



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

October 25, 2017

Via Electronic & U.S. Mail

XXXXXXXXXXXX

XXXXXXXXXXXX

Washington County Schools
405 W. College Street
Jonesborough, TN 37659

Re: OCR Complaint # 04-17-1422

Dear XXXXXXXX:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Washington County Schools (District) alleging discrimination on the bases of race, disability and retaliation. The Complainant alleged that the District discriminated against XXXXXXXX, who was a Student at XXXXXXXX (School), as follows:

1. XXXX harassed the Student because XXX did want to implement the Student's IEP in XX class by: (a) attempting to have the Student suspended after she returned to School XXXXXXXX by insisting that the Student XXXXX; (b) stating to the Student in front of the entire class XXXXXXXX; and (c) accusing the Student of XXXXXXXX based solely on an accusation by two students who had been harassing the Student, which eventually led to the Student XXXXXXXX.
2. A XXXXX told the Complainant that XXX did not care about the Student's disabilities and XXX did not have to tolerate them; a second XXXXXXXX then asked the Complainant to XXXX XXXXX.
3. A XXXX harassed the Student by XXXXX front of other students based on what XXXX stated had occurred in XX classroom.
4. The two students who allegedly reported to XXXXX that the Student XXXXX from XXX constantly harassed the Student about her race, by making racial slurs, such as Hispanics XXXXX, and XXX needed to be XXXX.
5. On the bus, other students told the Student that "XXXXXXX." The Student reported the racial harassment to a XXXXX, and XXX allegedly responded that XXXX XXXXX.

6. XXXX discussed with the two students who accused the Student of XXXXX that someone of the Student's type XXXXXXXX.
7. A XXXX told the Complainant that when the School was a purely Caucasian school, they did not have as many problems with violence and theft.
8. XXXXX told the Complainant that the District did not have a process for filing a grievance against students or staff.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities; and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq., and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the bases of race, color, or national origin by recipients of Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

OCR investigated the following legal issues:

1. Whether the District discriminated against the Student by failing to respond appropriately to incidents of racial harassment by her peers and XXX employees during the 2016-2017 school year, in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.3.
2. Whether the District discriminated against the Student by failing to respond appropriately to incidents of disability harassment by XXXXX employees during the 2016-2017 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District retaliated against the Student for complaining of disability and racial harassment by XXXXXXXXX and led to the Student XXXXX, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, Title II implementing regulation at 28 C.F.R. § 35.134, and Title VI implementing regulation at 100.7(e).

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that the recipient (District) failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. Prior to the conclusion of the investigation, the District requested to resolve the complaint allegations with a voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's Case Processing Manual (CPM). OCR determined that it is appropriate to resolve the complaint allegations with an Agreement during the course of the investigation. The evidence thus far and the proposed resolution are set forth below.

Applicable Legal Standards

Harassment Based on Race

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) provides that no person shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program operated by a recipient. Section 100.3(b)(1) prohibits a recipient, on the ground of race, color, or national origin, from denying an individual a service or benefit of a program; providing different services or benefits; subjecting an individual to segregation in any matter related to the receipt of a service or benefit; restricting an individual in any way in receiving a service or benefit; treating an individual differently in determining whether the individual satisfies any admission or eligibility requirement for provision of a service or benefit; and, denying an individual an opportunity to participate in a program or affording an opportunity to do so which is different from that afforded to others.

Harassment Based on Disability

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1) states that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) provide a qualified student with a disability an aid, benefit, or service that is not as effective as that provided to others; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

The Title II implementing regulation at 28 C.F.R. §35.130(a) mandates no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Retaliation

The Title VI implementing regulation at 34 C.F.R. § 100.7(e), 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 a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VI.

To establish a prima facie case of retaliation, OCR uses a three step analysis: (1) whether the Complainant experienced an adverse action caused by the recipient; (2) the recipient knew that the Complainant engaged in protected activity or believed she might engage in a protected activity in the future; and, (3) whether there is a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the Recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the Recipient's reason for its action is a pretext, or excuse, for unlawful retaliation.

Background

During the 2016-2017 school year, the Student was a XXXXX grader at XXXX (School). The Complainant stated that the Student has multiple disabilities. XXXXXX.

Summary of the Investigation to Date

District's Internal Grievance Procedures and Statement Against Racial Harassment

The Complainant alleged that she attempted to file an internal grievance with the District, but XXXXXXXX told her that the District had no process for filing a grievance against students or staff.

The evidence showed that the District does have internal grievance procedures for students to file an internal grievance. The procedures provide that any student may file a grievance alleging discrimination, bullying or harassment against another student or employee. The grievance can be in writing or oral and filed with the complaint manager. The student can also file the grievance with a teacher or any other adult employed with the District; the employee must report the grievance to the complaint manager. The District's grievance procedures provide that it is a violation in the District for any employee or student to harass a student through disparaging conduct or communication that it is based on sex, race, ethnicity, disability and religion. The policy also defines discrimination/harassment based on sex, race, ethnicity, disability and religion conduct, in part as advances, gestures, words, either written or spoken which, "unreasonably interfere" with the student's work or educational opportunities. The policy provides for a prohibition against retaliation, and states that a "full investigation" will be conducted by a complaint manager. The policy does not state that parties are allowed to present witnesses.

Allegation/Issue 1: Whether the District discriminated against the Student by failing to respond appropriately to incidents of racial harassment by her peers and XXXX employees during the 2016-2017 school year.

Evidence/Information Provided Thus Far

The Complainant alleged that two students who allegedly reported to XXXXX that the Student XXXXX constantly harassed the Student about her race, by making racial slurs, such as "Hispanics XXX," and "she needed to be XXXX." She further alleged that on the bus, other

students told the Student that “XXXX,” and XXXXXX. The Student stated that she reported the racial harassment to a XXXXX, and XXX allegedly responded that XXXXX.

In addition, the Complainant alleged that XXXX discussed with the two students who accused the Student of XXXX that someone of the Student’s type XXXX. The Complainant also alleged that a XXXX told her that when the School was a purely Caucasian school, they did not have as many problems with violence and theft.

The District’s data response included notes reportedly provide an account of a meeting between a XXXX and the Student. The notes state that the XXXX, who the Student accused of participating in the harassing conduct, informed the Student that XXX spoke with everyone that was involved with the incident on the bus. XXX also spoke with witnesses that were not involved. XXX then directed XXXXX. Also the Student was reportedly told XXXX. All witnesses and students involved said the XXXXXXXXX. The notes do not describe the incident(s) purportedly investigated by the XXXX, make any reference to investigation of the alleged peer harassment incidents that did not occur on the bus, or state whether witnesses corroborated any of the alleged harassing comments toward the Student.

The District also provided a memorandum prepared by XXXX in response to the OCR complaint. According to that memorandum, the Student was in a class of XXX students who were constantly monitored, and XXXX never approached XXXX regarding any harassment by any of the students in the classroom. The memorandum does not address the XXXX’s alleged comment to two students about “XXXXX.”

With regard to the XXXX’s alleged harassing comments, the notes that provide an account of the meeting between the XXX and the Student, state that a staff member or female employee was always present when XXXX a female student. According to XXXXXXXXX meetings with the Student, XXXX never heard the XXXX mention any race or race characteristics. The notes do not state that the author of the notes was present when XXXXX talked with female parents; XXXXXXXX.

Prior to OCR completing the investigation of this issue, the District offered to resolve the complaint and OCR determined that it is appropriate to resolve the allegations with an agreement during the course of the investigation. In order to make findings OCR would need to conduct interviews of students concerning whether alleged comments were made, and of staff concerning investigative steps. Nevertheless, it is appropriate to move forward with an agreement with regard to the alleged peer harassment, in light of the District’s failure to provide thus far, any information about investigation of the peer incidents that did not occur on the bus, and the implicit acknowledgement that one or more students made inappropriate comments toward the Student on the bus¹.

Proceeding with an agreement is also appropriate with regard to the alleged harassing conduct of XXXX. The information provided by the District does not respond directly to the allegations

¹ The notes reference a XXXX telling students to not XXXX and, in stating that the Student’s XXXXXXXX, the notes imply that there was may have been some inappropriate conduct by the other students.

about potentially racially harassing comments by XXXX to the Complainant or by XXX to two students. Moreover, nothing in the District's information references any District investigation of the alleged conduct of XXXX.

