



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

September 26, 2017

Dr. Stephen Russell
Superintendent
SAU #87 – Mascenic Regional School District
16 School Street
Greenville, NH 03048
By Email: srussell@mascenic.org

Re: Complaint Nos. 01-17-1321, 1322
SAU #87 (Mascenic Regional School District)

Dear Superintendent Russell:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against SAU #87 (the District). The Complainant alleged the District discriminated on the bases of disability and sex against XX XXXXXX (Student A) in Complaint No. 01-17-1322, and XXXXXXXXXXXX (Student B) in Complaint No. 01-17-1321. Specifically, the complaints alleged that the District did not have a Title IX Coordinator (Allegation 1) and failed to provide the Complainant with notice of the Title IX grievance procedure (Allegation 2). The complaints further alleged that the District had notice of a sexually hostile environment and failed to provide a prompt and equitable relief to Student A (Allegation 3) and/or Student B (Allegation 4). The complaints also alleged that the District denied Student A (Allegation 5) and Student B (Allegation 6) a free and appropriate education (FAPE) by failing to consider any changes in their needs resulting from the alleged incidents. Finally, the complaints alleged that the District retaliated against the Complainant and XXXXXX for their assertion of their rights under Title IX by interfering with the Complainant's efforts to transfer Students A and B to another district (Allegation 7).

As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. Further, OCR enforces 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

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

receiving federal financial assistance from the Department. Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Allegation 1: Title IX Coordinator

The Title IX implementing regulation, at 34 C.F.R. § 106.8(a), requires that a recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. The recipient must notify all students and employees of the name, office address, and telephone number of the designated coordinator. Also, recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. While a recipient may choose to have a number of employees responsible for Title IX matters, it is advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints.

Based on OCR's investigation to date, the evidence indicated that the District and its personnel did not consistently identify a designated Title IX Coordinator during the 2015-2016 and 2016-2017 school years. However, OCR has not completed its investigation regarding the District's Title IX Coordinator(s) during the relevant period. Accordingly, OCR has not reached a compliance determination regarding this allegation. The Agreement will ensure the District's Title IX Coordinator is designated and trained, and that the District provides notice of the identity of the Coordinator to all District students and employees. Further, the Agreement requires that, if the District designates more than one person to fill that role, it must specify who is responsible for overall coordination and oversight.¹

Allegation 2: Title IX Grievance Procedure

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. OCR evaluates on a case-by-case basis whether the resolution of a sexual harassment complaint is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR examines a number of factors in evaluating whether a recipient's grievance procedures provide for the prompt and equitable resolution of complaints, including whether the procedures provide for the following:

1. Notice to students and employees of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints alleging discrimination carried out by employees, other students, and third parties;
3. Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

¹ The District has identified several personnel who will serve as Title IX Coordinators, but has not specified how the duties and responsibilities will be divided amongst those individuals.

4. Designated and reasonably prompt timeframes for the major stages of the complaint process;
5. Notice to the parties of the outcome of the complaint; and
6. An assurance that the recipient will take steps to prevent recurrence of any discrimination and to correct discriminatory effects on the complainant and others, if appropriate.

A grievance procedure cannot be prompt or equitable unless members of the recipient's community are aware of its existence, how it works, and how to file a complaint. In addition, the recipient should provide both parties with an equitable opportunity to participate during the resolution process. Because retaliation is prohibited by Title IX, a recipient may want to include a provision in its grievance procedures prohibiting retaliation against any individual who files a complaint or participates in an investigation.

The District's primary policy concerning sexual harassment is labeled "JBAA" (JBAA). The policy does not indicate any other title, and contains no reference to Title IX, but it states that its purpose is "to maintain a learning environment that is free from sexual harassment and violence, or other improper behavior that may constitute harassment as defined below." Based on its review of the JBAA to date, OCR has identified preliminary concerns because the policy does not satisfy all six of the requirements listed above.

OCR has not completed its investigation of this allegation, including obtaining all other relevant materials concerning the District's sexual harassment policies/procedures² and evidence regarding the District's implementation of the JBAA. Accordingly, OCR has not reached a compliance determination regarding this allegation. The Agreement will ensure the District has a grievance procedure that complies with Title IX, which it will disseminate to all District students, parents/guardians, and employees. The District will also make any additional modifications to handbooks or other documents as necessary to ensure clarity regarding which policies or procedures apply to complaints of sexual harassment.

Allegations 3-4: Response to Indications of a Sexually Hostile Environment

Allegations 3 and 4 concern the District's alleged failure to respond appropriately to a sexually hostile environment at school for Students A and/or B.

A District's failure to respond promptly and effectively to sexual harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Title IX. A District has "notice" of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. Responsible employees include employees who have the authority to redress the harassment, who have the duty to report misconduct to school officials, or whom students could reasonably believe have this authority or duty.

² The District's Elementary and Middle School handbooks contain policies titled "Sexual Harassment and Sexual Violence" that mostly mimic the JBAA, but have some material variations. Further, the Elementary handbooks contained a policy titled "Personal Harassment (Title IX)" but the policy was not specific to Title IX, prohibited harassment on a number of protected characteristics, and did not provide any grievance procedures.

XXXX. However, the evidence does not indicate that the teams considered whether Student A or B’s educational needs had changed, despite XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX, and information suggesting a change in Student A’s conduct (i.e., XXXXXXXXXXXXXXXXXXXXXXX). While the District did conduct a re-evaluation of Student B in XXXXXXXXXXXXXXX, the documentation does not indicate whether the evaluation was prompted in part by the alleged incidents or absences, or whether the team considered information regarding the effects of the alleged incidents, despite indicating it had concerns about Student B’s XXXXXXXXXXXXXXXXXXXXXXX. The documentation also does not indicate that the team considered additional information received by the District XXXXXXXXXXXXXXX XX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. However, because the District agreed to resolve this complaint prior to OCR completing its investigation, OCR did not interview any individuals present at these meetings to verify the accuracy of the meeting notes and obtain additional evidence regarding these allegations.

OCR has not completed its investigation of these allegations and, accordingly, has not reached a compliance determination regarding Allegations 5 and 6. The Agreement will ensure the Students’ IEP teams convene to determine whether the Students are eligible for compensatory services.

Allegation 7 - Retaliation

The Title IX regulation, at 34 C.F.R. § 106.71, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Title IX or who files a complaint, testifies, assists, or participates in a proceeding under Title IX.

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In analyzing an individual’s claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future;⁴ (2) the individual experienced an adverse action caused by the recipient;⁵ and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR next examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for

⁴ A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws.
⁵ An adverse action is something that could deter a reasonable person from engaging in further protected activity

taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

The Complainant alleged that the District retaliated against XXXXXXXXXXXX for their assertion of their rights under Title IX by interfering with the Complainant’s efforts to transfer Students A and B to another district. OCR has not fully investigated this allegation to determine whether any actions by the Superintendent (or other District personnel) led to a delay in processing the Students’ transfers, and whether the District has identified a legitimate, non-discriminatory reason for any delay that was not a pretext for retaliation.

Prior to the conclusion of OCR’s investigation and pursuant to Section 302 of OCR’s *Case Processing Manual*, the District expressed an interest in resolving this complaint. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the complaint. OCR will monitor the District’s implementation of the Agreement.

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.

Please be advised that the District must 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. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, you may contact Civil Rights Attorney Catherine Deneke at (617) 289-0080 or by e-mail at Catherine.Deneke@ed.gov.

Sincerely,

Adrienne M. Mundy-Shepard
Acting Regional Director

Enclosure

cc: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX