November 22, 2019

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Dr. Karen Gray, Superintendent

Lincoln County School District

P.O. Box 1110

459 SW Coast Hwy

Newport, OR 97365

Re: Case #2019-KM-02

Dear PARENT and Superintendent Gray,

This letter is the investigatory determination on the appeal of a complaint filed with Lincoln County School District regarding possible violations of ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly), OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education), and OAR 581-021-0046 (prohibiting school districts from providing any course or carrying out any program or activity on a discriminatory basis). On appeal, PARENT (Parent A) alleges that the district violated these state laws and rules on the basis that the district did not adequately respond to acts of discrimination against her son (Student A) on the basis of sex. When an allegation of failure to adequately respond to acts of discrimination is made, the department reviews district procedures and findings of fact to determine if the district followed procedures and made determinations as required by ORS 659.850 and OAR 581-021-0045 and 581-021-0046.

## I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

Parent A alleges that Lincoln County School District discriminated against Student A when (1) the district did not conduct timely, fair, and impartial investigations of discrimination, and (2) the district did not remedy a hostile environment when complaints were made alleging discrimination on the basis of sex.

The Oregon Department of Education has jurisdiction to resolve this complaint under OAR 581-021-0049.[[1]](#footnote-1) 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 finds that discrimination may have occurred, the department will issue a letter setting forth the department’s findings and conclusions and require the school district to attempt to reach an agreement with the complainant through conciliation.[[3]](#footnote-3) If the school district cannot reach an agreement with the complainant within 30 days, the department will schedule a hearing to determine whether the school district is in compliance with ORS 659.850.[[4]](#footnote-4) If the department determines that the school district is not in compliance with ORS 659.850, the department will issue an order requiring compliance.[[5]](#footnote-5) If the school district fails to comply with the order within 30 days, the department will issue an order imposing an appropriate remedy.[[6]](#footnote-6) 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.[[7]](#footnote-7)

On this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department’s investigatory findings and conclusions.

## II. PROCEDURAL BACKGROUND

On February 20, 2019, Parent A filed an appeal with the Oregon Department of Education alleging discrimination on the basis of sex by Lincoln County School District. In her appeal, Parent A alleges that the district did not promptly inform her of an incident involving Student A. Student A and two other students (Student B and Student C) exposed themselves to one another in the bathroom of their elementary school. The students also touched one another’s genitals. Parent A alleges that the district, upon learning about the incident, did not timely inform her about the incident. Parent A further alleges that the district did not appropriately respond to and investigate the incident. In short, Parent A argues that the district failed to remedy a hostile environment. Parent A alleges several other discriminatory acts occurred after the incident and that the district also failed to appropriately respond to and investigate those incidents.

On February 28, 2019, the parent of Student B (Parent B) filed an appeal with the department alleging discrimination on the basis of sex by the district. Parent B alleges that the district, upon learning about the incident that occurred in the bathroom, did not promptly inform him about the incident. Parent B further alleges that the district did not appropriately respond to and investigate the incident. Parent B shares Parent A’s view that the district failed to remedy a hostile environment.

The department accepted both appeals on March 12, 2019. Generally, the department does not accept appeals alleging discrimination unless a complainant receives a final decision from a district, which under most circumstances requires a complainant to file a complaint with a district. Under OAR 581-021-0049, “[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 this instance, neither Parent A nor Parent B filed a complaint with the district. However, where an appeal alleges discrimination on the basis of failure to appropriately respond to and investigate an incident involving sexual harassment, the department will accept the appeal if the district knew or should have known about the incident.

When the department interprets and applies ORS 659.850 and OAR 581-021-0045 and 581-021-0046, the department relies on the federal anti-discrimination law known as Title IX[[8]](#footnote-8) and the interpretation of that law by federal courts and the United States Department of Education’s Office for Civil Rights (Office for Civil Rights). In interpreting Title IX, the Office of Civil Rights has provided guidance on a key issue related to accepting appeals. Under Title IX, 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.[[9]](#footnote-9)

In other words, 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 its 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 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.[[10]](#footnote-10) In such cases, for purposes of OAR 581-002-0049(1), the failure to recognize the act as discriminatory or make a reasonable inquiry as to whether the act was discriminatory constitutes “a complaint of discrimination.”

Because both Parent A’s and Parent B’s appeals concern the same incident, and because both Parent A and Parent B make the same argument about the district’s failure to remedy a hostile environment, the department consolidated the appeals for the purpose of investigating them.

## III. FINDINGS OF FACT

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

1. During the 2017-2018 school year, Students A, B, and C attended kindergarten in Lincoln County School District.
2. On March 12, 2018, Students A, B, and C were in kindergarten class together. One of the students obtained a bathroom pass from the teacher (Teacher A) and left the class to use the bathroom. The other two students also left the classroom. Teacher A did not notice the other two students leaving the classroom.
3. Students A, B, and C entered the bathroom together. The students exposed themselves to one another and touched one another’s genitals. A fourth student (Student D) entered the bathroom, witnessed the conduct, and told Students A, B, and C that he was going to report the incident to Teacher A. Students A, B, and C returned to the classroom.
4. Student D reported the incident to Teacher A, who, in turn, reported the incident to a second teacher (Teacher B). Teacher B reported the incident to the principal of the school. The principal was informed of the incident between 12:10 pm and 12:30 pm, when kindergarten students are at lunch recess.
5. On March 12, 2018, the principal interviewed Students A, B, C, and D about the incident. The principal interviewed each student separately. During the interviews, Students A, B, and C stated that they had exposed themselves to one another and touched one another’s genitals. Student A stated that they were playing. Student D confirmed the other students’ statements.
6. During the interviews, the principal documented that Students A, B, and C did not immediately proceed to the bathroom after leaving the classroom. The students first played in the hall. The principal also documented that Students A, B, and C were not afraid of each other. Students A, B, and C described the incident in a way that indicated that they did not feel any pressure to engage in the reported conduct and that no one forced them to engage in the reported conduct.
7. On March 12, 2018, the principal called Lincoln City Police Department’s School Resource Officer. The officer requested that the district not notify the students’ parents until he finished his investigation.
8. As part of his investigation, the officer interviewed Students A, B, C, and D. The officer also reviewed surveillance footage of the hallway between the classroom and the bathroom. The officer reviewed the footage to determine the timeline of events and to identify all of the students who were involved. The officer’s investigation corroborated the information obtained by the principal while interviewing the students.
9. At this time, the principal believed that if further investigation was necessary, the officer would conduct the investigation.
10. On March 12, 2018, at the end of the school day, after the district and the police conducted their respective investigations, the principal and the officer began contacting the parents of Students A, B, C, and D to inform them of the incident. Parent A and Parent B received notice of the incident when they were on their way to pick up their children from school.
11. On March 12, 2018, at 4:30 pm, the principal reported potential child abuse to the Oregon Department of Human Services. The principal documented the date and time that she made the report, the content of her report, and the person to whom she made the report. The principal made individual reports for Students A, B, and C. The reports included all of the relevant information that the principal had obtained while interviewing the students.
12. On March 12, 2018, after the students left for the day, the principal created a “Safety/Behavior Plan” for Student A. The plan was “intended as a short-term intervention to ensure the safety of [Student A] and classmates and will be reviewed as needed to determine if we are seeing positive progress or are in need of further intervention.” As part of the plan, Student A’s classroom teacher would review with him instructional material intended to teach kindergarten students about appropriate behavior with respect to their “private parts.” As part of the plan, Student A was limited to using his classroom’s single stall bathroom. Student A was not allowed to use the school’s common bathrooms.
13. On March 12, 2018, after the students left for the day, the principal created a “Safety/Behavior Plan” for Student B that was similar to the plan created for Student A.
14. On March 12, 2018, after the students left for the day, the principal created a “Safety/Behavior Plan” for Student C that was similar to the plans created for Students A and B.
15. The principal informed school staff of the plans created for Students A, B, and C. The principal wrote, “These students may not be excused to use the bathroom while at lunch, recess, or specials. The office bathroom is available to them if needed. Please call the office prior to sending them.”
16. Following the March 12th incident, the district’s Student Support Services Director ensured that district staff provided Students A, B, and C with instruction on appropriate behavior.
17. On March 20, 2018, the principal and the officer called the parents of Students A, B, C, and D to provide them with additional information related to the March 12th incident and with the Lincoln City Police Department’s case number for the incident.
18. On March 21, 2018, as part of its investigation into the March 12th incident, the district disciplined Teacher A for failing to appropriately supervise Students A, B, and C, and for failing to promptly notify the appropriate individuals when he noticed that they were not present in his class.
19. On April 10, 2018, the district provided training to district administrative staff that included a review of law enforcement investigations occurring within the district.
20. Students A, B, and C completed kindergarten without further incident.
