January 6, 2021

 **BY EMAIL**

REDACTED

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North Bend School District 13

1913 Meade Street

North Bend, OR 97459

Re: Case #2018-WC-01

Dear REDATED and REDACTED,

This letter is the investigatory determination for an appeal of a complaint filed with North Bend School District 13 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, REDACTED (Complainant), the parent of a student attending school in the district (Student A), alleges that the district violated these state laws and rules on the basis that (1) Student A was subject to discrimination on the basis of race when participating in a district program, (2) that other students were subject to discrimination on the basis of race and national origin when participating in a district program, and (3) that she was subject to discriminatory retaliation for filing a complaint with the district alleging retaliation. When an allegation of discrimination is made against a school district or other educational agency, the Oregon Department of Education investigates the allegation to determine whether the school district or other educational agency may have violated ORS 659.850, OAR 581-021-0045, or OAR 581-021-0046.

**APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION**

Complainant alleges (1) that Student A was subject to discrimination on the basis of race when participating in a North Bend School District 13 athletic program, (2) that other students were subject to discrimination on the basis of race and national origin when participating a district athletic program, and (3) that she was subject to discriminatory retaliation for filing a complaint with the district alleging discrimination.

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.

**PROCEDURAL BACKGROUND**

Complainant filed with the Oregon Department of Education an appeal of a complaint heard by North Bend School District 13.

Complainant first filed a complaint with the district on February 23, 2018. The complaint specifically alleged that Student A was subject to discrimination on the basis of race when participating in a district athletic program. The district responded to Complainant later that day, describing the subject of her complaint as a “communication issue” and attempting to set up a meeting with her. Complainant responded to the district on February 26, 2018, disagreeing with the district’s description of her complaint and refusing to attend the meeting.

Complainant filed a separate complaint with the district on March 1, 2018. The complaint specifically alleged that Student A was subject to discrimination on the basis of race when participating in a district athletic program. The district acknowledged receiving the complaint on March 9, 2018. Complainant and the district met about the complaint on March 20, 2018.

Complainant filed another separate complaint with the district school board on April 3, 2018, alleging, in part, discrimination by the district’s athletic director (Administrator 1) and the district’s superintendent (Administrator 2).

Administrator 2 emailed Complainant on April 4, 2018, assuring her that the district was almost finished investigating her March 1st complaint. Complainant met with Administrator 1 and Administrator 2 on April 6, 2018. At the meeting, the district presented Complainant with a written report. The report did not analyze incidents described in the March 1st complaint as incidents involving racial harassment. The report merely acknowledged that certain students reported that racial harassment had occurred. The report found that the incidents failed to substantiate discrimination.

Complainant emailed the district school board on April 17, 2018, requesting to appeal the district’s April 6th written report. The school board emailed Complainant on April 30, 2018, to inform her that it would hold a hearing on her appeal on May 8, 2018. Several communications between complainant and the school board followed, all pertaining to the hearing’s procedures. Complainant complied with all requests for information. After the hearing, the school board emailed Complainant, informing her that it would need additional time to make a decision regarding her appeal. The district emailed Complainant again on May 15, 2018, informing her that it would not reach a decision regarding her appeal within the 10-day period prescribed by the district’s policy manual.

Complainant subsequently filed an appeal with the department. The department accepted Complainant’s appeal on June 1, 2018, on the basis that Complainant had not received a final decision from the district within 90 days of filing her initial complaint.[[8]](#footnote-8)

**PRELIMINARY FINDINGS OF FACT**

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

1. At times relevant to this appeal, Student A attended high school in North Bend School District 13.
2. Student A was a member of the North Bend High School Swim Team (NB Swim Team). Student A is African American and Caucasian. Student A identifies as Mixed Race.
3. At times relevant to this appeal, Complainant was an employee of the district.
4. At times relevant to this appeal, there was a coach for the NB Swim Team (Coach). Coach coached the NB Swim Team during the 2017-2018 school year. Coach did not coach the NB Swim Team after the 2017-2018 school year.
5. Coach also coached a local club swim team (LC Swim Team). The season for the LC Swim Team was held before the season for the NB Swim Team. Coach coached the LC Swim Team until December, 2017. Student A was a member of the LC Swim Team during 2017.
6. Prior to the 2017-2018 school year, in February, 2017, a district student came to school wearing a hat on which the confederate flag was prominently displayed. An African American student saw the hat and objected to it. The two students exchanged racial threats and insults, then engaged in a fist fight. Following the incident, Administrator 2 promptly banned displaying the confederate flag at the district’s middle and high schools.
7. After the district banned displaying the confederate flag at its middle and high schools, a demonstration was held off-school grounds, but during school hours, to protest the ban. Confederate flags were displayed at the protest. The district allowed students to attend the demonstration. Certain members of the LC Swim Team and NB Swim Team attended the demonstration. During an interview with the department, Student A stated that he was aware of the demonstration and that it made him uncomfortable. Student A stated that as a mixed-race individual, it disturbed him that a large number of his classmates decided to leave school to join the protest.
8. At times relevant to this appeal, there was a student who participated in both LC Swim Team and NB Swim Team (Student B). Student B is the son of Coach. During the 2017-2018 school year, Student sent multiple text messages to a group chat consisting of LC Swim Team members and NB Swim Team members. In the text messages, Student B bragged about being racist and a member of the Ku Klux Klan. Student B referred to President Barak Obama as a “light skinned nig trying to be black.” During an interview with the department, Student A stated that he was a recipient of Student B’s texts. Student A stated that as a mixed-race individual, he was offended by the text. As a mixed-race individual, Student A was particularly offended by the text referring to President Barak Obama as a “light skinned nig trying to be black.”
9. Student A did not want to file a district complaint against Student B because Student B is the son of Coach, Student A was concerned that Coach would retaliate against him for filing a complaint. Student A choose to unfollow Student B in the group chat. When Student B learned why Student A unfollowed him, Student B laughed at Student A and made remarks about “thick black women.”
10. During the 2017-2018 school year, during a swim meet, Student B directed members of the men’s NB Swim Team line up behind the swim blocks according to race and skin color, with the member with the lightest skin color at one end of the pool and the member with the darkest skin color at the other end of the pool.
11. During the 2017-2018 school year, several members of the NB Swim Team, including Student B, called an exchange student from Spain (Student C) a “Mexican.” Having his national origin deliberately misrepresented upset Student C.
12. On February 23, 2018, Complainant filed a complaint with Administrator 1. The complaint alleged that Student A was subject to discrimination on the basis of race when participating in the district’s swim program. The complaint specifically alleged that Student B had sent multiple racist text messages to members of the LC Swim Team and the NB Swim Team. The complaint also specifically alleged that Student B had members of the men’s NB Swim Team line up according to race and skin color. The complaint contained photo evidence of the text messages. Administrator 1 responded to Complainant later that day, describing the subject of her complaint as a “communication issue” and attempting to set up a meeting with her. On February 26, 2018, Complainant emailed a response to Administrator 1, disagreeing with Administrator 1’s description of her complaint and refusing to attend the meeting.
13. On March 1, 2018, Complainant filed a complaint with Administrator 2, again alleging that Student A was subject to discrimination on the basis of race when participating in the district’s swim program. The complaint again alleged that Student B sent multiple racist text messages and directed members of the men’s NB Swim Team to line up according to race and skin color. The complaint specifically stated that the incidents were affecting Student A’s ability to participate in and enjoy the program.
14. On March 2, 2018, Complainant’s supervisor (Administrator 3) asked to speak to Complainant at work. Administrator 3 told Complainant that Administrator 2 had called her, inquiring about Complainant. During the call, Administrator 2 asked Administrator 3 what kind of person Complainant was. Administrator 2 asked Administrator 3 what kind of employee Complainant was. Administrator 2 asked Administrator 3 if they knew about the March 1st complaint and, if they did, what they knew about it.
15. On March 5, 2018, Administrator 3 asked to speak to Complainant. Administrator 3 told Complainant that the district’s human resource officer (Administrator 4) wanted to meet with Complainant. Complainant believed that the meeting would be about her March 1st complaint.
16. On March 5, 2018, at the district’s “Swimmer’s Only Dinner,” Administrator 1, Administrator 2, and the principal of the district high school gave speeches praising Coach in front of the NB Swim Team. Student A was upset about the speeches. Student A felt the speeches were inappropriate because of the complaints filed against Coach. Student A texted his other parent about his displeasure.
17. On March 6, 2018, at a district athletics awards ceremony, Student A received the “Rebel Scum” award and Student C received the “Best Mexican” award.
18. On March 7, 2018, Administrator 3 called Complainant in the evening to inform Complainant that she would be meeting with Administrator 4 on March 9, 2018. Administrator 3 informed Complainant that she was allowed to have a union representative with her at the meeting. Complainant was confused by this statement because she believed that the meeting would be about her March 1st complaint. On March 8, 2018, Complainant called the president of her union to request that a union representative attend the March 9th meeting. The president informed Complainant that the meeting did not concern her March 1st complaint. The president informed Complainant that the meeting concerned a complaint that Coach had filed against Complainant, alleging that Complainant had subjected her to workplace harassment.
19. Complainant did not interact with Coach as an employee. Complainant only interacted with Coach as the parent of a student athlete. During an interview with the department, Complainant stated that as a parent, she was deliberately friendly and courteous toward Coach, fearing that if she acted otherwise, Coach would retaliate against Student A.
20. On March 9, 2018, Complainant met with Administrator 4. A union representative was present at the meeting. Administrator 4 told Complainant that the meeting was an “investigatory hearing into [her] as an employee” and that Coach had filed a complaint against Complainant, alleging that Complainant had harassed her and created a hostile work environment.
* Administrator 4 claimed that Complainant had submitted complaints while she was on a break at work. Administrator 4 told Complainant that by submitting complaints while she was on break, she had violated the union contract between the district and its employees. Administrator 4 told Complainant that breaks were paid time, and that the district had the right to dictate what employees did on paid time. Administrator 4 told Complainant that she should handle her personal business during the evening or on the weekends.
* Administrator 4 asked Complainant when she typed the complaint. Complainant answered that she typed it at home.
* Administrator 4 asked Complainant what device she used to type the complaint. Complainant answered that she used her home computer to type it.
* Administrator 4 asked Complainant what device she used to send the complaint. Complainant answered that she used her phone to send it.
* Administrator 4 asked Complainant what role she saw herself in when she was writing the complaint. Complainant answered that she saw herself as a parent when writing it.
* Administrator 4 asked Complainant why she refused to meet Administrator 1 in her February 26th email. Complainant answered that she disagreed with Administrator 1’s description of her complaint as a “communication issue,” that she believed that Administrator 1 was favorably biased toward Coach, and that Administrator 1 had been ignoring other parental complaints about Coach.
* Complainant agreed to meet with Administrator 1 and Administrator 4 about her March 1st complaint if the meeting would result in the March 1st complaint being investigated.
1. On March 11, 2018, Complainant emailed Administrator 4 to arrange a meeting with Administrator 4 and Administrator 1 about the March 1st complaint. A meeting was scheduled for March 20, 2018. On March 20, 2018, Complainant and Parent met with Administrator 4 and Administrator 1. Administrator 1 told Complainant and Parent that the district would investigate the March 1st complaint.
2. On April 3, 2018, Complainant filed a new complaint with the district school board, alleging, in part, discrimination by Administrator 1 and Administrator 2 for launching an investigation into her as an employee.
3. On April 4, 2018, Administrator 2 emailed Complainant, assuring her that the district was almost finished investigating the March 1st complaint.
4. On April 6, 2018, Complainant met with Administrator 1 and Administrator 2. At the meeting, the district presented Complainant with a written report. The report found that the incidents failed to substantiate discrimination. Complainant asked why the district initially had ignored her complaint. Administrator 2 admitted to “dropping the ball.” Complainant asked why the district had launched an investigation into her as an employee. Administrator 2 denied that the district did so and downplayed the March 9th meeting between Complainant and Administrator 4.
5. In order to reach the conclusion that the incidents at issue failed to substantiate discrimination, Administrator 1 interviewed 8 students and 6 parents of students. When interviewing the parents and students, Administrator 1 did not ask any questions about the specific allegations that Complainant had raised. Administrator 1 asked the students the following questions:
6. Give me your general impression about the swim season.
7. Tell me about the most positive thing you witnessed with the swim team this year.
8. Tell me about the most negative thing you witnessed with the swim team this year.
9. Tell me about the team chemistry this year compared to other swim teams or other sports you’ve been involved with at [North Bend High School].
10. Do you feel that you or another swimmer(s) was ever singled out by another swimmer or coach? If so, tell me about the incident or situation.
11. How do you feel about the leadership of your team this year.
12. Do you feel like every athlete is treated with respect by their teammates and coaches and give me some examples of the reasons for your answer.
13. On a scale of 1-10 with 1 being low and 10 being high, rate[] your overall experience on the swim team this year and tell me why you feel that way.

Administrator 1 asked the parents the following questions:

1. Please give me your impression of your child’s experience on the swim team this season.
2. Do you have any concerns about how your child was treated by their coaches or teammates this year?
3. Did your child report anything to you about how their teammates were treated this year? Is there anything else that I need to know about the swimming season?

The completed report did not analyze the incidents described in the March 1st complaint as incidents involving racial harassment. The report merely acknowledged that certain students included in their responses claims that racial harassment had occurred.

1. During the department’s investigation, the department interviewed, among others, Administrator 1 and Administrator 2.
* When asked about the incidents described in Complainant’s March 1st complaint, Administrator 1 pointed to the April 6th written report, finding that the incidents failed to substantiate discrimination.
* When asked about calling Administrator 3 after receiving the March 1st complaint, during which Administrator 2 asked what kind of person Complainant was, what kind of employee Complainant was, and what Administrator 3 knew about the March 1st complaint, Administrator 2 replied that he would not have made the call had he known that Administrator 3 was going to tell Complainant about it.
* When asked about responding to Coach’s complaint alleging workplace harassment, but ignoring Complainant’s complaint alleging discrimination, Administrator 2 responded that his decision was not racially motivated because he “grew up in Chicago and had black friends.”
* When asked about not responding to Complainant’s complaint with the same promptness as he had responded to the incident involving the confederate flag, when the district had banned displaying the confederate flag at the district’s middle and high schools, Administrator 2 acknowledged that he should have been more involved in the March 1st complaint alleging discrimination.
* When asked about the March 6th district athletics awards ceremony, Administrator 1 had no reply.
1. On April 17, 2018, Complainant emailed the district school board, requesting to appeal the district’s April 6th written report. On April 30, 2018, the school board emailed Complainant to inform her that it would hold a hearing on her appeal on May 8, 2018. After the hearing, the school board emailed Complainant, informing her that it would need additional time to make a decision regarding her appeal. On May 15, 2018, the district emailed Complainant again, informing her that it would not reach a decision regarding her appeal within the 10-day period prescribed by the district’s policy manual.
2. Complainant filed an appeal with the department. The department accepted Complainant’s appeal on June 1, 2018.

**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.[[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:

 (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.”[[11]](#footnote-11)

This investigatory determination addresses whether North Bend School District 13, on the basis of race and national origin, violated any of the standards set forth in ORS 659.850, OAR 581-021-0045(3), or OAR 581-021-0046 with respect to Student A.

**A. Whether Student A and Other Students Were Subject to Discrimination on the Basis of Race, Color, or National Origin**

The evidence substantiates that Student A and other members of the NB Swim Team were subject to discrimination on the basis of race, color, and national origin.

Student B sent multiple text messages to a group chat consisting of students who participated in North Bend School District 13’s swim program. In the text messages, Student B bragged about being racist and a member of the Ku Klux Klan. Student B referred to President Barak Obama as a “light skinned nig trying to be black.” Student A was offended by the texts, but did not want to file a complaint against Student B because Student B is the son of Coach. Student A was concerned that if he filed a complaint, Coach would retaliate against him. Student A choose to resolve the matter by simply unfollowing Student B in the group chat. When Student B learned why Student A unfollowed him, Student B laughed at Student A and made remarks about “thick black women.”

In another incident, Student B directed members of the men’s NB Swim Team to line up behind the swim blocks during a swim meet according to race and skin color, with the member with the lightest skin color at one end of the pool and the member with the darkest skin color at the other end of the pool.

Additionally, several members of the NB Swim Team, including Coach’s son, called Student C, an exchange student from Spain, a “Mexican.” This behavior upset Student C because it deliberately misrepresented his national origin.

The NB Swim Team’s discriminatory conduct culminated at a district athletics awards ceremony, where Student A received the “Rebel Scum” award and Student C received the “Best Mexican” award.

In consideration of the evidence, the department finds that Student A and other members of the NB Swim Team may have been subject to unreasonable treatment because of their race, color, and national origin.

**B. Whether Student A and Other Students were Denied an Aid, Benefit, or Service**

Under OAR 581-021-0045(3)(c), a school district may not deny a person an aid, benefit, or service on the basis of race, color, or national origin.

In this case, Complainant filed complaints alleging discrimination with North Bend School District 13 on multiple occasions. On February 23, 2018, Complainant filed a complaint with Administrator 1 alleging that Student A was subject to discrimination on the basis of race. The complaint specifically alleged that Student B had sent multiple racist text messages to members of the NB Swim Team. The complaint also specifically alleged that Student B directed members of the men’s NB Swim Team to line up according to race and skin color.

On March 1, 2018, Complainant filed a complaint with Administrator 2, again alleging that Student A was subject to discrimination. Once again, the complaint alleged that Student B sent multiple racist text messages and directed members of the men’s NB Swim Team to line up according to race and skin color. The complaint specifically stated that the incidents were affecting Student A’s ability to participate in and enjoy the district’s swim program.

On both occasions, Complainant filed a complaint under the district’s policy for complaints alleging discrimination.[[12]](#footnote-12) The question on appeal is whether the district denied Complainant the benefit of using that policy, thereby denying Complainant a benefit in violation of OAR 581-021-0045(3)(c).

When analyzing an educational institution’s duties with respect to complaints alleging discrimination, the Oregon Department of Education relies on the federal anti-discrimination law known as Title VI[[13]](#footnote-13) and the interpretation of Title VI by federal courts and the United States Department of Education’s Office for Civil Rights (Office for Civil Rights). Because Title VI has the same intent as ORS 659.850, OAR 581-021-0045(3), and OAR 581-021-0046, and because the text of ORS 659.850, OAR 581-021-0045(3), and OAR 581-021-0046 allow the statute and rules to be applied broadly, the interpretation of Title VI 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, OAR 581-021-0045(3), and OAR 581-021-0046.

The Office for Civil Rights consistently has found that an educational institution violates Title VI when (1) the institution has notice of discrimination occurring in one of its programs, during delivery of one of its services, or at or at one of its sponsored activities, (2) the discrimination creates a hostile environment, and (3) the institution fails to respond appropriately to the discriminatory conduct.[[14]](#footnote-14)

The Office for Civil Rights has found that a hostile environment exists when two students call a black student “the ‘N word’” and make other discriminatory statements about the black student’s race, such as “‘all black people are gay’” and “‘your skin is black why are your teeth so white?’”[[15]](#footnote-15) The office also has found that a hostile environment exists when students make comments about “perceived shared ancestry or ethnic characteristics.”[[16]](#footnote-16) The office has found that a hostile environment exists when students make discriminatory comments, such as frequent use of the words “‘nigga’” or “‘nigger,’” on social media sites.[[17]](#footnote-17) Finally, the office has found that making discriminatory statements in public, in front of other students, exacerbates the hostile environment created by the statements.[[18]](#footnote-18)

When determining whether an educational institution responded appropriately to discriminatory conduct, the Office for Civil Rights consistently finds that educational institutions must consider the impact that the conduct has on the individual who has been discriminated against. In one case, the office found that a school violated Title VI where two white students subjected a black student to racial harassment over the course of several weeks.[[19]](#footnote-19) The office acknowledged that after a complaint had been filed, the school implemented several anti-discrimination policies, including providing weekly training to sixth graders and monthly training to lower grade levels, circulating anti-discrimination information to teachers, requiring students, school board members, and volunteers to sign an anti-bullying pledge, and requiring school board members and volunteers to watch a PowerPoint presentation on bullying and harassment.[[20]](#footnote-20) However, the office still found that the school violated Title VI because it failed to take measures calculated to provide the black student with a learning environment free from racial harassment.[[21]](#footnote-21) The office described several instances of such failure, most notably by offering the black student an opportunity to change classrooms, but not requiring the students who harassed him to change classrooms.[[22]](#footnote-22) As explained by the office, making the black student decide whether to change classrooms compounded the student’s feelings of not being accepted and safe.[[23]](#footnote-23) In short, even though the school took *school-wide* measures to combat racial animus, it did not fulfill its duty under Title VI because it did not take *specific* measures to protect the recipient of that animus.

It should be noted that for purposes of determining liability, federal courts have a narrower view of what it means to fail to respond appropriately to discriminatory conduct than the Office for Civil Rights. When determining liability under Title VI, federal courts have held that an educational institution must demonstrate “deliberate indifference” toward known discriminatory conduct.[[24]](#footnote-24) In *Davis v. Monroe County Board of Education*, the United States Supreme Court described the “deliberate indifference” standard when applying it to a Title IX claim.[[25]](#footnote-25) The Supreme Court explained that to establish deliberate indifference, a plaintiff must show that an educational institution “had knowledge of the alleged misconduct and the power to correct it but nonetheless failed to do so.”[[26]](#footnote-26)

Some federal courts equate the deliberate indifference standard to intentional discrimination,[[27]](#footnote-27) and the Supreme Court’s description of the standard supports that application. This is an important corollary, because federal courts distinguish between unintentional discrimination and intentional discrimination for the purpose of awarding relief. Federal courts award only injunctive relief upon finding unintentional discrimination. They award injunctive and *compensatory* relief upon finding intentional discrimination.[[28]](#footnote-28)

For purposes of ORS 659.850, deliberate indifference would be an *intentional* act that unreasonably differentiates treatment on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability. Under state law, discrimination does not need to be *intentional*.[[29]](#footnote-29) Thus, for purposes of determining whether an educational institution responded appropriately to discriminatory conduct, the department, like the Office for Civil Rights, will find the institution deficient when it fails to consider the impact of the conduct on the individual who has been discriminated against. That said, the deliberate indifference standard remains an important tool for the department to use when analyzing the contours of discriminatory conduct, particularly for the purpose of deciding upon an appropriate remedy. If the department finds that an educational institution *intentionally* discriminated against an individual as opposed to *unintentionally* discriminated against an individual, the department is more likely to withhold payments from the State School Fund that otherwise would be paid to a school district or assess a daily fine.[[30]](#footnote-30)

In this case, the evidence substantiates that North Bend School District 13 had notice of discrimination occurring in one of its programs. As described above, Complainant filed complaints alleging discrimination on February 23, 2018, and March 1, 2018. Additionally, on March 20, 2018, Complainant met with Administrator 4 and Administrator 1 to discuss the March 1st complaint. On April 17, 2018, Complainant emailed the district school board, requesting to appeal the district’s decision regarding the March 1st complaint.

The evidence also substantiates that the discriminatory conduct at issue created a hostile environment. First, there is evidence that discriminatory statements were made about Student A’s race. Student B bragged about being racist and a member of the Ku Klux Klan. Student B referred to President Barak Obama as a “light skinned nig trying to be black.” Student B made remarks about “thick black women.” There also is evidence of nonverbal discriminatory conduct. During a swim meet, Student B directed members of the men’s NB Swim Team to line up behind the swim blocks according to race and skin color.

Second, there is evidence that discriminatory statements were made about perceived shared ancestry or ethnic characteristics. Several members of the NB Swim Team, including Student B, called Student C a “Mexican” throughout the school year.

There is evidence that discriminatory comments were made as part of a group chat, accessible by several members of the NB Swim Team. There also is evidence that discriminatory comments were made publicly, in front of other students. In fact, discriminatory labels were given to students at a district event, an athletics awards ceremony. At the ceremony, Student A received the “Rebel Scum” award and Student C received the “Best Mexican” award.

The evidence finally substantiates that the district failed to respond appropriately to the discriminatory conduct. After Complainant filed her February 23rd complaint, the district described the complaint as a “communication issue.” After Complainant filed her March 1st complaint, the district did not investigate the discriminatory conduct. Instead, the district held an “investigatory hearing into [Complainant] as an employee.” To pursue her March 1st complaint, Complainant had to email Administrator 4 to arrange meeting, a meeting that the district did not schedule until March 20, 2018.

When the district finally did investigate the March 1st complaint, it did not ask students or parents any questions about the specific allegations that Complainant had raised. Rather, the district asked generic questions soliciting both positive and negative feedback about the NB Swim Team. For example, the district asked students both of the following questions: “Tell me about the most positive thing you witnessed with the swim team this year” and “Tell me about the most negative thing you witnessed with the swim team this year.” The district asked parents about their “impressions” of the NB Swim Team, whether they had any “concerns” about the team, and whether their children had reported to them incidents involving their teammates. Furthermore, the district’s April 14th written report did not address racial harassment as part of its analysis. It merely acknowledged that certain students included in their responses claims that racial harassment had occurred.

Subsequent events support the finding that the district failed to respond appropriately. When pressed by Complainant about why her complaint was initially ignored, the district admitted that it had “dropped the ball.” When asked about responding to Coach’s complaint alleging workplace harassment, but ignoring Complainant’s complaint alleging discrimination, Administrator 2 responded that his decision was not racially motivated because he “grew up in Chicago and had black friends.” When the department asked the district about not responding to Complainant’s complaint with the same promptness as it had responded to the incident involving the confederate flag, when the district had banned displaying the confederate flag at the district’s middle and high schools, Administrator 2 acknowledged that he should have been more involved in the March 1st complaint alleging discrimination. When the department asked about the athletics awards ceremony, the district had no reply.

In short, the district did not consider the impact that the discriminatory conduct had on Student A and other members of the NB Swim Team. The district did not take measures calculated to provide these students with an environment free from racially harassing conduct. For purposes of ORS 659.850, the district failed to respond appropriately.

To understand the exact nature of the district’s failure, it is also important to consider whether the district acted with deliberate indifference. The district clearly had evidence of discriminatory conduct. The district clearly had the power to correct that discriminatory conduct. But the district did nothing. Initially, the district ignored the conduct, allowing a month to transpire between receiving the first complaint and launching an investigation. The district excused the conduct as a “communication issue” and, instead, allocated its resources toward investigating the workplace harassment complaint. In fact, the district seemingly endorsed the conduct, publicly praising Coach for her leadership at the district’s “Swimmer’s Only Dinner.” Worse, the district actively encouraged the conduct, publicly labeling Student A as “Rebel Scum” and Student C as the “Best Mexican” at an athletics award ceremony. In short, the district “had knowledge of the alleged misconduct and the power to correct it but nonetheless failed to do so.”[[31]](#footnote-31)

In consideration of the evidence, the department finds that the district may have denied Student A and other members of the NB Swim Team an aid, benefit, or service on the basis of race, color, or national origin.

**C. Whether North Bend School District 13 Retaliated Against Complainant for Filing Complaints Alleging Discrimination**

The final issue on appeal is whether North Bend School District 13 retaliated against Complainant for filing complaints alleging discrimination.

Complainant filed complaints alleging discrimination on February 23, 2018, and March 1, 2018. On March 9, 2018, Complainant met with Administrator 4, believing that the purpose of the meeting was to discuss her complaints. Instead, Administrator 4 told Complainant that the meeting was an “investigatory hearing into [her] as an employee” and that Coach had filed a complaint against Complainant, alleging workplace harassment. The question on appeal is whether the district – in launching a workplace harassment investigation against Complainant – was retaliating against Complainant for filing complaints alleging discrimination.

In analyzing the matter on appeal, the Oregon Department of Education once again interprets ORS 659.850, OAR 581-021-0045(3), and OAR 581-021-0046 in accordance with Title VI, federal regulations implementing Title VI, and guidance issued by the Office for Civil Rights.[[32]](#footnote-32)

Regulations implementing Title VI provide that

[n]o recipient [to whom federal financial assistance is extended] or other person shall intimidate, threaten, coerce, or discriminate against any individual . . . because [the individual] has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing [conducted pursuant to regulations implementing Title VI].[[33]](#footnote-33)

The regulations additionally disallow a specific circumstance that may lead to intimidation, threats, coercion, or discrimination:

The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of [regulations implementing Title VI], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.[[34]](#footnote-34)

To determine whether retaliation occurred, the Office for Civil Rights first determines whether a *prima facie* case for retaliation exists.[[35]](#footnote-35) To determine whether a *prima facie* case for retaliation exists, the office first determines whether the individual against whom the retaliation allegedly occurred engaged in an activity protected by Title VI or the regulations implementing Title VI.[[36]](#footnote-36) The office then determines whether the alleged retaliator knew that the individual engaged in the protected activity. The office next determines whether the alleged retaliator acted adversely against the individual.[[37]](#footnote-37) Finally, the office determines whether there is a causal link between the protected activity and the adverse action.[[38]](#footnote-38)

If the Office for Civil Rights determines that a *prima facie* case for retaliation exists, the office will question the alleged retaliator to learn whether there is a legitimate non-discriminatory reason for the adverse action.[[39]](#footnote-39) If the alleged retaliator provides a reason for the adverse action, the office determines whether the proffered reason is a pretext and the actual reason is discriminatory.[[40]](#footnote-40) When making this determination, a showing of pretext is sufficient to support an inference of retaliation.[[41]](#footnote-41)

In this case, the evidence substantiates that Complainant engaged in a protected activity – filing a complaint alleging discrimination – and that the district knew about activity. Complainant filed complaints alleging discrimination on February 23, 2018, and March 1, 2018. On or about March 2, 2018, Administrator 2 contacted Administrator 3 to inquire, in part, about the March 1st complaint, demonstrating that he had actual knowledge of the complaint.

The evidence also substantiates that the district acted adversely against Complainant. The day after Complainant filed her March 1st complaint, her supervisor informed her that the district was inquiring about what kind of person and employee she was. On March 5, 2018, Complainant’s supervisor informed her that Administrator 4, the district’s human resource officer, wanted to talk to her. On March 7, 2018, Complainant’s supervisor informed her that she would be meeting with the human resource officer on March 9, 2018, and that she was allowed to have a union representative with her at the meeting. Upon contacting her union, Complainant learned that the upcoming meeting did not concern her March 1st complaint, but a subsequent complaint filed by Coach alleging workplace harassment against her. On March 9, 2018, Complainant met with Administrator 4, who told her that the meeting was an “investigatory hearing into [her] as an employee.” In consideration of the totality of evidence, the department finds the district’s actions constitute nothing less than a threat to discipline Complainant as an employee.[[42]](#footnote-42)

The evidence finally substantiates that there is a causal link between the protected activity – the filing of a complaint alleging discrimination – and the adverse action – to discipline Complainant as an employee. Several pieces of evidence establish this causal link. First, the district launched the workplace harassment investigation subsequent to and immediately after Complainant filed her March 1st complaint. There is a strong corollary between the two.

Second, the workplace harassment complaint was nothing more than a pretext for disciplining Complainant for filing the March 1st complaint. Complainant did not interact with Coach as an employee. Complainant only interacted with Coach as the parent of a student athlete. Further, at the March 9th meeting, the district did not address how Complainant had harassed Coach beyond filing the March 1st complaint. And the meeting did not concern workplace harassment so much as it concerned whether Complainant violated her union contract by filing the complaint. At the meeting, Administrator 4 claimed that Complainant had submitted complaints while she was on a break at work. Administrator 4 told Complainant that by submitting complaints while she was on break, she had violated the union contract between the district and its employees. Adminstrator 4 told Complainant that breaks were paid time, and that the district had the right to dictate what employees did on paid time. Administrator 4 then asked Complainant when she typed the complaint, to which Complainant replied that she typed it at home. Administrator 4 then asked Complainant what device she used to type the complaint, to which Complainant replied that she used her home computer. Administrator 4 then asked Complainant what device she used to send the complaint, to which Complainant replied that she used her phone. Administrator 4 finally asked Complainant what role she saw herself in when she was writing the complaint, to which Complainant replied that she saw herself as a parent. In consideration of these facts, the department finds that the filing of the complaint alleging discrimination not only led to the March 9th meeting, but likely was the exclusive cause for it.

Having found a *prima facie* case for retaliation, the department questioned the district to learn whether there was a legitimate, non-discriminatory reason for threatening disciplinary action against Complainant. Unlike at the March 9th meeting, the district did not proffer as a reason that Complainant engaged in workplace harassment or violated the terms of her union contract. Instead, when asked why the district responded to Coach’s complaint alleging workplace harassment, but ignored Complainant’s complaint alleging discrimination, Administrator 2 responded that his decision was not racially motivated because he “grew up in Chicago and had black friends.” The department finds that the district’s response does not provide a legitimate, non-discriminatory reason to threaten disciplinary action.

Notably, the district also violated the only act ancillary to discriminatory retaliation specifically prohibited in federal regulations: revealing the identity of a complainant.[[43]](#footnote-43) On or about March 2, 2018, Administrator 2 contacted Complainant’s supervisor to ask what kind of person Complainant was, what kind of employee she was, whether Administrator 3 knew about the March 1st complaint and, if so, what they knew about it. The department questioned the district about this incident. In response, Administrator 2 replied that he would not have made the call had he known that Administrator 3 was going to tell Complainant about it. The department finds that the district’s response does not explain why the district revealed the identity of the complainant to Administrator 3, but, instead, indicates that the district assumed that this violation of federal regulations would not be discovered.

In consideration of the evidence, the department finds that the district may have retaliated against Complainant for filing complaints alleging discrimination.

**PRELIMINARY CONCLUSION**

In conclusion, the Oregon Department of Education finds that North Bend School District 13 may have violated ORS 659.850 and OAR 581-021-0045(3) on the basis that:

* + There is sufficient evidence to find Student A and other students were subject to discrimination on the basis of race, color, and national origin by both the district and members of the NB Swim Team;
	+ There is sufficient evidence to find the district subjected Student A and Complainant to disparate treatment on the basis of race by not responding appropriately to that disparate treatment; and
	+ There is sufficient evidence to find Complainant was subject to discriminatory retaliation.

Accordingly, the department encourages the district to reach an agreement with Complainant through conciliation. If the district cannot reach an agreement with Complainant through conciliation within 30 days, the department will schedule a contested case hearing on the matter in accordance with OAR 581-021-0049, as in effect on March 21, 2019.

If Complainant or the district wishes to use the department as a resource during conciliation, Complainant or the district may contact the department.[[44]](#footnote-44)

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Specialist

Office of the Director

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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 June 1, 2018, 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* OAR 581-021-0049(1), as in effect on February 26, 2019 (providing that an appeal may be filed with the Oregon Department of Education when a school district fails to resolve a complaint within 90 days). [↑](#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. OAR 581-021-0046(1). [↑](#footnote-ref-11)
12. On the date of this order, this district policy may be accessed at: <https://drive.google.com/file/d/0B-DFUcqRpFcucXdGX0dkeG82ZUE/view>. [↑](#footnote-ref-12)
13. *See* Civil Rights Act of 1964, Public Law No. 88-352, Title VI, §§ 601-604 (codified at 42 U.S.C. §2000 *et seq.*). [↑](#footnote-ref-13)
14. *See* United States Department of Education Office for Civil Rights, *Lake Oswego School District 7J, OCR Reference Nos. 1071054 and 10181090*, 1 (July 30, 2018) (explaining that the office was investigating whether the school district “permitted a hostile environment based on race and national origin . . . to exist at Lake Oswego High School by failing to respond appropriately to reports of harassment” and whether the school district “discriminated against an 8th grade student at Lake Oswego Junior High School and other African American students based on race . . . when it did not respond appropriately to complaints of race-based harassment”). *See also* United States Department of Education Office for Civil Rights, *OCR Complaint #04-16-1010*, 2 (January 3, 2018) (explaining that “[a] recipient [of federal financial assistance] has subjected an individual to different treatment on the basis of race if it has . . . accepted, tolerated, encouraged, or failed to correct a hostile environment about which it has actual or constructive notice”); United States Department of Education Office for Civil Rights, *OCR Complaint #04-16-1607*, 2 (September 19, 2018) (explaining that “[t]he existence of a racially hostile environment that is created, encouraged, accepted, tolerated, or left uncorrected by a recipient [of federal financial assistance] also constitutes different treatment on the basis of race in violation of Title VI”). [↑](#footnote-ref-14)
15. Office for Civil Rights, *OCR Complaint #04-16-1010*, at 3-4, 7. [↑](#footnote-ref-15)
16. Office for Civil Rights, *Lake Oswego School District 7J, OCR Reference Nos. 1071054 and 10181090*, at 1-2. [↑](#footnote-ref-16)
17. Office for Civil Rights, *OCR Complaint #04-16-1607*, at 4, 6; *see also* Office for Civil Rights, *Lake Oswego School District 7J, OCR Reference Nos. 1071054 and 10181090*, at 2 (noting that discriminatory comments were made on a Facebook post). [↑](#footnote-ref-17)
18. Office for Civil Rights, *OCR Complaint #04-16-1010*, at 7. [↑](#footnote-ref-18)
19. *Id.* at 9. [↑](#footnote-ref-19)
20. *Id.* at 8. [↑](#footnote-ref-20)
21. *Id.* at 9. [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. *Id.* [↑](#footnote-ref-23)
24. *See Zeno v. Pine Plains Century School District*, 702 F.3d 655, 664-65 (2d Cir. 2012) (explaining that racial harassment of an individual may create liability if a plaintiff establishes “(1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge, and (4) deliberate indifference”); *Bryant v. Independent School District No. I-38 of Garvin County, Oklahoma*, 334 F.3d 928, 934 (10th Cir. 2003) (holding that “deliberate indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit”); *Monteiro v. Temple Union High School District*, 158 F.3d 1022, 1033 (9th Cir. 1998) (finding that a school district violates Title VI if there is a racially hostile environment, the district had notice of the discriminatory conduct, and the district failed to respond adequately to the conduct). [↑](#footnote-ref-24)
25. Although the United States Supreme Court has not had occasion to define “deliberate indifference” for Title VI, the department adopts the Supreme Court’s definition of “deliberate indifference” for Title IX on grounds that Congress based Title IX on Title VI and, therefore, an analysis of what constitutes sexual discrimination under Title IX directly informs an analysis of what constitutes racial discrimination under Title VI. *See Bryant*, 526 US at 934 (explaining that a holding defining intentional discrimination for Title IX provides a basis for finding intentional discrimination under Title VI). [↑](#footnote-ref-25)
26. *Blunt v. Lower Merion School District*, 767 F.3d 247, 273 (3rd Cir. 2014), *citing Davis v. Monroe County Board of Education*, 526 U.S. 629, 645-49 (1999). [↑](#footnote-ref-26)
27. *See Davis*, 526 U.S. at 642 (holding that the standard for intentional discrimination under Title IX is deliberate indifference); *see also* *Blunt*, 767 F.3d at 317 (holding that the standard for intentional discrimination under Title VI is deliberate indifference). [↑](#footnote-ref-27)
28. *See Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 597, 607 (1983) (holding that private individuals bringing a suit under Title VI may not recover compensatory damages unless they provide evidence substantiating that the defendant engaged in intentional discrimination); *see also Alexander v. Sandoval*, 532 U.S. 275, 282-83 (2001) (reaffirming that private individuals bringing a suit under Title VI may not recover compensatory damages unless they provide evidence substantiating intentional discrimination). [↑](#footnote-ref-28)
29. *See* ORS 659.850 (specifying that discrimination is an intentional or unintentional act). [↑](#footnote-ref-29)
30. *See* OAR 581-021-0049(3)(a) to (d) (specifying appropriate remedies for the department to impose against a school district). [↑](#footnote-ref-30)
31. Blunt, 767 F.3d at 273, *citing Davis*, 526 U.S. at 645-49. [↑](#footnote-ref-31)
32. In appeals alleging discrimination, the Oregon Department of Education may analyze a complaint alleging retaliation under both ORS 659.850, as a continuation of the discriminatory conduct that is the subject of the appeal, and ORS 659.852, as an act of retaliation in violation of state law. For purposes of this appeal, the department is analyzing the alleged retaliation under ORS 659.850. [↑](#footnote-ref-32)
33. 34 C.F.R. §100.7(e). *See also* United States Department of Education Office for Civil Rights, *Dear Colleague Letter*, 1-2 (April 24, 2013), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.pdf> (stating that “[a]lthough a significant portion of complaints filed with OCR in recent years have included retaliation claims, OCR has never before issued public guidance on this important issue,” that “once a student, parent, teacher, coach, or other individual complains formally or informally to a school about a potential civil rights violation or participates in an OCR investigation or proceeding, the recipient [of federal funds] is prohibited from retaliating . . . because of the individual’s complaint or participation,” and that “OCR will . . . vigorously enforce [the] prohibition against retaliation”). [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. United States Department of Education Office for Civil Rights, *Hillsborough County School District Investigation Letter Complaint Number 04-15-1023*, 3 (May 15, 2015). *See also Davis v. Halpern*, 768 F.Supp. 968, 985 (E.D.N.Y. 1991) (setting forth criteria for *prima facie* case for retaliation under Title VI). [↑](#footnote-ref-35)
36. Office for Civil Rights, *Investigation Letter Complaint Number 04-15-1023* at 3. [↑](#footnote-ref-36)
37. *Id.* [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. Office for Civil Rights, *Investigation Letter Complaint Number 04-15-1023* at 3. *See also Davis*, 768 F.Supp. at 985 (explaining the duty of an investigating agency to inquire about the reason for an adverse action). [↑](#footnote-ref-39)
40. Office for Civil Rights, *Investigation Letter Complaint Number 04-15-1023* at 3. [↑](#footnote-ref-40)
41. *Davis*, 768 F.Supp. at 985. [↑](#footnote-ref-41)
42. *See* 34 C.F.R. §100.7(e) (specifying that a “threat” is an adverse action for purposes of establishing a *prima facie* case of retaliation under Title VI). [↑](#footnote-ref-42)
43. *See* 34 C.F.R. §100.7(e) (specifying that “[t]he identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of [regulations implementing Title VI]”). [↑](#footnote-ref-43)
44. The department’s Title IV expert is Winston Cornwall. He may be reached at: Winston.Cornwall@ode.state.or.us. [↑](#footnote-ref-44)