2310 (requiring school districts to adopt a policy prohibiting harassment, intimidation, bullying, and cyberbullying and, thereby, making the content of the policy subject to the jurisdiction of the Oregon Department of Education, but not any determination made under the policy). [↑](#footnote-ref-31)
32. Office for Civil Rights, *Revised Sexual Harassment Guidance* at 13 (internal quotation marks omitted). [↑](#footnote-ref-32)
33. Office for Civil Rights, *Revised Sexual Harassment Guidance* at 16. [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. *See* OAR 581-021-0045(3) and (d) (specifying circumstances under which a school district commits discrimination). [↑](#footnote-ref-35)
36. The department’s Title IX expert is Katherine Hildebrandt. She may be reached at: Katherine.Hildebrandt@ode.state.or.us. [↑](#footnote-ref-36)