UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WISCONSIN

July 27, 2015

XXXXXXXXXXX
XXXXXXXXXXXXX
Sandwich Community Unit School District #430
XXXXXX XXXXXXX
Sandwich, Illinois 60548

Re: OCR # 05-15-1051
Sandwich Comm. Unit Sch. Dist. #430

Dear Mr. XXXXXXX:

This is to notify you of the disposition of the referenced complaint filed on September 12, 2014 with the U.S. Department of Education, Office for Civil Rights (OCR), against Sandwich Community Unit School District #430 (District) alleging discrimination on the basis XXXXXXXXXXXXXXX. Specifically, the complaint alleges that the District has discriminated against Student A on the bases of XXXXXXXXXXXX since the 2012-13 school year in that District students have subjected Student A to verbal and physical harassment based on his XXXXXXXXXXXXXXX and disability (XXXXXXXXXXXXXX) and the District is aware of the harassment but has failed to respond appropriately.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. Part 100, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation at 34 C.F.R. Part 106. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance, while Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. OCR also enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Title VI, Title IX, Section 504 and Title II.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the District, including relevant District policies and procedures, and interviewed the Complainant, District officials, administrators and staff, and third party witnesses. OCR determined, by a preponderance of the evidence, that Student A was subjected to XXXXXXXXXXXXXXX that was sufficiently severe, and to

XXXXXXXXXXXXXXXX harassment that was sufficiently serious, that it created a hostile environment based on XXXXXXXXXXXXXXXX that interfered with Student A's ability to participate in or benefit from the District's services and activities. In addition, OCR concluded that the District failed to take appropriate action reasonably calculated to end the harassment of which it had notice, eliminate the hostile environment, prevent its recurrence, and remedy the effects of the harassment. Lastly, OCR concluded that the District failed to remedy in a timely and effective manner the denial of FAPE services for Student A that was the result of the bullying of Student A by his peers during his middle school years. The reasons for these determinations are set forth below.

Background

District Policies and Procedures

Equal Educational Opportunities Policy

The District's Equal Educational Opportunities Policy (EEO Policy), in relevant part provides:

> Equal educational and extracurricular opportunities shall be available for all students without regard to race, nationality, sex, physical or mental disability, gender identity . . .
> . . .
> Any student may file a discrimination grievance by using Board policy 2:260, *Uniform Grievance Procedure*.

The EEO Policy is not included in the District's Student Handbook, nor is it readily available on the District's website.[1]

Harassment/Bullying Policy

Under a separate policy entitled "Harassment of Students Prohibited: Bullying, Intimidation, and Harassment Prohibited," (Harassment/Bullying Policy), the following conduct, among others, is prohibited:

> No person, including a District employee or agent, or student, shall harass, intimidate, or bully a student on the basis of actual or perceived: race; nationality; sex; gender identity; gender-related identity or expression; physical or mental disability; . . .

[1] *See* http://www.sandwich430.org/index.html (District website), and http://www.sandwich430.org/schools/sms/SMS%2014-15%20Handbook.pdf (Middle School student handbook). The District's nondiscrimination policies are available via a link to the Board's website, and in the Board's policies at: http://www.sandwich430.org/viewer.html?board/policyindex.pdf

> The District will not tolerate harassing, intimidating conduct, or bullying, whether verbal, physical, or visual, that affects the tangible benefits of education, that unreasonably interferes with a student's educational performance, or that creates an intimidating, hostile, or offensive educational environment.

The Harassment/Bullying Policy contains examples of prohibited conduct, and provides greater detail on prohibited sexual harassment.

Under the Harassment/Bullying Policy, "[s]tudents are encouraged to report claims or incidences of bullying, harassment, sexual harassment, or any other prohibited conduct to the Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students or a Complaint Manager." The Policy further clarifies that "[a]n allegation that a student was a victim of any prohibited conduct perpetrated by another student *shall be referred* to the Building Principal, Assistant Building Principal, or Dean of Students for appropriate action." (Emphasis added.)

Bullying Policy

The District contains two separate policies that address bullying: Bullying Procedures (Bullying Procedures), and Preventing Bullying, Intimidation, and Harassment (Bullying Policy). The District's Bullying Policy states, in part:

> Bullying on the basis of actual or perceived race, color, nationality, sex, . . . , age, … [and] physical or mental disability… is prohibited in each of the following situations:
>
> 1. During any school sponsored education program or activity.
> 2. While in school, on school property, on school buses or other school vehicles, at designated school bus stops, waiting for the school bus, or at school sponsored or school sanctioned events or activities.
> 3. Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment.

The Bullying Policy defines bullying as:

> any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student that has or can be reasonably predicted to have the effect of one or more of the following:
>
> 1. Placing the student in reasonable fear of harm to the student's person or property.

2. Causing a substantially detrimental effect on the student's physical or mental health.
3. Substantially interfering with the student's academic performance.
4. Substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

Under the Bullying Policy, students "are encouraged to report claims or incidences of bullying, harassment, sexual harassment, or any other prohibited conduct to the Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, or a Complaint Manager." The District's Bullying Procedures encourage the reporting of complaints to the Building Principal or Assistant Building Principal.

The Bullying Procedures set forth time frames for the investigation of a complaint (10 days when possible), include information about interim remedies for bullied/harassed student, and provide for the discipline of students, including suspension or expulsion, determined to have engaged in bullying/harassment. The District's Bullying Procedures further state that the District prohibits retaliation against any person who reports bullying.

Staff Training on Bullying and Harassment

The Sandwich Middle School's (School) administrators and staff receive annual on-line training on topics such as discipline, including bullying. During Teacher Institute Day, which is held every year during the spring, teachers also receive training on multiple topics of their choosing; bullying is one of the topics covered that day. Moreover, the School's staff also receives training on how to handle incidents of students reporting suicidal thoughts.

Facts

During the 2013-14 school year, the District had a total enrollment of approximately 2,263 students, 557 of whom attended the School. Student A, the Complainant's son, is a 14 year-old Mexican-American student who graduated from the XXXXX grade at the School in June 2015. He attended District schools since XXXXXXX, and has received special education services pursuant to an IEP since the 2006-2007 school year.

2012-2013 School Year

Harassment/Bullying by Student B

The Complainant alleges that Student A has been harassed and bullied by District students based on his race/national origin, sex, and/or disability at least since the 2012-13 school year when he started XXXXXX school. According to the Complainant, the District has been made aware of the harassment and bullying, but has failed to respond appropriately.

The Complainant stated that Student A was subjected to verbal and physical harassment and bullying on multiple occasions during XX[h] grade. She stated that between approximately December 2012 and May 2013 a XXXXX student (Student B) and his friends repeatedly harassed and bullied her son during and after school by calling him names constantly, taking his lunch money on several occasions, and physically attacking him.

The Complainant stated that she informed the XXXXXX, the XXXXXXX, and Student A's XXXXXX about these incidents. She explained that the XXXXX responded that he could not do anything because these incidents were happening outside of the school. She added that the middle school administrators did not discipline the boys involved and did not separate them from Student A, and as a result, the harassment and bullying continued until the end of the school year. As a result of these incidents, the Complainant states that Student A began to suffer psychological problems, had difficulty sleeping and said he did not want to go back to school.

Student A stated Student B and his friends, one of whom was a teammate on the XXXXX team, verbally harassed him by calling him names such as "stupid," "retard," and making fun of him during and after XXXXX practice on multiple occasions early during the season. However, he denied that Student B engaged in some of the specific physical conduct that the Complainant had described. Student A stated that the harassment from this group of students stopped after the XXXXX Coach started supervising all team members to make sure there was no bullying during or after XXXXXX practice.

The XXXXXX and Student A's XXXXXXX, XXXXXX, XXXXXX (Teacher A), and XXXXXX (Teacher B) all stated they did not recall hearing from anyone, including the Complainant, about any of the harassment or bullying incidents against Student A that occurred during the 2012-13 school year. The XXXXX stated he did not recall being told that Student B harassed and bullied Student A on multiple occasions. The XXXXX stated that the Complainant only communicated to him during the 2012-2013 school year that Student A had been threatened, but that this incident occurred outside of the School and the act was perpetrated by an individual who was not a District student. He added that he advised the Complainant to file a police report. Finally, Student A's XXXXXX also stated that while the Complainant communicated to him on multiple occasions during the 2012-2013 school year that Student A was "picked on" inside and outside of school and asked him to keep an eye on him in his interactions with other members of the team, which the XXXXXX agreed to do, he explained that neither he nor any of the other four XXXX witnessed any incidents of bullying against Student A during or after XXXXX practice.

2013-2014 School Year

Harassment/Bullying by Student C

The Complainant asserts that another XXXX student, Student C, began to harass and bully Student A in XXth grade, starting the first week of school in August 2013. According to the Complainant, Student C called Student A "XXX," "XXX," and "XXXX" in the lunchroom in front of cafeteria workers. A few weeks later, in September 2013, Student C put his hands around Student A's neck and tried to choke him. The Complainant stated she complained to Student A's XXXXXXX teachers and to the XXXXX about these instances of verbal harassment/bullying because she knew Student C was in Student A's XXXXX group.

After the first interactions between Student A and Student C early in the school year, the Complainant said she did not hear of other bullying incidents involving Student C again until March 2014, when Teacher B informed her that Student A exhibited severe emotional problems. Teacher B informed the Complainant that Student C had pushed Student A around that day and ridiculed him in front of his classmates and that after the incident Student A told Teacher B he was "done" and made a statement suggesting that he may harm himself. It was then, the Complainant asserts, that she learned that Student C had continuously bullied Student A throughout the year. The Complainant states that she complained to the Assistant Principal, but he told her he could not do anything about it because Student C and Student A were both in special education and different discipline rules apply for those students.

Student A recalled some of the incidents of name-calling involving Student C, but did not recall Student C calling him "XXXXX" or "XXXXX." He recalled Student C calling him "XXXXX," but was not sure how many times it occurred. Student A characterized Student C's bullying as mostly personal insults and physical attacks. He stated that he informed the Assistant Principal and the Social Worker of most of the incidents of bullying to which Student C subjected him during the school year. He stated he felt comfortable enough with them that he did not just complain generally, but also reported to them details of the incidents, such as whether the bullying involved specific insults and whether it included physical attacks.

The XXXX stated he investigated the name-calling incidents when the Complainant brought them to his attention and concluded that it was just back and forth name-calling between the two students. He also stated that based on his investigation, he determined these incidents were not witnessed or observed by any District employees. After concluding his investigation, the XXXXX stated he assigned a teacher's assistant (TA) to follow Student C to monitor his behavior in the classroom and hallways and to report any incidents of misbehavior or inappropriate conduct toward Student A to the XXXXX or XXXXXXl. The XXXXX stated that the TA did not report any incidents between the two students after being assigned to monitor and report back on their interactions. The XXXXX and XXXXXX also stated they had no knowledge of other bullying incidents involving Student A and Student C later that school year. The XXXXX stated that he knew about the name-calling incidents involving Student C, but did not recall the specific insults or the nature of the name-calling.

At least three of the District's XXXXXXX staff reported to OCR that they knew of Student C's on-going bullying of Student A throughout the 2013-14 school year. The XXXXX and Teacher A both categorized the XXth Grade as Student A's "worst year" at the middle school not only because of Student C's constant bullying, but also because Student C's bullying of Student A "escalated" during the school year from verbal insults to physical attacks such as poking, pushing, shoving and putting his hands around Student A's neck. The XXXXXX also stated that Student A was frequently at the XXXXXX's office talking about the bullying by Student C, while Teacher A indicated that the XXXXXX spoke with her after Student C's bullying escalated and instructed her to observe the two students' interactions and to report back to him or the Principal if there was an incident. The District's XXXXXXX (XXXXXX) stated she knew of the ongoing and increasing nature of the bullying to which Student A was subjected during this school year because her teaching staff kept her informed. The XXXXXX and XXXXXX reported they had no knowledge of any physical attacks on Student A or Student C's continuous bullying of Student A.

Teacher A, Teacher B, and the XXXX also stated they were aware that the ongoing bullying to which Student A was subjected caused him severe emotional problems and that he exhibited them sometime in March 2014. The XXXXX, the XXXXXX and the XXXXXX, however, all stated they had no knowledge of the severe emotional problems Student A was suffering as a result of the bullying he endured.

Although the District's initial response after receiving notice of the bullying to which Student A was subjected during this school year was to focus on stopping Student C's behavior by developing an intervention plan, the XXXXX stated that the District also made some adjustments to Student A's IEP in March 2014 to address this problem. First, the IEP team included in Student A's IEP a provision allowing him to report harassment/bullying incidents directly to the XXXXXX. Then the IEP team increased Student A's social work minutes and adjusted his social goals to address self-esteem problems due to the bullying by Student C.

Harassment/Bullying by Student D

The Complainant also alleges that a female student, Student D, harassed and bullied Student A throughout the 2013-14 school year, by calling him names such as "XXXXX," "XXX," "XXX," and "XXXX." The Complainant stated that she complained to Student A's XXXXXX teacher (Teacher C), and that Teacher C informed her that Student D was generally disrespectful and that she had to send her to the XXXXX's office often due to misbehavior. The Complainant states she demanded that the Principal take action to stop the harassment/bullying, but that the School did not do anything and the harassment/bullying continued throughout the year. The District staff interviewed by OCR, however, stated they did not know of the harassment/bullying of Student A by Student D. Moreover, Student A himself did not recall the harassment/bullying by Student D.

2014-2015 School Year

Harassment/Bullying by Student E

The Complainant contends that on October 8, 2014, Student A was harassed and bullied by Student E while they were in their XXXX class. She alleges that on this date, Student E took XXXXXXXXXXXXXXX even though Student A repeatedly told Student E that he did not want to be XXXXXX. According to the Complainant, after taking the XXXX, Student E altered the XXXX using an XXX on his XXXXX. