



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

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ATLANTA, GA 30303-8927

REGION IV

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July 2, 2014

B.J. Worthington, Ed.D.
Director of Schools
Clarksville-Montgomery County School System
621 Gracey Avenue
Clarksville, Tennessee 37040

Re: Complaint #04-13-1247

Dear Dr. Worthington:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint, which was filed on March 26, 2013 by the Complainant against the Clarksville-Montgomery School District (District). The Complainant alleged that a staff member at Kenwood High School (School) sexually harassed her daughter (Student), an 18-year-old with a learning disability, who previously attended the School. The Complainant alleged that the Student was sexually harassed by a School Nurse (Nurse). Specifically, the Complainant alleged that, while checking the students in the class for lice, the Nurse inappropriately touched the Student and asked the Student if she liked the contact. The Complainant further alleged that the Nurse's act of searching the Student without her consent was an act of retaliation for her previous complaint filings with OCR and advocacy on behalf of the Student.¹

LEGAL ISSUES:

Issue One: Whether the Student was subjected to a hostile environment as a result of sexual harassment by the School Nurse and whether the District failed to take prompt and equitable steps to investigate and respond to the report of harassment in noncompliance with the Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations.

Issue Two: Whether the District retaliated against the Student by searching her person without parental consent, in noncompliance with Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) and their implementing regulations.

¹ The previous complaint filings were based on the Complainant's advocacy for the Student's disability.

During the investigation, OCR reviewed documentation submitted by the District and the Complainant, and conducted interviews with the Complainant, the Student, District staff and student witnesses, with the permission of their parents.

LEGAL STANDARDS

The Title IX regulation at 34 C.F.R. § 106.31, provides 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 or other education program or activity operated by a recipient of Federal financial assistance.² Sexual harassment of students, including sexual violence,³ is a form of prohibited sex discrimination. Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including sexual harassment or other acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

A recipient violates a student's rights under Title IX regarding student-on-student sexual harassment when the following conditions are met: 1) the harassing conduct is sufficiently serious to deny or limit an individual's ability to participate in or benefit from the educational program (*i.e.*, a hostile environment exists); 2) the recipient knew or reasonably should have known about the harassment; and 3) the recipient fails to take appropriate responsive action. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and reasonably calculated to eliminate any hostile environment and its effects and prevent the harassment from recurring. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination.

Once a recipient knows or reasonably should have known about sexual harassment that may create a hostile environment for its students, the recipient must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that sexual harassment created a hostile environment, the recipient must then take prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject the student 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

² The applicable legal standards described herein are more fully set forth in OCR's 2011 Dear Colleague Letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011); for further clarification, see "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), which is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also OCR's Dear Colleague Letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleatgue-201010.html> (Oct. 26, 2010); and OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001).

³ Sexual violence includes rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

failure to respond promptly and appropriately. A recipient's obligation to respond appropriately to sexual harassment complaints is the same irrespective of the sex or sexes of the parties involved.

Sexual harassment of a student by a faculty member or other school employee also violates Title IX. Recipients are responsible for taking prompt and effective action to stop the harassment, prevent its recurrence and remedy its effects. A recipient is responsible under Title IX regulations for the nondiscriminatory provision of aid, benefits, and services to students. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in sexual harassment, the recipient is responsible for the discriminatory conduct. The recipient is also responsible for remedying any effects of the harassment on the complainant, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has notice of the harassment. A recipient has notice of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment.

The Title IX regulation at 34 C.F.R. § 106.9 requires that each recipient publish a statement (notice) that it does not discriminate on the basis of sex in its education programs or activities. The notice must state, at a minimum, that the recipient does not discriminate on the basis of sex in its education program or activity, including in admission to or employment in its education programs or activities. The notice should indicate that inquiries concerning Title IX may be referred to the Title IX coordinator or to OCR. The Title IX regulation at 34 C.F.R. § 106.9(b) requires that the notice of nondiscrimination be displayed prominently in each announcement, bulletin, catalog, or application form used in connection with its education program and activity and in recruitment of students or employees and it should include the name, office address, and telephone number for the designated Title IX coordinator.

The Title IX regulation at 34 C.F.R. § 106.8(a) requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the Title IX regulation, including any investigation of any complaint communicated to such recipient alleging its noncompliance or alleging any actions that would be prohibited by the Title IX regulation. The recipient must notify all its students and employees of the name, office address and telephone number of the appointed employee or employees. The Title IX coordinator must have knowledge of the requirements of Title IX, of the recipient's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the recipient.

The regulation at 34 C.F.R. § 106.8(b) requires a recipient to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any actions prohibited by Title IX and its implementing regulation. In evaluating whether a recipient's grievance procedures satisfy this requirement, OCR reviews all aspects of a recipient's policies and practices, including the following elements that are necessary to achieve compliance with Title IX: 1. notice to students and employees of the grievance procedures, including where complaints may be filed; 2. application of the grievance procedures to complaints filed by students or on their behalf alleging sexual harassment carried out by employees, other student, or third parties; 3. provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged

perpetrator to present witnesses and evidence; 4. designated and reasonably prompt time frames for the major stages of the complaint process; 5. written notice to the complainant and alleged perpetrator of the outcome of the complaint; and 6. assurance that the school will take steps to prevent recurrence of any sexual harassment and remedy discriminatory effects on the complainant and others, if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the recipient processes complaints, the recipient's Title IX grievance procedures should also include the following in writing: a statement of the recipient's jurisdiction over Title IX complaints; adequate definitions of sexual assault and an explanation as to when such conduct creates a hostile environment; reporting policies and protocols, including provisions for confidential reporting; identification of the employee or employees responsible for evaluating requests for confidentiality; notice that Title IX prohibits retaliation; notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously; notice of available interim measures that may be taken to protect the student in the educational setting; the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint; notice of potential remedies for students; notice of potential sanctions against perpetrators; and sources of counseling, advocacy and support.

The procedures for resolving complaints of sexual harassment should be written in language that is easily understood, be easily located, and should be widely distributed. It is permissible for a school to have either one grievance procedure that applies to all sex discrimination and harassment or separate procedures for discrimination and harassment. However, a recipient's grievance procedures for handling discrimination complaints must meet the Title IX requirement of affording a complainant a prompt and equitable resolution. In addition, a school may have one grievance procedure for complaints by students and employees or separate procedures for complaints by students and complaints by employees.

In addition, recipients should provide training to employees about its grievance procedures and their implementation. All persons involved in implementing a recipient's grievance procedures (*e.g.*, Title IX coordinators, investigators and adjudicators) must have training or experience in handling complaints of sexual harassment, and in the recipient's grievance procedures as well as applicable confidentiality requirements. In sexual violence cases in particular, the fact-finder and the decision-maker also should have adequate training or knowledge regarding sexual violence. Recipients should also provide training about its grievance procedures and their implementation to any employees likely to witness or receive reports of sexual harassment; including teachers, recipient law enforcement unit employees, recipient administrators, recipient counselors, general counsels, health personnel, and resident advisors. Recipients need to ensure that their employees are trained so that they know to report sexual harassment to appropriate officials, and so that employees with the authority to address sexual harassment know how to respond properly.

The Section 504 implementing regulation at 34 C.F.R. § 104.61 adopts the anti-retaliation provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title VI anti-retaliation regulation, as incorporated by Section 504, provides *that no* recipient or other person shall intimidate, threaten,

coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by a law enforced by OCR, or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504.

To establish whether retaliation has occurred, OCR uses a five-step analysis which examines whether: 1. the Complainant engaged in a protected activity; 2. the recipient was aware of the protected activity; 3. the recipient took adverse action against the Complainant contemporaneous with or subsequent to participation in a protected activity; 4. there is a causal connection between the adverse action and the protected activity; and 5. the recipient had legitimate, non-retaliatory reasons for its actions that are not a pretext for discrimination.

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with the laws and regulations enforced by OCR, or whether the evidence is insufficient to support such a conclusion.

Issue One: Whether the Student was subjected to a hostile environment as a result of sexual harassment by the School Nurse and whether the District failed to take prompt and equitable steps to investigate and respond to the report of harassment in noncompliance with the Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations.

DISTRICT PROCEDURES

OCR examined whether the District had a notice of nondiscrimination statement with a designation and identification of a Title IX Coordinator. OCR also determined whether the District's sexual harassment policies and procedures comply with the requirements of Title IX as written and as applied in practice.

Statement of Nondiscrimination & Title IX Coordinator. The District's Statement of Nondiscrimination includes the prohibition of discrimination on the basis of sex and identifies the District's Title IX Coordinator by name, providing contact information for submitting inquiries or complaints. The nondiscrimination provision is included in the Student Code of Conduct (Code). The Title IX Coordinator is also identified as the District's Chief Human Resource Officer. The District's Sexual Harassment Policy and procedures regarding Student on Student Sexual Misconduct identify the Chief Human Resource Officer as the point of contact for receipt of all complaints of sexual harassment or misconduct, district-wide.

Policies and Procedures Related to Sexual Harassment. The District has four policies/procedures related to sexual harassment: the *Human Relations Department Sexual Harassment Policy*, *Reporting Allegations of Sexual Harassment*, *Student on Student Sexual Misconduct Procedure*, and *Student Code of Conduct*. The policies vary with respect to the

types of harassment they cover and the category of complainant⁴ or reporter to whom the policy applies.

Human Relations Department Sexual Harassment Policy. The District's Human Resources Department Sexual Harassment Policy states that the District will maintain a working and learning environment that is free from sexual harassment. The policy states that sexual harassment is a violation of Title VII of the Civil Rights Act of 1964 (Title VII). It does not, however, identify sexual harassment as a violation of Title IX. The policy refers to procedures HUM-P019 (Reporting allegations of sexual harassment) and HUM-P028 (Student to student sexual misconduct, middle and high school students) as the implementing procedures for the policy.

Reporting Allegations of Sexual Harassment. The District's policy for reporting allegations of sexual harassment, which is published online, states in Section 1.1 that it outlines the process for employees to report any suspicions or allegations of sexual harassment perpetrated on any student, employee or third party individual in a school setting by a student, employee or third party individual. However, Section 5.1 of the policy states that it applies to any person "who believes he or she has been the victim of sexual harassment" by a school employee, student or a third party. The policy defines sexual harassment as unwelcome or unwanted advances including sexually motivated physical conduct, other physical, verbal or visual conduct or communication of a sexual nature occurring on school property or at a school-sponsored event when submission to or rejection of that conduct or communication by an individual is made a term or condition of or is used as a factor in decisions related to, either explicitly or implicitly, obtaining or retaining employment or obtaining an education; or where the conduct has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education or creating an intimidating, hostile or offensive employment or educational environment.

The policy instructs individuals who believe they have been subjected to sexual harassment, or who have knowledge or belief of conduct which may constitute sexual harassment, to report the acts to the Principal at the relevant school or the Human Rights Officer. If the Principal is the subject of the allegation, individuals can file with the Human Resources Officer (HRO). If the HRO is the subject of the allegation, individuals can file with the Director of Schools).

Principals are responsible for receiving oral and written reports of harassment at the building level. Individuals who report harassment are encouraged, but not required, to complete a written complaint form. Principals are similarly encouraged to complete the form based on available information and to initiate an inquiry into the allegation. No timeframes are set in the policy regarding when the Principal will initiate an inquiry into the allegation after receiving a report or complaint.

The Principal is designated to investigate allegations of student-on-student harassment while incidents involving a student and a staff member or third party are to be referred immediately to the Human Rights Officer, who will appoint an investigating official to conduct the

⁴ Throughout this document, unless otherwise noted, the term "complainant" refers to the student who allegedly experienced the sexual harassment.

investigation. The official conducting the investigation should complete specific forms as a report of the investigation and submit the forms to the Human Rights Officer within 10 working days of the initial allegation. The policy states that failure to forward a report or complaint of sexual harassment may result in disciplinary action.

The policy requires that the investigating official consider surrounding circumstances, the nature of the sexual advances, the relationships of the parties and the context in which the incidents occurred. The policy requires that the investigation consist of personal interviews with the complainant, the individual(s) against whom the complaint is made, and others who may have knowledge of the incidents giving rise to the complaint.

The policy provides that the District will respect the confidentiality of the complainant and individuals against whom the complaint is filed as much as possible, consistent with the District's legal obligations and the necessity to investigate allegations. The District may take immediate steps, at its discretion, to protect the complainant, students and employees pending completion of the investigation. The policy also prohibits retaliation against any individual who reports harassment or who testifies, assists, or participates in the investigation.

Student-on-Student Sexual Misconduct Procedure (Procedure). The District's Procedure outlines the process for District administrators to investigate and report "student-on-student" misconduct at the middle and high school level.⁵ The Procedure defines student-on-student sexual misconduct between middle school and high school students as the unwanted intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, occurring on school property or at a school-sponsored event.

The Procedure requires contacting the school's resource officer (SRO) when a sexual misconduct report is received or if, during the processing of a sexual harassment or other complaint, the alleged perpetrator's conduct could rise to the level of sexual misconduct. If the SRO is not available, the Chief Human Resources Officer will be contacted to report the incident to applicable law enforcement. The Policy requires that once the determination has been made that a sexual misconduct investigation is warranted, the District will not request any additional verbal or written statements from students and the SRO will conduct the investigation.

The Procedure requires that the District representative coordinate with the SRO to notify the parent or guardian of the alleged victim, and to make every effort possible to separate the alleged victim from the alleged perpetrator pending the completion of the law enforcement investigation and the subsequent school investigation. Once the SRO has completed the law enforcement portion of the investigation, the case will be turned over to the District personnel to investigate pursuant to HUM-F076.

Student Code of Conduct (Code). The District's Code includes information regarding sexual harassment and the procedures for reporting allegations of sexual harassment. The Code references Title VII, but does not refer to Title IX. The Code defines sexual harassment as

⁵ The procedure does not include the process that a complainant should use to make a report to an administrator; rather, it covers the steps that should be taken after an administrator has notice of an incident.

consisting of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when (a) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or retaining employment, or of obtaining an education; or (b) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or (c) conduct or communication that has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education, or creating an intimidating, hostile or offensive employment or educational environment.

The Code states that the consequences for a student involved in harassment, intimidation, hazing, or bullying-related conduct or offenses range from behavioral intervention up to suspension or expulsion, as permitted by district policy. The Code also states the following factors will be considered in determining the consequences and appropriate remedial action for harassment, intimidation, hazing, or bullying-related offenses: 1. the developmental level and maturity levels of the parties involved; 2. the levels of harm as determined by the student's ability to be educated in a safe and orderly environment; 3. the surrounding circumstances; 4. the nature of the behavior(s); 5. past incidences or continuing patterns of behavior; 6. the relationships between the parties involved; and 7. the context in which the alleged incidents occurred.

Analysis and Conclusion

As noted above, the District's policies include a statement of nondiscrimination, which prohibits discrimination on the basis of sex, and identifies the District's Title IX Coordinator by name, providing contact information for submitting inquiries or complaints. The nondiscrimination provision is also included in the Student Code of Conduct, including identification of the Title IX Coordinator by title and contact information.

OCR identified several deficiencies in the District's grievance procedures and other policies related to sexual harassment. OCR noted that the policy for reporting allegations of sexual harassment has an incorrect definition of hostile environment.⁶ The policy does not require that the investigating official provide written notice of the results of the investigation to the alleged victim or accused. Further, the policy lacks timeframes for completing major stages of the investigation as well as an assurance that the District will take steps to prevent the recurrence of any harassment and remedy any effects of the harassment on the victims. The policy uses the phrase "at its discretion" with respect to protecting the complainant or victim, while an investigation is underway, rather than requiring such protection or other interim relief as necessary, and it does not clearly state that any efforts to separate the alleged victim and perpetrator should not unduly burden the alleged victim. This policy does not clarify the role of law enforcement, including the school resource officers, in the District's process or the effect of criminal complaints on the District's Title IX process. Specifically, the policy does not clarify the District's obligation to conduct an independent investigation of a report of sexual harassment.

⁶ Under OCR's standards a hostile environment is created if harassing conduct is **sufficiently serious** that it interferes with or limits a student's ability to participate in or benefit from the school's program. The OCR standard does not require "substantial" or "unreasonable" interference.

Lastly, the policy does not state the legal standard applied to the investigation as “preponderance of the evidence.”

OCR noted that the Student-on-Student Sexual Misconduct Procedure does not require that the District immediately resume its responsibility under Title IX to conduct a prompt and equitable investigation after the SRO or local law enforcement completes its gathering of evidence (the District should not wait for the conclusion of law enforcement’s investigation to conduct its investigation under Title IX). The Procedure does not provide that during the pendency of any criminal investigation complainants will be advised of their Title IX rights and the District’s grievance procedures. Further the Procedure does not clarify that even if the District temporarily delays the fact-finding portion of its investigation while the police gather evidence it will take interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency’s fact-gathering is in progress.