21. During the 2018-2019 school year, Students A and B attended first grade in the district.
22. On October 1, 2018, Parent B called the district to communicate that Student B was having emotional issues that Parent B interpreted were the result of the March 12th incident. Parent B also expressed displeasure about not receiving further information from the district about the March 12th incident.
23. On October 2, 2018, Parent B met with district staff to discuss their concerns about Student B. Parent B reported that Student B often did not want to enter the school in the morning. Parent B was concerned about whether Student B’s teacher was making him feel welcome. The district and Parent B discussed how the district could best serve Student B. The district and Parent B discussed whether the “Safety/Behavior Plan” created for Student B following the March 12th incident should be reinstated for the 2018-2019 school year.
24. The district arranged for Student B to meet with the school counselor. During the meeting, Student B told the school counselor that he was happy at school.
25. On October 4, 2018, the district contacted Parent B. The district reported to Parent B the outcome of the meeting between Student B and the school counselor. The district again asked whether the “Safety/Behavior Plan” created for Student B should be reinstated for the 2018-2019 school year. The district also directed Parent B to contact local law enforcement agencies or child protective services if Parent B needed further information about the March 12th incident. The district provided Parent B with the contact information of the officer who conducted the investigation of the March 12th incident.
26. During the morning of October 17, 2018, Parent A escorted Student A to the school bus stop. Student A boarded the school bus. Upon boarding, Student A saw that another student on the bus (Student E) was naked. Student A turned and told Parent A. Parent A boarded the bus, saw that Student E was naked, and told the bus driver. Until Parent A told the bus driver, the bus driver was unaware that Student E was naked.
27. During the fall of 2018, the district was evaluating Student E for special education services. The district was evaluating Student E because he often disrobed and engaged in other problematic behaviors. The district interpreted the October 17th incident as a manifestation of Student E’s behaviors.
28. On October 17, 2018, after the bus incident, Parent A took Student A to a local law enforcement agency to report the incident.
29. In accordance with district policy, the district reported the October 17th incident to Student E’s parents, local law enforcement, and the Oregon Department of Human Services.
30. In accordance with district policy, the district attempted to contact Parent A to update her about the October 17th incident, but could not get ahold of her.
31. On February 6, 2019, while at school, a student (Student F) grabbed Student A in his private area. Later that day, a different student (Student I) inadvertently smacked Student A on the bottom while playing. The district determined that the incidents were not sexual in nature. The district determined that Students F and I were acting impulsively. The district did determine that the actions were inappropriate and gave Student F an in-school suspension and directed Student I to apologize to Student A.
32. In accordance with district policy, the district reported the February 6th incidents to the respective parents of Students F and I, local law enforcement, and the Oregon Department of Human Services.
33. In accordance with district policy, the district reported the February 6th incidents to Parent A. Parent A asked the district whether Student A required counseling after the incidents. The principal explained that neither incident was sexual in nature. The principal explained that Students F and I were acting impulsively. The principal stated that “[the] boy who did [the spanking] was excited and said he didn’t mean to hit [Student A’s] bottom, but his back or shoulder. He was very sorry and knew it was inappropriate.”
34. Student A did not attend school on February 7, 2019.
35. During the morning of February 8, 2019, the principal met with Student A. At the meeting, Student A reported feeling “bad” about the February 6th incidents. The principal observed Student A throughout the day. During his observations, the principal documented that Student A “seemed happy, was laughing with classmates and participating.”
36. At the end of the school day on February 8, 2019, as students were lining up to leave for the day, a student (Student G) was dancing in the classroom and moved toward Student A. As part of his dance, Student G was thrusting his hips toward Student A. Student A’s teacher reported the incident to Parent A. The district determined that the incident was not sexual in nature. The district did determine that the actions were inappropriate and gave Student G an in-school suspension.
37. On February 12, 2019, and February 14, 2019, the principal called Parent A. The principal and Parent A discussed counseling services for Student A as well as transferring Student A to a different classroom.
38. On February 21, 2019, Parent A met with the principal, the Superintendent of Lincoln County School District, and the district’s Student Support Services Director. Parent A was accompanied by representatives from the Children’s Advocacy Center. Parent A shared her concerns about the February 6th incidents and the February 8th incident. The principal, superintendent, and director explained why the district did not find the incidents to be sexual in nature.
39. On March 20, 2019, Parent A again met with the principal, the superintendent, the district’s Student Support Services Director, and representatives from the Children’s Advocacy Center. At the meeting, Parent A shared her concerns about the March 12th incident from the previous year.
40. On April 1, 2019, Student A was interviewed by the Children’s Advocacy Center about the March 12th incident.
41. Before the end of the 2018-2019 school year, Parent A removed Student A from public school and homeschooled him.

