



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION III
DELAWARE
KENTUCKY
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October, 11, 2018

IN RESPONSE, PLEASE REFER TO: 03161179

Manny P. Arvon
Superintendent
Berkeley County Schools
401 S. Queen Street
Martinsburg, WV, 25401

Dear Mr. Arvon:

This is to notify you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against the Berkeley County Schools (the District). The Complainant alleged that the District and the James Rumsey Technical Institute (the Institute) discriminated against XXXXXX, the Student, on the basis of sex by failing to promptly and equitably respond to XXXXXX report on XXXXXX, that XXXXXX. OCR's investigation of the complaint allegations made against the Institute is addressed under a separate docket number: 03162138.

OCR enforces 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. Therefore, OCR has jurisdiction to investigate this complaint under Title IX.

XX – paragraph redacted – XX

During the investigation of this complaint, OCR reviewed documentation from the Complainant and the District. With regard to the Complainant's allegation of sex discrimination, consistent with OCR's procedures, prior to OCR's completion of the investigation of the complaint, the District requested to resolve the complaint through a Voluntary Resolution Agreement. On August 13, 2018, the District signed an Agreement.

LEGAL AUTHORITY

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

The Title IX regulation at 34 C.F.R. § 106.31 provides generally that, except as provided elsewhere in the regulation, no person shall on the basis of sex be excluded from participation in, denied the benefits of, or subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance.¹

Under Title IX, elementary and secondary schools that receive Federal financial assistance are responsible for providing students with a nondiscriminatory educational environment.² 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.³ Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the recipient's program.⁴

OCR considers a variety of related factors to determine if a sexually hostile environment has been created and considers the conduct in question from both an objective and a subjective perspective. Factors examined include the degree to which the misconduct affected one or more students' education; the type, frequency, and duration of the misconduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment, the size of the school, location of the incidents, and the context in which they occurred; and other incidents at the school. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.⁵

Once a recipient knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. A recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, prevent the harassment from recurring and, as appropriate, remedy its effects. 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.⁶ If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject students to a hostile environment.⁷ If it does, the recipient will be required to remedy the effects of both the initial sexual harassment and the effects of the recipient's failure to respond promptly and appropriately.⁸ A recipient's

¹ 20 U.S.C. §1681(a).

² 20 U.S.C. §1681(a).

³ See 2001 Revised Sexual Harassment Guidance, Section II.

⁴ See 2001 Revised Sexual Harassment Guidance, Section V.A.

⁵ See 2001 Revised Sexual Harassment Guidance, Section V.A.1.

⁶ See 2001 Revised Sexual Harassment Guidance, Section VII.

⁷ See 2001 Revised Sexual Harassment Guidance, Section V.C.

⁸ See 2001 Revised Sexual Harassment Guidance, Section VII.B.

obligation to respond appropriately to sexual harassment complaints is the same regardless of the sex or sexes of the parties involved.⁹

Sexual harassment of a student by a faculty member or other school employee also violates Title IX. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out the employee's day-to-day responsibilities (such as teaching, counselling, supervising and advising) engages in sexual harassment, the recipient is responsible for remedying any effects of the harassment on the complainant, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has notice of the harassment.¹⁰

Title IX Coordinators

The Title IX 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).¹¹ A Title IX coordinator's core responsibilities include overseeing the recipient's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. The Title IX coordinator must have knowledge of the requirements of Title IX, of the recipient's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the recipient.¹²

Notice of Non-Discrimination

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires that recipients notify applicants for admission and employment, students, employees, students and parents of elementary and secondary school students, sources of referral of applicants for admission and employment, 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. Such notification shall state at least that the requirement not to discriminate in the education program or activity extends to employment.¹³ The notice must also state that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR.¹⁴ Such notice should be widely disseminated.

Grievance Procedures

⁹ See 2001 Revised Sexual Harassment Guidance, Section III.

¹⁰ See 2001 Revised Sexual Harassment Guidance, Section V.B.1.

¹¹ 34 C.F.R. §106.8(a).

¹² Dear Colleague Letter on Title IX Coordinators (April 24, 2015)

¹³ 34 C.F.R. §106.9(a).

¹⁴ 34 C.F.R. §106.9(a).

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 sexual harassment and sexual assault.¹⁵ Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints, including sexual assault complaints.¹⁶

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, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
2. application of the procedures to complaints alleging discrimination and harassment carried out by employees, other students, or third parties;
3. provision for adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
4. designated and reasonably prompt timeframes for the major stages of the complaint process;
5. notice to both parties of the outcome of the complaint; and
6. an assurance that the recipient will take steps to prevent recurrence of any sex discrimination or harassment and to correct its discriminatory effects on the complainant and others, if appropriate.¹⁷

FINDINGS OF FACT

Background

The High School is one of four high schools in the District, and serves grades 9 through 12. The High School currently has a total enrollment of 1,268 students. The Institute provides career and technical education at no cost to West Virginia high school students.

The Student began attending the High School in the fall of 2013. She submitted an application to attend firefighting classes at the Institute in her junior year (2015-2016 school year). The High School transported her by bus to and from the Institute. The Student stopped attending the course on March 2, 2016 because of the incident, and received a grade of “incomplete.” As of August 7, 2018, the Student’s transcript was modified to reflect a grade of “A” for the course. On or about the third week of May 2016, the Student and her family moved to Williamsport, Pennsylvania. The Student graduated from Williamsport Area High School in June 2017.

Title IX Procedural requirements

The District provided documents in response to OCR’s request for the District and the High School’s Notice of Non-discrimination and Title IX policies and procedures: (1) “*Expected*

¹⁵ 34 C.F.R. §106.9(b).

¹⁶ See 2001 Revised Sexual Harassment Guidance, Section IX.

¹⁷ See 2001 Revised Sexual Harassment Guidance, Section IX.

Behavior in Safe and Supportive Schools (Policy Manual); (2) Grievance Procedures; and (3) The District's Student Handbook for 2016-2017 school year.

Notice of Non-Discrimination

The District's homepage on its website (<https://www.berkeleycountyschools.org/Page/8606>) includes a notice of nondiscrimination as follows:

The Berkeley County public school system does not discriminate on the basis of race, color, creed, ancestry, familial status, religion, national origin, gender, sexual orientation, age, disability or other legally protected classification in its programs, activities or employment practices. For inquiries, please contact Assistant Superintendent Ron Stephens, Title IX Coordinator, or Rick Deuell, Section 504 Coordinator, at: Berkeley County Schools, 401 South Queen Street, Martinsburg, WV 25401 or by phone at: (304) 267-3500.

The notice does not include the coordinator's email address and it is not widely publicized, as required. Specifically, OCR was unable to locate the notice of non-discrimination on the District website. Moreover, while it appears in the current 2017-18 Student Handbook, the contact information for the Title IX coordinator is not located within the notice of non-discrimination, but instead, in a different location in the Handbook under the District's non-discrimination grievance procedure.

Title IX Coordinator

The District's 2017-2018 parent and student handbook provides that the School Board designates the Assistant Superintendent of Student Services as the District's Compliance Officer to serve as the coordinator and/or compliance official for purposes of Title IX of the Educational Amendments Act of 1972, the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and all other nondiscrimination statutes and regulations.

According to the policy, the Compliance Officer shall publish and disseminate a notice of the policy and complaint procedure at least annually to students, parents/guardians, employees, and the public, together with either a copy of the policy or a statement how to obtain a copy of the policy. A copy of the policy will be distributed to all buildings and facilities within the district, and included or referenced in all student or employee handbooks, online or in print. Nondiscrimination statements shall include the position, office address and telephone number of the Compliance Officer.

The policy states that the Compliance Officer is responsible to monitor the implementation of nondiscrimination procedures in areas including the grievance procedure. However, the District did not provide any information regarding the Title IX coordinator's experience and training regarding Title IX and his Title IX responsibilities.

Title IX Policies and Procedures

The District's Policy Manual (Effective July 1, 2012)

The District's policy manual includes Policy 4373 (Expected Behavior in Safe and Supportive Schools), which is a policy set forth by the West Virginia Department of Education for statewide implementation. It applies to complaints of sexual misconduct, sexual harassment, and sexual violence by students, staff or the public. Policy 4373 provides, in part, that all inappropriate behaviors observed by students or public guests must be reported to the school principal for appropriate action to be taken as specified in this policy and the school implementation plan. For school buildings/facilities that do not have a building principal (e.g. maintenance, transportation), the Director of such building, facility or department shall be responsible for receiving reports of inappropriate behaviors. The term "principal" includes the term "Director." According to Policy 4373, any person who believes he or she has been the victim of an inappropriate behavior or any person with knowledge or belief of conduct which may constitute a violation of the policy manual should report the alleged acts immediately to the appropriate official(s) designated by the policy.