The harassment policy within the Code sets forth a procedure for a person subjected to harassment or a third party to report harassment committed by a student or employee, but does not state that it covers harassment committed by a third party. Also, the Code provides that the Principal must reduce any complaint to writing and report it to the Human Rights Officer within 24 hours of receipt, this provision is not included in any of the policies addressed above. The Code specifies that an investigation is to be conducted by a District official or a third party designated by the Director of Schools or the Human Rights Officer. The investigating party must submit a status report within 10 days; however, there are no other timeframes for major stages of the investigation. Further, the procedure does not include notice of the outcome to the parties or an assurance that the District will take steps to prevent the recurrence of any harassment and remedy any effects of the harassment on the victims.

OCR also notes that the Code states that the District considers whether harassing behavior “substantially or unreasonably” interferes with an individual’s employment or education; rather than considering whether the harassing behavior is “sufficiently serious” that it interferes with or limits a student’s ability to participate in or benefit from the school’s program. Finally, both the Human Relations Policy and the Code note that sexual harassment violates Title VII, but fail to refer to Title IX.

DISTRICT’S RESPONSE

Incident Involving the Student

The Complainant alleged that on January 10, 2013, a District Nurse (Nurse) touched the Student inappropriately and made sexual noises and comments while conducting lice checks for students in the Class. The Complainant alleged that the Nurse touched the Student’s neck, bra, and front and back panty area and made sexual noises when touching the Student around her panty region and asked the Student “does this feel good?” The Complainant clarified that the Student was not asked to, nor did she, remove any clothing. The Complainant stated that a teacher (Teacher) and aide (Aide) were present and did not stop the behaviors. When asked for any evidence to support her allegation of harassment, the Complainant identified three students in class who she believed witnessed the alleged harassment of the Student.

The Complainant alleged that the District failed to take appropriate action in response to her complaint after she contacted School staff on January 10, 2013, and reported she was upset that the Student was searched in front of other students, including boys. According to an internal District email dated January 11, 2013, the Student later reported that the Nurse had touched her inappropriately and asked if she “liked it.”

OCR examined the District’s response to the alleged incident involving the Student. At the time of the alleged harassment the Student attended the School in a self-contained setting, in a class with other students with disabilities and peer mentors who did not have disabilities. The class was separated into two sections with different teachers and aides and the Student was in one of the sections. According to the District, the searches were conducted in front of the open bathroom door. The Nurse reported that this choice was made to ensure maximum privacy for the student being searched. Witnesses reported that only those individuals sitting at the central table were able to see the searches. Subsequent to the alleged harassment the Complainant withdrew the Student from the School.

The District denied that the Student was inappropriately touched by the Nurse, as alleged. The District further contended that the School investigated the allegations made to their staff by the Complainant and found no evidence to support the Complainant’s allegations.

When interviewed by OCR, the Principal confirmed that he learned about the complaint from the Complainant on January 10, 2013, when he received a message from his assistant that the Complainant had called and was concerned about the Student having been searched for lice in front of boys. The Principal later learned that the Complainant believed that the Student had been searched in the bra and panty area and that the Complainant alleged that the Nurse had made inappropriate noises asking the Student “if she liked that.”

Pursuant to the District’s policies and procedures, the Principal is encouraged to put the report of harassment in writing for purposes of the District conducting an investigation. The Principal is responsible for notifying the District’s Human Resources Officer, who is responsible for investigating all complaints of staff-on-student sexual harassment.

The Principal confirmed that he did not put the Complainant’s allegations in writing. He stated that he contacted the Human Resources Department (HR) on January 10, 2013, to notify them of the allegation. The Principal reported that he learned, via email from HR, that the Complainant had already contacted the police and that an investigation was going to be conducted by the police.

The Principal reported that on January 11, 2013, he secluded each of the staff members who were present for the lice check in preparation for interview by the police. The Principal stated that he told each staff member that there had been a complaint of misconduct, but gave no further information.

The Principal stated that he participated in the investigation by the police, sitting in on six hours of interviews that the police conducted with the Nurse and staff who were present at the lice check. However, he did not ask any questions or document the witness statements. The

Principal further confirmed that he did not go to the Complainant's home with the police officer to interview the Complainant or Student. The Principal stated that after the interviews he concluded that there was no evidence to support the Complainant's contention that the Student had been subjected to sexual harassment, inappropriate touching or inappropriate conduct of any kind in conjunction with the lice check. The Principal stated that the police notified him of their conclusion, which was the same. The Principal notified the Complainant of the conclusion in response to an email from the Complainant on January 16, 2013.

The Principal explained the involvement of the police and the scope of the District's investigation, stating that when there is an allegation of sexual harassment involving a staff member and a student, the first step is to notify HR so that they can contact the police. He stated that it was their internal practice to notify the local police about potential child abuse, which includes allegations of sexual harassment by an adult. The local police permit the District to have a staff member participate in the investigation as long as the staff member is not the accused and with the agreement that the District will not conduct its own independent investigation at the same time based on concerns that a simultaneous independent investigation by District staff might obstruct the course of their investigation.

Pursuant to District policy, if the District or the police conclude that there was evidence of some form of wrong-doing the Principal would report that conclusion to HR. If the police concluded that there was a criminal charge to be made or if he concluded that there was a breach of District policy or some other issue then HR would proceed to its own action, e.g., discipline of a staff person.

The District produced its head lice management protocols to OCR, which include an information sheet identifying facts about lice, signs and symptoms of an infestation, management and treatment options. The protocol includes directives for how to respond if there is a report of potential lice and requires that searches be conducted maintaining privacy to the maximum extent possible.

When interviewed by OCR, the Nurse stated that typically a report is isolated to a single student and only that student will be searched. A single report, usually from a teacher or a peer who witnesses itching or nits, will result in a search conducted in the Nurse's clinic. The Nurse reported that on January 10, 2013, she received a lice report regarding a student enrolled in the Student's class. After conducting a check on the student in her clinic the Nurse determined that the student had a significant infestation. Because the student with the infestation was a "hugger" of staff and peers in the class, the Nurse determined that this report required a more widespread search of students and staff with whom the student with the infestation had been in contact. The Nurse reported that she came to the class at the end of the day to check all of the students and staff.

The Nurse, a Staff Member and an Aide all described the lice check in the same manner. The Nurse opened the door of the class bathroom out into the classroom and put a chair in that space. She had the student who was being searched sit in the chair and stood behind the student to conduct the search using tongue depressors for student with longer hair. The Nurse stated that she did this to maintain the privacy of the student being searched. The Staff Member and Aide

both sat in chairs at the table located in front of the bathroom waiting to be searched after the students and reported being close enough to watch the searches and hear anything that was said.

The Staff Member and Aide stated that male and female students were searched in the same way, the only exception being for hair length. The Nurse had a table near her with a stack of wrapped tongue depressors from which she unwrapped a new set of tongue depressors for each student and used them to lift long hair off the back of the neck of students and then part and flip through sections of the hair. If a student had short hair they did not require as much hair parting. The Staff Member and Aide stated definitively that the Nurse did not touch any of the students with her hands and that the searches were only conducted on the students heads.

The Nurse expressly denied having touched the Student or any of the students in the class with her hands. The Nurse further denied making any comments or noises to the Student as alleged.

When interviewed by OCR, the Student stated that the Nurse touched her in the bra and panty region and that she was standing when she was searched. OCR also interviewed four other students, two of whom were identified by the Complainant, who were present at the lice check. The three students who were identified by the Complainant confirmed that they had been subjected to a lice check by the Nurse, but none of them witnessed the Nurse checking the Student for lice. The other student (student 1) whom OCR interviewed, is a peer mentor enrolled in the class, witnessed all of the class lice checks, including that of the Student, along with the Staff Member and Aide.

Student 1 remembered the lice check because the Teacher asked them to sit near the other students while they were checked in order to witness everything that occurred. Student 1 sat at a table with the Staff Member and watched the checks after Student 1 was checked. Student 1 stated that the search was conducted with students in a chair in front of the restroom while the Nurse stood behind them and checked their hair with tongue depressors. Student 1 stated that the Nurse did not touch any of the students, including the Student, with her hands at any time. Student 1 stated that Student 1 was close enough to hear the Student and the Nurse talking during her search. Student 1 stated that the Student was squirming in her seat and said that the tongue depressors tickled her neck. Student 1 heard the Nurse gently ask the Student to sit still so she could complete the check, and stated that the Student was sitting during the search. Student 1 stated that the Nurse never touched the Student anywhere except on her head using the tongue depressors, and that the Nurse did not make any of the noises or comments alleged.

OCR also reviewed an affidavit from a local police officer who conducted an investigation of the Complainant's allegations. The police officer's investigation concluded with a determination that no inappropriate physical conduct had occurred. Accordingly, the evidence failed to corroborate the Complainant's allegation that the Nurse engaged in sexually harassing conduct toward the Student, as alleged.

Analysis and Conclusion regarding the District's Response to Incident Involving the Student

The Principal participated in interviews conducted by local law enforcement, and provided the Complainant with an email response to her complaint within six days of receipt. The Principal

told OCR that he concluded that there was insufficient evidence to substantiate the Complainant's claim. However, he did not speak directly to the Complainant or Student regarding the incident and instead relied on email communication from the District's central office regarding the Complainant's complaint. Accordingly, the Principal failed to conduct an independent investigation of the alleged sexual harassment.

Other Reported Sexual Harassment Incidents

OCR requested that the District provide data concerning all sexual harassment or sexual violence allegations at the School in the three most recent full school years, including the 2013-2014 school year. The evidence shows that the School's investigation of other allegations of sexual harassment or touching did not meet the requirements of Title IX and OCR's policy.

Specifically, the evidence indicates that prior to the 2013-2014 school year, the District did not conduct complete investigations of the incidents and in many of the files reviewed by OCR there was no indication that witnesses were interviewed. Furthermore, there was no indication of application of appropriate legal standards. Because the documentation maintained is not detailed, OCR cannot ascertain if the District took steps to protect the alleged victim(s) during the course of their investigations, or notified the alleged victim or harasser of the conclusion of the investigation.

Issue Two: Whether the District retaliated against the Student by searching her person without parental consent, in noncompliance with Section 504 and Title II and their implementing regulations.

During OCR's rebuttal call with the Complainant, she clarified that lack of consent was not her concern with the lice search, but rather that she considered the sexual harassment of the Student by the Nurse to have been conducted in retaliation for her previous advocacy for the Student as a student with a disability and her prior filing of OCR complaints.

As previously noted, to establish retaliation, OCR must find that: (1) the complainant engaged in an activity protected by the laws OCR enforces; (2) the Recipient was aware of the protected activity; (3) the Recipient took adverse action contemporaneous with, or subsequent to, the protected activity; (4) a causal connection can be established between the protected activity and the adverse action; and (5) the Recipient cannot provide legitimate, nondiscriminatory and non-pretextual reasons for its action.

The evidence shows that the Complainant advocated for the rights of the Student as a student with a disability by filing two prior complaints with OCR in April 2012 and January 2013 and that the District received notice of the complaints on May 11, 2012, and February 21, 2013, respectively. Accordingly, the District had knowledge of the Complainant's protected activities.

However, the evidence did not establish that the Student was subjected to inappropriate conduct by the Nurse. Accordingly, there is insufficient evidence to establish that the District retaliated against the Complainant.

On July 2, 2014, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of

noncompliance. When fully implemented, the Agreement entered into by the District will resolve the issues of noncompliance.

The Agreement commits the District to the following:

1. development of new anti-harassment statement and sexual harassment policies and procedures for review and approval by OCR;
2. training of staff regarding the revised policies and procedures to include how to recognize and appropriately address possible sexual harassment or sexual violence under Title IX;
3. development of a system to track and review formal and informal complaints of sexual harassment or sexual violence against students including documentation of the scope and nature of investigation and disposition of each;
4. execution of a climate survey to students and staff to assess the presence and effect of harassment, including sex-based harassment, at the School, along with a commitment to work together in good faith with OCR to implement appropriate corrective actions to address all climate issues identified through the Survey.

Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the recipient deemed compliant if the recipient enters into an agreement that, full performed, will remedy the identified areas of noncompliance. OCR will closely monitor the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issues raised. As stated in the Agreement, if the District fails to fully implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiation administrative enforcement (34 C.F.R. §§ 100.9 and 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Based on the commitments the District has made in the Agreement, OCR has determined that it is appropriate to consider this complaint resolved. This letter of findings sets for the OCR's determination in an individual OCR complaint and should not be construed to cover any other issue regarding the District's compliance. 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 whether or not OCR finds a violation.

The regulations OCR enforces protect individuals who file a complaint with OCR or participate in an OCR complaint investigation. Recipients may not retaliate or take any adverse actions against individuals based upon their having filed a complaint or provided assistance to OCR. Individuals who believe they have been subjected to retaliation or other adverse action because of their participation in any OCR compliance activity may file a complaint with OCR. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive such a request, we will seek to protect, to the extent possible, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This concludes OCR's consideration of this complaint. If you have any questions about this letter, please Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

Cynthia G. Pierre, Ph.D.
Regional Director