

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Brookings-Harbor
School District # 17B

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FINDINGS OF FACT,
CONCLUSIONS
AND FINAL ORDER (A)
Case Reference No. 1013001

I. BACKGROUND INFORMATION

On August 28, 2013, the Oregon Department of Education (Department), received a letter of appeal from a parent of a student alleging sex discrimination, harassment, intimidation and retaliation, against students affiliated with the Brookings-Harbor School District girls' high school basketball program.¹

The Department must respond to written appeals, following exhaustion of local grievance procedures or 90 days, whichever comes first, that allege violations of ORS 659.850, prohibiting discrimination in public schools financed in whole or in part by monies appropriated by the Oregon Legislature (Oregon Administrative Rule 581-021-0049, Hearings and Appeals). The Department determined more than 90 days elapsed between the complainant's initial request to the school and the Department's receipt of the appeal.

At the time this complaint was received, the Brookings-Harbor School District (District) had initiated an investigation of these and similar complaints following a June 19, 2013 school board meeting. At that meeting a number of current and former students and their families spoke about concerns they had with the girls' basketball program. Following receipt of the appeal on August 28, 2013, the Department continued to receive information from other parents and students in the District of similar allegations.

On September 12, 2013, the Department began an investigation of the complainants' allegations. On October 30, 2013, November 20, 2013, and December 20, 2013, the Department's Civil Rights Education Specialist (Department specialist) met with the District's superintendent. During these meetings the Department specialist discussed with the District superintendent the importance of transparency with parents, and the need for consistent written rules and policies. The Department specialist also discussed specific facts related to the complaint, the specific complainants, while suggesting that team practices should be open and no one parent should have more access to school facilities than another.

In a letter dated November 13, 2013, the Department formally notified the District of this appeal noting that the complaint raised possible violations of ORS 659.850 and OAR 581-021-0045, specifically discrimination, harassment, intimidation and retaliation against students and parents in the Brookings-Harbor School District 17B (District). In this appeal, it was alleged that 1) District personnel engaged in emotional and verbal harassment against female students affiliated with the girls' basketball program, and 2) school employees engaged in intimidation and retaliation against female students and parents.

On December 20, 2013, the District provided a timely *Response* to the Department. The District provided many of the documents requested in the November 13, 2013 letter, copies of which were provided to the parent. The Department specialist reviewed these documents.

¹ The complaint totaled 20 pages. The Department received additional information from complainant.

Given the different perceptions of what events had transpired from the complainants, school and District's viewpoints, the Department conducted on-site interviews to resolve the allegations in this appeal. On December 31, 2013, the Department sent a letter to current and past members of the girls' basketball team and their families inviting their input. The Department's specialist conducted on-site interviews with all who responded between January 23, and January 26, 2014. Interviews were conducted with several current and former players and their families, as well as two school board members whose children also play on the team.

On April 24, 2014, District Counsel provided a five-page narrative response to the allegations.

On April 29 through May 2, 2014, the Department's specialist conducted on-site interviews with District staff including the District superintendent, legal counsel, high school principal, athletic director, the current girls' high school basketball coach, former girls' basketball assistant coach, one current and one former school board member. The Department's specialist reviewed and considered all of these documents along with the interview transcript/notes.

II. ALLEGATIONS AND CONCLUSIONS

The Department determined that (sex) discrimination *may* exist in the Brookings-Harbor School District. Complainants and the District will attempt conciliation to reach agreement regarding the allegations of District personnel engaging in emotional and verbal harassment along with retaliation against students affiliated with the girls' basketball program. The conciliation will address incidents, and the failure of the District to properly investigate or address allegations raised by parents and students.

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 106.31(b)(6) and OAR 581-021-0049. The parents' allegations and the Department's conclusions are set out below. These conclusions are based on the Findings of Fact in Section III and Section V, and the Discussion in Section IV and Section VI.

Issue No. 1

Whether District personnel engaged in emotional and verbal harassment against female students affiliated with the girls' basketball program.

III. FINDINGS OF FACT

- 1) Brookings-Harbor High School girls' basketball program has a varsity and junior varsity team. The program has a varsity/head coach, and junior varsity/assistant coach. The same coaches for the girls' basketball also coach the girls' summer basketball program. The summer basketball program is not a school-sponsored event, but utilizes school facilities and makes use of many of the same players.
- 2) Parent A2 filed a complaint with the Department on August 28, 2013.
- 3) During prior years' beginning season player/parent meetings, coaches announced the practices were closed. This policy reportedly arose from parents prone to sideline coaching, and giving conflicting advice and direction to students during practice. (This policy was changed for the 2013-2014 school year. Parents were instead instructed to sit in the bleachers far enough away from students so that parents could not become involved in coaching student athletes.)

- 4) Student A1 started at Brookings-Harbor High School as a freshman in the 2010-2011 school year. Student A1 played on the girls' basketball team all four years of high school into Student A1's senior year in the 2013-2014 school year.
- 5) Parents A2 and A3 report witnessing objectionable conduct and comments by both coaches prior to the-2012-2013 school year, but felt those issues were handled by speaking with the coaches directly.
- 6) Student A1 recalled the assistant coach referring to Student I1 as "Raccoon" in reference to Student I1 wearing heavy eye makeup.
- 7) During a tournament in California, Student A1 reported that the team was kept up late watching game film. During the review of film the head coach yelled at team members, bringing many to tears. The head coach reportedly told Student A1 that he expected her not to "...go running to your Mommy about this." The following day, Parent A2 observed that Student A1 has red puffy eyes from crying. Upon returning home, Student A1 was very emotional regarding the time spent at the tournament. Parent A2 became concerned about Student A1, and arranged for Student A1 to speak with the school counselor upon the team's return to school. Student A1 reported to the school counselor that this conduct by the head coach was ruining her confidence in her ability to play basketball.
- 8) After a game in December 2012, Parent A2 reports that Student A1 was brought to tears by comments made by the assistant coach about Student A1's play. The head coach's wife consoled Student A1.
- 9) In January 2013, the assistant coach began to make more comments to Student A1 regarding her play. Student A1 and Parent A2 report that the assistant coach, in response to Student A1 and others crying, made comments such as, "It's time for you to grow up," "I'm just going to cry about it because I'm a baby," and "Nothing's ever happened to you to make you cry." Parent A2 reports the assistant coach yelled to female players during a game, "Put on your big girls pants!"
- 10) On 2/26/2013, the assistant coach observed a cut or cold sore on Student A1's lip. The assistant coach asked Student A1 whether she got "that from [her] boyfriend," or words to that effect. Student A1 and another team member understood this comment to insinuate Student A1 had contracted an STD from her boyfriend. Student A1 was embarrassed by this comment. The assistant coach did not apologize for this comment.
- 11) On 2/26/2013, Student A1 had leg blisters from fleabites suffered at home. Parent A2 treated the bites with anti-itch cream. During a basketball game, Student A1 complained to the head coach that the fleabites itched. The assistant coach retrieved a spray from the school medical kit. Student A1 developed blistering around the site of the bites the next day. On approximately 3/18/2013, Parents A2 and A3 took Student A1 to a dermatologist. The doctor asked what the assistant coach sprayed on Student A1's leg. When asked the assistant coach was unable to identify the specific substance sprayed on Student A1, saying the container was discarded after use on Student A1. Student A1 asked the assistant coach about what spray was used. The assistant coach allegedly responded by saying, "Whatever I did didn't cause that."
- 12) Parent A2 asked the athletic director about completing an accident report regarding the assistant coach spraying an as yet identified substance on Student A1. The athletic director told Parent A2 that the principal would need to be consulted regarding the incident.

- 13) During interviews conducted by the Department specialist January 23 through January 26, 2014, parents and students raised a variety of concerns regarding the Brookings-Harbor girls' basketball program.
- a) Many parents raised concerns regarding team practices occurring in a closed gym. Coaches denied entry to parents and other students during the girl's basketball team practices. Parents also raised concerns that there was not an adult female present during practices, locker room meetings, or away games.
 - b) Student E1 was dating a male student who was on the boy's basketball team. That male student was diagnosed with cancer. As a symbol of support, the boy's basketball team shaved their heads. Student E1 reports that the head coach commented to her, "You don't love you boyfriend enough to shave your head," or words to that effect. Student E1 and Student A1 report that this comment made Student E1 visibly upset to the point that Student E1 was brought to tears. Students E1 and A1 both report that the head coach did not apologize for this comment.
 - c) Student E1 quit the team. Student A1 attributed student E1's quitting the team to comments, such as this, from the head coach directed toward Student E1.
 - d) Interviews conducted with parents and students January 23 through January 26, revealed multiple reports of the head coach having thrown a chair in a team meeting room during halftime at a game. Players present for this display reported being scared and crying. The head coach told at least one player to "shut up" when her crying became more audible.
 - e) Student A1 reported that assistant coach made sarcastic or joking comments such as, referring to his spouse's effort to make shirts for a fundraiser, who is Asian, as a "Chinese sweat shop," and commenting about a Hispanic student, that the students should be running faster because that's what the students needed to do to get across the border.
 - f) Student C1 reported that the assistant coach often yelled at her. When the assistant coach saw Student C1 crying, he would say such things as, "Why are you crying?" and tell her that her crying was "bringing everyone down." Student C1 reported being yelled at in front of other team members. Student C1 knew she needed improvement, but noted that the assistant coach would mock her mistakes, saying such things as "you pulled a [Student C1]" when another player made a similar mistake. Student C1, noting that she was not a starting player but one who wanted to contribute and be played more, noted a time when she was allowed to play for a few seconds but was taken out. This very brief window of play caused her to cry from disappointment. Student C1 reported that the assistant coach responded to her crying by telling her, "If you weren't crying I'd have played you again." Student C1 explained that this pattern of comments and behavior by the assistant coach led other teammates to laugh at her when the assistant coach made such comments. Student C1 was on the junior varsity team. Student C1 reported an incident when she passed by the assistant coach and he commented, "What's that smell?" Other teammates responded by saying, "Eww." Student C1 ran from the gym crying. When she returned she reports that the assistant coach was still laughing. When asked why she didn't report these incidents, Student C1 explained that the coaches instructed teammates to bring problems or issues to them, but she did not feel comfortable talking to the coaches about these issues for fear of making her situation worse. Student C1 also notes that the assistant coach purchased a great number of items for the team and felt as though her complaint would engender resentment from other teammates. Members of the varsity team reported to Student C1, that assistant coach would make jokes about

Student C1 during varsity practice. Student C1 also reported that the assistant coach made disparaging remarks such as mocking comments regarding Student D1's physical size and aggressiveness. Student D1 also reported that the assistant coach referred to her as "Brett Favre" due to her size, and that the head coach commented that he did not want her playing defense on him because of her size. Student C1 reported that Student I1 felt singled out, but refused to come forward for fear of becoming similarly treated by the assistant coach.

- g) Parent C2 reported that the coaches told him that if Student C1 quit the basketball team, Student C1 could not play another sport. Parent C2 reportedly asked the coaches to cut Student C1 from the team instead to alleviate this issue. Student C1 reported that after Parent C2 spoke with the coaches, the yelling intensified. Student C1 considered quitting the team, but was under the impression that quitting would disqualify Student C1 from playing another sport Student C1 enjoyed. Parent C2 was not aware of the degree to which the Student C1 was affected by the coaches' conduct in the basketball program. One of Student C1's teachers stopped Parent C2 in a grocery store, and shared with him Student C1's journal entry in class. Student C1 wrote about a recent experience at a game and the frustration it caused. In part Student C1 wrote, "He yelled at me for crying after we won a game; well guess what (EXPLETIVE DELETED), I wasn't apart [sic] of the EXPLETIVE DELETED GAME! EXPLETIVE DELETED [assistant coach]." The entry goes on to include a drawing of "I (heart) basketball" where the (heart) is a picture of a basketball torn in half, indicating heartbreak or a breakup with basketball, followed by, "or is it just the coaches! EXPLETIVE DELETED [assistant coach] EXPLETIVE DELETED [assistant] coach." The entry is dated 2/15/2013.
- h) Parent D2 noted that before observing issues with Student D1's experience on the basketball team, he considered himself and the assistant coach "best of friends." Parent D2 spoke with the head coach and former athletic director regarding concerns about treatment of players on the girls' basketball team. Parent D2 felt that complaining about the program led to retaliation against students. Parent D2 explained that Student D1 wanted to play basketball and participate on the track team. Before complaining to the former athletic director, Student D1 was told that participation on two teams was permissible. After Parent D2 complained about the assistant coach making humiliating comments toward players, Student D1 was told she could not participate on two sports. This was after Student D1 allegedly purchased a uniform for the second sport. Parent D2 described himself as having not understood the impact the coaches had on Student D1. Only after speaking with Parent J2, who mentioned that Student J1 was coming home each night crying after basketball practice did Parent D2 realize that Student D1's experience was not unique. Parent D2 called this his "Aha moment," where he realized that other players had the same experience as his daughter.
- i) Student K1 reported that the assistant coach was very tough on her, but that she considered this to be something that she needed to hear. Student K1 described the coaches as very passionate and that they would be very upset with the team after a game if they lost. Student K1 agreed that some teammates became upset with this conduct, but that she did not think that a coach was there to be a friend. Student K1 reported that the head coach would intentionally anger her in an attempt to get her to play angry. Student D1 also reported this conduct. Student K1 reported that the head coach would "give [her] crap about boys." Student further reported that the head coach made comments to Student K1 to the effect that had she not been flirting with her boyfriend the team would not have lost. Student D1 also reported this conduct on the part of the head coach. Student K1 also noted that the head coach was especially hard on Student M2. Student K1 went on to play basketball in college. Student K1 reported having a very negative experience with her

college coach, and one of her high school friends telling her, "Now you know how I felt with [the head coach]." Student K1 also reported the head coach making a disparaging comment about a student whose boyfriend had cancer.

- j) Parent B4 had three children participate in the basketball program. Parent B4 described students B1, B2 and B3 improving greatly under the tutelage of the assistant coach during grade school. Student B1, B2 and B3 are special education students on Individual Education Plans (IEPs) with Section 504 (equal opportunity) provisions. Once Student B1 entered high school, Parent B4 observed Student B1 coming home from practice crying. Parent B4 reports concerning interactions with the assistant coach, such as after a loss the assistant coach asking Student B1, "Did you give 100%?" Student B1 responded while crying, "I guess not." The assistant coach then said, "That's what I thought," and walked away. Parent B4 began to notice that Student B2 could not understand all of the words used by the assistant coach, and that Student B2 would become confused due to Student B1's learning disabilities. Parent B4 reports having spoke with the assistant coach regarding Student B1's disabilities, and asking him to "just give her some slack."
- k) Student L1 requested to be interviewed by the Department specialist. Student L1 graduated the year prior, played all four years of high school on the basketball team, and described herself as a supporter of both coaches. Student L1 is now in the military. Student L1 agreed that the assistant coach engaged in teasing players. Student L1 reported that she could recall an instance where such teasing so upset her sister, Student L2, that Student L2 called her, where she is now living out of state, to talk about the incident. Student L1 reported becoming upset over hearing Student L2's experience. She reports that having gone through basic training, she now thinks that her experience with the basketball program wasn't as bad as she may have thought while still a student in high school. Student L1 also witnessed emotional outbursts and yelling by coaches. Student L1 reported that a friend who had not yet graduated was then having problems with the coaches.
- l) Students D1 and A1 report that the head coach did not allow players to wear makeup, dye their hair, or wear headbands to keep their hair out of their faces. Students report the head coach making comments about opposing players who did wear such things as "punks" or girls with heavy makeup as "Raccoon Eyes."
- m) Parent G2 identified himself as a personal friend and supporter of the assistant coach. Parent G2 was also on the panel that interviewed and hired the head coach. Parent G2 also identified at least two specific types of racially insensitive comments the assistant coach made to, and in the presence of players. Parent G2 related one comment made toward members of the girls' basketball team who were of Asian descent, "Ok, keep your eyes open," while using his fingers to pull at the corners of his eyes in an effort to mock the eye shape of Asians. Parent G2 also related that the assistant coach would say such things as "Mexicans should stick to soccer."
- n) Parent N3 reports there were times when the coaches really yelled at the players. It was Parent N3's opinion getting yelled at was part of participation in competitive sports. Parent N3 reports the assistant coach referring to Student C1 as "Baby Giraffe" because she had little body control.
- o) A number of players on the team pointed out that the assistant coach called several girls by nicknames. Players variously objected to the names chosen for them and other players as disrespectful, or demeaning of their play or their femininity. Such names included, "Big Guy," "Chester," "Hannah Montana," "Raccoon," "Wild Life Safari" and "Baby Giraffe."

- p) A number of players expressed exasperation with coach's comments, nicknames, yelling, and overall behavior, as discouraging them from playing, or taking a more active role in the basketball program.
- 14) The Department specialist conducted interviews with District staff and board members, April 29 through May 2, 2014.
- a) The head coach, when asked about chair-throwing incident, characterized his action as him having kicked a chair propping a door open out of frustration with the door being open, rather than anger over the team's performance. During the same interview he reported that he did so as a type of "play acting" to get player's attention. The head coach reported engaging in this behavior 1 to 2 times per season.

IV. ANALYSIS

1) *Emotional and verbal harassment.*

Title IX states that, "...no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular... program or activity operated by a recipient which receives Federal financial assistance."² Oregon further prohibits discrimination based on gender in educational settings.³ While sexual harassment is generally understood to be unwelcome conduct of a sexual nature,⁴ it can also include gender based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, or sex-stereotyping.⁵

The Brookings-Harbor School District has implemented a policy to address harassment.⁶ That policy recognizes that harassment can have a discriminatory effect on a student, and has the potential of "creating a hostile environment including interfering with the psychological well being of the student."⁷ The label a complainant uses to describe conduct they find objectionable, does not determine how the school is obligated to respond.⁸ While true in all cases, it is especially relevant when the child has a disability, and harassment may be disability harassment under Section 504 and Title II of the Americans with Disabilities Act of 1990.⁹ Discrimination in Oregon schools includes acts that differentiate based on "age, disability, national origin, race, color, marital status, religion, sex, or sexual orientation."¹⁰ Such discrimination is prohibited in Oregon public schools.¹¹ Federal law requires recipients of federal school funding to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints.¹²

² 34 C.F.R. § 106.31(a) (1997)

³ ORS 659.850(1)

⁴ Office for Civil Rights Revised Sexual Harassment Guidance, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁵ *Id.* at 3. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)

⁶ Brookings-Harbor School District 17B, Harassment/Intimidation/Bullying/Cyberbullying/Teen Dating Violence—Student** (adopted 8/22/2012)

⁷ *Id.*

⁸ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁹ *Id.*

¹⁰ OAR 581-021-0045(1)(a)

¹¹ ORS 659.850(2)

¹² 34 CFR § 106.8(b) (1997)

Boards of Oregon public schools are required to adopt policies that prohibit discrimination.¹³ When the harassment occurs at the hands of school district employees, it must be determined whether that harassment occurred during the provision of aid, benefit, or services to students. When that harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of sex, the District is responsible for the discriminatory conduct.¹⁴ The District must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment.¹⁵

The relationship between the harasser, where the harasser is a school district employee, is more likely to limit or deny a student's equal access to educational benefits even when the harassing conduct is a single incident.¹⁶ Determining whether conduct creates a hostile environment is evaluated objectively¹⁷ and subjectively¹⁸. A hostile environment can be created even if the harassment has not targeted an individual complainant.¹⁹ Furthermore, the perspective of the victim of harassment should also be considered.²⁰

One of the complainants in this matter, Parent A2, and other parents and students in the Brookings-Harbor School District, have alleged that male coaches in the girls high school basketball program have engaged in emotional and verbal harassment. Parents A2 and A3 have raised a number of issues with regard to Student A1, including a pattern of comments toward Student A1 that had the effect of harming Student A1's confidence. Parent A2 alleged that many past team members quit because of similar emotional and verbal harassment.

The context, location, and setting of the harassment can all be factors affecting its intensity. Harassment that occurs in an isolated area, confined space, or secluded area, can have a greater impact on the victim, than the same conduct occurring in a more public space.²¹ The complainant and other parents in the District made District officials aware of their concerns regarding closed practices. Students reported incidents of concern to parents that occurred during practice, yet coaches established at a meeting at the start of the season that parents were not allowed at practice. Parents, who raised concerns regarding closed practices, were told that it provided less distraction from parents prone to sideline coach their children. Parents nonetheless had concerns in light of their children's experiences. In addition to closed practices, Parents also voiced concerns about conduct on away games, some of which involved overnight stays. Conduct occurring away from home, or in a vehicle, could exacerbate the seriousness of the harassment.²²

During the Department's investigation, the head coach agreed that he did throw things during the basketball season, but did so as means of "play acting" to encourage team members to play with more intensity. Members of the team reported that they feared these displays, and that they and others cried in the face of this behavior. Students reported that when they cried after being yelled at, they would be mocked or ridiculed for crying, or additionally yelled at and told to cease crying. Brookings-Harbor School

¹³ ORS 326.051(1)(e)

¹⁴ *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 653 (1999)

¹⁵ 28 CFR 107(a), 34 CFR 104.7(a), and 34 CFR 106.8(a)

¹⁶ *Id.*

¹⁷ *Davis*, at 650

¹⁸ *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993)

¹⁹ *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (1989)

²⁰ *Ellison v. Brady*, 924 F.2d 872, 878 (1991)

²¹ *Barrett v. Omaha Nat'l Bank*, 584 F. Supp 22, 30 (1983)

²² *Id.* at 30.

District has adopted a policy against harassment, intimidation, bullying, cyber bullying, and teen dating violence.²³ That policy states that harassment, intimidation or bullying is defined as "...any act that substantially interferes with a student's educational benefits, opportunities or performance" which creates "...a hostile environment including interfering with the psychological well being of the student."²⁴

Subjectively, based on the Department's interviews with parents and students, several students felt the environment was abusive. During the Department's investigation, many players and their families were interviewed who identified themselves as supporters of the coaches. The majority of these families agreed that the coaches did yell at female players. Some students, such as Student K1, did not feel that comments made to her or about her were hurtful. However, other students objectively viewed the same comments at creating a hostile environment when spoken about another female student. Objectively, the alleged harassment has to be judged from the "perspective of a reasonable person in the [victim's] position, considering all the circumstances."²⁵ Part of the purpose of an investigation is to determine all of the facts and circumstances once harassment is alleged. Determining the existence of harassment includes assessing the "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."²⁶ The perspective of the victim is very important in assessing the alleged harassment.²⁷ While parents attempted to provide accurate reports of the experience of their children, the Department's interviews produced a greater level of detail of the conduct complainants alleged. This illustrates the value of a prompt, thorough complaint resolutions process.²⁸

The District did not engage its Title IX coordinator in the process of handling these complaints. The District's Title IX coordinator is female, where all of the staff members to whom parents had access to lodge complaints, were male. In *Ellison*, the court applied a "reasonable woman" standard noting, "that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." Parents complained that female students were coming home crying because of the manner in which male coaches spoke to them, and felt humiliated by the conduct of their male coach's sarcasm. The District may have seen these complaints differently had a female administrator, or the District's Title IX coordinator, reviewed them. The U.S. Department of Education's Office for Civil Rights (OCR) recommends that "when considering whether an actionable hostile environment has been created in an educational setting, the determining body should consider 'the age of the victims; the frequency, duration, repetition, location, severity, and scope of the acts of harassment; [and] the nature of context of the incidents,' in essence using a "reasonable student" standard."²⁹ In this case, parents complained of male coaches yelling at female students, conduct that intensified in the face of female students crying, nicknames that players did not opt into, and comments to, and about female players' makeup. Such conduct and comments by male staff toward female players could be the basis of harassment based on sex-stereotyping.³⁰ The Department specialist heard repeatedly from female students that their parents had concerns about such conduct in the context of a closed gym, locker rooms, and traveling for away games. Parents and students discussed with the District and the Department specialist,

²³ Brookings-Harbor School District 17B, Harassment/Intimidation/Bullying/Cyberbullying/Teen Dating Violence—Student** (adpted 8/22/2012)

²⁴ *Id.*

²⁵ *Onacle v. Sundowner Offshore Servs*, 523 U.S. 75, 81 (1998)

²⁶ *Onacle*, at 82.

²⁷ *Ellison*, at 878.

²⁸ 34 CFR 106.8(b)

²⁹ *Patricia v. Berkeley Unified Sch. Dist.*, 830 F. Supp 1288, 1294 (1993), quoting OCR guidance.

³⁰ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

the effect on students witnessing a coach throwing items, and yelling at students in such surroundings. Parent B4 also attempted to discuss with the coaching staff that Student B1's learning disability likely limited Student B1's ability to understand directions. Parent B4 became concerned that Students B1, B2, and B3 were mocked or singled out because of their disability. Such situations highlight the potential for the District to misidentify potential disability harassment.³¹

Districts are required to adopt written procedures for the prompt resolution of complaints of discrimination.³² After exhausting local school district grievance procedures, an individual may appeal the concern to the State Superintendent of Public Instruction.³³ The State Superintendent of Public Instruction will then review the local school district process and findings of fact to determine whether proper procedures were followed and what if any action should be taken.³⁴ When a complaint has been appealed, it may result in the State Superintendent of Public Instruction determining if a local district is in compliance with the provisions of ORS 659.850.³⁵ If the district has been found not to be in compliance with ORS 659.850, the State Superintendent of Public Instruction shall issue an order requiring compliance in 30 days.³⁶

Issue No. 2

Whether school employees engaged in intimidation and retaliation against female students and parents.

V. FINDINGS OF FACT

1. Interviews conducted with parents and students between January 23 through January 26, revealed many identical reports of varsity and assistant coaches telling players to "Put on their big girl pants!" or similar language toward players who exhibited emotional responses to the varsity and assistant coaches' yelling.
2. Regarding the incident of the head coach having thrown a chair during halftime and yelling at students, mentioned above, Parent A2 called the high school and spoke with the principal regarding this issue. Parent A2 was told that such behavior was not acceptable and that it would be dealt with.
3. During interviews conducted January 23 through January 26, other parents report calling the school about this incident. These parents spoke with either the athletic director or principal about their concerns.
4. Interviews conducted with parents and students between January 23 and January 26, found most parents and students reporting a perception of reduced playing time for students after any incident where a parent or student complained to District administration about the behavior of coaches.
5. The high school principal reports having spoken with head coach about this incident with the chair. The high school principal reports that because head coach was not a licensed staff member he gave the head coach a verbal warning, noting that further such conduct could be grounds for dismissal.

³¹ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

³² OAR 581-021-0049(1)

³³ *Id.*

³⁴ *Id.*

³⁵ OAR 581-021-0049(2)(b)

³⁶ OAR 581-021-0049(3)

6. After Parent D2 met with the former athletic director and head coach, Student D1 was pulled out of class. Student D1 estimates that she was pulled out of her first period English class when the former athletic director called the classroom she was in. She was called into a meeting in the athletic director's office, with the athletic director and head coach, and told that she was causing trouble by going home and talking about her experience on the team. Student D1 reported that the former athletic director and head coach told her that her emotional responses to her experiences on the team were the result of her "being too dramatic." Student D1 estimated that this meeting lasted approximately 20 minutes. Student D1 reported being so upset by this meeting, that she immediately called Parent D2, while crying, and asked to be picked up from school. Parent D2 recalled being so upset by this incident that Parent D2's spouse had to intervene to stop Parent D2's reaction. Student D1 explained that after this incident, she stopped reporting incidents to Parent D2 because of the stress her experiences caused at home.
7. Student D1 illustrated another incident where, at an away game, Student D1 pulled the assistant coach and head coach aside, and asked, "I don't know what I did to make you guys not like me?" In response the assistant coach allegedly told her, "I know you are like your uncle, you can take it." The head coach allegedly told Student D1 that she was "so dramatic," insinuating that her reaction was the problem, not their behavior.
8. Parent B4 reports having spoken with school administration regarding Parent B4's children playing volleyball. Parent B4 did not feel as though those concerns were taken seriously. Parent B4 also spoke with the athletic director about the basketball program but noticed that Parent B1's children received less playing time in games after Parent B1 complained to school administration about either coach. Parent B1 resolved to try to ignore issues, because having students on Individual Education Plans (IEPs) with Section 504 (equal opportunity) provisions, sports greatly helped Students B1, B2 and B3 stay excited about school, where they otherwise often felt discouraged academically because of their disabilities.
9. On 1/11/2013, Parent F2 met with the principal to discuss concerns regarding disparaging comments made by the assistant coach toward Student F1 and teammates, concerns regarding closed practices, and concerns about possible retaliation from the assistant coach if news of the meeting were disclosed.
10. After Parent F2 went in to speak with the principal the varsity and junior head coaches pulled Student A1 and F1 aside during practice and asked how both students felt about their playing time. Student A1 reports feeling singled out and made to feel awkward as this occurred in full view of other teammates.
11. On 1/14/2013, the head coach pulled aside Student A1 and Student F1 during practice. Head coach asked both students whether they like being on the team. This interaction upsets Student A1, who asks Parent A2 whether Parent A2 had complained to school administration about either coach's behavior. Parent A2 finds out that Parent F2 recently met with school administration about the assistant coach's behavior. Both students report that on the same date the assistant coach stops speaking to the varsity team members.
12. On 1/16/2013, Student A1 talks with the head coach regarding her concerns about comments made to her by the assistant coach, which she felt were diminishing her confidence.
13. On 1/20/2013, head coach calls Parent F2 regarding Parent F2's meeting with the high school

principal. Parent F2 was disappointed that the high school principal had not concealed her identity as requested.

14. On 1/21/2013, the head coach called Parent F2 to discuss concerns Parent F2 raised to the principal. Parent F2 calls the principal afterward to inquire why the principal requested the head coach call. Parent F2 reports that the principal suggested that the two talk and resolve their differences.
15. On 1/22/2013, Parent F2 met with the high school principal and athletic director regarding concerns about bullying and retribution against team members.
16. On 1/27/2013, Parent F2 met with the head coach and athletic director. During this meeting Parent F2 discussed Student F1's unhappiness stemming from participation in the basketball program due to comments and behavior by the assistant coach. Parent F2 also discussed with them the assistant coach's pattern of subbing players in and out of the game, which caused a great deal of frustration for Student F1. Parent F2 also raised concerns about the assistant coach using sarcasm in coaching and the effect it had on players. Parent F2 alleged that coaches made demeaning and dismissive comments to Student F1.
17. On 1/28/2013, Parent A3 talked with the head coach about concerns regarding rude comments made by the assistant coach, and Student A1 being removed from games for small mistakes. Parent A3 leaves this meeting with the understanding that the head coach will address these issues with the assistant coach.
18. On 2/13/2013, Parents A2 and A3 meet with the athletic director regarding the conduct of coaches. The high school principal was also present at this meeting. Parents A2 and A3 voiced their concerns about the assistant coach bullying and mocking Student A1. Parents A2 and A3 covered their concerns about the coaches, comments, and behavior, in this approximately half hour meeting, including reviewing a timeline of events that Parent A2 kept regarding Student A1's experiences. During this meeting, the principal and athletic director informed Parents A2 and A3 that the assistant coach had previously been spoken to about his comments directed toward members of the team.
19. During interviews conducted January 23 through January 26, 2014, Parent A2 reported that on 2/20/2013, two members of Student A1's team approached her and reported that they will not allow their parents to complain about either coach; for fear that they will be treated in the same manner as Student A1.
20. On 3/12/2013, Parent A2 called the athletic director to schedule a meeting to discuss the comment made to Student A1 about the sore on her mouth.
21. On 3/13/2013, Parent A2 met with the athletic director regarding complaints the family brought to the attention of school administration. The athletic director informed Parent A2 that the assistant coach was made aware of Parent A2's complaint's and had been spoken to regarding comments made about a sore on Student A1's lip, which Parent A2 reported the day prior.
22. On 4/3/2013, Parent A2 left a message for the athletic director requesting an update regarding the complaint concerning the assistant coach's comment to Student A1 about a sore on her lip, and asking for an accident report for the incident involving the spray applied by the assistant coach to Student A1's legs. Parent A2 did not receive a response to this inquiry.

23. On 4/5/2013, Parent F2, met with the District superintendent and business manager regarding concerns over financial management of fundraising proceeds in the hands of the head coach and assistant coach. Parent F2 raised concerns that head coach and assistant coach did not provide clarity with regard to how funds raised by student fundraising events would be used. Specifically Parent F2 noted that checks written toward the fundraiser were not deposited into school District controlled accounts, but rather were deposited into an out of state account. The superintendent and business manager asked Parent F2 to provide additional checks from other parents to corroborate this assertion. Parent A2 provided a cancelled check from the same fundraiser that had also been deposited into an out of state account. Parent F2 provided Parent A2's cancelled check to the superintendent.
24. On 4/11/2013, Parent A2 met with the athletic director to inquire about filing an accident report with regard to the assistant coach spraying an as yet to be identified substance on Student A1. Parent A2 also inquired whether the assistant coach was disciplined for his comments regarding the sore on Student A1's lip.
25. On 4/24/2013, Parents A2 and A3 filed a complaint with the District alleging sexual harassment, harassment, intimidation, and bullying.
26. On 4/23/2103, Parent A2 left a message for the athletic director asking for a status update with regard to Parent A2's complaint about the comment made by the assistant coach, and filing an accident report regarding the spray applied to Student A1's legs. Parent A2 did not receive a response.
27. On 4/24/2013, Parent A2 delivered a letter to the District office requesting a meeting with the superintendent. Parent mailed a copy of the same letter to the high school principal.
28. On 4/29/2013, Parent A2 spoke with the superintendent about scheduling a meeting. Parent A2 and Parent A3 met with the superintendent and principal later that same day. During this meeting Parent A2 raised several issues, including conduct by the head coach, and specific comments and behavior by the assistant coach. During this meeting Parent A2 produced a picture of the team and pointed out that a large number of students pictured therein had quit the team, and asserted that they quit because of similar bullying from the coaches that Student A1 also experienced. Parent A2 raised the issue that the spray used on Student A1's legs had yet to be identified. During this meeting the principal asked Parent A3, who is a teacher and coach in the District, about the contents of the medical kits used by most coaches. Parent A3 responded that sprays are not a customary part of the medical kits, and voiced the primary concern that the assistant coach could not identify what was sprayed on the legs of Student A1.
29. In May of 2013, the head coach, assistant coach, athletic director, and principal, met regarding whether to renew the assistant coach's contract in light of complaints from parents. Those assembled agreed to renew the assistant coach's contract.
30. On 6/7/2013, Parent F2 submitted a complaint, on the District complaint form, asking the District "To address the inappropriate behavior of [the assistant coach] & [head coach] as coaches of the BHHS Girls Basketball team."
31. On 6/19/2013, the Brookings-Harbor School Board held a regularly scheduled meeting. During this meeting several current and former students and parents spoke regarding their concerns regarding the girls basketball program at Brookings-Harbor High School. Those who spoke were asked to fill out a

card with their name and brief summary of what they wanted to speak about. The District collected nine public comment cards with the names and contact information of those who spoke at the meeting regarding concerns about the girls' basketball program. During this meeting Parent F2 read letters written by Parent A2 and Parent B4. Student D1 read a letter regarding negative experiences while playing on the team. Student J1, Student C1, and Student B1 also spoke about their experiences. Parent D2 spoke regarding the impact the coaches had on Student D1. Parent E2 also spoke to the Board regarding the experiences of his daughter, Student E1.

32. Parent D2 spoke during the June 19, 2013 school board meeting. After the meeting he was told about the District complaint form. Parent D2 reported to the Department specialist that he had never seen the form before.
33. Following this Board meeting the board chair and business manager contacted the Oregon School Boards Association (OSBA) and determined the appropriate response to the allegations raised was an independent investigation. The District contacted its insurer, Property and Casualty Coverage for Education (PACE), to conduct this investigation.
34. Parents A2 and A3, provided a two page letter to board members citing, "metal abuse and bullying," listing meetings Student A1 had with coaches, meetings Parents A2 and A3 had with coaches and District administration to address concerns, "bullying and mocking of [Student A1]," potential violations of OSAA rules, the as yet identified spray the assistant coach applied to Student A1, the comment made by the assistant coach to Student A1 regarding the sore on her lip, and other concerns.
35. On 7/1/2013, the superintendent sent a letter to those who spoke or presented information at the 6/19/2013 school board meeting. That letter read in relevant part, "The concerns raised at the school board meeting appear to fall with [sic] Brookings-Harbor School District policy JFCF-AR, which is titled Harassment/Intimidation/Bullying/Cyberbullying/Tee Dating Violence Complaint Procedures – Student." That same letter goes on to ask, "To comply with JFCF-AR and to enable to the District to conduct a thorough investigation, please submit your concerns to the District in writing."
36. On 8/8/2013, Students P1 and D1 jointly submitted a complaint, on the District complaint form, asking for a complete investigation of the athletic and school program, and policies. Student P1 attached a letter with the form that included details of the head coach "disrespecting, degrading, and badgering," members of the high school girls' basketball team. Student D1 attached a letter with the form that included concerns such as, enduring ridicule, bullying and sarcastic comments from coaches, and retaliation if students or parents complained to District administration.
37. On 8/9/2013, the superintendent sent a letter to Students P1 and D1 confirming receipt of their complaints and the involvement of an investigator from PACE.
38. On 10/7/2013, the athletic director produced a letter confirming that the assistant coach voluntarily resigned his position. That letter noted that two families complained that the assistant coach used sarcasm, and noted that the District investigated and cleared the assistant coach of any wrongdoing.
39. On October 30, 2013, November 20, 2013, and December 20, 2013, the Department specialist met with the District superintendent. Among things discussed during this meeting was the former assistant coach had keys to the school gym which he and his children used, and he appeared to continue to coach students. During this meeting, the Department's specialist also stressed the importance of transparency to include open practices, clear communication with parents, and having team rules in

writing. Following these meetings, the District superintendent agreed to relieve the now former, assistant coach, of his keys to the building, such that he would have the same access to the building and gymnasium as any other parent.

40. Sometime in December of 2013, the board received the result of the PACE investigation initiated after the 6/19/2013 board meeting.

41. On 12/20/2013, the last school day before the District Winter Recess, Parent A2 received a home phone message from the superintendent asking if Parent A2 would please return his call at the District office. At the time Parent A2 returned home and retrieved this message, the District office was closed.

a) On 12/26/2013, Parent A2 returned the superintendent's call and spoke with the District business manager. He informed Parent A2 that the superintendent would like to set up a meeting about girls' basketball. Parent A2 would be out of town until 12/31/2013. The business manager said he would relay the message and the superintendent would call Parent A2 after school began again in January.

b) On 12/31/2013 Parent A2 returned home and had another phone message from the superintendent asking Parent A2 to please call him at the District office. Parent A2 returned the superintendent's call. The superintendent asked if Student A1 and Parent A2 could come in and speak to him at the District office. The superintendent expressed a desire to speak with Student A1 about basketball, and wanted Parent A2 present as the student's parent. Parent A2 expressed the preference not to meet with the superintendent at that time regarding about basketball, and if anything needed addressing the family would go through the proper channels. Parent A2 expressed appreciation that the superintendent called.

42. On 1/1/2014 Student A1 returned home from basketball practice and reported to Parent A2 that the former assistant coach was at practice that day. Student A1 stated the former assistant coach was seated beside the current assistant coach. Initially, the former assistant coach only engaged the current assistant coach in conversation. However, once the team began to run "Gold" (the press), the former assistant coach started explaining the press to the current assistant coach in more detail.

a) As the team was running the press, Student A1 made a mistake. The varsity coach stopped the drill and corrected Student A1. Student A1 said that when the varsity coach was walking away the former assistant coach said, "Well duh!"

b) The team started scrimmaging. The varsity coach told the girl taking stats to add 2 points to the wrong team. At that point, the former assistant coach said to the varsity coach, "You mean the blue team?" The head coach jokingly said, "Yeah, stop yelling at me." Student A1 said the former assistant coach then looked right at her and said, "Sorry, I forgot you're sensitive."

c) Student A1 also told Parent A2 that she felt like the climate of practice changed when the former assistant coach arrived. Student A1 said she was uncomfortable, and she was afraid to try because she thought she would make mistakes because the former assistant coach was at practice. Student A1 reported hesitating to make plays or even have the ball in her hands because she was afraid to make errors. Student A1 also said she did not understand why having the former assistant coach at practice would be beneficial to anyone.

d) On 1/1/2014, after practice, Student A1 sent the head coach a text message saying that having

the former assistant coach at practice helping the current assistant coach made her uncomfortable. The head coach responded to Student A1 that the former assistant coach was not there helping to coach, or assisting the current assistant coach. He was there "...as a Dad." The head coach stated he did appreciate Student A1 communicating and thanked her.

- e) Student A1 responded that day to the head coach, "Okay. But honestly even if he is just there as a parent, it made me uncomfortable. The head coach responded promptly, "Okay. Thanks for letting me know how you feel."
- f) On 1/6/2014, the first day of school after the District Winter Recess, Parents A2 and A3 filed a formal complaint under ORS 659.850 regarding the aforementioned events at the 1/1/2014 practice. The complaint was sent to Board member O1, the principal and the athletic director. The Department specialist received a copy of the complaint.
- g) In their 1/6/2014 complaint, Student A1, Parents A2 and A3, requested that all correspondence and responses be in writing, either in the form of emails or letters. The family stated it did not feel comfortable meeting in person.
- h) On 1/8/2014, Parent A3 was called over to the District office and handed a letter by the athletic director. The letter, addressed to both parents stated, "I would like to meet with Student A1 in my office about the formal complaint tomorrow morning, Thursday, January 9th. The purpose of the meeting is to confirm whether the facts alleged in the email are true. If one or both of you would like to sit in on the meeting tomorrow, that would be fine."
- i) Parent A3 hand wrote his response to this letter stating, "Received 1/8, 2:05PM, but not agreeing to meeting at this time."
- j) On 1/9/2014, Parent A2 received a morning text message from Student A1 indicating that the athletic director had called Student A1 to the office. When Parent A2 arrived at the high school, Student A1 and all but one of the girl's varsity basketball teammates were assembled outside the office.
- k) As Student A1 and Parent A2 entered, another girl basketball player exited the athletic director's office and patted Student A1 on the back.
- l) Parent A2 informed the athletic director she would be tape recording the meeting. The athletic director also informed the family he would be also turn on his tape recorder. The athletic director read the 1/6/2014 complaint email aloud. He confirmed the information stated in this email with Student A1. He also asked Student A1 to explain in her own words what else happened.
- m) Student A1 confirmed the details in the e-mail. Student A1 stated she actually wrote down the incidents that occurred, from which Parent A2 wrote the e-mail to the District board chair, high school principal and athletic director.
- n) Student A1 reported hearing some for the conversation between the former and current assistant coaches. Student A1 heard the former assistant coach explaining the (full court) press and "correcting student A1's mistakes" in his explanations to the current assistant coach.

- o) When the head coach stopped the drill and corrected Student A1, the former assisted coach stared at Student A1 and said, "Well duh!" Student A1 stated this comment, along with the former assistant coach's attendance, made her uncomfortable. Student A1 previously informed her head coach and parents; at this meeting she informed the athletic director about this discomfort.
- p) The athletic director said to Student A1, "I want you to feel comfortable. This is the first time I have gotten to talk to you about this. This is a safe place, and you are not alone. You are not on an island; I am on your side."
- q) The athletic director thanked Parent A2 and Student A1. He then stated to them, "He (the former assistant coach) will not be at practice in that capacity again."
- r) Student A1 had to walk past several teammates as she exited the room where the meeting with the athletic director was held. Student A1 believed some of the teammates were glaring at Student A1 as they knew she was the cause of them being interviewed by the athletic director.
- s) Student A1 reported the former assistant coach did not return to any of the team's remaining practices following the report of this incident.

43. Between April 29 and May 2, 2014, the Department's specialist, conducted interviews with District staff and board members.

- a) On 4/24/2014, the District provided a written response to the Department's investigations. In this response the District identified the spray used on Student A1's leg as Nitortan, a germicide topical spray used in sports medicine.
- b) The athletic director identified the spray used on Student A1 as Nitrotan, during the interview with the Department specialist.
- c) The head coach, responding to questions regarding parent perception of student playing time, explained that he played a zone game utilizing short rotations. Players were rotated in and out of the game based on a predetermined rotation that was taxing and difficult to track. The head coach explained this helped the team overcome the strengths of other teams with speed.
- d) During the on-site interviews conducted by the Department's specialist, the Department confirmed that despite two prior conversations, the former assistant coach retained keys to District buildings and access to the gymnasium. The assistant coach himself informed the Department specialist that he possessed keys to the athletic facilities and used those keys to access the gymnasium at will.
- e) The assistant coach offered an explanation concerning Parent F2's inquiry about checks from fundraising activities deposited in accounts other than those controlled by the District. The assistant coach explained that due to delays in the District processing reimbursements, and the volume of purchases related to the girls' basketball team's expenses, the business manager had approved the assistant coach and head coach to maintain a separate bank account for these funds. The assistant coach explained that he maintained detailed records of the management of these funds.

- f) The principal explained that the District accident report form is generally utilized for injuries to students that occur during school hours, and provided the example of a student bleeding. The principal explained that the accident report form was not an appropriate tool for the incident with Student A1's leg and the spray applied by the assistant coach.

VI. ANALYSIS

1) *Intimidation and Retaliation*

Title IX generally prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX.³⁷ The Brookings-Harbor School District policy on harassment, defines "retaliation" as "harassment, intimidation, or bullying, teen dating violence and acts of cyberbullying toward a person in response to a student for actually or apparently reporting or participating in the investigation of harassment, intimidation, bullying, teen dating violence and acts of cyber bullying or retaliation."³⁸ Schools should take steps to prevent further harassment of anyone who reports harassment.³⁹ One way that a school can help prevent retaliation is to conceal the identity of the complainant when the complainant so requests.

During the Department's interviews with parents and students, student's playing time was perceived as arbitrary, and something that could be used to punish a student. The amount of time a player receives in any particular game is likely influenced by an incalculable number of variables that a coach has to decide on the fly. The Department notes that numerous students and players perceived that the amount of time they were given decreased relative to their family's complaints to the District. Furthermore, the head coach's explanation given to the Department specialist regarding game strategy was not provided to families that complained about their child's game play.

During the Department's interviews with District staff, explanations for complaints were provided which had not been provided to parents or students when they initially complained to the District. Many of these issues were perceived as retaliatory by parents and students. Parent A2 and A3 repeatedly contacted the District asking about the spray used by the assistant coach on Student A1. Identifying the spray arose as an issue after a dermatologist inquired about it to aid the diagnosis and treatment Student A1. As late as the 6/19/2013, meeting, Parent A2 had not learned what was sprayed on Student A1. Prior to the Department's interviews the District's legal counsel, in its written response to the investigation dated 4/24/2014, identified the spray as Nirtotan. During the Department specialist's interview with on staff 4/29/2014, the athletic director also identified the spray as Nitrotan. Despite Parent A2 repeatedly asking to file an accident report regarding the use of the spray and the resulting reaction Student A1 had to the spray, Parent A2 was never told that such incidents were not the proper use of the accident report, in the same way that this was explained to the Department specialist.

Parent F2 met with the superintendent regarding several issues related to Student F1's experiences and treatment on the girls' basketball team. One of the issues raised was the coach's handling of money from fundraising. Parent F2 noted that a check from a fundraiser was not deposited into a school District account. Parent F2 brought this to the attention of the superintendent. The superintendent

³⁷ 34 CFR 106.8(b), 34 CFR 106.71

³⁸ Brookings-Harbor School District 17B, Harassment/Intimidation/Bullying/Cyberbullying/Teen Dating Violence—Student** (adpted 8/22/2012)

³⁹ 34 CFR 106.8(b), 34 CFR 107.71, 34 CFR 100.7(e)

asked F2 for additional evidence in the form of other similarly deposited checks. Parent F2 produced a similarly deposited check from Parent A2 to the superintendent. The District did not provide Parent F2 with an explanation for their concerns about the management of proceeds from fundraisers. During the Department's interview with the assistant coach, it was reported that the District business manager provided the assistant coach with permission to maintain an account separate from the District. Neither the assistant coach nor the superintendent could explain why, if the business manager was present at the meeting where Parent F2 raised concerns about the disposition and management of these funds, this explanation was not provided to Parent F2 at that time, or any time after.

Parent A2 also alleged that other team members' complaints were effectively silenced for fear that they too would become the subject of similar comments by the coaches. Parents perceived the District did not take their complaints seriously and were not investigating complaints. On 10/7/2013, the athletic director produced a letter regarding the assistant coach's resignation that read in relevant part, "There have been complaints from two separate families regarding topics the use [sic] of sarcasm. These complaints were investigated by the District and [assistant coach] was cleared of any wrong doing." As illustrated above, the District had received complaints from more than two families. Furthermore, during the Department's interview with Board Member O1, it learned that the District did not obtain the result of the PACE investigation until December.

Following reports of potential misconduct by the assistant coach and head coach, Students A1 and F1 were pulled aside during practice and asked by the assistant coach and head coach about their feelings concerning the basketball program. Parents A2, A3, and F2, found this objectionable and expected the District to handle their complaints without members on the team being treated differently after the report. Student A1 also illustrated such comments as the head coach telling her not to "...go running to your Mommy" about his conduct. Student D1 reported being similarly pulled out of class into a meeting with the head coach and talked to about Parent D2's complaint to the athletic director.

All of these examples display an uneven response to parent complaints, a lack of information provided to parents, and the alleged harassers' knowledge of the identity of the complainants. These factors led parents and students to report that they experienced retaliation, and that the District would ignore their complaints.

2) Failure of district to investigate and take action to stop the harassment

Whether a district can effectively respond to allegations of harassment depends on if and when a district has knowledge of the incidents.⁴⁰ Information regarding the alleged harassment must reach a school official with authority to end the harassment.⁴¹ Educational institutions are required to designate a responsible employee to conduct investigations into allegations of harassment and coordinate communication with the complainant.⁴² The Brookings-Harbor School District has adopted a policy specifying that, "administrative personnel will take reports and conduct prompt investigation of any report of an act of harassment, intimidation or bullying..."⁴³ Districts must consider the nature of the complaint received and whether the behavior or incident complained of has

⁴⁰ Gebser v. Lago Vista Indep. Sch. Dist., 524 US 274, 283 (1998)

⁴¹ *Id.*

⁴² 34 CFR 106.8

⁴³ Brookings-Harbor School District 17B, Harassment/Intimidation/Bullying/Cyberbullying/Teen Dating Violence—Student** (adopted 8/22/2012)

the potential to amount to harassment and thereby trigger the application of a specific policy. For example, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the misconduct also results in discriminatory harassment.⁴⁴

The district employee to whom the behavior is reported must consider whether the information reported implicated Title IX, and by extension the district's policy and procedure. "The label used to describe an incident does not determine how a school is obligated to respond."⁴⁵ A school has notice of harassment once a responsible employee becomes aware of harassment, or in the course of their duties should have known about the harassment.⁴⁶ Reports of harassment should trigger an investigation to allow the district to discover additional incidents.⁴⁷ A substantiated report of harassment may suggest a pattern of conduct relevant to other students and should trigger an inquiry as to whether other students have been similarly harassed.⁴⁸ A school may also have an obligation to respond to harassment occurring off school grounds, and outside of the school's education programs, if the student or his/her family files a complaint with the school.⁴⁹ If a district has actual knowledge of harassment and has not remedied the harassment, such failure could evidence deliberate indifference on the part of the district. Deliberate indifference requires that the recipient of a report of harassment failed to remedy the violation by refusing to take action.⁵⁰ Where district employees make the decision not to remedy the situation described by the complainant by choosing not to bring the district into compliance⁵¹, or follows a custom or policy of not responding or remedying complaints, the district acts with deliberate indifference to the discrimination.⁵²

Once reported, a district must apply a procedure adopted to satisfy the requirements of Title IX to determine the proper mechanism for discovering and correcting the problem.⁵³ A district should take immediate and appropriate steps to investigate the allegations, and take steps to alleviate the harassment.⁵⁴ Districts should consider many factors in investigating the allegations, but should consider the facts of the specific situation to craft an effective corrective action.⁵⁵

a) Complaints made before June 2013

During interviews with District staff, the Department specialist repeatedly heard that parent complaints were about sarcastic comments and complaints regarding playing time of student athletes. As described above, District staff were made aware and given examples of the types of comments made by coaches associated with the girls' basketball team. The Department's interviews with team

⁴⁴ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁴⁵ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁴⁶ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁴⁷ *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63-61 (D. Me. 1999)

⁴⁸ *Id.* at 63-64

⁴⁹ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, April 4, 2011, available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁵⁰ *Gebser* at 1998.

⁵¹ *Board of Comm'rs of Bryan Cty. V. Brown*, 530 U.S. 397, 398-399 (1997)

⁵² *Collins v. Harker Heights*, 503 U.S. 115, 123-124 (1992)

⁵³ 34 CFR 106.9, 34 CFR 106.8(b)

⁵⁴ 34 CFR 106.31, 34 CFR 106.3

⁵⁵

members and parents uncovered additional concerning comments made by coaches toward female players. While the comments varied, the theme of screaming and yelling at female players during games and practice was common.

Prior to the 2012-2013 school year, Parents A2, H3 and H4 brought their concerns about the coaches to the principal. During the Department's investigation of these matters it was the athletic director who reported that Parents H3 and H4 independently and separately approached the principal in 2011-2012 school year with similar concerns about the girls' basketball program, students coming home crying and conduct of coaches. Parents A2 and H3 requested that their meetings occur outside of school district buildings because of concerns that their reports would affect their children's experience on the team. During the Department's interview with the principal, he noted that Parent H3's concerns related to a non-district run basketball program that only utilized school buildings. Based on Department interviews with parents and students, both the assistant coach and head coach of the girls basketball team, ran the summer basketball program, and encouraged team members to participate in the summer program to maintain their level of skill. Students often feel the continuing effects of off-campus harassment in the educational setting; schools need to consider whether the reported incident continues to create a hostile environment on campus.⁵⁶ As *Davis*⁵⁷ notes, when the harasser is a school district employee, the harassment is more likely to impact a student than a similar single incident from a fellow student. In this case, although the conduct Parent H3 complained of may have occurred during the summer program, Parent H3 raised concerns about the same coaches that Student H1 had during the previous school year and would have in the upcoming school year. Furthermore, Parent A2 and H4 discussed with the district a range of issues not limited to the summer program, and more focused on the emotional impact of comments and conduct by coaches. The principal did not inform the athletic director or superintendent of past complaints received regarding these same coaches. Part of the purpose of the Title IX coordinator for a district is maintaining records of complaints, so that recurring problems, and employees with multiple complaints filed against them, can be properly coordinated.⁵⁸

During the 2012-2103 school year the Brookings-Harbor School District received additional complaints related to the girls' basketball program. Parents of Student A1 met with the District multiple times regarding their concerns. The school has an informal policy or tradition of taking concerns regarding athletic programs first to the coach, then the athletic director, and working up the chain of command from there. Such informal customs or policies of not referring complaints to the District Title IX coordinator, and instead dealing with such complaints through a chain of command structure, or requesting that parties work out their differences, can contribute to a failure to address the discrimination properly.⁵⁹ Parent A2 and A3 first addressed their concerns with the head coach. Having not received satisfaction regarding their concerns, they then met with the athletic director, principal, and superintendent. Parents A2 and A3 raised a variety of concerns, including yelling at students, comments that brought Student A1 and others to tears, inappropriate humor, a comment to Student A1 of a sexual nature, students quitting the team because of such conduct, and the lack of an adult female associated with the team. Based on the Department's interviews with District staff and parents, students were never interviewed regarding their experiences. Interviews conducted with the athletic director, principal, and superintendent found that the sole investigatory activity conducted in

⁵⁶ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, April 4, 2011, available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁵⁷ *Davis* at 653.

⁵⁸ University of California, Santa Cruz, OCR Case No. 09-93-2131.

⁵⁹ *Collins* at 123.

response to these complaints were talks with the coaches involved. The District did not handle the complaints received from Parents A2 or A3 within the context of any District policy. The District did not inform or include the District Title IX coordinator in any of the complaints raised by Parent A2 or A3.

Parents A2, A3, D2, and F2, raised similar concerns regarding the behavior of coaches and the girls' basketball program to school administrators during the 2012-2013 school year. Some parents raised numerous complaints. During the Department's interviews with District officials, including the athletic director, principal, superintendent, and board members, District employees repeated that the only complaints received related to coach's use of sarcasm and playing time. A school district is responsible for investigating and addressing incidents of harassment it had knowledge of or of which it should have had knowledge.⁶⁰ Furthermore, a district needs to take prompt action to investigate complaints. As mentioned above, a complainant need not specifically complain of a Title IX violation. Districts have the responsibility to recognize potential violations of Title IX within the conduct complained of.⁶¹

During the 2012-2013 school year, neither the athletic director, principal, nor superintendent, after being made aware of parent complaints, interviewed any student associated with the girls' basketball program. The District investigatory responses to complaints received from parents were limited to talking with the coaches directly. This investigatory strategy did not change after parents complained about continuing conduct by the same coaches. Schools have an obligation to ensure that educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.⁶²

b) Complaints made at and after June 19, 2013 Board meeting

On June 19, 2013, several parent and former students associated with the girls' basketball program assembled at a regularly scheduled meeting of the Brookings-Harbor School Board. Parent F2 spoke during this meeting concerning Student F1, and read prepared remarks from Parent A2. Student B1, Student J1, Student C1, Parent D2, Student D1, Parent C2, Student E1, and Parent E2 also assembled and spoke regarding their concerns and experiences with the girls' basketball team. Those concerns related to the conduct of the coaches associated with the team, comments made, and the emotional impact on students. The assembled board members were provided with written documentation from some of those who spoke. According to board member O1, board members were provided included photocopied pages from student C1's journal where she expressed her frustration and emotions regarding the assistant coach and copies of a letter written by Parent A2. Board member O1 considered these verbal complaints and materials received as constituting a formal complaint.

