



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

August 20, 2019

Superintendent Daniel Higgins
Ellsworth School Department

Via email: dhiggins@ellsworthschools.org

Re: Complaint No. 01-19-1165
Ellsworth School Department

Dear Superintendent Higgins:

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 the Ellsworth School Department (District). The Complainant alleges that the District discriminated against her daughter (Student) on the basis of her race. Specifically, the complaint alleges that the District failed to respond in a reasonable, timely, and effective manner to racial harassment of the Student of which the District had notice during the XXXXXX school year. 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). Hereinafter, you will be referred to as “the Superintendent.”

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) 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 program or activity receiving federal financial assistance from the Department. Because the District receives federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title VI.

During its preliminary investigation, OCR reviewed documentation provided by the Complainant and District.

Relevant District Policies and Procedures

The District informed OCR that it has disseminated the following policies and procedures in its Student Handbook, which is provided electronically to all students through school-provided e-mail, available on the District’s website, and provided to individuals who request a printed copy.¹

¹ Title VI does not require recipients to adopt and publish grievance procedures or other policies relating to discrimination on the basis of race, color, or national origin, but the content of any such policies or procedures that a recipient chooses to publish is relevant in assessing the adequacy of the recipient’s response to alleged racial harassment of which it had notice.

- Board Policy “AC: Non-Discrimination/Equal Opportunity and Affirmative Action,” which states that the District “prohibits discrimination against and harassment of employees, candidates for employment, students, and others with rights to admission or access to school programs, activities, or premises on the basis of race, color, . . . or national origin.” Board Policy AC references Title VI and notes that the District’s “Affirmative Action Plan will include designation of an Affirmative Action Officer who will be responsible for ensuring compliance with all Federal and State requirements related to nondiscrimination.”
- Board Policy “ACAA: Harassment and Sexual Harassment of Students,” which states that “[h]arassment includes but is not limited to verbal abuse based on race, color, . . . or national origin.”² Board Policy ACAA notes that “[h]arassment[] of students by other students is considered grounds for disciplinary action, up to and including expulsion,” and “[t]he Superintendent, school principal, or the Affirmative Action Officer will investigate complaints of harassment in accordance with the Student Harassment Complaint Procedure.”
- Board Policy “ACAA-R: Student Discrimination and Harassment Complaint Procedure,” which states that, upon notice of “an allegation that a student has been discriminated against or harassed on the basis of race, color, . . . [or] national origin,” “[t]he building administrator shall promptly inform the Superintendent and the person(s) who is the subject of the complaint that a complaint has been received.” Board Policy ACAA-R also notes that “[t]he complaint will be investigated by the building administrator unless the Superintendent chooses to investigate the complaint or designates another person to investigate it on his/her behalf,” and “[t]he building administrator shall consult with the Superintendent concerning the investigation, conclusions, and any remedial and/or disciplinary actions.” It also notes that “[i]f the school principal determines that discrimination or harassment occurred, he/she shall, in consultation with the Superintendent,” “[d]etermine what remedial action is required, if any”; “[d]etermine what disciplinary action should be taken against the person(s) who engaged in discrimination or harassment, if any”; and “[i]n writing, inform the student and parents/legal guardians of the student who made the complaint of the results of the investigation and its resolution in accordance with applicable state and federal privacy laws.” Board Policy ACAA-R also affords an appeal process to aggrieved parents and legal guardians.

Relevant Events

Student A is XX XXXXX-year-old, XXXXX (XXXXXXXX XXX XXXXX) girl who was enrolled in the XXXX grade at the XXXXXX XXXXXXXX-XXXX XXXXX (School) during the events in question.

² While a document entitled Board Policy “JICK: Bullying and Cyberbullying Prevention in Schools” states that “[h]arassment . . . (as defined in board policy ACAA)” also “constitutes bullying,” another document entitled Board Policy “JICK-R: Bullying and Cyberbullying Administrative Procedure” states that “[b]ehavior alleged to be based on a targeted student’s actual or perceived race, color, . . . or national origin . . . should be addressed under the Student Harassment and Sexual Harassment procedure (ACAA).”

The District informed OCR that, on XXXXXX XX, XXXX, an unnamed staff member at the School informed the School’s Assistant Principal that a XXXXX-year-old, male, XXXX-grade student (Student B) had been “sent in from XXXXX . . . for using inappropriate language.” The School’s Principal and Assistant Principal met with Student B, who admitted that he had “shouted the word XXXXXX” because he was “frustrated” but denied “directing [it] at anyone.” The Principal noted that she “made it very clear” to Student B “that this type of language was completely unacceptable and should never be said again.” She then “made contact with [Student B’s] mother, explained the situation, and she came to get him.” The Principal provided Student B’s mother a letter stating that he would receive an immediate XXXX-XXX XXX-XX-XXXXX XXXXXXXX for “Vulgar Language.”³

The District informed OCR that, on XXXXXXXX X, XXXX, Student A informed her Guidance Counselor that Student B “had called her XXX XX XXXX.”⁴ The Guidance Counselor reported this to the Assistant Principal, who informed the Principal and met with Student A and the Guidance Counselor to discuss the incident. The Assistant Principal wrote that Student A alleged “that after a XXXX XXXX [during XXXXX Student B] had ‘a tantrum,’” said “inappropriate words[,] and then he called her XXX XXX XXXX. She also stated that in the past [Student B] commented on her XXXX stating that she got [it] from her XXX dad.”⁵ Student A named XXXXX student witnesses, all of whom informed the Assistant Principal that “the XXXX . . . had happened ‘last week or the week before’” and they “had heard” Student B say “XXXXX” “in the past but not today.” The Assistant Principal’s notes state that one of the witnesses heard another student (Student C) “call [Student A] XXX XXX XXXX” “while waiting in line to come in from XXXXX,” but when Student A and this witness questioned Student C, “she said she had said ‘XXXXX.’” There is no further reference to Student C’s alleged comment in the records provided by the District. The Assistant Principal informed all of the witnesses “not to talk about this with other students, as we were still doing the investigation.” Based on the information he received from these witnesses, the Assistant Principal “determined that the incident in question was actually an incident already addressed on XXXXXXXX XX and had not actually happened on XXXXXXXX XX.”

On XXXXXXXX X, XXXX, the Assistant Principal requested that the Guidance Counselor confirm with Student A when the incident occurred, and the Guidance Counselor reported that

³ Student B’s “Behavioral Detail Report” states that he was XXXXXXXX for “Disruption and Inappropriate Language.”

⁴ The Complainant informed OCR that Student B called Student A “a ‘stupid XXXXX’” between XXXXXXX XX and XXXXXXX X, XXXX, and reported this to the Guidance Counselor, who “advised [her] to ‘not tell anyone’ about the incident.”

⁵ The Assistant Principal’s notes state that “this was in the past” and it was “tangent[ial] to [the] meeting but important” (emphasis in original). The Complainant informed OCR that Student B told Student A “that he ‘knows she gets her nasty XXXX from her ugly XXXXXXX daddy’” at some point between XXXXX XX and XX, XXXX, and “the school supposedly interviewed” witnesses to this incident. The Assistant Principal’s notes also state that a witness informed him that “last week [Student B] was making fun of [Student A’s] XXXX” by calling it “XXXXX” and “XXX” but she “didn’t hear XXX XXX XXXX.” There is no further reference to this allegation in the records provided by the District.

Student A “repeatedly stated it was today.”⁶ The Assistant Principal discussed the situation with the Principal, who “told him that we had already addressed this by XXXXXXXX [Student B] and . . . we didn’t need to discipline him again for the same incident.” The District informed OCR that the Assistant Principal “let [Student A] know that this had been taken care of,” “told her that it was important that she knows that we want her to feel safe and secure here,” and “told her not to talk with her peers about the incident.” The records provided by the District do not indicate that the District followed up with Student B about whether he had, contrary to his prior assertion, directed a racial slur at Student A, nor do the records indicate whether the District considered recharacterizing Student B’s conduct from “[v]ulgar” or “[i]nappropriate language” to “harassment” that should be addressed pursuant to Board Policies ACAA and ACAA-R.⁷

The District provided OCR a narrative written by the Assistant Principal stating that he called the Complainant “to let her know that this situation had already been addressed” and “stated that [he] couldn’t give any details.” He noted that “[l]ater that afternoon [Student A’s] dad called” and the Assistant Principal informed him “that the incident in question had been addressed and [he] apologized that no details would or even could be shared with him on how it had been addressed.”

The District provided OCR a “Bullying and Cyberbullying Reporting Form,” a “Bullying and Cyberbullying Responding Form,” and a “Bullying and Cyberbullying Remediation Form,” all dated XXXXXXXX XX, XXXX and signed by the Principal. Each of the forms indicates that it was first received by the Superintendent on XXXXX XX, XXXX.

The Reporting Form states that “[i]t was reported” by an unnamed “staff member” that Student B “was at XXXXXXX using vulgar and inappropriate language”; that he “admitted to his behavior”; and that, “[u]pon further investigation, we found that he had called another student XXX XXX XXXX.” This form notes that there were no witnesses to this incident.

