November 6, 2018

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Superintendent Stefanie Garber

Culver School District

PO Box 259

Culver, Oregon 97734

Case Reference Number: 2018-007-KM (CORRECTED)

Dear PARENT and Superintendent Garber:

This letter is the investigatory determination on the appeal of a complaint filed with the Culver School District (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).[[1]](#footnote-1) To ensure compliance with these laws and rules, the Oregon Department of Education (Department) will review the local school district procedures and findings of fact to determine if proper procedures were followed and what action, if any, should be taken.[[2]](#footnote-2)

## I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

PARENT (Parent) alleges that the District discriminated against her daughter (Student) and similarly situated students by (1) not responding to complaints alleging discrimination, (2) failing to provide students with a learning environment that is free from sexual harassment and remedying complaints alleging sexual harassment, and (3) obstructing the establishment and continued operation of a student organization pertaining to LGBTQ+ issues.

The Department has jurisdiction to resolve this complaint under OAR 581-021-0049. 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.[[3]](#footnote-3) If the Department finds that discrimination may have occurred, the Director of the Oregon Department of Education (Director) will issue an investigatory determination and require the school district to attempt to reach an agreement with the person through conciliation.[[4]](#footnote-4) If the school district cannot reach an agreement with the person within 30 days, the Director will schedule a hearing for the purpose of determining whether the school district is in compliance with ORS 659.850.[[5]](#footnote-5) If the Director determines that the school district is not in compliance with ORS 659.850, the Director will issue an order requiring compliance.[[6]](#footnote-6) If the school district fails to comply with the order within 30 days, the Director will issue an order imposing an appropriate remedy.[[7]](#footnote-7) Appropriate remedies include: (1) withholding all or part of one or more quarterly payments that otherwise would be paid to a school district under ORS 327.095, (2) assessing a daily fine against the school district, (3) forbidding the school district to participate in interschool activities, and (4) any other appropriate remedy.[[8]](#footnote-8)

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

## II. PROCEDURAL BACKGROUND

On November 8, 2017, Student’s parents filed a complaint with the middle school attended by Student. The school investigated the complaint, but did not provide Student’s parents with a written response to the complaint.

On November 29, 2017, Parent contacted the superintendent of the District. The superintendent asked Parent to clarify that Parent was filing a complaint. Parent responded that she was. The District accepted Parent’s complaint as if she was appealing a written response by a school within the District. The District investigated Parent’s complaint. On January 8, 2018, the District provided Parent with a written response to the complaint. Dissatisfied with the District’s response, Parent filed this appeal with the Department on January 30, 2018.

On February 5, 2018, the Department accepted Parent’s appeal. The Department accepted the appeal pursuant to OAR 581-021-0049 (1), under which “[p]ersons may, after exhausting local grievance procedures or 90 days (whichever occurs first) appeal [a school district’s resolution of a complaint of discrimination] in writing to the Superintendent of Public Instruction.” Although Parent had not exhausted local grievance procedures, 90 days had passed since student’s Parents first filed a complaint with the middle school.

On February 5, 2018, the Department notified the District of the appeal and requested from the District information relevant to Parent’s appeal.

## III. FINDINGS OF FACT

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

1. Culver is a community of nearly 1,400 people in Jefferson County. The elementary school, middle school, high school, and district offices share a contiguous campus.
2. Student attended the middle school in the District pursuant to an inter-district transfer.
3. At the end of the 2016-2017 school year, Parent informed the District that Student was interested in establishing a student organization at the middle school called “Gay Straight Alliance.”
	1. According to district policy, student organizations need a faculty advisor.
	2. The District requested that Student provide the District with additional information about the goals of the proposed student organization. Over the course of the summer, Parent provided the District with materials pertaining to LGBTQ+ issues and student organizations supportive of LGBTQ+ issues.
	3. The District discussed with Parent potential community opposition to the establishment of the proposed student organization. The District discussed with Parent the need to have patience finding a faculty advisor for the proposed organization. The District suggested to Parent that Student give a presentation on the importance of the proposed organization to facilitate finding a faculty advisor.

* 1. At the time that Student proposed to establish the student organization, only the high school had student organizations. The middle school did not have any student organizations.

* 1. The District approved the establishment of a student organization called “Gay Straight Alliance” at the beginning of the 2017-2018 school year.
1. On October 23, 2017, Student reported to a teacher that another student called her a “mega-faggot.” The Principal investigated the incident. The other student acknowledged using the phrase. The student claimed that the phrase was not directed toward Student. The Principal disciplined the student for using the phrase.
2. On November 8, 2017, Student’s parents met with the principal and vice-principal of the middle school attended by Student. During the meeting, the parents made the following allegations:
	1. Four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom. At the meeting, Parent read a letter written by Student describing the alleged incident. The District documented the letter as stating that those students were “touching, poking, and being bossy toward [Student].”
	2. Male students often discussed sexually offensive topics in the presence of Student.
	3. District staff members did not intercede when students used discriminatory language.
3. Following the November 8th meeting, the principal of the middle school investigated the allegation that male students often discuss sexually offensive topics in the presence of Student and the allegation that four female students touched Student inappropriately. The principal met with the male students and discussed their behavior. The principal met with the four female students, who denied engaging in the alleged behavior.
4. During the month of November, 2017:
	1. Student mounted posters promoting the Gay Straight Alliance on school walls.
	2. Student mounted a poster promoting the Gay Straight Alliance outside a classroom after obtaining the approval of the teacher who taught in the classroom.
	3. Student mounted a poster promoting the Gay Straight Alliance in the cafeteria. The cafeteria was used by students of grade levels K-12. The poster featured the word “sex.” The poster also did not refer to the student organization by the name “Gay Straight Alliance.” Instead, the poster referred to the student organization by the name “Gender Sexuality Alliance.”
	4. Upon seeing the poster mounted in the cafeteria, parents of younger students complained to the District about the use of the term “sex” and name “Gender Sexuality Alliance.” The parents requested the removal of the poster.
	5. One of the posters included rainbow stickers and encouraged people to take a sticker to show their support for the Gay Straight Alliance and its mission. Some students removed the stickers. The stickers were found on the floor of the school. The principal of the middle school discussed the incident with the responsible students.
	6. Parent called the vice-principal of the middle school and claimed that district staff members removed a poster promoting the Gay Straight Alliance from a school wall. Parent was concerned that district staff members had a negative attitude toward the student organization. Parent claimed that district staff members exhibited disapproval when Student wore symbols that supported LGBTQ+ causes.
	7. The vice-principal of the middle school met with district staff members. The vice-principal reviewed with them the district’s policy pertaining to publications, productions, and displays, under which all publications, productions, and displays must be preapproved by the District.
	8. The vice-principal of the middle school removed posters promoting the Gay Straight Alliance and returned them to Student because they had not been preapproved by the District. The vice-principal informed Student of the district’s policy pertaining to publications, productions, and displays and of the procedure by which Student could request the District to preapprove the posters.
5. On November 27, 2017, Student began attending online classes and stopped attending the middle school. Student was enrolled in one in-person class at the high school.
6. On November 29, 2017, Parent sent an email to the superintendent of the District. In the email, Parent stated that Student did not feel safe at the middle school. On November 30, 2017, the superintendent responded to Parent’s email. In her response, the superintendent suggested that student list the ways in which Student did not feel safe. The superintendent also asked Parent to clarify whether she was filing a complaint.
7. On December 4, 2017, Parent, Student, and a representative of the Oregon chapter of Parents, Families and Friends of Lesbians and Gays (PFLAG) met with the superintendent of the District.
	1. Parent, Student, and the superintendent discussed the November 8th meeting between Student’s parents and the principal and vice-principal of the middle school.

* 1. Student reiterated the allegation that other students touched her inappropriately. Student identified the four female students who touched her.
	2. Student alleged that other students made statements like “Is that a queer?” when passing by Student. Student alleged that district staff members did not intervene when they heard students make these statements.
	3. Student reported approaching a classroom and hearing teachers inside talking and laughing. Student alleged that when she entered the classroom, the talking and laughing stopped and at least two district staff members rolled their eyes at Student and left the room.
	4. Student reported seeing other students tear down posters promoting the Gay Straight Alliance in the presence of district staff members. Student alleged that the district staff members did not intervene to stop the behavior.
	5. Parent, Student, and the superintendent discussed the poster hung in the cafeteria. They discussed how the poster featured the word “sex” and referred to the student organization by the name “Gender Sexuality Alliance.” They discussed whether the poster and name needed to be changed. The superintendent stated that she was requesting to change the poster and the name because the cafeteria is utilized by all grade levels, and parents of younger students objected to the terminology.
	6. Student reported feeling unsafe in most classes, including online classes.
1. The District investigated the allegations made at the December 4th meeting.
2. On January 8, 2018, the District issued a written report of the District’s findings and actions. As documented in the report, the District investigated 18 allegations made by Student, including that other students had touched Student inappropriately. The District also listed 14 actions that it would take to promote a safe environment for all students in the District. In the report:
	1. The District found that there was insufficient evidence to support Student’s allegation that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom.
	2. The District found that another student grabbed Student’s breasts earlier in the year. The incident was not reported at the time. The other student was disciplined for the incident and apologized to Student. The student reportedly was not aware that the behavior bothered Student.
	3. The District found that female students attending the middle school participated in a game—based on a skit performed by comedic actors Keegan Michael Key and Jordon Peele—where they would slap each other on the bottom. The District documented that other students believed that Student was participating in the game. The District found that Student participated in the game.
	4. The District found that another student said “that is so gay” when talking to a peer. The District could not determine whether the language was directed toward Student.
	5. The District found that students removed posters promoting the Gay Straight Alliance. The District reported that it disciplined those students for removing the posters.
	6. The District found that district staff members were not present when students removed posters promoting the Gay Straight Alliance.
	7. The District found that district staff members did not roll their eyes or scoff at Student. The district staff members reported that they were engaged in an ongoing conversation when Student entered the room. They denied that any verbal or non-verbal actions were directed toward Student.
	8. The District stated that it would direct district staff members to be more responsive to students’ use of discriminatory language.
3. On January 11, 2018, the superintendent of the District sent an email to Parent requesting an update on Student’s enrollment status. The superintendent noted that Student had not attended in-person classes since January 2, 2018. Parent responded by email that Student was taking online classes offered by the District. Parent requested a safety plan to accompany Student’s return to in-person classes.
4. On January 15, 2018, Parent sent an email to the superintendent of the District requesting a safety plan to accompany Student’s return to in-person classes. The superintendent responded the same day, suggesting dates on which they could meet about the safety plan.
5. On January 17, 2018, the superintendent of the District sent Parent a draft safety plan by email.
6. Before January 29, 2018, two faculty advisors to the Gay Straight Alliance resigned.
7. Before January 29, 2018, student members of the Gay Straight Alliance requested the name of the student organization to be changed to “Plus Club.”
8. On January 29, 2018, Student’s parents, Student, the superintendent of the District, the principal and vice-principal of the middle school, other district staff members, and members of LGBTQ+ advocacy groups met to discuss the safety plan. The meeting participants also discussed the Gay Straight Alliance, why it was necessary to change the content of posters promoting the student organization, why it was necessary to use either the designated name for the student organization (“Gay Straight Alliance”) or the name proposed by student members of the student organization (“Plus Club”), and why it was difficult to retain and find district staff members willing to serve as faculty advisors to the student organization.
9. On February 5, 2018, Parent filed this appeal with the Department.

## IV. ANALYSIS OF SPECIFIC ALLEGATIONS

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.[[9]](#footnote-9)

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.”[[10]](#footnote-10)

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; [or]

\* \* \* \* \*

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

The issues addressed on appeal are: (1) whether the District violated Oregon’s anti-discrimination statute and OAR 581-021-0045 (3)(c) by denying Student a service when it failed to respond to a complaint alleging discrimination; (2) whether the District violated Oregon’s anti-discrimination statute by failing to provide students with a learning environment that is free from sexual harassment and by failing to remedy complaints alleging sexual harassment; and (3) whether the District violated OAR 581-021-0045 (3)(d) or (f) by subjecting Student to different rules of behavior or different treatment or by otherwise limiting Student’s enjoyment of a right, privilege, or opportunity during the establishment and continued operation of the Gay Straight Alliance.

### A. Whether District failed to respond to complaints alleging discrimination

Parent alleges that the District failed to respond to complaints alleging discrimination. Parent alleges that Student was subjected to unwanted physical contact. Parent alleges that when she reported the unwanted physical contact to the District, the District did not investigate the matter as an incident involving discrimination. Parent further alleges that the District did not provide her with proper process because the District, when she first alleged discrimination, did not respond to her complaint in writing.

Parent’s allegation turns on two factors: first, whether the District failed to recognize a discrimination complaint; second, whether the District was required to respond to her report in writing.

#### 1. Whether the District failed to recognize a discrimination complaint

On November 8, 2017, Student’s parents met with the principal and vice-principal of the middle school attended by Student. During the meeting, the parents alleged that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom. Parent read a letter written by Student describing the incident. The District documented the letter as stating that those students were “touching, poking, and being bossy toward [Student].”

The principal investigated Student’s parents’ complaint as an informal complaint involving non-discriminatory bullying and harassment. During an interview with the Department, the principal described speaking with the four female students who were the subject of Student’s complaint. The principal stated that the students denied the accusation that they had poked, slapped, and groped Student’s breasts and bottom.

Parent claims that when she and her partner reported the unwanted physical contact, they made a complaint alleging discrimination. In response, the District claims that the principal believed that Student’s parents made a complaint alleging non-discriminatory bullying and harassment. The Department does not find the District’s response compelling. The fact that Principal believed Student’s parents were making a bullying and harassment complaint is immaterial to an analysis of whether discrimination occurred. Oregon’s anti-discrimination stature prohibits both “intended” and “unintended” discriminatory acts.[[11]](#footnote-11) For purposes of this appeal, the deciding factor is whether failure to investigate a complaint alleging discrimination as a bullying and harassment complaint is, by itself, discriminatory.

Under Oregon’s anti-discrimination statute, a person may not be subjected to unreasonable treatment on the basis of the person’s sex or sexual orientation. Under OAR 581-021-0045 (3)(c), a school district may not “deny any person . . . an aid, benefit, or service” on the basis of the person’s sex or sexual orientation. The question is whether the District discriminated against Student when it failed to recognize Student’s parents’ complaint as alleging discrimination because that failure subjected Student to unreasonable treatment on the basis of her sex or sexual orientation or failed to provide student with an aid, benefit, or service on the basis of her sex or sexual orientation.

With respect to analyzing the District’s duty to recognize complaints alleging discrimination, the Department relies on the federal anti-discrimination laws known as Title IX[[12]](#footnote-12) 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 on two key issues related to this appeal.

First, 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[.][[13]](#footnote-13)

In other words: failure by an educational institution to provide students with a learning environment that is free from sexual harassment, and failure by an educational institution to remedy complaints alleging sexual harassment, constitutes, for purposes of ORS 659.850, subjection to discrimination.

Second, an educational entity’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.[[14]](#footnote-14)

The Office for Civil Rights interprets Title IX as requiring a school to take reasonable action to address, rather than neglect, discriminatory acts about which the school should have known. In other words, for purposes of fulfilling it duty to respond to discriminatory acts under Title IX, a school has a duty to recognize the acts as discriminatory or, in cases where it is unclear whether the acts are discriminatory, to make a reasonably diligent inquiry as to whether the acts are discriminatory.

In consideration of the Office for Civil Rights interpretation of Title IX, a school district 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, and denies a person an aid, benefit, or service in violation of OAR 581-021-0045 (3)(c), if the person was subject to sexual harassment and the school district did not recognize the act as discriminatory or make a reasonable inquiry as to whether the act was discriminatory.[[15]](#footnote-15)

In the present case, Student’s parents alleged sexual harassment at the November 8th meeting. The parents alleged that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom.[[16]](#footnote-16)

The principal and vice-principal received notice of the sexual harassment. Student’s parents directly told them that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom.[[17]](#footnote-17)

The principal and vice-principal did not recognize the complaint as a complaint alleging discrimination. The principal believed the complaint concerned bullying and harassment.

In consideration of the facts available to the Department, the principal and vice-principal should have recognized the alleged acts as discriminatory. Student’s parents alleged that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom, an incident that clearly involves sexual harassment. However, even if Student’s parents had alleged that the four female students only poked and slapped Student, given that Student’s parents also alleged that male students often discussed sexually offensive topics in the presence of Student and that district staff members did not intercede when students used discriminatory language, the principal and vice-principal should have made a reasonably diligent inquiry as to whether Student’s parents were making a complaint alleging discrimination.

In consideration of law and fact, the Department finds that the District may have violated Oregon’s anti-discrimination statue and OAR 581-021-0045 (3)(c) because the District did not recognize a complaint alleging discrimination.

#### 2. Whether the District failed to respond to a discrimination complaint in writing

On November 8, 2017, Student’s parents met with the principal and vice-principal of the middle school attended by Student and alleged that four female students touched Student inappropriately. Following the November 8th meeting, the principal investigated the complaint. The principal met with the four female students, who denied engaging in the alleged behavior. However, the principal did not respond to Student’s parents in writing or provide a written response to the superintendent of the District after conducting its investigation.

The question is whether the District discriminated against Student when the principal did not respond in writing because the District, on the basis of Student’s sex or sexual orientation, provided Student with “different aid, benefits, or services,” denied Student an “aid, benefit, or service,” subjected Student to “separate or different . . . treatment,” or otherwise limited Student’s “enjoyment of . . . [a] right [or] privilege” in violation of OAR 581-021-0045 (3)(b), (c), (d), or (f).

The District maintains policies prohibiting discrimination,[[18]](#footnote-18) providing for the investigation of complaints alleging discrimination,[[19]](#footnote-19) prohibiting non-discriminatory harassment and bullying,[[20]](#footnote-20) and providing for the investigation of complaints alleging harassment and bullying.[[21]](#footnote-21)

Both the policy providing for the investigation of complaints alleging discrimination and the policy providing for the investigation of complaints alleging non-discriminatory harassment and bullying set forth the same requirement that is at issue here: under both policies, the District must respond to a complainant in writing after conducting an investigation.[[22]](#footnote-22) Furthermore, under both polices, if an investigation is conducted by a school, the school must provide the superintendent with the written response.[[23]](#footnote-23)

The District argues that the report made by Student’s parents at the November 8th meeting was an informal complaint and, therefore, not subject to its formal complaint procedures. The District argues that it verbally reported the results of the investigation to Parent. In the District’s view, a verbal report sufficed under the circumstances.

The Department rejects the District’s argument. First, Parent subsequently demonstrated that she believed she had filed a formal complaint. Parent contacted the superintendent on November 29, 2017, because Parent did not receive a response from the principal. The facts demonstrate that Parent was expecting a response. Second, the District impliedly affirmed Parent’s belief. Although the superintendent needed to clarify whether Parent was filing a complaint, the superintendent accepted Parent’s complaint as if she had previously filed a formal complaint. The superintendent investigated the complaint and issued a written response to the complaint.

Because the principal did not provide Student’s parents with a written response, the District may have violated OAR 581-021-0045 (3)(b), (c), (d), or (f).

That said, with respect to not providing Student’s parents with a written response, the District corrected any potential violation prior to this appeal. On November 29, 2017, Parent sent an email to the superintendent. In the email, Parent stated that Student did not feel safe at the middle school. On November 30, 2017, the superintendent responded to Parent’s email. In her response, the superintendent suggested that Student list the ways in which she did not feel safe. The superintendent also asked Parent to clarify whether she was filing a complaint. On December 4, 2017, Parent, Student, and a representative of the Oregon chapter of PFLAG met with the superintendent. At the meeting, Student reiterated the allegation that other students touched her inappropriately. In accordance with district policy, the superintendent investigated the alleged discriminatory act and issued a written report on January 8, 2017.

In consideration of law and fact, the Department finds that: (1) the District may have violated OAR 581-021-0045 (3)(b), (c), (d), or (f); and (2) the District corrected any potential violation prior to this appeal.[[24]](#footnote-24)

### B. District allegedly failed to provide students with a learning environment that is free from sexual harassment and remedy complaints alleging sexual harassment.

Parent alleges that she and Student reported to the District instances where: (1) students used discriminatory language toward Student, including comments about Student’s sexual orientation; (2) students subjected Student to unwanted physical contact; (3) posters promoting the student organization established by Student, the Gay Straight Alliance, were destroyed by other students and staff; and (4) staff treated Student differently because of her sexual orientation. Parent alleges that the District failed to properly address these instances and that other students continued to subject Student to sexual harassment after she reported them.

As explained above, Oregon’s anti-discrimination statute requires school districts to provide students with a learning environment that is free from sexual harassment and to remedy complaints alleging sexual harassment.

#### 1. Use of discriminatory language

The facts demonstrate that on October 23, 2017, Student reported to a teacher that another student called her a “mega-faggot.” On November 8, 2017, Student’s parents met with the principal and vice-principal of the middle school attended by Student and alleged that male students discussed sexually offensive topics in the presence of Student. On December 4, 2017, Parent and Student met with the superintendent of the District and alleged that other students made statements like “Is that a queer?” when passing by Student. Parent and Student also alleged that district staff members did not intervene when they heard students make these comments.

The principal investigated the October 23 incident. The student who used the term “mega-faggot” acknowledged using the phrase. The student claimed that the phrase was not directed toward Student. The principal disciplined the other student for using the phrase.

Following the November 8th meeting, the principal investigated the allegation that male students often discuss sexually offensive topics in the presence of Student. The principal met with the male students and discussed their behavior.

Finally, following the December 4th meeting, the superintendent directed the District to investigate whether students directed discriminatory comments toward Student. The superintendent also directed the District to investigate whether district staff members did not intervene when they heard students make these comments. The District verified at least one incident where another student used discriminatory language when talking to a peer. However, the District could not determine whether the language was directed toward Student. The District also directed district staff members to be more responsive to the use of discriminatory language.

The District argues that in most incidents, any discriminatory language used in the presence of Student was not directed toward Student. The District argues that remedying the use of discriminatory language is complicated by the impossibility of policing every student conversation. The District acknowledges that some students are hostile to the idea of LGBTQ+ students attending the middle school.

Importantly, the District does not argue that discriminatory language does not constitute sexual harassment if it is not directed at a person. The District agrees with the Department that such language can constitute sexual harassment. The District merely argues that any perceived deficiency with respect to its duty to investigate and remedy the use of such language does not reflect its efforts to provide an environment that is free from sexual harassment. The District claims that it endeavors to address all incidents where discriminatory language is used, whether or not it is directed toward a specific student.

For purposes of this appeal, the facts support the District’s argument. The District investigated all incidents where discriminatory language was used, disciplined students who used discriminatory language, and directed district staff members to be more responsive to the use of discriminatory language.

#### 2. Unwanted physical contact

The facts demonstrate that on November 8, 2017, Student’s parents met with the principal and vice-principal of the middle school attended by Student and alleged that four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom.

Following the November 8th meeting, the principal investigated the allegation. The principal met with the four female students, who denied engaging in the alleged behavior.

Following the December 4th report, the superintendent directed the District to investigate the allegation. The District found that there was insufficient evidence to support Student’s allegation. The District did find that another student grabbed Student’s breasts earlier in the year. The District disciplined the student. The District found that female students attending the middle school participated in a game—based on a skit performed by comedic actors Keegan Michael Key and Jordon Peele—where they would slap each other on the bottom. The District documented that other students believed that Student was participating in the game. The District found that Student participated in the game. During the investigation conducted for this appeal, the District explained that it had difficulty in separating Student’s allegation from incidents connected to the game.

Parent argues that Student was not participating in the game. Parent claims that a female student slapped Student on the bottom and Student retaliated by slapping the other student in return. However, even if Parent’s version of events is accurate, it does not address the District’s argument that other students believed Student was participating in the game, or the difficulty that District had in separating Student’s allegation from incidents connected to the game. Whether participatory or retaliatory in nature, Student slapped another student on the bottom.[[25]](#footnote-25)

#### 3. Removal of posters promoting the student organization established by Student, the Gay Straight Alliance

The facts demonstrate that during the week of November 27, 2017, students removed stickers from a poster promoting the student organization established by Student, the Gay Straight Alliance, and, instead of using the stickers to demonstrate their support for the Gay Straight Alliance, discarded them on the floor of the school. Also during the week of November 27, Parent called the vice-principal of the middle school attended by Student and claimed that district staff members removed a poster promoting the Gay Straight Alliance from a school wall. On December 4, 2017, Parent and Student met with the superintendent of the District and Student reported seeing other students tear down posters promoting the Gay Straight Alliance in the presence of district staff members. Student alleged that the district staff members did not intervene to stop the behavior.

With respect to other students removing the stickers and discarding them, the principal of the middle school discussed the incident with the responsible students. With respect to district staff members removing a poster, the facts indicate that the only district staff member who removed posters was the vice-principal. The vice-principal removed the posters in accordance with district policy, under which all publications, productions, and displays must be preapproved by the District. The vice-principal removed the posters and returned them to Student. The vice-principal informed Student of the district’s policy pertaining to publications, productions, and displays and of the procedure by which Student could request the District to preapprove the posters.

Finally, the District found that students removed posters promoting the Gay Straight Alliance. Upon making that finding, the District disciplined the students. The District also found that the posters were not removed in the presence of district staff members.

#### 4. Treatment by staff

The facts demonstrate that on December 4, 2017, Parent and Student met with the superintendent. At the meeting, Student reported approaching a classroom and hearing teachers inside talking and laughing. Student alleged that when she entered the classroom, the talking and laughing stopped and at least two district staff members rolled their eyes at Student and left the room. The District investigated the matter and found that that district staff members did not roll their eyes or scoff at Student. The district staff members reported that they were engaged in an ongoing conversation when Student entered the room. They denied that any verbal or non-verbal actions were directed toward Student.

#### 5. Conclusion

The facts substantiate that the District investigated each incident reported by Parent and Student. If the District found that other students engaged in the reported conduct, it disciplined the students. For some of the allegations, the District did not find evidence sufficient to substantiate the reported conduct. But the District provided the Department with evidence sufficient to substantiate that it investigated each incident.

In evaluating whether the District provided students with a learning environment that is free from sexual harassment, the Department also gives weight to the fact that the District attempted to develop a safety plan for Student.

On January 15, 2018, Parent sent an email to the superintendent of the District requesting a safety plan to accompany Student’s return to in-person classes. The superintendent responded the same day, suggesting dates on which they could meet about the safety plan. On January 17, 2018, the superintendent sent Parent a draft safety plan by email. Parent and the superintendent agreed to meet about the safety plan on January 29, 2018. At the January 29th meeting, the superintendent of the District, the principal and vice-principal of the middle school, other district staff members, and members of LGBTQ+ advocacy groups met to discuss the safety plan. On February 5, 2018, before the District had an opportunity to implement the safety plan, Parent filed this appeal.

From the information available, the Department finds that the District responded appropriately to Parent’s and Student’s allegations.[[26]](#footnote-26) Parent, Student, and advocates for Student raised additional concerns during the course of the Department’s investigation. However, the facts suggest that the District did not have knowledge of these incidents.[[27]](#footnote-27) With respect to the allegation that the District failed to provide students with a learning environment that is free from sexual harassment and to remedy complaints alleging sexual harassment, the Department finds that the District did not violate Oregon’s anti-discrimination statute.

### C. Whether the District discriminated against Student and similarly situated students by obstructing the establishment and continued operation of a student organization pertaining to LGBTQ+ issues

Parent alleged that the District treated Student differently based on sexual orientation. Specifically, Parent alleged that the District treated Student differently during the establishment and continued operation of a student organization pertaining to LGBTQ+ issues, the Gay Straight Alliance, because (1) the District imposed additional requirements on the establishment of the Gay Straight Alliance that are not required for the establishment of other student organizations, (2) the District removed posters promoting the Gay Straight Alliance, (3) the District requested that posters promoting the Gay Straight Alliance be changed, (4) the District requested the name of the Gay Straight Alliance be changed, and (5) the District had difficulty finding and retaining, and allegedly removed, faculty advisors to the Gay Straight Alliance.

 OAR 581-021-0045 (3) specifically states that a school district may not:

 (d) Subject any person to separate or different rules of behavior, sanctions, or other treatment; [or]

\* \* \* \* \*

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

Parent’s allegations raise the issue of whether the District violated one of these provisions.

#### 1. Additional requirements on the establishment of the Gay Straight Alliance

At the end of the 2016-2017 school year, Parent informed the District that Student was interested in establishing a student organization at the middle school called “Gay Straight Alliance.” The District requested that Student provide the District with additional information about the goals of the proposed student organization. Over the course of the summer, Parent provided the District with materials pertaining to LGBTQ+ issues and student organizations supportive of LGBTQ+ issues. The District also discussed with Parent potential community opposition to the establishment of the proposed organization. The District discussed with Parent the need to have patience finding a faculty advisor for the proposed organization. The District suggested to Parent that Student give a presentation on the importance of the proposed organization to facilitate finding a faculty advisor. In Parent’s view, the District subjected Student to different rules of behavior and treatment.

The District contends that it did not subject Student to different rules of behavior or treatment. The District argues that at the time that Student proposed to establish the student organization, only the high school had student organizations. The middle school did not have any student organizations. The District further argues that it only suggested Student give a presentation on the importance of the proposed organization to facilitate finding a faculty advisor.

The Department agrees with the District. At the time that Student established the Gay Straight Alliance, there was no district procedure for approving student organizations for the middle school. There was no other student organization with which to compare the establishment of the proposed organization. The District could not subject Student to different rules of behavior or treatment. As for requesting Student provide the District with additional information about the goals of the proposed organization, or suggesting to Parent that Student give a presentation on the importance of the proposed organization, the facts suggest that the District was attempting to assist Student in establishing the student organization, not obstructing its establishment.

#### 2. Removal of posters promoting the Gay Straight Alliance

The District removed posters promoting the Gay Straight Alliance from school walls. In Parent’s view, by removing the posters, the District denied Student a benefit or otherwise limited her enjoyment of a right, privilege, advantage, or opportunity.

The District argues that it removed posters promoting the Gay Straight Alliance in accordance with district policy. Even though Student secured the approval of a teacher to hang a poster, all publications, productions, and displays must be preapproved by the District. When the vice-principal of the middle school removed the posters, he informed Student of the district’s policy pertaining to publications, productions, and displays and of the procedure by which Student could request the District to preapprove the posters.

#### 3. Requesting that posters promoting the Gay Straight Alliance and the name of the Gay Straight Alliance be changed

Student mounted a poster promoting the Gay Straight Alliance in the cafeteria. The cafeteria was used by students of grade levels K-12. The poster featured the word “sex.” The poster also did not refer to the student organization by the name “Gay Straight Alliance.” Instead, the poster referred to the student organization by the name “Gender Sexuality Alliance.” Upon seeing the poster mounted in the cafeteria, parents of younger students complained to the District about the use of the term “sex” and name “Gender Sexuality Alliance.” The parents requested the removal of the poster.

On December 4, 2017, Parent, Student, and a representative of the Oregon chapter of PFLAG met with the superintendent of the District. At the meeting, they discussed the poster hung in the cafeteria. They discussed how the poster featured the word “sex” and referred to the student organization by the name “Gender Sexuality Alliance.” They discussed whether the poster and name needed to be changed. The superintendent requested to change the poster and the name because the cafeteria is utilized by all grade levels, and parents of younger students objected to the terminology.

Parent argues that by requesting the changes, the District denied Student a benefit or otherwise limited her enjoyment of a right, privilege, advantage, or opportunity. In the District’s view, the requests were not discriminatory because they were not made on the basis that the posters promoted the Gay Straight Alliance, concerned LGBTQ+ issues, or that the name reflected a LGBTQ+ point of view. The District requested the changes because the cafeteria is utilized by all grade levels, and parents of younger students objected to the terminology. The District argues that it would have requested the changes no matter the purpose or affiliation of the poster or name.

The Department agrees with the District. The District requested the change because it determined that the words “sex” and “sexuality” were inappropriate for younger students. It was not requesting the change because the poster promoted the Gay Straight Alliance or concerned LGBTQ+ issues.

#### 4. Difficulty in finding and retaining, and allegedly removing, faculty advisors to the Gay Straight Alliance

Before January 29, 2018, two faculty advisors to the Gay Straight Alliance resigned from the position. Parent alleges that the District was involved in their removal. However, when the Department interviewed the two individuals who had been faculty advisors to the Gay Straight Alliance, they stated that Parent posted certain messages on a social media website that resulted in them receiving communications that were of sufficient concern to them, both in content and in number, that they chose to resign. Eventually, a new individual volunteered to be the Gay Straight Alliance’s faculty advisor.

#### 5. Conclusion

With respect to the issue of whether the District discriminated against Student and similarly situated students by obstructing the establishment and continued operation of a student organization pertaining to LGBTQ+ issues, the Department finds that the District did not violate OAR 581-021-0045 (3)(d) or (f).

## VI. CONCLUSION

In conclusion, the Department finds that the District may have violated Oregon’s anti-discrimination statue and OAR 581-021-0045 (3)(c) because the District did not recognize a complaint alleging discrimination. The Department also finds that the District did not violate Oregon’s anti-discrimination statue or OAR 581-021-0045 on any other grounds.

Accordingly, the Department encourages the District to reach an agreement with Parent through conciliation. If the District cannot reach an agreement with Parent through conciliation within 30 days, the Deputy Superintendent will schedule a hearing for the purpose of determining whether the District is in compliance with ORS 659.850.

If Parent or the District wishes to use the Department as a resource during conciliation, Parent or the District may contact the Department. [[28]](#footnote-28)

If the Deputy Superintendent schedules a hearing for the purpose of determining whether the District is in compliance with ORS 659.850, the scope of the hearing will be limited to whether the District violated Oregon’s anti-discrimination statue and OAR 581-021-0045 (3)(c) because the District did not recognize a complaint alleging discrimination. Parent and Student may not argue other aspects of their appeal at the hearing.

Sincerely,



Mark Mayer

Complaint and Appeals Coordinator

Office of Government and Legal Affairs

Mark.Mayer@state.or.us

503-947-0464

1. Case Reference No. 2018-007-KM. [↑](#footnote-ref-1)
2. OAR 581-021-0049 (1). [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. OAR 581-021-0049 (1)(b). [↑](#footnote-ref-4)
5. OAR 581-021-0049 (2). [↑](#footnote-ref-5)
6. OAR 581-021-0049 (3). [↑](#footnote-ref-6)
7. OAR 581-021-0049 (3). [↑](#footnote-ref-7)
8. OAR 581-021-0049 (3)(a) to (d). [↑](#footnote-ref-8)
9. 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-9)
10. 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-10)
11. ORS 659.850 (2). [↑](#footnote-ref-11)
12. *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-12)
13. 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](https://www2.ed.gov/%20about/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-13)
14. *Id.* at 13 (internal quotation marks omitted). [↑](#footnote-ref-14)
15. 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 581-021-0049. 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-15)
16. *See also* Davis, 526 U.S. at 653 (finding “numerous acts of objectively offensive touching” to be sexual harassment). [↑](#footnote-ref-16)
17. *See Revised Sexual Harassment Guidance*, *supra* note 13, at 13 (explaining that a school receives notice of sexual harassment when a student, parent, or other individual contacts appropriate district personnel, like a principal or vice-principal). [↑](#footnote-ref-17)
18. Culver School District 4J, Nondiscrimination, Policy AC. [↑](#footnote-ref-18)
19. Culver School District 4J, Discrimination Complaint Procedure, Policy AC-AR. [↑](#footnote-ref-19)
20. Culver School District 4J, Hazing/Harassment/Intimidation/Bullying/Menacing/Cyberbullying--Staff, Policy GBNA. [↑](#footnote-ref-20)
21. Culver School District 4J, Hazing/Harassment/Intimidation/Bullying/Menacing/Cyberbullying--Staff, Policy GBNA-AR. [↑](#footnote-ref-21)
22. Culver School District 4J, Discrimination Complaint Procedure, Policy AC-AR and Culver School District 4J, Hazing/Harassment/Intimidation/Bullying/Menacing/Cyberbullying--Staff, Policy GBNA-AR. [↑](#footnote-ref-22)
23. Culver School District 4J, Discrimination Complaint Procedure, Policy AC-AR and Culver School District 4J, Hazing/Harassment/Intimidation/Bullying/Menacing/Cyberbullying--Staff, Policy GBNA-AR. [↑](#footnote-ref-23)
24. It should be noted that the Department may have reached a different conclusion had the superintendent of the District not accepted Parent’s November 29 email as a complaint on appeal. [↑](#footnote-ref-24)
25. Importantly, the game where students would slap each other on the bottom might constitute discrimination without reference to Student’s alleged participation in the game. The game may create a learning environment that is not free from sexual harassment. However, the Department declines to address the matter on appeal because Parent’s initial complaint did not articulate facts sufficiently connected to the game to give the District an opportunity to investigate and hear the matter. Furthermore, during its investigation, the Department determined that the District stopped students from playing the game upon learning about it. [↑](#footnote-ref-25)
26. An additional matter, raised by an advocate for Student, involves whether district staff members did not properly report sexual assault when Student reported that four female students touched her inappropriately by poking, slapping, and groping Student’s breasts and bottom. The Department lacks the authority to enforce noncompliance with mandatory reporting laws. [↑](#footnote-ref-26)
27. During the Department’s investigation, an advocate for Student reported to the Department that Student disclosed additional information to the advocate about the incident where four female students touched Student inappropriately by poking, slapping, and groping Student’s breasts and bottom. The advocate also reported witnessing discriminatory communications between students on a form of social media that could not be recorded. During its investigation, the Department interviewed three advocates for Student and reviewed audio of the January 29th meeting. There is no evidence in the record that this additional information was reported to the District. [↑](#footnote-ref-27)
28. The Department’s Title IX expert is Karin Moscon. She may be reached at 502-947-5706 or at Karin.moscon@state.or.us. [↑](#footnote-ref-28)