Board member O1 explained that following the Board meeting she worked with the District business manager to contact legal counsel for advice. It was determined that the Oregon School Board Association, Property and Casualty Coverage for Education (PACE) should conduct an independent investigation. As part of its investigation, the superintendent sent out a letter to those who came to the board meeting. That letter identifies the nature of complaints as falling under the District's

⁶⁰ Office for Civil Rights Revised Sexual Harassment Guidance, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>
(<http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Federal-Register>)

⁶¹ *Id.*

⁶² *Id.*

Harassment/Intimidation/Bullying/Cyberbullying/Teen Dating Violence—Student policy JFCF-AR. That letter further asks recipients to submit complaints in writing to comply with the policy. Nowhere in the policy are complainants required to submit complaints in writing. Furthermore, Title IX requires the prompt and equitable resolution of complaints.⁶³ Board member O1 went on to explain to the Department specialist that complainants' failure to submit written reports probably reflected complainants not having felt strongly enough about issues so submit the information in writing. Schools may not distinguish between formal and informal complaints when addressing allegations of harassment.⁶⁴ During the Department's interviews with parents and students, some expressed the opinion that receiving a letter from the superintendent after having voiced their concerns to the school board indicated to them the board was not going to consider their complaints. That letter did not mention an independent investigation, or the superintendent was acting at the direction of the board in soliciting written complaints, which, as noted above, are not required by law or District policy.

During the 6/19/2013 board meeting those who spoke about the girl's basketball program completed a public comment card with a brief description of their concern, which included their contact information. While the actual report provided by PACE is covered by attorney client privilege, the Department's investigation did not find a single staff member, parent, or student who was interviewed in connection with this investigation. None of the board members interviewed by the Department specialist, were contacted by the PACE investigator regarding what they witnessed at the board meeting. Neither the athletic director nor the principal were interviewed regarding complaints made to them. In addition to the letter from Parent A2, and photocopies of the Student C1's journal, two additional students, Students D1 and P1, filed written complaints on the District supplied complaint form. Along with the complaint form, each student attached a letter with details of their experiences. The board and superintendent received reports, which the superintendent's 7/1/2013 letter classified as falling under District policy JFCF-AR. There is no evidence that the District's Title IX coordinator was involved in any way with the District's investigation, or was made aware of these complaints. While statements differed on the exact date of the outcome of the investigation, all District employees and board members agreed that the report concluded that there was no actionable information on which to proceed.

The District received verbal and written allegations of harassment and bullying. Board Member O1 described receiving copies of Student C1's journal entry expressing her frustration and anger with the assistant coach. Such diary or journal entries made contemporaneously with the alleged harassment can serve as evidence of the harassment of which a student complains.⁶⁵ The school board and superintendent received numerous complaints and information from parents and students. It is not known exactly what information was passed on to the PACE investigator. From interviews with District staff and board members, the perception seemed to be that only two parents complained, and that the complaints were limited to issues that would not trigger any specific District policy. This is further evidenced by the athletic director's letter, which states that there had "...been complaints from two separate families..."

Multiple District officials, including board members, had actual knowledge of allegations of harassment. The court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, noted that for a district to be deliberately indifferent there must be "an official decision by the recipient not to remedy the

⁶³ 34 CFR 106.8(b)

⁶⁴ University of Maine at Machias, OCR Case No. 01.94.6001

⁶⁵ Office for Civil Rights Revised Sexual Harassment Guidance, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

violation.”⁶⁶ The consideration of all information presented to the District seems to have been frustrated or undermined by some undetermined force. Board Member O2 expressed dissatisfaction with the outcome of the PACE investigation because the board was asked to make a determination based on a lack of information. Board Member O2 pointed out that the PACE investigator did not receive information in writing and could therefore not precede with the investigation. Such statements by Board Members O2 and O1, along with the District superintendent’s letter soliciting written complaints, evidence a lack of understanding of the very policy cited in the superintendent’s letter seeking written complaints. When harassment is sufficiently widespread, training may be necessary to help students, teachers, and staff better recognize harassment if it recurs and understand the proper response.⁶⁷

On 10/7/2013, the athletic director produced a letter confirming that the assistant coach voluntarily resigned his position. The District did not remove the former assistant coach from his position. That letter included information about complaints received by the District, noting that two families complained that the assistant coach used sarcasm. The letter went on to describe that the District investigated and cleared the assistant coach of any wrongdoing. This letter is dated prior to the conclusion of the PACE investigation, the outcome of which was presented to school board members sometime in December of 2013. Investigations of alleged harassment must be prompt, thorough and impartial.⁶⁸

Parents A2 and A3, and Student A1 were contacted by the District superintendent in December of 2013. This contact came at the conclusion of the PACE investigation, after the initiation of the Department’s investigation, and only weeks before the Department specialist’s scheduled interviews with players and parents. Parents A2, A3, and Student A1 had not previously been contacted to meet regarding their concerns. Although the basketball program has a policy of allowing parents to observe practice, they are asked to sit in the bleachers at a distance that prevents them from engaging with students and coaching staff during practice. On 1/6/2014, Parents A2 and A3 filed a complaint with the District regarding the former assistant coach’s attendance and involvement at the 1/1/2014 team practice. At this practice, the former assistant coach sat with and partook in the coaching responsibilities by discussing plays and commenting to students, specifically Student A1. Conduct and comments by the alleged harasser can have a discriminatory effect if based on stereotypical notions of femininity.⁶⁹ Furthermore, gender-based harassment may be found in the absence of sexual conduct, when the conduct is based on sex or sex-stereotyping.⁷⁰

Finally, following the Department’s receipt of Parent A2’s 8/28/2013 complaint, the Department specialist met with the District on 10/30/2013, 11/20/2013, and 12/20/2013, and discussed with the superintendent the perception of the then former assistant coach’s continued expanded access to school facilities. The former assistant coach retained keys to the school building and gymnasium; a privilege not afforded to all parents in the District. The Department specialist suggested, and the District superintendent agreed, that relieving the former assistant coach of his keys to the building

⁶⁶ *Gebser*, at 290.

⁶⁷ Tacoma School Dist. No. 10 OCR Case No. 10-94-1079, Los Medanos College, OCR Case No. 09-84-2092, and Sacramento City Unified School Dist., OCR Case NO. 09-83-1063.

⁶⁸ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁶⁹ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁷⁰ Office for Civil Rights Revised Sexual Harassment Guidance, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

would be an appropriate remedy for this perceived favoritism of the former assistant coach. During the Department specialist's April 29 through May 2, 2014, interviews with District staff and witnesses, the former assistant coach disclosed that he retained keys to the school. Districts have an obligation to protect students from retaliatory harassment.⁷¹

Students and parents reported that the former assistant coach's continued special access to school facilities and events, and perceived special treatment such as pronouncements that he engaged in no wrongdoing, publically questioning students thereby constructively identifying the complainants, all contributed to their perception that the District would take no meaningful action to address their concerns. Districts are required to act promptly and effectively to not only investigate but also end the harassment.⁷² As noted above, the District did not.

For the above reasons discussed, the complainants have successfully alleged facts that could support a finding of harassment, bullying, and/or intimidation.

CONCILIATION

The Department determined (sex) discrimination *may* exist in the Brookings-Harbor School District, and expects the complainants and the District to attempt conciliation to reach agreement regarding the allegations of emotional and verbal harassment, intimidation and retaliation.⁷³

The Department encourages Student A1, Parents A2, A3, Student C1, Parent C2, Parent F2, and the District to pursue the conciliation process in earnest. It also encourages all parties to consider, in addition to the concerns presented by all parties, addressing the following topics:

1. Prompt and equitable requirements and grievance procedures;
2. Adequate, reliable and impartial investigation of complaints;
3. Designated and reasonably prompt investigation time frames;
4. Written notice of outcome to complainants;
5. Appropriate remedies and enforcement;
6. Proactive education, training and prevention for all participants; and
7. Effective involvement of the District's Title IX coordinator.

If conciliation fails to resolve the parties' differences within 30 days, the State Superintendent of Public Instruction shall promptly establish a date for a hearing on the complaint. Said hearing shall be conducted within 30 days of failure of conciliation unless both parties agree to an extension of the period. The hearing shall be conducted in accordance with provisions of Oregon's Administrative Procedures Act.

⁷¹ Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, April 4, 2011, available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁷² Russlynn Ali, Assistant Secretary for Civil Rights, Dear Colleague Letter, October 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁷³ OAR 581-021-0049(1)(b)

Dated this 17th day of November, 2014

David Bautista

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Office of Learning - Education Equity Unit