The Responding Form states that “[a]t the time of the initial report, it was unknown” “who was believed to have been bullied” on the basis of “race/color,” but “[u]pon further investigation we found it to be” Student A.⁸ This form notes that “[a]t XXXXX [Student B] was XXXXXXX with students” and a “staff member over heard [sic] [him] use vulgar language and sent him in to the office.” It states that “[w]hen we interviewed [Student B] he admitted to vulgar language and swearing,” and “[u]pon further investigation, we found that he called another student xxx xxx xxxx.” The form notes that there have been no “reports of alleged incidents of bullying or substantiated incident(s) of bullying involving the student(s).”⁹ It states that the District “[c]alled

⁶ Although the Assistant Principal’s narrative uses the word “today,” it should probably be “yesterday” given that this conversation with Student A ostensibly occurred the day after she reported the incident to the Guidance Counselor.

⁷ Harassment need not be directed specifically at any particular individual.

⁸ The Responding Form states that, for bullying on the basis of race or color, the District should “refer to Board [P]olicy ACAA: Harassment and Sexual Harassment of Students” and “include the [District’s] Affirmative Action Officer in this investigation.” The District informed OCR that the District’s Superintendent is the person responsible for alleged violations of Title VI in the District’s programs or activities.

⁹ In contrast, Student B’s Behavior Detail Report states that he “xxxxx xxxxxx xx xxxxxxxx xx” because he had been “xxxxxxx xxxxxxxx xxxx xxxxxxx, xxx xxxxxxx xxx xxx [xxx] xxxxxxx” on xxxxxxxx xx, xxxx; he received a XXXXX-XXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXX XX XXXXX X, XXXX for “XXXXXXXXX”; and he “XXXXX

[Student B’s] mother” on XXXXXXXX XX, XXXX “and explained . . . that he was being XXXXXXXX for the use of vulgar and inappropriate language.” The form also notes that Student A’s “parents called [the] Assistant Principal” on XXXXXXXX X, XXXX, and he “let them know that this was still an ongoing investigation” and “a student had been talked with and that it had been handled appropriately according to the information we currently had.”¹⁰ It also states that “the student receives Special Education services” and “the Director of Special Education or [Section] 504 Coordinator [was] made aware of this situation” on XXXXXXXX XX, XXXX, but it does not clarify whether “the student” refers to Student A or Student B. The form notes that Student A did not identify any witnesses, contrary to the Principal’s and Assistant Principals’ narratives, discussed above. It also states that, on XXXXXXXX XX, XXXX, the Guidance Counselor informed the Complainant that she had met with Student A, “worked with the [Complainant] to discuss outside supports for” Student A, and informed the Complainant that the Principal had spoken with the Director of the Maine Attorney General’s Civil Rights Team Project (Project Director), “listened to recommendations for how to best assist in these situations, and received a follow up email” from the Project Director on XXXXXXXX XX, XXXX. The form concludes that Student B’s “substantiated incident of bullying” had “[c]reat[ed] an intimidating or hostile educational environment for” Student A. It notes that “[a]ll findings and results shall be reported to the superintendent” “and to the Maine Department of Education.”

In contrast, the Complainant informed OCR that, after she called the Principal on XXXXXXXX X, XXXX to “ask[] her why [she] hadn’t been notified of the incident,” the District “didn’t follow up with” Student A, “never communicated [to] her or [the Complainant] any measures that they would take to ensure her safety or prevent any further acts from happening,” never informed the Complainant of Student B’s alleged statement regarding Student A’s XXXX, and “never [provided] a straight answer as to whether or not [the District] had concluded that [Student B] had in fact called [Student A] XXX X XXXX.” The Complainant also alleged that the Guidance Counselor informed her during the XXXXXXXX XX, XXXX telephone call that “they had found a ‘XXXXXX XXXX written by” Student A, which prompted the Complainant to “call[] Crisis immediately.” The Crisis center “sent a worker out to evaluate” Student A, “concluded that she was safe at home,” and “suggested [that the Complainant] call a case manager for [Student A] as well as a XXXXX XXXXX XXXXX XXXXXXXXX, and a XXXXXXX.” The Complainant “did all 3 of those” things. The Complainant alleged that, the following day, she “took [Student A] to see [a] XXXXX XXXXX XXXX XXXXXXXX,” who “diagnosed [Student A] with XXXXXXXXX XXXXXXX XXXXXXX.” She asserted that she subsequently met with the Assistant Principal and “expressed . . . [her] concern that nothing had been done as far as consequences for” Student B, and the Assistant Principal responded that “he wasn’t able to tell [her] ‘what he had handed down as a punishment’ but assured [her] it was ‘the harshest punishment he was able to give him’^[11] and also said that [Student B] understood if it happened again ‘that would be it.’” The Complainant asserted that Student A had informed her that Student B “was in school everyday [sic] after the ‘investigation’ into the racial harassment.”

