



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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March 18, 2015

IN RESPONSE, PLEASE REFER TO: 03141163

Ms. Sherry Horsley
Superintendent
Greenup County School District
45 Musketeer Drive
Greenup, KY 41144

Dear Ms. Horsley:

This letter is to notify you of the determination made by the U.S. Department of Education (the Department), Office for Civil Rights (OCR), in the above-referenced complaint filed against the Greenup County School District (the District). The Complainant, xxxxxxx xxxxxxxx, alleged that the District discriminated against xxx xxxxxx, xxxxx xxxxxx xxxx xxxxxxxx, on the basis of sex. Specifically, xxx alleged that the District permitted a hostile environment to exist by failing to provide a prompt and equitable response to the Student's xxxxx xxx xxxxxxxxx complaints that xxx was subjected to sexual harassment.

OCR is responsible for enforcing 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 education programs and activities receiving financial assistance from the Department. The District is a recipient of financial assistance from the Department. X- sentence redacted -X.

In its investigation, OCR reviewed documentation from the Complainant and the District, as well as the District's policies and procedures relating to sexual harassment. OCR also interviewed the Student, several District staff members, and other witnesses identified by the Student. Further, OCR conducted an onsite visit to the District on September 26, 2014.

OCR has determined that the District's grievance procedures and notice of nondiscrimination fail to comply with the requirements of Title IX. OCR also determined that the District failed to provide a prompt and equitable response to the Student's complaints of sexual harassment. On March 11, 2015, the District signed a Resolution Agreement to address these compliance concerns.

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LEGAL AUTHORITY

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. Sexual harassment can include unwelcome sexual advances; requests 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.¹

In determining whether this denial or limitation has occurred, OCR examines all of the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the District; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently severe to create a hostile environment. Title IX also protects all students at recipient institutions from sex harassment, including male and female students.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a recipient's responsibility regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. A law enforcement investigation does not relieve the recipient of its independent Title IX obligation to investigate the conduct. A recipient should not wait for the conclusion of a criminal investigation or criminal proceeding to conduct its own Title IX investigation; and if needed, must take immediate steps to protect the complainant from further harassment prior to the completion of the Title IX investigation/resolution. Additionally, under Title IX, a recipient must process all complaints of sexual assault/violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an education program or activity or had continuing effects on campus or in an off-campus education program or activity. Further, once a school is on notice of off-campus sexual assault/violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment, and if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual harassment, and sexual assault/violence. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints, including sexual assault/violence complaints.

¹ The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (April 4, 2011); for further clarification on this topic, see "Questions and Answers on Title IX and Sexual Violence," at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (April 29, 2014). See also OCR's 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (October 26, 2010), and OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (January 19, 2001).

A recipient may use student disciplinary or other separate procedures for these complaints; however, a recipient's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. In evaluating whether a recipient's grievance procedures are prompt and equitable, OCR reviews all aspects of a recipient's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

1. notice to students and employees of the procedures, including where complaints may be filed;
2. application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties;
3. provision for adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence;
4. designated and reasonably prompt timeframes for major stages of the complaint process;
5. written notice to parties of the outcome of the complaint and any appeal; and
6. an assurance that the institution will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate.

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 responsibilities to comply with and carry out its responsibilities under that law. The recipient is further required, by the Title IX implementing regulation at 34 C.F.R. § 106.9(a), to notify all students and employees of the name (or title), office address, and telephone number of the designated employee(s). In addition, OCR's 2011 Dear Colleague Letter on Sexual Violence states that recipients should notify all students and employees of the electronic mail (email) address of the Title IX Coordinator. The coordinator's responsibilities include overseeing the recipient's response to Title IX reports and complaints of sexual harassment, including sexual assault/violence, and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. The coordinator or designee should be available to meet with students, as needed. The Title IX coordinator should not have other job responsibilities that may create a conflict of interest. Also, as noted above, recipients must ensure that employees designated to serve as Title IX coordinators have training or experience in handling sexual harassment, including sexual assault/violence complaints, and in the operation of the recipient's grievance procedures.

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires that recipients notify applicants for employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in its education programs or activities, and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR.

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LEGAL ANALYSIS – SEXUAL HARASSMENT

To determine whether a recipient provided a prompt and equitable resolution to a complaint of sex discrimination, including sexual harassment, OCR considers several factors, such as: the length of time taken to reach a resolution, including whether the recipient met any established timeframes; whether both parties were able to present evidence and witnesses; whether the outcome was communicated to both parties; and whether the recipient will take steps to prevent recurrence and correct discriminatory effects on the victim.

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Notice of Non-Discrimination

The District has a notice of nondiscrimination that is widely published in the local newspaper, in the District's Code of Conduct, and on the District's website, which prohibits discrimination on the basis of race, color, national origin, sex, genetic information, disability, or age in its programs and activities, and identifies the District's Title IX Equity Coordinator by name, address and phone number.

Harassment/Discrimination Policy

The District utilizes Board Policy 9.42811 (Harassment/Discrimination) to address complaints of race, color, national origin, age, religion, sex and disability discrimination. The grievance procedures define harassment/discrimination as “unlawful behavior based on race, color, national origin, age, religion, sex, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student’s education or creates a hostile or abusive educational environment.” The grievance procedures prohibit discrimination and harassment by student, employees and third parties, as well as retaliation. Moreover, the grievance procedures contain examples of the types of behavior that may rise to the level of discrimination/harassment, including but not limited to, slurs, stories, jokes, written materials or pictures that are lewd, vulgar, or profane, unwanted touching, sexual advances, spreading of sexual rumors, and sexual violence.

The grievance procedures state that the building principal is the person responsible for receiving complaints, but that they may also be made to the superintendent, and that complaints of discrimination on the basis of sex may also be made to the Title IX Coordinator. Additionally, the Title IX Coordinator is to be notified when complaints of sex discrimination/harassment are alleged. Failure by employees to report, notify, and/or initiate an investigation of alleged harassment/discrimination as required by this policy, or to take corrective action, shall be cause for disciplinary action. The grievance procedures also state that employees who believe prohibited behavior is occurring or has occurred shall notify the victim’s principal, who shall then immediately forward the information to the superintendent. The procedures state, however, that “without a report being made to the principal, superintendent, or Title IX coordinator, the District shall not be deemed to have received a complaint of harassment/discrimination.”

The grievance procedures require complaints of harassment/discrimination, whether verbal or written, to lead to a documented investigation and a written report. With respect to the investigative process, the grievance procedures state that the investigation is to commence as soon as possible, but no later than three (3) school days of receipt of the original complaint. In addition, a written report of the findings shall be completed within 30 calendar days, unless additional time is necessary due to the matter being investigated by law enforcement or a governmental agency. The superintendent or designee may also take interim measures to protect complainants during investigations. Within three (3) school days of the submission of the written investigative report, methods to correct and prevent reoccurrence of the harassment/discrimination are to be identified and implemented. If corrective action is not required, an explanation shall be included in the report.

A form entitled “Notice to Individuals Complaining of Harassment/Discrimination” explains the investigative process, including the right for the complainant to provide the District with information and documentation, and advise the District of the identity and location of possible witnesses. The form also states that if the individual is unsatisfied with the District’s response, a complaint may be filed with OCR. The grievance procedures also contain a complaint form that is available on the District’s website.

The grievance procedures also contain a “Harassment/Discrimination Investigation and Appeals” form that is labeled as “for internal administrative tracking purposes only.” Although not specified in the grievance procedures themselves, that form provides that an informal process may be used if both parties agree. Like the grievance procedures, this form also specifies that “without a report being made to the principal, superintendent, or Title IX coordinator, the District shall not be deemed to have received a complaint of harassment/discrimination.” Additionally, although not specified in the grievance procedures, this form states that appeals must be made within ten (10)

school days, and that a response will be provided to the complainant and accused student within three school days of completion of the appeal level of the investigation.

A “Resolution Response” form is to be completed and provided to both parties to the complaint, although the form does not identify the timeframe for which notice will be provided to the parties.

LEGAL ANALYSIS – POLICIES AND PROCEDURES

Title IX Coordinator

The District has designated an individual to serve as its Title IX Coordinator. Although her job duties include coordinating compliance with Title IX, including complaints of noncompliance, she has not received adequate training regarding Title IX, including the 2011 Dear Colleague Letter. Likewise, although XXX provides annual sex discrimination training to the building principals who in turn provide it to their administrators and staff, the Principal and Assistant Principal lacked an understanding of sexual harassment, as well as the District’s own harassment policies and procedures. Administrators in the District do not have a working understanding of the grievance procedures or the types of conduct that may invoke their application, and as a result, disciplinary incidents that may have risen to the level of sexual harassment were not properly investigated to make that determination. Our investigation also found that the SRO has a great deal of discretion regarding discipline at the High School, but that he has not been trained regarding Title IX or the District’s Title IX grievance procedures. In addition, OCR reviewed disciplinary incidents from the prior three school years and concluded that a number of the incidents involved conduct of a sexual nature and should have triggered an investigation by the District to determine whether the conduct rose to the level of sexual harassment.

Notice of Non-Discrimination

While the District has a notice of nondiscrimination that is widely published in the local newspaper, Code of Conduct, and on the District’s website, it does not contain the Title IX Coordinator’s email address.

Harassment/Discrimination Policy

While the District’s Title IX grievance procedures contain many of the provisions required for a prompt and equitable resolution of sexual harassment complaints, they do not contain all of the necessary provisions. First, the grievance procedures state that “without a report being made to the principal, superintendent, or Title IX coordinator, the District shall not be deemed to have received a complaint of harassment/discrimination.” This statement does not comply with the requirements of Title IX which provide that a recipient is on notice once it knows or should have known of the harassment. The District may not absolve itself of responsibility due to an employee’s failure to report harassing conduct to the appropriate administrator. In addition, although the Notice to Individuals Complaining of Harassment/Discrimination states that the complainant has a right to provide information, documentation and witnesses as part of the investigative process, the same right is not afforded to the accused student. The “Harassment/Discrimination Investigation and Appeals” form provides for an informal process to which both parties must agree; however, the form does not clarify that mediation will not be used to resolve sexual assault/violence complaints. Moreover, while the District’s Policy and Forms delineates timeframes for most stages of the complaint process, they do not provide a timeframe for which notice of the outcome of the complaint will be provided to the parties.

CONCLUSION

OCR concludes, by a preponderance of evidence, that the District failed to provide a prompt and equitable response to the Student's complaints of sexual harassment. OCR has also determined that the District's grievance procedures and notice of nondiscrimination fail to comply with the requirements of Title IX. Thus, OCR concluded that the District did not comply with the applicable Title IX regulations at 34 C.F.R §§ 106.8, 106.9, and 106.31.

On March 11, 2015, the District provided OCR with the enclosed signed Resolution Agreement (the Agreement). When fully implemented, the Agreement will address all of OCR's compliance concerns. OCR will monitor the implementation of the Agreement until the recipient is in compliance with the statute(s) and regulations at issue in the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Program'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.

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, we 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. Please be advised that the Program 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 Complainant may file another complaint alleging such treatment.

OCR is committed to prompt and effective service. If you have any questions, please contact me at (215) 656-6935, or by email at beth.gellman-beer@ed.gov.

Sincerely,

/S/
Beth Gellman-Beer
Team Leader
Philadelphia Office

Enclosure

Cc: xxxxxx xxxxxxxx