## IV. 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.[[11]](#footnote-11)

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.”[[12]](#footnote-12)

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.

Additionally, under OAR 581-021-0046, a school district may not “provide any course or otherwise carry out any of its educational programs or activities on a discriminatory basis or require or refuse participation therein by any of its students on such basis.”[[13]](#footnote-13)

The issue addressed in this appeal is whether Lincoln County School District violated ORS 659.850 and OAR 581-021-0045 or 581-021-0046 on the basis that (1) the district did not conduct timely, fair, and impartial discrimination investigations, and (2) the district did not remedy a hostile environment when complaints were made alleging discrimination on the basis of sex.

### A. Whether Lincoln County School District conducted timely, fair, and impartial discrimination investigations

*1. Incident that occurred on March 12, 2018*

Parents A and B allege that Lincoln County School District did not timely notify them after learning about the incident that occurred on March 12, 2018. Parents A and B argue that their children needed them immediately after the incident. Parents A and B argue that the incident, not properly handled, could further traumatize the children. Parents A and B also allege that the district’s investigation did not include essential follow-up, such as conducting forensic interviews of the children, providing individual counseling to the children, and issuing definitive investigatory findings.

With respect to the parents’ first allegation, the district first became aware of the incident when Student D reported the incident to Teacher A. Teacher A, in turn, reported the incident to Teacher B, who reported the incident to the principal of the school. The principal was informed of the incident between 12:10 pm and 12:30 pm. Parents A and B were notified of the incident shortly after the end of the school day. During the interim, the following occurred:

* The principal interviewed Students A, B, C, and D about the incident. The principal interviewed each student separately.
* The principal documented facts about the incident.
* The principal determined that the students were not afraid of each other. The principal determined that the students did not feel any pressure to engage in the reported conduct and that no one forced them to engage in the reported conduct.
* The principal called Lincoln City Police Department’s School Resource Officer. The officer requested that the district not notify the students’ parents until he finished his investigation.
* The officer interviewed Students A, B, C, and D.
* The officer reviewed surveillance footage of the hallway between the classroom and the bathroom.

The Oregon Department of Education finds that the district was responsive to the incident. After learning about the incident, it immediately conducted interviews and contacted the police department. Further, the district determined that the students were not afraid of each other and did not feel any pressure to engage in the reported conduct. Finally, the officer assigned to the case requested that the district not notify the parents until he finished his investigation. Under these circumstances, the department finds that the district’s notice of the incident to the parents was timely.

With respect to the parents’ second allegation, the district responded to the incident in the following ways:

* On the day of the incident, the principal interviewed Students A, B, C, and D about the incident. The principal interviewed each student separately.
* On the day of the incident, the principal documented facts about the incident.
* On the day of the incident, the principal reported the incident to Lincoln City Police Department’s School Resource Officer.
* On the day of the incident, the principal reported potential child abuse to the Oregon Department of Human Services.
* On the day of the incident, the principal created a “Safety/Behavior Plan” for each of the students involved in the incident. As part of the plans, the students’ teacher would review with them instructional material intended to teach kindergarten students about appropriate behavior with respect to their “private parts.” As part of the plan, the students were limited to using their classroom’s single stall bathroom. The students were not allowed to use the school’s common bathrooms.
* The principal informed school staff of the plans created for the students.
* The district’s Student Support Services Director ensured that district staff provided Students A, B, and C with instruction on appropriate behavior.
* The principal and the officer called the parents of the students to provide them with additional information related to the incident and with the Lincoln City Police Department’s case number for the incident.
* The district disciplined Teacher A for failing to appropriately supervise the students, and for failing to promptly notify the appropriate individuals when he noticed that they were not present in his class.
* The district provided training to district administrative staff that included a review of law enforcement investigations occurring within the district.
* During the subsequent school year, district staff met with Parent B to discuss their concerns about Student B.
* The district arranged for Student B to meet with the school counselor.
* The district contacted Parent B and reported to him the outcome of the meeting between Student B and the school counselor.
* The district asked Parent B whether the “Safety/Behavior Plan” created for Student B should be reinstated for the 2018-2019 school year.
* The district directed Parent B to contact local law enforcement agencies or child protective services if Parent B needed further information about the March 12th incident. The district provided Parent B with the contact information of the officer who conducted the investigation of the incident.

The department finds that the district was responsive and thorough in investigating the incident and provided appropriate follow-up. The department further finds that the district was operating under the belief that if further investigation was necessary, the Lincoln County Police Department would conduct the investigation. The department finds that the district directed Parents A and B to contact the police department for further information about the case, and that the district provided Parents A and B with the information necessary to contact the police.

It should be noted that the type of investigatory follow-up that Parents A and B expected – i.e., forensic interviews of the children – is generally conducted by local law enforcement agencies and the Department of Human Services, not public schools. The district has a duty to investigate student behavior and, upon gathering sufficient information to suspect potential child abuse, to report the behavior to a local law enforcement agency and the Department of Human Services. The district fulfilled that duty here. On the day of the incident, the principal reported the incident to Lincoln City Police Department’s School Resource Officer. Also on the day of the incident, the principal reported potential child abuse to the Oregon Department of Human Services. After making these reports, the principal believed that if further investigation were necessary, the officer would conduct the investigation.

Under these circumstances, the department finds that the district’s investigation and follow-up was fair and impartial.

*2. Incident that occurred on October 17, 2018*

Parent A alleges that the district did not conduct a timely, fair, and impartial investigation of the incident that occurred on October 17, 2018. On that day, Student A boarded the school bus and saw that Student E was naked. Student A turned and told Parent A. Parent A boarded the bus, saw that Student E was naked, and told the bus driver. Until Parent A told the bus driver, the bus driver was unaware that Student E was naked.

Importantly, Student E was not targeting Student A with his behavior. At that time, the district was evaluating Student E for special education services. The district was evaluating Student E because he often disrobed and engaged in other problematic behaviors. The district interpreted the incident as a manifestation of Student E’s behaviors.

Under Oregon law, the department can adjudicate only certain types of complaints and appeals. Oregon is known as a “local control state.” In local control states, locally elected school boards regulate the public schools located within their school districts. The department does not have the authority to accept a complaint or appeal unless a federal or state law allows or requires the department to do so. At the time that Parent A filed her appeal, federal and state law allowed or required the department to accept six types of complaints and appeals. Under the law, the department:

* Took on appeal complaints alleging a violation of standards of the Oregon Administrative Rules, chapter 581, division 022 (Division 22 Standards).[[14]](#footnote-14)
* Took on appeal complaints alleging a violation of ORS 339.285 to 339.303 or OAR 581-021-0550 to 581-021-0570 (prohibiting restraint and seclusion).[[15]](#footnote-15)
* Took on appeal complaints alleging a violation of ORS 659.852 (prohibiting retaliation).[[16]](#footnote-16)
* Took on appeal complaints alleging discrimination.[[17]](#footnote-17)
* Heard complaints alleging a violation of the federal Individuals with Disabilities Education Act or regulations adopted pursuant to the act.[[18]](#footnote-18)
* Heard complaints alleging that a district sponsors, financially supports, or is actively involved with religious activity.[[19]](#footnote-19)

Parent A specifically alleged that Student A was sexually harassed by the incident that occurred on October 17, 2018. The department has the legal authority to accept such an appeal pursuant to ORS 659.850. In contrast, the department does not have the legal authority to accept an appeal alleging that a district failed to conduct a timely, fair, and impartial investigation of behavior that is not discriminatory in nature. Thus, for purposes of adjudicating the incident that occurred on October 17, 2018, the primary question for the department to consider is whether Student A was sexually harassed. If Student A was sexually harassed, the matter is properly before the department. If Student A was not sexually harassed, the matter is not properly before the department.