XXXX XXXXXXXX XX XXXXX XXXXXXX . . . XXXXXXX XXXX” and “XXXXXX XX XXX XXXXXXX XX ‘XXXX’ XX XXXXXXXX XX, XXXX, noting that “XXXXXX XXX XXXXXXXXXXX XXXXX.”

¹⁰ As previously discussed, the Assistant Principal’s written narrative states that he called the Complainant, and Student A’s father called him, to discuss the incident on XXXXXXXX X, XXXX.

¹¹ As noted above, Board Policy ACAA authorizes expulsion for substantiated student-on-student harassment.

The Remediation Form notes that Student B was assigned an “XXXXXXXXXXXX XXXXXXXX” for the XXXXXXXX XX, XXXX incident and states that law enforcement was not notified. A section of the form noting whether the incident was reported to the Maine Department of Education is blank.

Given that the three forms referenced above, all of which are dated XXXXXXXX XX, XXXX, discuss events occurring after that date and the forms were not provided to the Superintendent until XXXXX XX, XXXX, it is unclear when the District actually completed these forms.

The District provided OCR a narrative written by the Principal stating that “[t]o [her] knowledge [Student B] has not used . . . any . . . racial slurs since his XXXXXXXX in XXXXXXXX.” She also noted that the Project Director “contacted [her] and asked if [she] would be open to receiving some information about how to handle these situations,” and the Principal “told him that [she] absolutely would.” The Project Director sent an email to the Principal and Assistant Principal on XXXXXXXX XX, XXXX stating that he “do[es]n’t know much about the particulars in terms of what you have or haven’t done in response to the recent incident at your school” and including general “recommendations for best practice” for responding to and preventing unlawful discrimination in school.

The Complainant informed OCR that she withdrew Student A from the District on XXXXXXXX X, XXXX due to the District’s inadequate response to the incidents involving Student B and other students’ bullying of Student A.¹²

According to a narrative written by the Superintendent, his knowledge of and involvement in this matter began in early XXXXX XXXX when the Complainant spoke about it at a public meeting. Thereafter, he obtained information from the School administrators and met with the Complainant on XXXXX XX, XXXX. The Superintendent “assured her that [the District’s] administrators took very seriously the report of the incident against [Student A], conducted a prompt investigation, and assigned consequences to [Student B].” He also “informed her that, to [his] knowledge, there had been no other reports made to school staff of instances of racism or discriminatory behavior against [Student A], either from [Student B] or from other students.” At the end of the meeting, the Complainant allegedly told the Superintendent that the home school program was not working; nonetheless, she said she would not be re-enrolling Student A in the District.

Legal Standard

Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Racial harassment that creates a hostile environment is a form of discrimination prohibited by Title VI. Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness.

¹² The Complainant informed OCR that a group of female classmates began bullying Student A in XXXXXXXX XXXX. She informed OCR that this bullying was not on the basis of Student A’s race.

Preliminary Analysis

The documentation provided by the District indicates that the District took responsive action to an incident involving a racial epithet. OCR has concerns, however, regarding whether the District responded in a reasonable, timely, and effective manner when it was made aware that the racial epithet may have been directed at Student A, along with other possible racial comments. Documentation indicates the District may not have appropriately reconsidered the racial epithet incident, interviewed relevant witnesses, and reached determinations regarding whether Student B told Student A that she “got her XXXX from her XXXXXX dad” or whether Student C called Student A a “XXXXX.”¹³ Contrary to Board Policies ACAA and ACAA-R, the District may not have promptly informed the Superintendent, the alleged perpetrators and victim, and their parents or guardians of some or all of these allegations, the outcome of the District’s investigation, and the parents’ right to appeal.¹⁴ The documentation also indicates that the District may not have “[d]etermine[d] what remedial action is required” for Student A, focusing instead on the “disciplinary action [that] should be taken against” Student B, as required by Board Policy ACAA-R.

Conclusion

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 and OCR determined that a voluntary resolution would be appropriate. 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.

¹³ Although OCR generally will not second-guess a recipient’s conclusions, in light of Student A’s insistence that one of the incidents occurred on XXXXXXXX X, XXXX rather than XXXXXXXX XX, XXXX, OCR has concern regarding whether Student A may have been subjected to another, similar instance of racial harassment on XXXXXXXX X.

¹⁴ While OCR will not find a Title VI violation based solely on the District’s failure to comply with its own policies or procedures, the extent to which the District’s response deviated from its own policies or procedures is relevant in assessing whether the District’s response to alleged racial harassment of which it had notice was reasonable given the circumstances.

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 Paul Easton at (617) 289-0008 or by e-mail at Paul.Easton@ed.gov.

Sincerely,

/s/ Michelle Kalka
Michelle Kalka
Compliance Team Leader

Enclosure

cc: Allen L. Kropp, Esq. (via email: AKropp@dwmlaw.com)