Policy 4373 provides that the school principal or other individual(s) designated by the school, shall upon receipt of a report or complaint immediately undertake or authorize an investigation. The investigation must, at a minimum consist of personal interviews with the complainant, the individual(s) against whom the complaint is filed, and others who may have knowledge of the alleged incident(s) or circumstances giving rise to the complaint. The investigation may also consist of any other methods and review of circumstances deemed pertinent by the investigator.

Policy 4373 provides that the principal shall: determine whether the alleged conduct constitutes a violation of the policy; immediately take such reasonable steps as necessary, to protect the complainant, teachers, administrators or other personnel pending completion of an investigation students of an alleged policy violation; and assure that the investigation will be completed as soon as practicable but no later than 10 school days following the reported violation.

Upon completion of the investigation, Policy 4373 states that a report shall be provided to the principal which should include a determination of whether the allegations have been substantiated as factual and whether they appear to be violations of Policy 4373. Policy 4373 provides that the report shall be recorded and filed at the school. Policy 4373 mandates that the conclusion of the investigation of each complaint filed under these procedures will be reported in writing to the complainant or his/her legal guardian by the principal or his/her designee within 10 school days following the reported violation. However, Policy 4373 does not explicitly state that the responding party receives notice of the conclusion of the investigation.

Policy 4373 sets forth the relevant consequences and remedial measures for incidents of sexual harassment that have been substantiated through investigation, including warning, suspension, termination, revocation of licensure, notification of law enforcement and/or human services for staff. Policy 4373 provides for counseling services to any person subjected to harassment and, where appropriate, the person who committed the harassment, in addition to academic support services to any person subjected to harassment.

Policy 4373 does not include notice that states that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR. Further, Policy 4373 does not provide for notice to the responding party of the outcome of the investigation.

The District's Non-Discrimination Grievance Procedures (rev. July 2013)

The grievance procedure includes information regarding the Compliance Officer and a complaint procedure. Initially, filing a verbal complaint may be done but must be later committed to writing using the District's forms. The District's grievance procedures provide that complaints must be filed within 30 calendar days after any incident alleged to be a violation of this policy or they shall be deemed untimely, unless special circumstances exist which justify a later filing. The Compliance officer takes all necessary interim actions reasonably calculated to prevent any violations during the periods before the completion of informal and formal procedures. The investigating officials can be the principal and compliance officer or if they are the subject of the complaint, the superintendent. The investigator must initiate an investigation within 24 hours of receiving the formal complaint, unless extenuating circumstances justify otherwise. If the person designated to conduct the initial investigation is unable to complete the investigation in a timely manner, the compliance officer or superintendent shall authorize another person to complete the investigation. The complainant and the responding party may have the opportunity to present witnesses and other evidence.

According to the grievance procedures, the formal investigation shall include individual interviews with the complainant, the responding party, and others with knowledge relative to the incident. The investigator may also evaluate any other information and materials relevant to the investigation, and shall consider all information presented by the complainant and the accused. Moreover, the school principal and/or compliance officer shall maintain on-going contact with the victim throughout the investigation.

The grievance procedures provide that the building principal or other person designated to conduct the initial investigation shall prepare a written report within 10 school days following the reported violation, unless additional time to complete the investigation is required. In that case, the investigator shall report on the status of the investigation to the complainant, the accused, and the Compliance Officer at the expiration of the 10 day period and 5 school days thereafter. Although the District may extend the investigation when necessary, it must insure that the completion provides a prompt and equitable resolution. The written report shall include a summary of the investigation; findings of fact and an explanation of the evidence in support of such findings (including a determination with respect to the factual allegations of the complaint); conclusions whether there have been any violations of this grievance procedure based on the factual findings and a discussion of the reasons for such conclusions; and a recommended disposition of the complaint, including any recommended District action.

The grievance procedures provide that copies of the report shall be provided to the complainant, the accused, and the Compliance Officer. Any such copies shall be redacted as necessary to comply with the confidentiality requirements of this policy. If the investigation or appeal results in a finding that the complaint is factual and constitutes a violation of this policy,

the District shall take prompt, corrective action reasonably calculated to ensure that such conduct ceases and will not recur, and to remedy any effects of the violation for which the District is responsible. District action within the authority of administration shall be implemented as recommended in the investigation and appeal process. The school principal and/or Compliance Officer shall contact the individual harassed within a reasonable period of time following the conclusion of the investigation to assess whether there has been on-going harassment or retaliation and to determine whether additional supportive measures are needed.

