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May 8, 2019

Mr. Guadalupe Guerrero
Superintendent
Portland School District No. 1J
501 North Dixon Street
Portland, Oregon 97227

Re: Portland School District No. 1J
OCR Reference No. 10191017

Dear Mr. Guerrero:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) is closing its investigation of the above-referenced complaint against the Portland School District No. 1J (district). The complainant alleged that the district failed to:

1. respond appropriately to a report of sexual harassment of a student at XXXXXXXX Elementary School during the 2017-2018 school year (hereafter, the student); and
2. provide home instruction during the 2018-2019 school year as required by the student's Individualized Education Plan (IEP).

OCR investigated this complaint under Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) which prohibit discrimination on the bases of sex and disability, respectively, in programs and activities receiving federal financial assistance. OCR also investigated this complaint under Title II of Americans with Disabilities Act of 1990 (Title II), which prohibits discrimination on the basis of disability by public entities. The district receives federal financial assistance from this Department and is a public entity. Therefore, it is subject to Title IX, Section 504, and Title II.

As set forth below, OCR determined that the evidence did not support a conclusion that the district violated Title IX with regard to allegation no. 1. Prior to completion of OCR's investigation into allegation no. 2, the district expressed an interest in voluntarily resolving this allegation and signed the enclosed Voluntary Resolution Agreement (agreement) to address a concern that the district may have violated Section 504 and Title II as raised in allegation no. 2.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

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Findings of Fact Regarding Allegation No. 1

The student is female and was a kindergarten student during the 2017-2018 school year at the XXXXXX (school), which is a pre-K-8 neighborhood district school located in Northeast Portland. The student's kindergarten class during the 2017-2018 school year included approximately 30 students with one teacher (teacher) and one educational assistant (educational assistant).

The student's parent (parent) told OCR that during the 2017-2018 school year a male student (male student) in the student's class demanded to kiss her and forcibly kissed her on the playground during recess. According to the parent, this conduct occurred daily throughout the school year; however, the parent was not aware that it had been ongoing until after the school year had ended. The parent informed OCR that she found out details regarding the frequency of the conduct and the effect it had on the student from the student's private counselor in summer 2018, and that prior to summer 2018, the student told her and others that the behavior was not a continuing problem.

The parent told OCR that she reported the male student's conduct to the district on two occasions, each time by e-mail. The parent provided OCR with the e-mails she sent to school staff in March and April 2018 in which she reported the conduct. According to the parent, the district failed to respond appropriately to the first report of the conduct in March 2018, and as a result, the conduct recurred, and she reported it again in April 2018.

The district acknowledged receipt of the e-mails from the parent with respect to the male student's conduct. Additionally, the district told OCR that the parent had made an oral report of the conduct to the teacher in March 2018 right before the parent first reported the conduct in writing to the district. The district stated in its data response that it responded appropriately to each of the reports and that the conduct did not recur.

The teacher told OCR that, shortly before the parent reported the male student's conduct in writing by e-mail to the district on March 13, 2018, the parent verbally reported to her that the male student would not leave the student alone and was trying to kiss the student. The teacher told OCR that, in response to this verbal report from the parent, she pulled the student aside to a safe space and asked her about it and that the student told the teacher it was no longer occurring. The teacher also told OCR that she instructed the student to let her know if the conduct occurred again and that the student never told her where the conduct was happening or when it had occurred.

The parent reported the conduct in writing in two e-mails on March 13, 2018. The parent sent the first email in the morning to the teacher, the school counselor, and the special education teacher, and sent a second e-mail that evening to the teacher only. In the first e-mail the parent

stated that the student told her private counselor that she wants “someone to stop kissing on me,” and in the second e-mail, the student’s parent stated that the male student “would not leave [the student] alone [...] [The male student] told [the student] he’s still going to kiss her and that he’s not kissing anyone else.”

In a March 14, 2018, e-mail reply from the teacher, the teacher informed the parent that she spoke to the student the previous day and that the student told the teacher that the male student had not been kissing her since the first time the teacher had addressed it with the student. The teacher told OCR that the “first time” mentioned in her March 14, 2018, reply e-mail referred to the discussion the teacher had with the student after the parent verbally reported the conduct in March 2018. Although the email from the teacher to the parent indicated that the kissing had stopped, the teacher wrote to the parent that the student felt uncomfortable with someone being in her space, so the teacher encouraged the student to advocate for herself if she does not want someone in her space. The e-mail also stated that the teacher planned on continuing a conversation with the whole class about keeping a positive classroom space.

The teacher also told OCR that despite daily check-ins with the parent, the parent never mentioned the conduct outside of the one conversation, these March 2018 e-mails, and the April 16, 2018, e-mail discussed below. The teacher said she spoke to the male student and worked with the educational assistant to ensure that the two students were not seated together or on the carpet together.

According to the educational assistant, the students were separated throughout the day and she and the teacher discussed keeping an eye on them. The educational assistant and the teacher said they were responsible for monitoring behavior on the playground during recess and that they did not see the student and the male student interact at all during recess.

Both the educational assistant and the teacher told OCR that in addition to speaking to the students and separating them, they spoke to the whole class about appropriate kissing and consent following the March 2018 reports.

The parent told OCR that following the e-mail exchange that took place over March 13-14, 2018 with school staff, the teacher told the parent that the teacher would keep an eye on the students and separate them. The parent also told OCR that the teacher told the parent that the teacher spoke to the student, who told the teacher she was fine. The parent told OCR that because of the student’s disability and desire to please her teachers, the student told the teacher she was fine even though the parent believes the student was having anxiety regarding the situation. The parent stated that she believed at the time that the situation was being addressed by the teacher, but that due to what she learned after the school year ended, she came to believe that the conduct had continued.

The parent told OCR that she again reported the conduct to the district in an April 16, 2018, e-mail to the teacher, special education teacher, and school counselor. The parent provided to OCR the April 16, 2018, e-mail, which had the subject line: “1st grade teacher placement for [the student].” In that e-mail, the parent discusses classroom placement for the coming year and describes the type of teacher who would be a best fit for the student and also asks that the student’s best friend be placed in the same class. The parent then states “if possible, not as urgent in priority as the other two items, but important, we would like her to be placed in a class that is away from [male student].” She notes that the male student has “been harassing [the student] (demanding she allow him to kiss her, destroying her creations, etc.).”

Between the March 13, 2018, e-mails above and this April 16, 2018, e-mail, the parent stated to OCR that the student had told the parent that the student experienced anxiety that was affecting her ability to eat lunch and that she would only play in areas that were in full sight of others because she did not feel safe around the male student. The parent told OCR that no one took any steps in response to the April 16, 2018, e-mail beyond the teacher telling her that she would keep an eye on the situation.

The parent also told OCR that she and the male student’s parent were neighbors. The parents would alternate in picking the students up from school and initially the parent thought the student would be comfortable playing with the male student outside of school, but after one visit to their home, the parent discerned that the student would become anxious around the male student. The parent told OCR that the parents continued to be friendly and would pick up each other’s child from school. The parent told OCR that she volunteered in the school at least once a week and she personally spoke to the male student in question about boundaries and spoke to his parent.

The teacher told OCR that she ensured that the students continued to be separated for the rest of the school year and that she informed the administration regarding the April 16, 2018, e-mail in order to ensure that the students would not be in the same class for the following year, as the student’s parent had requested. The teacher stated that she continued to keep a close eye on the two students and that she did not observe any of the behavior the parent mentioned in the e-mail. The teacher informed OCR that she observed the student to ensure that she was feeling heard and believed and that the teacher provided the student with more attention than other students to ensure that she was receiving the support the parent believed she needed. The teacher also told OCR that on the same morning she received the April 16, 2018, e-mail she held a special community circle for the class regarding keeping their hands to themselves and respecting other students’ space as well as advocating for themselves in case someone entered their space. The teacher also told OCR that at the end of the year, after the April 16, 2018, e-mail, she received an e-mail from the parent saying that the student was able to go home with the male student and his mother.

