



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, D.C.

June 11, 2012

Dr. Tim Markley
Superintendent
New Hanover County Schools
6410 Carolina Beach Road
Wilmington, NC 28412

Re: OCR Complaint No. 11-09-1240
Letter of Findings

Dear Dr. Markley:

This letter is to notify you of the disposition of the above-referenced complaint filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department) against New Hanover County Schools (the District) on July 22, 2009. The Complainant alleged the following:

Allegation 1: Students 1 and 2 were denied admission to Eaton Elementary School (the School) for the 2009-2010 school year based on sex.

Allegation 2: Student 1 was not admitted to open spots in her grade in school lotteries for the 2009-2010 school year because the District used zip code 28401 as a factor, which the Complainant believes discriminates against her based on her race, White.

Allegation 3: Student 2 was not admitted to open spots in his grade in school lotteries for the 2009-10 school year because the District used zip code 28401 as a factor, which the Complainant believes discriminates against him based on his race, White.

Allegation 4: The School retaliated against Students 1 and 2 because the Complainant raised questions about racial discrimination in the application process when it did not admit them to the School.

OCR is responsible for enforcing certain federal civil rights statutes and regulations, including Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, at 34 C.F.R. Part 100, which prohibit discrimination on the bases of race, color, or national origin in activities or programs that receive federal financial assistance. OCR also is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving federal

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

financial assistance. These laws also prohibit a recipient or other person from retaliating against an individual because that person has made a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under the laws enforced by OCR. The District receives federal financial assistance from the Department and therefore, is subject to the provisions of Title VI, Title IX, and their implementing regulations.

In reaching a determination regarding the complaint allegations, OCR interviewed the Complainant and District staff, including the Assistant Superintendent and Enrollment Specialist. In addition, OCR reviewed relevant records and documents submitted by the Complainant and the District. After carefully reviewing this information, OCR determined that there is insufficient evidence to support a finding that discrimination occurred, as alleged. The basis for this conclusion is presented below.

Background

The Complainant is a parent of two children, Student 1 and Student 2, who sought admission into the School's year-round program through a lottery for the 2009-10 school year. Students 1 and 2 attended a private school in the 2008-09 school year. Student 1 is a White female student who sought admission into the first grade at the School. Student 2 is a White male student who sought admission into the third grade at the School. The Complainant filled out lottery applications for each student on March 9, 2009.

The application for admission to the School asks for each student's address (including zip code), parental income, parental educational level, and the applicant's race and sex. On May 8, 2009, the Complainant sent an e-mail to the Assistant Superintendent asking why certain information was requested on the lottery application. The Enrollment Specialist responded to the Complainant on behalf of the Assistant Superintendent on May 8th. The e-mail from the Enrollment Specialist explained that each student who applies for the year-round program gets one spot in the lottery and that students are given an additional spot if they reside in zip code 28401. The Enrollment Specialist also explained that additional spots are given to students whose parents have a high school education or less, or if the parental income is less than \$30,000 a year. On May 12, 2009, the Complainant sent an e-mail to the Enrollment Specialist suggesting that the lottery process was discriminatory because it requested information about students' races, parental educational level, and parental income. The Enrollment Specialist responded on May 14, 2009, noting that information about a student's race is collected for demographic purposes only and is not considered in the lottery process.

The initial lottery for the first and third grades was held on May 28, 2009. Neither Student 1 nor Student 2 was selected in the lottery for their relevant grades. According to District documents, unsuccessful applicants remain in the applicant pool and additional lotteries are run when an opening occurs at that grade, such as when a student moves to another school or district.

At the first grade level, two additional lotteries were held as a result of subsequent openings at the School. The additional first grade lotteries were held on June 2, 2009 and July 9, 2009; Student 1 was not selected in either lottery. At the third grade level, an additional lottery was held on June 17, 2009 because of subsequent third grade openings at the School. Student 2 was not selected. After each lottery, the District sent the Complainant a letter stating that Student 1 or Student 2 was not selected.

Allegation 1: Students 1 and 2 were denied admission to the School for the 2009-2010 school year based on sex.

The Complainant alleged that Students 1 and 2 were denied admission by the District because it used sex as a factor in admission into the School's year-round program. The basis for the Complainant's belief is that the District's application for admission to the year-round program at the School requests the disclosure of each applicant's gender.

The School's application for the 2009-10 school year asks the parent of an applicant to disclose the applicant's gender. According to the District's Enrollment Specialist, the District asks a student applicant's gender only to gather demographic information. District officials deny that gender is used in the selection of students for admission into the School.

The regulation implementing Title IX at 34 CFR § 106.21 allows a recipient to make a preadmission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of both sexes and the results of the inquiry are not used in connection with prohibited discrimination. Here, the inquiry was made of all applicants, regardless of gender. Indeed, the Complainant answered the gender question for both his daughter (Student 1) and son (Student 2).

OCR finds that the District's explanation for the inclusion of gender on its application form and its statements that gender is not used in selection decisions is a legitimate non-discriminatory reason. Although the application includes a question regarding the student's sex, no weights are assigned in the lottery on that basis.¹

OCR analyzed the lottery results at the first and third grade at the School to see if there was any evidence of pretext, i.e., that the explanation was an excuse for unlawful discrimination. At the School's first grade lotteries, a total of four of nineteen females were picked, while seven out of nineteen males were picked. Thus, males were accepted at a slightly higher rate at the School's first grade lotteries for the 2009-10 school year. In the case of the School's third grade lotteries, a total of four out of fifteen females were picked in the lotteries, while five out of fourteen males got picked in the lottery. Thus, males were accepted at a slightly higher rate at the School's third grade lotteries for the 2009-10 school year. Statistical analyses of the first and third grade lotteries at the School indicate that the results of the lotteries by gender fall well within the boundaries of chance.

Absent other evidence of gender-based selections, OCR finds that there is insufficient evidence that the District violated Title IX, as implemented at 34 CFR § 106.21 and 106.31, with respect to this allegation.

Allegations 2 and 3: Students 1 and 2 were not admitted to open spots in her grade in School lotteries for the 2009-2010 school year because the District used zip code 28401 as a factor, which the Complainant believes discriminated against the Students based on their race, White.

The District operates two year-round elementary schools, Codington and Eaton. In 2010-2011, the District was overall 64 percent white, 23 percent black, and 8 percent Hispanic. Codington was 87 percent white, 4 percent black, and 4 percent Hispanic. Eaton was 86 percent white, 6 percent black, and 3 percent Hispanic. Prior to 2008, admission to the schools was decided through an unweighted lottery system. Beginning in March 2008, the District implemented a weighted lottery system, in

¹ The application does not state that providing information about sex is voluntary or include a disclaimer that it will not be used to discriminate. OCR cautions the District that it must include language on lottery applications or any other form asking about an applicant's sex that providing the information is voluntary and will be used in a non-discriminatory manner.

which additional weights are assigned to applicants if they live in zip code 28401, if parental education level is high school/GED or less, or if family income is \$30,000 or less.

The decision to implement the weighted lottery system was made by the student assignment committee, a sub-committee of the Board of Education, consisting of three individuals: the current Chairman of the Board of Education, the Vice Chairman of the Board of Education, and the then-Superintendent. OCR interviewed two members of that committee – the Board Chair and the Board Vice Chair. Each explained that the decision was driven by a desire to increase socioeconomic diversity at the year-round elementary schools. According to the District, parents orally expressed a view that the year-round schools were “almost private in nature” because of the lack of socioeconomic diversity.

The student assignment committee then determined what factors would be used as weights in the lottery. Zip code 28401 was selected because over 50% of students in most schools in that zip code are eligible for free or reduced price lunch (FRL). The District had found that the student test scores at schools with larger populations of FRL-eligible students were lower than student test scores at the year-round schools; including the zip code as a weighting factor was seen as a way to give the students from poorer families at the lower performing schools a greater opportunity to attend one of the year-round schools. Other zip codes in the District have pockets with a high percentage of FRL-eligible students, but do not have the same widespread pattern of high poverty students as in zip code 28401.² The Board Chair told OCR that around the time they were considering the weighted lottery system, the local government created a Blue Ribbon Commission modeled after the Harlem Children’s Zone, with the aim of combating poverty and increasing opportunities for children in the downtown area (zip code 28401); he indicated that the committee was aware of the Blue Ribbon Commission and it coincided with the committee’s objectives.

Applicants each get one “card” for the lottery. As noted above, there are three weighting factors – zip code, family income level, and parental education level. Each applicant receives one additional card for each of those factors the applicant satisfies. Therefore, an applicant who satisfies none of the factors has one card, and an applicant who satisfies all three of the factors has four cards. Applicants apply separately to each year-round school they are interested in attending. Each school runs a separate lottery.

As a first step of its analysis, OCR reviewed information regarding the number of students from zip code 28401 who were included in the first grade lottery at the School. District data indicated that no student from zip code 28401 applied for the first grade lotteries. Thus, the Complainant’s assertion that Student 1 was denied admission because of the use of zip code 28401 is not supported by the evidence obtained in the course of OCR’s investigation. In other words, there is no indication that Student 1 was denied admission because a student from zip code 28401 was offered admission. Similarly, OCR reviewed information on the number of students from zip code 28401 who were included in the third grade lottery at the School. District data indicated that only a few students from zip code 28401 applied for the third grade lottery. None of the students from zip code 28401 who applied for entrance in the third grade lottery were selected in the lotteries. Thus, the Complainant’s assertion that Student 2 was denied admission to the School because of the use of zip code 28401 is not supported by the investigative evidence. In other words, there is no indication that Student 2 was denied admission because a student from zip code 28401 was offered admission.

² OCR reviewed census data for the zip codes in the District. Those data bear out that a significantly greater proportion of families in 28401 are below the poverty level than in other District zip codes.

In addition, OCR acknowledges that the District’s interests in socioeconomic diversity were substantial and legitimate. OCR recognizes the judgment of educators and the ample research findings in the educational literature that socioeconomic diversity is educationally beneficial in elementary, secondary and postsecondary education programs. Further, OCR’s investigation revealed no evidence of intent to discriminate based on race or any difference in treatment of students based on race. Although the application for the year-round schools includes a question regarding the student’s race, no weights are assigned in the lottery based on an applicant’s race.³ The Board Chair and Vice Chair stated that the committee did not discuss using race as a factor in the lottery or meant to achieve any racial purpose by implementing the weighted lottery.

The Board Chair did acknowledge that he expected that increasing socioeconomic diversity in the year-round schools might also have the effect of increasing minority representation in these schools. Indeed, although the District’s goal was socioeconomic diversity, the district could have legally pursued racial and ethnic diversity in its year round schools by using the same race-neutral factors that it used for the purposes of increasing socioeconomic diversity. A district’s use of race-neutral criteria—such as zip codes, parental education or income—for the purpose of achieving the compelling interests in racial diversity or avoiding racial isolation is not subject to strict scrutiny review. Districts may, “with candor,” “consider [] the impact a given approach might have on students of different races.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in the judgment).

Allegation 4: The School retaliated against Students 1 and 2 because the Complainant raised questions about racial discrimination in the application process when it did not admit them to the School.

Both Title IX and Title VI prohibit retaliation. In investigating a retaliation claim, OCR first determines whether (1) the complainant engaged in a protected activity, e.g., asserted a right or privilege secured by one of the statutes enforced by OCR; (2) the recipient had knowledge that the complainant engaged in the protected activity; (3) the recipient took adverse action against the complainant or one closely associated with the complainant; and (4) there was some evidence of a causal connection between the adverse action and the protected activity. If all of these elements are established, then an initial case of retaliation is established and OCR inquires whether the recipient had a legitimate non-retaliatory reason for taking action that was adverse. The evidence is then analyzed to determine whether the explanation provided is merely an excuse or pretext for retaliation.

OCR assumed for purposes of this analysis that an initial, or *prima facie*, case of retaliation has been established and reviewed the District’s legitimate, non-retaliatory reason for not admitting Students 1 and 2 to the School.

The Enrollment Specialist explained that Students 1 and 2 were not admitted to the School based on a random lottery. The Enrollment Specialist stated that the names of all applicants are entered into an Excel spreadsheet and assigned a corresponding applicant number from number “1” onwards. The District uses the computer program “Research Randomizer” (Program) to select applicants. According to data provided about the Program, the Program asks how many applicants to select in a lottery and how many entries are in the group from which applicants are selected. The Program then randomly

³ The application does not state that providing information about race is voluntary or include a disclaimer that it will not be used to discriminate. OCR cautions the District that it must include language on lottery applications or any other form asking about an applicant’s race that providing the information is voluntary and will be used in a non-discriminatory manner.

selects the set of numbers to be pulled for the lottery. The specific numbers chosen are then matched to the students with the corresponding numbers on the Excel spreadsheets. The District sends letters to parents of these students offering admission to the School. The District also sends letters of regret to parents of students not selected in the lotteries. Students who are not selected remain in the wait list pool until the day before School begins, and are entered in subsequent lotteries at that grade level.

OCR reviewed the Excel spreadsheets for the School's first and third grade lotteries for admission for the 2009-10 school year. Students 1 and 2 are listed in the Excel spreadsheets for each lottery for their respective grades at the School. This indicates that Students 1 and 2 were entered into the relevant grade lotteries for the School. The District also provided OCR the printouts of the results from the Program for the lotteries conducted in the summer of 2009 for admission into the first and third grades at the School. The lottery results indicate that the numerical codes assigned to Student 1 and 2 were not selected in any of the lotteries. OCR finds that the District has established a legitimate non-retaliatory reason why Students 1 and 2 were not admitted to the School.

OCR then examined whether the District's explanation was a pretext or excuse for unlawful retaliation. In doing so, OCR examined the District's treatment of similarly-situated students. Based on District data, results indicate that, for the first and third grade School lotteries, forty-five first and third grade student applicants other than Students 1 and 2 were not offered admission into the School. The District informed OCR that none of the parents or guardians of these students had raised allegations of discrimination about the School's lottery process. Thus, OCR cannot establish that Students 1 and 2 were treated differently because of the Complainant's protected activity. OCR's investigation did not otherwise suggest that the legitimate, non-retaliatory rationale proffered by the District was an excuse for discrimination. Therefore, OCR finds insufficient evidence that the District or School retaliated against Students 1 and 2 because the Complainant raised questions of racial discrimination in the application process.

Conclusion

This concludes OCR's investigation of the complaint, and we are closing it effective the date of this letter. This determination letter addresses only the allegations discussed herein and should not be construed to cover any other issues regarding the District's compliance with Title VI. Be advised that the Complainant may file a private suit in federal court whether or not OCR finds a violation.

We have notified the Complainant that the District may not harass, coerce, intimidate, or discriminate against the Complainant because the Complainant filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

This letter sets forth OCR's determination in an individual OCR case. 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.

We appreciate the assistance and cooperation provided by Assistant Superintendent Dr. Rick Holliday. If you have any questions, feel free to contact Sara Clash-Drexler, at (202) 453-5906 or Sara.Clash-Drexler@ed.gov or Martha Russo, at (214) 661-9622 or Martha.Russo@ed.gov.

Sincerely,

/s/

Olabisi L. Okubadejo
Team Leader
District of Columbia Office
Office for Civil Rights