

July 27, 2018

Dr. Robert A. McGarry  
Superintendent of Schools  
Holmdel Township Schools  
65 McCampbell Road  
Holmdel, New Jersey 07733

Re: Case Nos. 02-18-1163 & 02-18-1296  
Holmdel Township Schools

Dear Dr. McGarry:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaints filed against Holmdel Township Schools (the District). The complainant alleged that the District discriminated against XXX XXXXXXXXXX (the Student), on the basis of her sex, by failing to respond appropriately to complaints made to staff at the XXXXXXXX XXXXXXXXXXXX XXXXXXXX (the School) in XXXXXXXXXXXX 2017 (Complaint 1) and XXXXXXXX 2017 (Complaint 2), that a XXXXX student (student A) sexually harassed and assaulted the Student [Case No. 02-18-1163]; and on XXXXXX XXX XXXX (Complaint 3), that another XXXXX student (student B) sexually harassed the Student in her XXX class; and as a result, the Student was subjected to a sexually hostile environment (Allegation 1). The complainant also alleged that the District retaliated because he filed a complaint against the District with OCR, by disciplining the Student with XXXXXXXXXXXX XXXXXXXXXXXX from XXXXXX XXX 2018 to XXXXXX XXX 2018 (Allegation 2); and on XXX XX XXXX (Allegation 3) [Case No. 02-18-1296].

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 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 programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The District is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any

right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

On March 12, 2018, OCR notified the District that it had opened Case No. 02-18-1163 for investigation. On May 2, 2018, during the course of OCR's investigation of Case No. 02-18-1163, the complainant raised additional allegations, which OCR docketed as Case No. 02-18-1296. On July 13, 2018, while OCR was in the process of evaluating Case No. 02-18-1296, the District communicated its willingness to voluntarily resolve Case No. 02-18-1296, pursuant to OCR's Rapid Resolution Process (RRP) under Section 109 of OCR's Case Processing Manual (CPM).<sup>1</sup>

In its investigation of OCR Case No. 02-18-1163 and evaluation of OCR Case No. 02-18-1296, OCR reviewed documentation that the complainant provided. OCR also reviewed the District's designation and notice of its Title IX Coordinator; notice of nondiscrimination; grievance procedures; and harassment, intimidation, and bullying (HIB) policy located on the District's website.

#### *Designation and Notice of Title IX Coordinator*

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and its implementing regulation, including the investigation of any complaint communicated to such recipient alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX. It also requires that each recipient must notify all of its students and employees of the name, office address, and telephone number of the employee or employees appointed. Additionally, OCR policy states that recipients should provide the electronic mail (email) address of the designated Title IX coordinator.

The District's website states that the District has designated the Supervisor of Physical Education, Health and Athletics, as its Title IX coordinator (the Title IX coordinator).<sup>2</sup> OCR determined that the District satisfied the requirement of 34 C.F.R. § 106.8(a) to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and its implementing regulation.

The District's webpage identifying the Title IX coordinator includes the name, title, and electronic mail address for the Title IX coordinator; however, it does not include the Title IX coordinator's office address and telephone number. Therefore, OCR has determined that the District's notice of the Title IX coordinator does not comply with the requirements of the

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<sup>1</sup> RRP is an expedited case processing approach that can be used in substantive areas OCR has determined to be appropriate for such resolution. RRP provides an opportunity to resolve complaints and to obtain information and make determinations early. The outcomes in all RRP cases must meet OCR's standards for legal sufficiency. See Section 207 of OCR's *Case Processing Manual* (CPM).

<sup>2</sup> See <https://www.holmdelschools.org/district/aspirations-for-teaching-and-learning/health-and-physical-education> (last visited on July 27, 2018).

regulation implementing Title IX, at 34 C.F.R. § 106.8(a). On July 27, 2018, the District signed a resolution agreement (the Agreement) to voluntarily address this compliance concern.

*Notice of Non-Discrimination*

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students, employees, sources of referral of applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by Title IX and its implementing regulation not to discriminate in such a manner. Such notification shall state at least that the requirement not to discriminate in the education programs or activities extends to employment therein, and to admission thereto, unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to 34 C.F.R. § 106.8, or to OCR's Assistant Secretary. The regulation implementing Title IX, at 34 C.F.R. § 106.9(b), requires each recipient to include the notice of non-discrimination in each announcement, bulletin, catalog, or application form which it makes available to the types of persons described in 34 C.F.R. § 106.9(a), or which is otherwise used in connection with the recruitment of students or employees.

The District includes copies of its non-discrimination notice on its Educational Equity webpage on its website (Notice 1);<sup>3</sup> in the Equal Educational Opportunity policy (Notice 2);<sup>4</sup> and in the Equal Employment Opportunities policy (Notice 3).<sup>5</sup> However, Notices 1, 2, and 3 all fail to state that the District does not discriminate on the basis of sex in the District's education programs or activities, and that it extends to employment in the District; and that inquiries concerning the application of Title IX and its implementing regulation may be referred to the District's Title IX coordinator, or OCR, as required by the regulation implementing Title IX, at 34 C.F.R. § 106.9(a). OCR also reviewed the District's Human Resources and Compliance webpage, employment application webpage, and several online job announcements, and did not find a notice of non-discrimination on the webpages or in any of the job announcements.<sup>6</sup> Therefore, OCR has determined that the District's notice of non-discrimination does not comply with the requirements of the regulation implementing Title IX, at 34 C.F.R. § 106.9(a). On July 27, 2018, the District signed the Agreement to voluntarily address this compliance concern.

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<sup>3</sup> See <https://www.holmdelschools.org/district/educational-equity> (last visited on July 27, 2018).

<sup>4</sup> See Equal Educational Opportunity Policy (Policy 5750) at <https://www.straussesmay.com/seportal/Public/DistrictPolicy.aspx?policyid=5750&id=db979825af1b42e381d05b7cebdb5212> (last visited on July 27, 2018).

<sup>5</sup> See Equal Employment Opportunities Policy (Policy 1530) at <https://www.straussesmay.com/seportal/Public/DistrictPolicy.aspx?policyid=1530&id=db979825af1b42e381d05b7cebdb5212> (last visited on July 27, 2018).

<sup>6</sup> <https://www.holmdelschools.org/departments/human-resources-and-compliance> (last visited July 27, 2018); and <https://www.applitrack.com/holmdel/onlineapp/default.aspx> (last visited July 27, 2018).

### *Grievance Procedures*

The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires a recipient to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX and its implementing regulation. OCR has identified a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for: (1) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (2) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (3) adequate, reliable, and impartial investigation of complaints, including an opportunity to present witnesses and evidence; (4) designated and reasonably prompt timeframes for the major stages of the grievance process; (5) notice to the parties of the outcome; and (6) an assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

The District has a Student Harassment, Intimidation & Bullying Policy (the HIB policy) that prohibits all forms of HIB that are motivated by any actual or perceived characteristic such as gender,<sup>7</sup> sexual orientation, gender identity and expression, or a mental, physical or sensory disability.<sup>8</sup> Pursuant to the HIB policy, any District employee, pupil, Board of Education (Board) Member, or volunteer who has witnessed a pupil being subjected to HIB, or has reliable information that a pupil has been subjected to HIB, has a duty to report the incident to the appropriately designated administrator or his/her designee; and all acts of HIB shall be reported orally to the school principal on the same day, and in writing within two school days of the date the individual witnessed the incident, or was in possession of reliable information that an incident occurred. The HIB policy states that oral reports, written reports or electronic reports will be taken, and requires that all violations and complaint reports of HIB shall be investigated promptly by the designated administrator.<sup>9</sup> The results shall be reported to the Superintendent within two school days from the date of the completion of the investigation. The results of each investigation shall be reported to the Board no later than the date of the next Board meeting following the completion of the investigation.

The HIB policy further provides that parents/guardians of the students who are parties to the investigation are entitled to receive written notice of the outcome of the investigation within five days of the date that the Superintendent reports the investigation results to the District's Board of Education; and the parties will be provided information regarding their rights if they are not satisfied with the outcome. The parent or guardian may request a hearing before the District

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<sup>7</sup> The HIB policy does not state that it applies to conduct based on sex. The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides, in relevant part, that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, or other education program or activity operated by a recipient that receives federal financial assistance.

<sup>8</sup> See Harassment, Intimidation, and Bullying Policy (Policy 5512) at <https://www.straussesmay.com/seportal/Public/DistrictPolicy.aspx?policyid=5512&search=harassment&id=db979825af1b42e381d05b7cebdb5212> (last visited July 27, 2018).

<sup>9</sup> Specifically, the HIB policy provides that an investigation shall be initiated by the principal within one school day of the report of the incident and the investigation shall be completed within ten school days from the date of the written report of the incident of HIB.

Board of Education after receiving the information about the investigation, and a hearing must be held within ten school days of the request. The Board's decision may be appealed to the Commissioner of Education, in accordance with N.J.A.C. 6A:3, Controversies and Disputes, no later than ninety days after issuance of the Board of Education's decision. OCR determined, however, that the HIB Policy does not provide for the parties to submit witnesses or other evidence during the investigation stage; or provide for reasonably prompt timeframes for notice of the outcome of the investigation to the Board and the parties. Therefore, OCR determined that the HIB policy does not provide for the prompt and equitable resolution of complaints of sexual harassment. Therefore, OCR has determined that the HIB policy does not comply with the requirements of the regulation implementing Title IX, at 34 C.F.R. § 106.8(b). On July 27, 2018, the District signed the Agreement to voluntarily address this compliance concern.

The District publishes an Equal Educational Opportunity Complaint Procedure for students or their parents/guardians to complain about alleged discriminatory treatment by an officer or employee of the District (the EEOC procedure).<sup>10</sup> The EEOC procedure requires that a complainant discuss his or her complaint with the staff member most closely involved, in an attempt to resolve the matter informally. If the matter is not resolved to the satisfaction of the complainant within thirty working days, the complainant may then submit a written complaint to the District's Affirmative Action Officer (the AAO). The complaint must include the reasons the informal complaint was not satisfactorily resolved. The AAO must investigate the matter informally and respond to the complainant in writing no later than ten days after receipt of the written complaint. The EEOC procedure also provides that: the complainant may file an appeal of the AAO's determination within three days of receipt of the AAO's determination; a copy of the appeal must be given to the staff member alleged to have acted discriminatorily; and the complainant will be given an informal hearing before the Superintendent no later than seven days after the request for a hearing has been submitted. The Superintendent may require that the staff member charged with a discriminatory act and any other person with knowledge of the act complained of be present at the hearing. The Superintendent must render a written decision in the matter no later than ten days after the appeal was filed or the hearing was held, whichever occurred later. The EEOC procedure provides that the complainant has the right to file an appeal with the District's Board of Education no later than three days after receipt of the Superintendent's decision. A copy of the appeal must be given to the staff member alleged to have acted discriminatorily. The Board may convene a hearing at the complainant's request. The Board's decision is due no later than forty-five calendar days after the appeal was filed or the hearing held.

The EEOC procedure does not: include designated and reasonably prompt timeframes for major stages of the investigation; provide for an equal opportunity for the parties to present witnesses and evidence; provide that the respondent to the complaint will be advised of the results of the investigation and of the District's response; provide that the respondent will be given a hearing before the Superintendent; provide appeal rights for the respondent, even though appeal rights are provided for the complainant; indicate that it applies to other students or third-parties; or include an assurance that the District will take steps to prevent further harassment and to correct

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<sup>10</sup> See Equal Educational Opportunity Complaint Procedure (Regulation 5750) at <https://www.straussesmay.com/seportal/Public/DistrictRegulation.aspx?RegulationID=5750&id=db979825af1b42e381d05b7cebdb5212> (last visited July 27, 2018).

its discriminatory effects on the complainant and others, if appropriate. Therefore, OCR has determined that the EEOC procedure does not comply with the requirements of the regulation implementing Title IX, at 34 C.F.R. § 106.8(b). On July 27, 2018, the District signed the Agreement to voluntarily address this compliance concern.

The complainant alleged that the District discriminated against XXX XXXXXXXXXX (the Student), on the basis of her sex, by failing to respond appropriately to complaints made to staff at the XXXXXXXX XXXXXXXXXXXX XXXXXXXX (the School) in XXXXXXXX 2017 (Complaint 1) and XXXXXXXX 2017 (Complaint 2), that a XXXX student (student A) sexually harassed and assaulted the Student [Case No. 02-18-1163]; and on XXXXX XXX XXXX (Complaint 3), that another XXXX student (student B) sexually harassed the Student in her XXX class; and as a result, the Student was subjected to a sexually hostile environment (Allegation 1). Additionally, the complainant alleged that the District retaliated because he filed Case No. 02-18-1163 against the District with OCR, by disciplining the Student with XXXXXXXXXXXX XXXXXXXXXXXX from XXXXX XXX 2018 to XXXXX XXX 2018 (Allegation 2); and on XXX XX 2018 (Allegation 3) [Case No. 02-18-1296].

The regulation implementing Title IX, at 34 C.F.R. § 106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature and can include sexual advances, request for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Prior to the conclusion of the investigation of OCR Case No. 02-18-1163 and evaluation of OCR Case No. 02-18-1296, the District expressed an interest in voluntarily resolving the allegations in the cases without further investigation or evaluation, pursuant to Sections 302 and 109 of OCR's CPM, respectively. On July 27, 2018, the District signed the Agreement to voluntarily resolve the complainant's allegations. OCR will monitor the District's implementation of the Agreement. Upon the District's satisfaction of the commitments made under the Agreement, OCR will close the cases.

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 two individual OCR cases. 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 a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a 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. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have questions regarding OCR's determinations, please contact Stacy Bobbitt, Compliance Team Investigator, at (646) 428-3823 or [stacy.bobbitt@ed.gov](mailto:stacy.bobbitt@ed.gov); Grace Kim, Compliance Team Attorney, at (646) 428-3977 or [grace.d.kim@ed.gov](mailto:grace.d.kim@ed.gov); or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Paul H. Green, Esq.