The grievance procedures further provide that any student or employee who is found to have engaged in conduct constituting unlawful discrimination or harassment in violation of this policy shall be subject to discipline up to and including expulsion from school or termination of employment. Disciplinary actions and procedures shall be consistent with Policy 4373, Board policies and District procedures, and other applicable state and federal laws, rules, regulations, and constitutional requirements.

The grievance procedures additionally include remedies available to victims and/or witnesses of harassment and/or discrimination including counseling and/or academic services and other strategies to educate the school wide population regarding awareness of harassment and discrimination issues through the guidance program or other appropriate means. Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the District's Title IX and Section 504/Title II coordinators.

The grievance procedures further provide that if the complainant is not satisfied with any finding or recommended corrective action proposed in the investigative report, he/she may submit a written appeal to the Compliance Officer within 10 school days after receipt of the investigative report. If the Compliance Officer is the subject of the complaint or otherwise not impartial, the appeal shall be submitted to the Superintendent who shall designate another administrator to conduct the appeal. If an appropriate administrator cannot be designated, the Superintendent shall designate a qualified third party to conduct the appeal. An appeal may also be initiated by the Compliance Officer if he/she does not accept without further review the recommended corrective action proposed in the investigative report. In that event, the Compliance Officer shall notify the complainant and the responding party that an appeal will be conducted and shall discuss alternative corrective actions with the complainant. (The

Compliance Officer may not initiate an appeal if he/she is the subject of the complaint or is otherwise not impartial.) The Compliance Officer (or other designated appeal official) shall review the investigation and the investigative report and may also conduct a reasonable supplemental investigation.

The Compliance Officer (or other designated appeal official) shall prepare a written determination with respect to the appeal within 15 school days after initiation of the appeal, unless additional time to complete a supplemental investigation is required. In that case, the appeal officer shall report on the status of the supplemental investigation to the complainant and the responding party at the expiration of the 15 day period and every 5 school days thereafter. Although the District may extend the investigation when necessary, it must insure that the completion provides a prompt and equitable resolution. The written determination includes a summary of any supplemental investigation; findings of fact and an explanation of the evidence in support of such findings (including a determination with respect to the factual allegations of the complaint); conclusions whether there have been any violations of this policy based on the factual findings and a discussion of the reasons for such conclusions; and a recommended disposition of the complaint, including any recommended District action. Copies of the determination on appeal shall be provided to the complainant, the responding party, and the person who conducted the initial investigation.

The grievance procedures direct that complaints of discrimination shall be investigated promptly and corrective action be taken when allegations are substantiated. The grievance procedures provide that a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems. Counseling and/or academic support will be provided by the District to address any impact on the individual harassed and/or any witness to the harassment.

The grievance procedures include nondiscrimination statements and according to the District stated that such statements shall include the position, office address and telephone number of the Compliance Officer.

OCR notes that the appeal process is only offered to the reporting party, not to the responding party.

The District's Student Handbook for the 2016 -2017 School Year

The District provided its most current handbook for the 2016-2017 school year. The language contained in the Handbook under "Non-Discriminatory Grievance Procedures" is identical to the provisions set forth in the grievance procedures, described above, and may be found on its website at: www.berkeleycountyschools.org under the "Student and Parent Reference Guide."

As noted above, the appeal process is only offered to the reporting party, not to the responding party.¹⁸

The Incident

XX – paragraphs redacted – XX

CONCLUSION

Under OCR procedures, a complaint may be resolved before the conclusion of an investigation if a recipient asks to resolve the complaint by signing a Resolution Agreement and OCR determines that such a resolution is appropriate. The provisions of the Resolution Agreement must be aligned with the complaint allegations, the information obtained in the investigation to date, and be consistent with applicable regulations. Such a request does not constitute an admission of a violation on the part of the District, nor does it constitute a determination by OCR of any violation of our regulations.

On March 26, 2018, prior to OCR completing its investigation, the District asked OCR to enter into a Resolution Agreement. On August 13, 2018, the District signed this Agreement. As is our standard practice, OCR will monitor the District's implementation of the Agreement, a copy of which is enclosed. Accordingly, OCR is concluding its investigation of the District as of the date of this letter.

This concludes OCR's investigation of the complaint and 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.

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 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.

OCR is committed to prompt and effective service. If you have any questions, please contact Marcia Jones at (215) 656-8555, or by email at marcia.jones@ed.gov.

Sincerely,

¹⁸ See September 2017 Q&A on Campus Sexual Misconduct, Question 10.

/s/

Nancy Potter
Team Leader

cc: Margaret Kursey