



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

September 17, 2019

Superintendent Winfried Feneberg
Kearsarge Regional School District / School Administrative Unit 65

Via email: wfeneberg@kearsarge.org

Re: Complaint No. 01-17-1201
Kearsarge Regional School District / School Administrative Unit 65

Dear Superintendent Feneberg:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received on April 14, 2017 against Kearsarge Regional School District / School Administrative Unit 65 (District). The Complainant alleged that the District discriminated against her XXX (Student) on the basis of sex by failing to respond equitably to complaints, reports, and/or incidents of sexual harassment allegedly committed by the Student between XXXXX XXXX and XXXXXXXX XXXX (Allegation 1); and discriminated against the Student on the basis of race by imposing disproportionately severe punishment on the Student as compared to similarly-situated white students in XXXXXXXX XXXX and XXXXXXXX XXXX (Allegation 2).

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of financial assistance from the Department, and 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 basis of race, color, or national origin in any education program or activity operated by a recipient of financial assistance from the Department. The District is subject to the requirements of Title IX and Title VI because it is a recipient of financial assistance from the Department.

During the investigation, OCR reviewed a video recording and documents provided by the District and the Complainant; interviewed the Student, Complainant, and District staff; and conducted a site visit on May 7, 2019. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 2. Before OCR completed its investigation of Allegation 1, the District expressed a willingness to resolve that allegation on August 14, 2019. OCR's findings and conclusions are discussed below. Hereinafter, you will be referred to as "the Superintendent."

Facts

The Student, who is a XXXXXXXX XXXXXXXXXXXX XXXX XXXX, was enrolled in the XXXX grade at XXXXXXXX XXXXXXXX XXXX School XXXX XXXX during the XXXX-XXXX school year.

The Student's First Suspension

On XXXXXXXX XX, XXXX, the mother of XXXX XXXXX grade XXXX enrolled at XXXXXXXX XXXXXXXX XXXXXXXX School XXXXX XXXXX called their guidance counselor to report that the XXXX had been “harassed on the bus” by the Student, who was “talking about sex and XXXXXXXX.” The guidance counselor met with one of the XXXX, who told XXX that the Student “was asking XXX and other students to XXXXXXXX on the bus,” and “this has happened more than one time.” The guidance counselor reported this information to the XXXXX School’s principal and assistant principal.

On XXXXXXXXXXXX, XXXX, the XXXXXXXX School principal interviewed the XXXX and a third witness, an XXXXX-grade XXX. The principal informed one of the XXXX School’s two assistant principals (Assistant Principal A) that all three witnesses had confirmed that, on the bus ride home on XXXXXXXXXXXX, XXXX, the Student “told them they should be XXXXXXX XXXX, cools kids do it, and that they should be XXXXXXXX,” although the Student had “used more colorful language.” The Student informed OCR that XX had only spoken to one of the XXXX near the back of the bus while the other XXXX was sitting at the front of the bus where XX could not see or hear the Student. On XXXXXXXXXXXX, XXXX, Assistant Principal A collected written statements from one of the XXXX and the XXXXX grade witness.

Assistant Principal A informed OCR that she orally summarized the information that she had learned from the XXXXX School students and asked the Student whether what they had said was true. She and the Student both recalled that the Student nodded and affirmed that XX understood that it was an inappropriate conversation. She also stated that she believed she would have informed the Student that she was imposing a XXX-day out-of-school suspension for this misconduct after the interview, but she could not specifically recall when this information was shared with the Student. An incident report signed by Assistant Principal A states that the Student initially denied having a “conversation of an inappropriate nature,” but admitted to having a conversation about XXXXXXXX after learning that the XXXXX School students had been questioned and stated that XX had “probably taken it too far.” The report notes that the Student acknowledged knowing that the students were in XXXXX school but denied knowing that one of the XXXX was XXXXXXX years old.

Later on XXXXXXXXXXXX XX, XXXX, Assistant Principal A called the Complainant and sent her a letter stating that the Student “encouraged XXX and XXX grade students to engage in a conversation of a sexual nature” on the school bus.¹ The letter notes that the Student had been issued a XXXXXXX-day out-of-school suspension that would commence the following day. The letter does not reference any District policy that the Student had allegedly violated. However, the

¹ The Student’s “Discipline Alert Log” includes materially identical language to refer to the conduct for which the Student was found responsible.

incident report states that the District had found the Student responsible for “sexual harassment.”² Assistant Principal A informed OCR that she had not drafted the incident report or categorized the incident as sexual harassment until she told the Complainant that the Student had engaged in a sexual conversation on the bus and the Complainant asked her to more specifically define the misconduct and explain why it warranted a XXXXXX-day suspension.³ She noted that she shared the definition of sexual harassment with the Complainant, but she “wouldn’t say [she] ever officially classified it as sexual harassment.”

The Complainant informed OCR that during the call, Assistant Principal A stated that she was “confident in [her] decision” that the Student had initiated the conversation “[b]ased on [an] incident XXXX XXXX” involving the Student in which XX had allegedly bullied another student. The Complainant also alleged that Assistant Principal A referenced the Student’s “physical attributes” during this telephone call and asserted that XX was “using power negatively.” The Complainant alleged that Assistant Principal A had made similar comments about the Student following the alleged bullying incident during the XXXXXX XXXXX XXXX.⁴ The Complainant informed OCR that when she asked Assistant Principal A what she meant by “power,” she responded that the Student was “XXXX” and “XXXXX.”⁵

That evening, the Complainant sent Assistant Principal A, the XXXXX School’s principal, the Student’s guidance counselor, and the XXXXX School guidance counselor an email requesting that they attend a meeting with her the following morning and asking that the Student XXXXXX XX XXXXXX “until this is resolved.” The District acceded to the Complainant’s request to delay the suspension.

On XXXXXXXX XX, XXXX, the Complainant and Student met with Assistant Principal A and the XXXX School principal. The Complainant informed OCR that she expressed various concerns and requested a copy of all records relating to the incident during this meeting, but did

² The District’s “Sexual Harassment and Sexual Violence” policy defines sexual harassment as “verbal communication of a sexual nature when: that conduct or communication 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 education environment.” This policy further states that “[p]ersons accused of harassment will be given sufficient information about the allegations and a reasonable opportunity to respond before they are found to have harassed another and before any corrective action or discipline is imposed.” Such discipline may include any action that the District “deems necessary and appropriate, including but not limited to warning, suspension or immediate removal from the school setting to end sexual harassment and sexual violence and prevent its recurrence.” The policy also states that the District “will notify the victim and alleged harasser, in writing, of the outcome of the investigation.”

³ The Complainant informed OCR that during this conversation, Assistant Principal A initially referred to the conversation as “rude and inappropriate” rather than “sexual” and falsely informed her that the three XXXXX School students had complained about the conversation to the XXXXX School guidance counselor.

⁴ The Complainant and Student both informed OCR that the District had never found the Student responsible for any misconduct involving this other student and disputed that it had occurred.

⁵ Assistant Principal A informed OCR that a student with XXXXXX XXXXX had previously informed her that the Student had been making fun of XXX on the school bus. She noted that while she took this previous incident into account in determining that the Student was responsible for the more recent misconduct, it was not determinative. She also noted that, although she could not recall whether she had referred to the Student as XXXX or XXXXX, she did discuss with the Complainant that the Student was well-liked, looked up to, and could exert a lot of influence over other students.

not receive them. The Complainant subsequently met with the Superintendent, who agreed with the Complainant that further investigation of the incident was warranted.

Later that same day, Assistant Principal A obtained additional written statements from two of the witnesses to the incident. Assistant Principal A also viewed a video of the interior of the bus during the events in question. The video confirms that the Student engaged in a conversation with the first XXXX during the bus ride, but it is not possible to determine from the video whether the Student made any of the alleged comments or gestures.

On XXXXXXXX XX, XXXX, Assistant Principal A informed the Complainant that she had reviewed the video of the bus ride and had taken a follow-up statement from a student at the XXXXXX School, who informed her that the Student “initiated the conversation when asked what XX was looking at on XXX phone.” She confirmed that the Student would be suspended “for engaging in a conversation that falls under the definition of sexual harassment.”

On XXXXXXXX XX, XXXX, Assistant Principal A informed the Complainant that she “was hoping to speak with [her] prior to talking with [the Student]; however, having not heard from [her], [she] plan[ned] to” inform the Student that XX would “be suspended from school on” XXXXXXXX X and X, XXXX. The Complainant requested to meet with Assistant Principal A on one of the following two days. Assistant Principal A agreed to meet with the Complainant, but confirmed that the suspension would nevertheless proceed as planned.

That same day, the Complainant’s XXXXXXXX sent Assistant Principal A a letter requesting all records relating to the Student’s suspension and additional information regarding the specific District policy that the Student had allegedly violated. The letter also requested an appeal of the District’s disciplinary determination, which the District declined to grant.⁶ The District subsequently informed OCR that its resolution of the complaint was not “based upon the procedures specified in any policy,” and Assistant Principal A noted that it was her understanding that she had the leeway to suspend a student for any inappropriate incident. There is no evidence in the record indicating that the Assistant Superintendent – whom the District has designated as its Title IX coordinator – played any role in coordinating the investigation of the allegations against the Student, and the Complainant informed OCR that he was not involved in the resolution of the allegations against the Student.

On XXXXX X, XXXX, the Complainant’s XXXXXXXX requested that the District expunge the Student’s suspension from XXX record and/or “reclassif[y the offense] as a lesser offense unrelated to sexual harassment.” The District agreed and revised both the incident report and suspension notice to state that the Student had been suspended because XX “engaged in an inappropriate and offensive conversation with XXX and XXX grade students.”

The District informed OCR that it assigned the Student a XXX-day suspension for this incident because XX had engaged in “inappropriate language/conduct . . . with young students,” which

⁶ The District’s “Sexual Harassment and Sexual Violence” policy allows either party to appeal the outcome of the District’s investigation of a sexual harassment allegation. The District informed OCR that the superintendent had “reviewed the matter and found no basis to change the punishment.”

constituted “gross misconduct” justifying an out-of-school suspension. It noted that it did not refer the incident to any law enforcement agency.

The Student’s Second Suspension

On XXXXXXXXX X, XXXX, a XXXXX student (Student A) at the XXXX School informed XXX teacher that the Student had called XXX a “XXXXX,” “XXXXX,” “XXXXX,” and “XXXXX XXXX” the previous day and the Student’s white, XXXX classmate (Student B) had called XXX a “XXXXX” on one prior occasion. The teacher reported these allegations to one of the XXXX School’s two assistant principals (Assistant Principal B), who had Student A complete a written statement regarding XXX allegations, in which XXX referenced a witness to the incident (Student C). Assistant Principal B informed OCR that she informed the parents of all parties involved about the allegations at the beginning of her investigation.

The following day, District staff interviewed Student C and had XXX complete a written statement regarding Student A’s allegations. Student C, who the District informed OCR receives XXXXXX XXXXXXXXXX XXXXXX, confirmed the use of various terms and also wrote that the Student and Student B had been calling XXX a “XXXXXXX,” “XXXXXXX,” and “XXXXXXX” in the classroom XXXXX XXX for the XXXXX XXXXX XXXX. Student C identified a witness, who completed a written statement at Assistant Principal A’s request that same day confirming that the Student and Student B had consistently said these and other “mean things” to Student C in the classroom XXXXXXXXXX XXX XXXXX XXXX.

Assistant Principal B interviewed the Student and Student B separately later the same day. She informed OCR that she orally summarized the allegations for both students, informed them that she was conducting a bullying or harassment investigation of the allegations,⁷ and had the Student complete a written statement. The District informed OCR that it ultimately substantiated the comments that the Student and Student B had made to Student C, but it could only substantiate that the Student and Student B had called Student A a “XXXXX” and that Student B had called XXX a “XXXXXXX.” Assistant Principal B informed OCR that the Student had exhibited little reluctance to admit to calling Student C these names. The Student confirmed Assistant Principal B’s account, but XX added that XX had informed Assistant Principal B that XX, Student B, and Student C frequently XXXXXXX XX XXXXXXX XXXX together in class and they all called each other these names while XXXXX XXXX XXXX, but not in other contexts. The incident report notes that Assistant Principal B and a guidance counselor educated the Student and Student B on the seriousness of calling another student these types of names.⁸

⁷ The Student informed OCR that XX could not recall whether Assistant Principal B informed XXX that she was conducting a bullying or harassment investigation.

⁸ The Complainant informed OCR that she did not believe it was necessary for the guidance counselor, “who works with XXXXX XXXXXXXXXX for XXXXXX,” to participate in these conversations, and she asserted that his presence “negatively impact[ed]” the Student. Assistant Principal B informed OCR that she asked the guidance counselor to participate in the Student’s interview because she believed it would make it more of a therapeutic setting and because she was aware that the Complainant had expressed concern about the District’s handling of prior disciplinary incidents involving the Student and did not want the interview to be a one-on-one situation. She noted that she had taken over the District’s handling of misconduct allegations involving the Student because of the Complainant’s concerns regarding Assistant Principal A’s processing of such allegations.

The District determined that the Student and Student B were responsible for “bullying” Student C.⁹ Assistant Principal B informed OCR that she and the Principal had jointly agreed that a XXX-day suspension was an appropriate consequence for the Student’s and Student B’s misconduct, and noted that all XXX-day suspensions are imposed following consultation with the Principal. She noted that the length of the suspension was due in part to the fact that Student C had some “XXXXXXXX XXXXXX,” made an easy target, had been previously subjected to bullying by other students, and had been bullied by the Student and Student B for a significant period of time. She also informed OCR that she always takes into account a student’s prior disciplinary history when reaching a responsibility determination and determining what consequences may be appropriate, as it may show a pattern of behavior indicating that the current allegations are more likely to be true.

On XXXXXXX X, XXXX, Assistant Principal B spoke with the Complainant by telephone about the investigation and the XXX-day out-of-school suspension for bullying. She stated that it was necessary for the suspension to commence the following day in order to protect Student C. Assistant Principal B noted that she had not been able to inform the Student of the suspension before XX left school that day, and the Complainant informed OCR that the Student had also not been informed at that time that XX had been charged with bullying. The Complainant and Assistant Principal B agreed to meet to continue the discussion the following day.

The “Notification of Bullying Report” states that both students were initially assigned a XXX-day out-of-school suspension, and the parents of the Student, Student A, Student B, and Student C were notified of the outcome of the investigation by XXXXXXX X, XXXX. On XXXXXXX X, XXXX, the District provided the Complainant and Student B’s parents written notice that both students had been found to be “making rude comments to a XXXXX student” and “bullying a XXXX student over the course of XXXX XXXXX XXXX by repeatedly calling XXX derogatory names.” The notices state that the out-of-school suspension had been imposed effective that same day and that the District would be XXXXXXX X XXXXX with the XXXXX XXXXX concerning the incident XXXXXXX XX XXXXX XXX.¹⁰ The Complainant’s written notice states that the Student had been assigned a XXX-day out-of school suspension, whereas the written notice provided to Student B’s parents states that XX had been assigned a XXXX-day out-of-school suspension and would be required to attend a minimum of XXXX XXXXXXX with the school XXXXX XXXXX. Although the contemporaneous records that the District provided to OCR do not explain the reason that Student B’s sanction was reduced from what was originally noted in the “Notification of Bullying Report,” the District informed OCR that “[t]he XXXX School permits students who are suspended for XXX days and who have no prior discipline in the XXXXX XXXX to XXX XXXX XXXX suspension days by meeting with the

⁹ State law and District policy define bullying as “a single significant incident or pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which: physically harms a pupil or damages the pupil’s property; causes emotional distress to a student; interferes with a pupil’s educational opportunities; creates a hostile educational environment; or substantially disrupts the orderly operation of the school.” See N.H. Rev. Stat. Ann. 193-F:2; <https://www.kearsarge.org/XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX>.