Allegation/Issue 2: Whether the Student was subjected to a hostile environment as a result of incidents of disability-based harassment by XXXX employees during the 2016-2017 school year and if so, whether the District failed to take prompt and equitable steps to investigate and respond to the report of harassment

Information/Evidence Thus Far

The Complainant alleged that XXXX harassed the Student because XXXX did not want to implement the Student's IEP in XXXX class by: (a) attempting to have the Student suspended after she returned to School XXXXXX; (b) stating to the Student in front of the entire class that XXXX; and (c) accusing the Student of XXXXX solely on an accusation by two students who had been harassing the Student. Further, XXXX harassed the Student by XXXXX based on what XXXXXX.

The Complainant also alleged that XXXXX told the Complainant that XXXX did not care about the Student's disabilities and XX did not have to tolerate them; another XXXX then asked the Complainant to XXXX.

In the memorandum XXXX prepared, the XXXXXXXX front of the entire class and states that instead, XX told the Student, in a private conversation while in close proximity to XXXX, that XX was tired of XXXXXX. The Complainant informed OCR that XXXX received a XXXXX from the XXXXX as a result of this incident.

The evidence showed that XXXXX acknowledged in a memo to the School dated XXXX, 2017 that the Student did not have any outstanding assignments for XXXX class prior to XXXXXX.

Last, the memorandum from XXXX states that two students reported to the XXXX. XXXX then XXXX. XXXXX requested that two School XXXX come to XXX classroom. XXXX also requested that XXX present. XXX spoke to the Student. When the School XXXX arrived, XXXX asked XXXX who witnessed the incident XXX; XXXX closed the classroom door when the XXXX. After XXXXXX, XXXX instructed XXXX to return to the classroom. The XXXX removed the XXXX. All of the conversations regarding XXXX were conducted XXXXX. The School initially notified the Complainant that the Student would receive a XXX, but instead had the Student XXXXX.

The evidence showed that XXXXXX stated XXXX knew of the Student's disabilities and always followed the IEP. The XXXX informed the Complainant that as her mother, it was her right to XXXXX.

Prior to OCR completing the investigation of this issue to determine whether the District promptly and equitably responded to the investigation, the District offered to resolve the

complaint pursuant to 302 and OCR determined that an agreement during the investigation was appropriate.

Allegation/Issue 3: Whether the District retaliated against the Student for complaining of disability and racial harassment by the XXX accused the Student of XXXXX and led to the Student XXXX.

The Complainant alleged that the XXXXX was in retaliation for the Complainant complaining to School administration regarding XX harassment of the Student because XXXX the Student a XX in front of the entire class. The XXXXXX received XXXXXX for this incident. The XXXX accused the Student XXXX after this incident and the XXXX.

Prior to OCR completing the investigation of this issue, the District offered to resolve the complaint and OCR determined that an agreement during the course of the investigation is appropriate. The evidence thus far for Allegation/Issue #2 above supports the allegations concerning Complainant's protected activity, the adverse action and a temporal connection between the two. The District has implicitly articulated a reason for the XXXX's actions through the memorandum submitted to OCR. In order to make findings concerning whether the asserted reason is a pretext for retaliation OCR would need to interview the students who reportedly made the accusations, interview teachers and School officials who were reportedly XXXX and review documents related to the XXXX incident, including witness statements if any were taken.

Proposed Resolution

The attached Agreement requires the District to: (1) provide training to District staff on the District's revised internal grievance procedures; (2) provide training, by OCR or alternatively the Tennessee Department of Education, to School administrators and faculty on Section 504, Title II and Title VI prohibitions against harassment based on race or disability and retaliation; (3) provide training for all School employees responsible for investigating complaints of harassment or bullying based on race or disability on how to conduct the investigation of such internal complaints or grievances, including a discussion of the District's revised grievance procedures; (4) remove the disciplinary referrals issued to the Student on September 1, 2016, and September 15, 2016, from the Student's disciplinary records; (5) have a District administrator conduct an investigation of the Student's allegations of harassment based on her race and disability; (6) have XXXXXXXX; and (7) revise the District's Section 504 grievance procedures.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and are consistent with applicable regulations. OCR will monitor the implementation of the agreement until the District is in compliance with the statutes and regulations at issue in the case.

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 duly authorized OCR officials 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.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

If you have any questions about this complaint, please contact XXXX, Senior Attorney, at XXX, or the undersigned at XXXX.

Sincerely,

XXXXXXXXXX
Supervisory General Attorney

Enclosure