When the department interprets and applies ORS 659.850 and OAR 581-021-0045 and 581-021-0046, the department relies on the federal anti-discrimination law known as Title IX[[20]](#footnote-20) and the interpretation of that law by federal courts and the United States Department of Education’s Office for Civil Rights (Office for Civil Rights). In interpreting Title IX, the Office of Civil Rights has provided guidance on a key issue related to accepting appeals.

Under Title IX, behavior constitutes sexual harassment if the behavior “is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from [an] education program, or to create a hostile or abusive educational environment.”[[21]](#footnote-21)

In this case, Student A saw Student E naked. However, in consideration of the broader context in which the incident occurred – that the district was evaluating Student E for special education services because he engaged in this type of behavior – and that Student A and Student E did not interact after incident, the department finds that the incident was not sufficiently severe, persistent, or pervasive enough to limit Student A’s ability to participate in or benefit from the activity at hand – taking the bus to school – for the incident to constitute sexual harassment for purposes of ORS 659.850 and OAR 581-021-0045 and 581-021-0046. Therefore, the department does not have the legal authority to adjudicate the incident on appeal.

The department further finds that the district was timely, fair, and impartial in investigating the incident. In accordance with district policy, the district reported the incident to Student E’s parents, local law enforcement, and the Oregon Department of Human Services. Also in accordance with district policy, the district attempted to contact Parent A to update her about the incident; however, the district could not get ahold of her.

The department finds that there is inadequate evidence of sexual harassment to substantiate that the district did not conduct a timely, fair, and impartial investigation of the incident as required by ORS 659.850 and OAR 581-021-0045 and 581-021-0046.

*3. First incident that occurred on February 6, 2019*

Parent A alleges that the district did not conduct a timely, fair, and impartial investigation of the incident that occurred on February 6, 2019, where Student F grabbed him in his privates. The district determined that the incident was not sexual in nature. The district determined that Student F was acting impulsively. The district did determine that Student F acted inappropriately and disciplined him for the incident.

In accordance with district policy, the district reported the incident to Student F’s parents, local law enforcement, and the Oregon Department of Human Services. The district also reported the incident to Parent A.

As with the October 17th incident, the primary question for the department to consider is whether Student A was sexually harassed.

Under the circumstances, where Student F’s behavior was not sexual in nature, the department finds that the incident was not sufficiently severe, persistent, or pervasive enough to limit Student A’s ability to participate in or benefit from school activities for the incident to constitute sexual harassment for purposes of ORS 659.850 and OAR 581-021-0045 and 581-021-0046. As with the October 17th incident, the department does not have the legal authority to adjudicate the incident on appeal.

It should also be noted that the district followed district policies in response to the incident by contacting Student F’s parents, local law enforcement, the Oregon Department of Human Services, and Parent A.

In consideration of the aforementioned factors, the department finds that there is inadequate evidence of sexual harassment to substantiate that the district did not conduct a timely, fair, and impartial investigation of the incident as required by ORS 659.850 and OAR 581-021-0045 and 581-021-0046.

*4. Second incident that occurred on February 6, 2019*

Parent A alleges that the district did not conduct a timely, fair, and impartial investigation of the incident that occurred on February 6, 2019, where Student I inadvertently smacked Student A on the bottom while playing. The district determined that the incident was not sexual in nature and that the act was an inadvertent touching. The district also determined that Student I acted inappropriately and disciplined him for the incident.

In accordance with district policy, the district reported the incident to Student I’s parents, local law enforcement, and the Oregon Department of Human Services. The district also reported the incident to Parent A.

As with the October 17th incident and the other February 6th incident, the primary question for the department to consider is whether Student A was sexually harassed.

Under the circumstances, where Student I’s behavior was not sexual in nature, the department finds that the incident was not sufficiently severe, persistent, or pervasive enough to limit Student A’s ability to participate in or benefit from school activities for the incident to constitute sexual harassment for purposes of ORS 659.850 and OAR 581-021-0045 and 581-021-0046. As with the October 17th incident and the other February 6th incident, the department does not have the legal authority to adjudicate the incident on appeal.

It should also be noted that the district followed district policies in response to the incident by contacting Student I’s parents, local law enforcement, the Oregon Department of Human Services, and Parent A.

In consideration of the aforementioned factors, the department finds that there is inadequate evidence of sexual harassment to substantiate that the district did not conduct a timely, fair, and impartial investigation of the incident as required by ORS 659.850 and OAR 581-021-0045 and 581-021-0046.

*5. Incident that occurred on February 8, 2019*

Parent A alleges that the district did not conduct a timely, fair, and impartial investigation of the incident that occurred on February 8, 2019. As students were lining up to leave for the day, Student G was dancing in the classroom and moved toward Student A. As part of his dance, Student G was thrusting his hips toward Student A. The district determined that the incident was not sexual in nature.

In response to the incident, the district reported the incident to Parent A. The district also disciplined Student G for the incident.

As with the October 17th incident and the February 6th incidents, the primary question for the department to consider is whether Student A was sexually harassed.

Under the circumstances, where Student G’s behavior was not sexual in nature, the department finds that the incident was not sufficiently severe, persistent, or pervasive enough to limit Student A’s ability to participate in or benefit from school activities for the incident to constitute sexual harassment for purposes of ORS 659.850 and OAR 581-021-0045 and 581-021-0046. As with the October 17th incident and the February 6th incidents, the department does not have the legal authority to adjudicate the incident on appeal.

In consideration of the aforementioned factors, the department finds that there is inadequate evidence of sexual harassment to substantiate that the district did not conduct a timely, fair, and impartial investigation of the incident as required by ORS 659.850 and OAR 581-021-0045 and 581-021-0046.

### B. Whether Lincoln County School District failed to remedy a hostile environment when complaints were made alleging discrimination on the basis of sex

Parents A and B allege that Lincoln County School District failed to remedy a hostile environment when complaints were made alleging discrimination on the basis of sex.

The Oregon Department of Education first finds that there is a significant difference between the incident that occurred on March 12, 2018, and the incidents that occurred on October 17, 2018, February 6, 2019, and February 8th, 2019. As explained above, whereas the March 12th incident falls under the department’s jurisdiction as prescribed by state law, the October 17th, February 6th, and February 8th incidents do not.

The district took several actions to remedy the March 12th incident. Specifically, the district did the following:

* On the day of the incident, the principal interviewed Students A, B, C, and D about the incident. The principal interviewed each student separately.
* On the day of the incident, the principal documented facts about the incident.
* On the day of the incident, the principal reported the incident to Lincoln City Police Department’s School Resource Officer.
* On the day of the incident, the principal reported potential child abuse to the Oregon Department of Human Services.
* On the day of the incident, the principal created a “Safety/Behavior Plan” for each of the students involved in the incident. As part of the plans, the students’ teacher would review with them instructional material intended to teach kindergarten students about appropriate behavior with respect to their “private parts.” As part of the plan, the students were limited to using their classroom’s single stall bathroom. The students were not allowed to use the school’s common bathrooms.
* The principal informed school staff of the plans created for the students.
* The district’s Student Support Services Director ensured that district staff provided Students A, B, and C with instruction on appropriate behavior.
* The principal and the officer called the parents of the students to provide them with additional information related to the incident and with the Lincoln City Police Department’s case number for the incident.
* The district disciplined Teacher A for failing to appropriately supervise the students, and for failing to promptly notify the appropriate individuals when he noticed that they were not present in his class.
* The district provided training to district administrative staff that included a review of law enforcement investigations occurring within the district.
* During the subsequent school year, district staff met with Parent B to discuss their concerns about Student B.
* The district arranged for Student B to meet with the school counselor.
* The district contacted Parent B and reported to him the outcome of the meeting between Student B and the school counselor.
* The district asked Parent B whether the “Safety/Behavior Plan” created for Student B should be reinstated for the 2018-2019 school year.
* The district directed Parent B to contact local law enforcement agencies or child protective services if Parent B needed further information about the incident. The district provided Parent B with the contact information of the officer who conducted the investigation of the incident.

The district was responsive to the event. It interviewed Students A, B, and C on the day of the incident. It contacted the Lincoln County Police Department’s School Resource Officer and the Department of Human Services on the day of the incident. It developed “Safety/Behavior Plans” on the day of the incident. It communicated those plans to school staff. It conducted trainings to ensure that school staff understood law enforcement investigations occurring within the district. It followed-up its investigation by observing the students in class and providing Parents A and B with the contact information for Lincoln City Police Department, including the case number for the incident. During the subsequent school year, the district met with Parent B to discuss their concerns about Student B and options for providing him with additional support.

Parents A and B argue that the district should have conducted forensic interviews of the children, provided individual counseling for the children, and issued definitive investigatory findings. The department is sympathetic to the concerns of Parents A and B. It may be that Students A and B did not receive the appropriate forensic interviews and necessary counseling. It may be that suitable findings were not issued for the incident. However, when a situation involves potential child abuse, the appropriate agencies for conducting forensic interviews, making determinations related to future counseling, and issuing definitive findings are local law enforcement agencies and the Department of Human Services. School districts have a duty to provide students with an environment that is free from sexual harassment. School districts have a duty to report potential acts of child abuse to local law enforcement agencies and the Department of Human Services. However, school districts do not have the duty to fully investigate potential acts of child abuse or to ensure the psychological well-being of students who may have suffered an act of child abuse. The reason for this distinction in duty is simple: whereas school districts do not have the resources and experience necessary to investigate potential acts of child abuse and make determinations related to the psychological well-being of students who may have suffered an act of child abuse, the agencies to which school districts must report such acts do. When circumstances rise to the level of those that occurred at the district on March 12, 2018, the most appropriate course of action for a school district to take is the one that the district took here: to report the incident to the appropriate authorities and collaborate with the authorities to the extent necessary for them to perform their jobs.

Parents A and B have good reason to be upset about the events that occurred on March 12, 2019. However, in this case, there is insufficient evidence to find that the district failed to remedy a hostile environment when complaints were made alleging discrimination on the basis of sex.

## V. CONCLUSION

In conclusion, the Oregon Department of Education finds that Lincoln County School District did not violate ORS 659.850 or OAR 581-021-0045 or 581-021-0046 on the basis that (1) the district did not conduct timely, fair, and impartial discrimination investigations, or (2) the district did not remedy a hostile environment when complaints were made alleging discrimination on the basis of sex.

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Coordinator

Office of the Department

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1. The State School Board repealed OAR 581-021-0049 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Complainant’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-1)
2. OAR 581-021-0049(1). [↑](#footnote-ref-2)
3. OAR 581-021-0049(1)(b). [↑](#footnote-ref-3)
4. OAR 581-021-0049(2). [↑](#footnote-ref-4)
5. OAR 581-021-0049(3). [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. OAR 581-021-0049(3)(a) to (d). [↑](#footnote-ref-7)
8. *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-8)
9. United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 13 (2001), 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). [↑](#footnote-ref-9)
10. 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-10)
11. 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-11)
12. 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-12)
13. OAR 581-021-0046(1). [↑](#footnote-ref-13)
14. OAR 581-002-0040(1). The State School Board repealed OAR 581-002-0040 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Parent A’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-14)
15. OAR 581-002-0040(1). The State School Board repealed OAR 581-002-0040 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Parent A’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-15)
16. OAR 581-002-0040(1). The State School Board repealed OAR 581-002-0040 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Parent A’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-16)
17. ORS 659.850 and OAR 581-021-0049(1). The State School Board repealed OAR 581-021-0049 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Complainant’s appeal on March 16, 2019, the rule applies to her appeal. [↑](#footnote-ref-17)
18. OAR 581-015-2030(1). [↑](#footnote-ref-18)
19. ORS 327.109. [↑](#footnote-ref-19)
20. *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-20)
21. United States Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 4. [↑](#footnote-ref-21)