The teacher also told OCR that in January 2018 in response to the parent's expressed concerns regarding the student's ability to advocate for herself in light of her experiences at her previous school, the teacher had connected the student with the school's counselor. The school counselor, who was included on the second March 13, 2018, and the April 16, 2018, emails, told OCR that in response to the referral from the teacher she created a Kindergarten Leadership Group for the student and a few other kindergarten students, who were selected as individuals who would be good friends for her. The school counselor stated that the group met every Thursday throughout the rest of the school year. The school counselor also told OCR that she never heard the student mention the reported conduct involving the male student and that she never observed the students together. The school counselor said that in response to the March 13, 2018, and April 16, 2018, email reports she read a book with the student regarding consent and encouraged the student to talk to her regarding any concerns the student may have.

The student's special education teacher, who was also included on the first March 13, 2018, e-mails and the April 16, 2018, e-mail, told OCR that she never observed the student and the male student interact with each other and that they were never placed in groups together. The special education teacher informed OCR that following the April 16, 2018, e-mail, she recalls being part of conversations regarding placement for the following year, and that the placement team decided to separate the student and the male student.

Analysis Regarding Allegation No. 1

The issue investigated was whether the district failed to provide an appropriate response to the parent's reports of sexual harassment of the student by a male student during the 2017-2018 school year.

The Title IX regulation at 34 C.F.R. § 106.31 provides generally that, except as provided elsewhere in the regulation, no person shall on the basis of sex be excluded from participation in, denied the benefits of, or subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance.

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the recipient's program.

Once a recipient knows of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. A recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, prevent the harassment from recurring and, as appropriate, remedy its effects. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the

recipient's own action may subject students to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial sexual harassment and the effects of the recipient's failure to respond promptly and appropriately.

The evidence established that the parent reported to the district that the student was being forcibly kissed or subjected to demands to be kissed by the male student during spring 2018. The parent believes that the behavior continued throughout the spring. However, OCR found that none of the teachers or other staff that regularly interacted with the student observed or heard any reports of ongoing harassment from the student or the parent despite daily check-ins with the parent and increased supervision of the students. OCR also found that in response to reports from the parent, the teacher and the educational assistant separated the students and monitored them to ensure separation and instructed the students and other members on the class regarding appropriate kinds of kissing and consent. Therefore, there is insufficient evidence that the district did not comply with Title IX with respect to the issue investigated.

Allegation No. 2

The issue investigated was whether the district failed to provide home instruction during the 2018-2019 school year as required by the student's IEP.

Before the conclusion of OCR's investigation, the district expressed an interest in voluntarily resolving this allegation. OCR's investigation to date identified a concern regarding whether the district was providing the student with the hours of home instruction as required by the student's IEP. Specifically, OCR identified information indicating that as of September 2018, the student is a student with a disability receiving services under an IEP, that the student's educational placement was home instruction, that the student's IEP required that she receive five hours per week of home instruction, and that there was a delay in providing the student with the required home instruction. OCR has not concluded its investigation in order to determine how many hours of home instruction are currently outstanding.

In accordance with Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved at any time when, prior to the point OCR issues a final determination, a recipient expresses an interest in resolving the complaint allegations, and OCR determines that it is appropriate to resolve the complaint allegations with a voluntary resolution agreement. OCR determined that a voluntary resolution agreement was appropriate in this case. Subsequent discussions with the district resulted in the district signing the enclosed agreement, which when fully implemented, will resolve the allegations in the complaint. OCR will monitor the implementation of the agreement until the district fulfills the terms of the agreement.

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the district's compliance with any other regulatory provisions or to

address any issues other than those addressed in this letter. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court regardless of OCR's determination.

The complainant has a right to appeal OCR's determination with respect to allegation no. 1 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete, inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the district may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this occurs, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, OCR will seek to protect, to the extent provided by law, personally identifiable information, which if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR will monitor the implementation of the agreement and will close the complaint when OCR determines that the terms of the agreement have been satisfied. OCR looks forward to receiving the reports as set forth in the agreement.

Thank you for the cooperation that you and your staff extended to OCR in resolving this complaint. If you have any questions about this letter, you may contact Tina Sohaili, Attorney, by telephone at (206) 607-1634, or by e-mail at tina.sohaili@ed.gov.

Sincerely,

Barbara Wery
Team Leader

Enclosure: Voluntary Resolution Agreement