¹⁰ The District XXXXX XXX XXXXX XXXXX concerning the Student’s and Student B’s conduct toward Student C later that day. The XXXXX are materially identical with the exception that the Student’s XXXX labels the offense “bullying,” whereas Student B’s XXXX labels the offense “harassment.”

school XXXXX XXXXXX.”¹¹ Because Student B “had no prior disciplinary incidents XXXX XXXX, XX was permitted to XXX XXXX XXXX XXX days of XXX XXX day suspension.” According to the District, because the Student had previously been found responsible for XXX serious offenses XXXX XXXXXX XXXX, this was not an option that was available to XXX.¹² Assistant Principal B confirmed that this was the reason that the “XXX XXXX” program was offered to Student B but not Student A, although she could not recall who had spoken to Student B or XXX parents regarding that option.

On XXXXXXXX X, XXXX, the Complainant emailed Assistant Principal B to seek clarification regarding the specific allegations for which the Student had been found responsible. She also requested that the District consider imposing a less severe punishment than out-of-school suspension “[s]ince this all occurred within one classroom.” Assistant Principal B responded that, because the Complainant had XXXXXX XX XXXXXXXX to the XXXXXX X, XXXX meeting, she should direct any inquiries related to the Student’s suspension to the District’s counsel. She noted that the Complainant could meet again with District staff to continue discussing the matter if XX XXXXXXXX XXXX XXXXXXXX. The District informed OCR that Assistant Principal B also informed the Complainant that the XXX-day out-of-school suspension was appropriate because “it was the XXXX major incident for [the Student] XXXX XXXX and XXX behavior was escalating.” The Complainant disputed that Assistant Principal B had ever made this comment to her.

The District’s Discipline of Similarly-Situated Students

The XXXX School’s Student Handbook states that if a student is found responsible for a first offense related to XXXXX or XXXXX XXXX, “XXXX XXXXX XXXX XXXXXXXX XX XXXXXXXX XXXXXXXX XXXXXXXXXX XXX XXX XXXX,” but “XXXX XXXXXXXX XXX XXXX XXX XXXXX XX XXXXXXX XXXXX XX XXX XX XXXX XXXXXXXX XX XXXXX XXXXX XX XXXXXXXX XX XXXXXXXXXXXXXXX XXXXXXXX.” The Handbook does not provide for a reduction in the length of suspension for students found responsible for a second offense. The District informed OCR that “the school administration began to apply this practice to other offenses in which students were issued a XXX day out of school suspension” “[i]n the XXXX of XXXX” in order “to encourage students to reflect on their actions . . . to mitigate future instances of similar behavior.” It noted that “XXX day suspension[s] ha[ve] been reserved for those students with gross misconduct such as bullying or harassment and also may include areas such as assault, or threatening statements around school violence or toward others.” The District informed OCR that the “[a]dministration looks at each situation as an individual case,” and “[t]he decision to offer a student the ability to reduce their suspension is based on the situation/student conduct, students [sic] willingness to take accountability for their actions and the impact that the situation had on other students within the school community.” It noted that

¹¹ While Assistant Principals A and B generally agreed with this description of the “XXX XXX” program, they informed OCR that it is only made available to students who have had no prior discipline while enrolled at the XXXX School, not just during the XXXXXXX XXXXXX XXXX.

¹² In addition to the XXXXXXXX XX, XXXX incident on the school bus, the District found the Student and another white, XXXX classmate responsible for XXXXXXXXXX XXXXXXXX a school XXXXXXXX in XXXXXXXXXX XXXX. Both students were assigned XXX XXXXXXX XXXXXXX and were responsible for XXXXXXXXXX XXXXXXXX XX XXX XXXXXXX.

there were no students who did not meet the eligibility criteria but were nevertheless allowed to “XXX XXXXX” days of suspension during the XXXX-XXXX school year.

OCR requested that the District provide information regarding all incidents of alleged bullying, harassment (of any kind), or inappropriate and/or offensive student conversations of which the District had notice during the XXXX-XXXX, XXXX-XXXX, and XXXX-XXXX school years. The District provided OCR information regarding 81 such incidents. Eight of these incidents, all involving bullying or harassment, resulted in the offending student receiving a XXX-day out-of-school suspension – the most severe disciplinary sanction that the District imposed for the above-referenced offenses during the relevant time period. All seven of the offending students other than the Student were white. The District informed OCR that three of these students were permitted to “XXX XXXX” days of suspension because they did not have any prior disciplinary history, whereas the remaining four students did have a prior disciplinary history and were thus required to serve the full XXX-day suspension. The students’ discipline logs corroborate the District’s assertion.¹³

The District substantiated twenty incidents of student misconduct that it characterized as bullying or harassment (including sexual harassment) during the relevant time period. The District imposed an out-of-school suspension of between XXX and XXXX days on each offending student and XXXXXX XXX XXXXXXXXXX regarding all but one of these incidents.¹⁴ Aside from the Student, only one of the twenty offending students was not white. That individual – an XXXXXXXX XXXXXXXX student – received a XXX-day suspension for “making inappropriate remarks and rude comments to a student over a period of time.”¹⁵

The District informed OCR that, with respect to the Student’s first suspension, the most similarly-situated student is a white, XXXXX, XXXXXXXX-grade student whom the District determined had shown a XXXX, XXXXX-grade student a photograph of XXXX XXXXXXXXXX and discussed XXXX XXXXXXXXXX with XXX while they were riding the school bus together. XXXXX and XXXXX-grade students overheard this conversation and reported it to their parents. The District imposed a XXX-day out-of-school suspension on the XXXXX-grade student for engaging “in an inappropriate sexual conversation/conduct on the school bus” and terminated XXX XXXXXXXX project working with XXXXXXX XXXXXXX XXXXXXX. The District informed OCR that it assigned a XXX-day suspension in this case because the XXXXXXX-grader had engaged in “inappropriate language/image/conduct . . . with young students,” which constituted “gross misconduct” justifying an out-of-school suspension. The District also referred this incident to XXX XXXX XXXXX XXXXXXXXXX. OCR’s review of the comparator data provided by the District indicates that the XXX-day out-of-school suspension that the District

¹³ Although all four students’ discipline logs indicate a prior disciplinary history in the District, three of the discipline logs indicate that the offending student had not yet been disciplined during that school year. In contrast, the discipline logs for the three students who were permitted to XXX XXXX days of suspension indicate that those students had never previously been disciplined in the District.

¹⁴ The one incident in which the District did not XXXXXXX XXX XXXXXXXXXX involved a student being disciplined for falsely accusing another student of harassment.

¹⁵ Aside from the misconduct allegedly committed by the Student and the bullying committed by this XXXXXXX XXXXXXXX student, only one of the 81 incidents described by the District involved a non-white offender. That student, who is also XXXXXXX XXXXXXXX, was required to XXXXXXXXXX XX X XXXXXXX XXX XXX XXXXXXX XXXXXXX XXX XXXXX for making inappropriate comments on social media.

assigned to the Student fell within the middle of the range of sanctions imposed on students whom the District determined had made inappropriate comments.¹⁶

The District informed OCR that, with respect to the Student’s second suspension, the most similarly-situated student is Student B, a white student who engaged in the same misconduct and who would have received identical disciplinary consequences but for XXX eligibility for the District’s suspension XXXXXXXX program.

Legal Standards

Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. The Title IX regulation, at 34 C.F.R. § 106.31(a), 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 education program or activity operated by a recipient of Federal financial assistance. Sexual harassment that creates a hostile environment can be a form of sex discrimination prohibited by Title IX.

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints of Title IX violations, and promptly and equitably resolve all such complaints of which it has notice. OCR evaluates on a case-by-case basis whether the resolution of such complaints is prompt and equitable. The Title IX regulation, at 34 C.F.R. § 106.8(a), also requires that a recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, including any investigation of any complaint communicated to the recipient alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX.

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District’s programs or activities on the basis of race, color, or national origin. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether a recipient treated someone less favorably than similarly situated individuals of a different race. If not, that ends OCR’s inquiry.

Analysis

Allegation 1

OCR identified concerns during the preliminary investigation of Allegation 1. The evidence indicates that Assistant Principal A may have failed, at the outset of the District’s investigation of the XXXXXXXX XX, XXXX incident on the school bus, to determine whether the allegations against the Student should be investigated as (1) sexual harassment, which would have called for utilizing the District’s grievance procedures subject to the requirements of Title IX, or (2) rude, inappropriate, and/or offensive conduct, which would not be subject to Title IX. Assistant

¹⁶ These sanctions ranged from a warning to a six-day out-of-school suspension.

Principal A did not reference sexual harassment in the suspension notice, Discipline Alert Log, or during her interview with the Student, and she informed OCR that she “wouldn’t say [she] ever officially classified [the Student’s conduct] as sexual harassment.” However, after the Complainant pressed her to more specifically define the Student’s misconduct and explain why it warranted a XXX-day out-of-school suspension, she shared the definition of sexual harassment with the Complainant, informed her that the Student was being suspended “for engaging in a conversation that falls under th[at] definition,” and subsequently wrote in the incident report that the Student “was suspended from school for XXX days for engaging in a conversation that falls under the definition of sexual harassment.” If the District had in fact characterized the allegation as sexual harassment, it should have notified the parties of that fact at the outset of the District’s resolution process, resolved the allegation pursuant to the District’s Title IX grievance procedures,¹⁷ and ensured that the District’s Title IX coordinator coordinated any investigation of the allegation. The evidence gathered thus far does not indicate that those things occurred.

At the Complainant’s request, the District took steps to clarify the Student’s record, eliminating all references to sexual harassment. In light of all the circumstances, there is no individual remedy required under Title IX at this point in time.

Allegation 2

OCR has determined that, with respect to the Student’s suspension in XXXXXX XXXX, the District did not treat the Student less favorably than similarly-situated individuals of a different race. Specifically, OCR determined that the XXX-day out-of-school suspension that the District assigned to the Student fell within the middle of the range of sanctions imposed on students whom the District determined had made inappropriate comments – nearly all of whom were white. Furthermore, OCR credits the District’s assertion that the student who was most similarly-situated to the Student is the white, XXXXX, XXXXX-grade student who engaged “in an inappropriate sexual conversation/conduct” “with young students” “on the school bus.” OCR determined that the discipline imposed on this student – a XXXX-day out-of-school suspension, termination of a XXXXX project, and XXXXXXXX XX XXX XXXXXXXXX – was more severe than the discipline imposed on the Student for the XXXXXXX XXXX incident on the school bus. Accordingly, OCR has determined that there is insufficient evidence to establish a prima facie case of discrimination with respect to this incident.

Similarly, OCR has determined that, with respect to the Student’s suspension in XXXXXX XXXX, the District did not treat the Student less favorably than similarly-situated individuals of a different race. Specifically, the Student was not similarly situated to other students, like Student B, who had no prior record of discipline. OCR determined that the District subjected three white students who engaged in bullying or harassment that the District initially determined warranted a XXX-day out-of-school suspension – including Student B, who engaged in conduct virtually identical to the Student’s – to a XXXX-day out-of-school suspension and XXXX XXXXXX with the school XXXXX XXXXX, but none of these students were similarly situated to the Student, who had XXX previous offenses that XXXXXX XXXX. Moreover, student

¹⁷ A Title IX investigation, with its focus on hostile environment, likely should have considered the allegation raised by one of the XXXXX School students that conduct similar to what allegedly occurred on the school bus “has happened more than one time,” which the District may not have investigated or otherwise resolved.

discipline logs corroborate that every other instance of bullying and harassment that resulted in a XXX-day out-of-school suspension involved a white offending student.

Accordingly, OCR has determined that there is insufficient evidence to support Allegation 2.

Conclusion

Prior to OCR's issuance of a final determination regarding Allegation 1, the District expressed an interest in resolving that allegation pursuant to Section 302 of OCR's *Case Processing Manual* (CPM) and OCR determined that it was appropriate to do so because OCR's investigation identified issues that can be addressed through a resolution agreement. On September 4, 2019, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of concern. The Agreement entered into by the District is designed to resolve these concerns. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified compliance concerns. OCR will monitor closely 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 if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement entered into by the District on September 4, 2019, if the District fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

The Complainant has a right to appeal OCR's determination regarding Allegation 2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, 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, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law

enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it 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.

Sincerely,

/s/

Michelle Kalka
Acting Regional Director

Enclosure

cc: Diane M. Gorrow, Esq. (via email: gorrow@soulefirm.com)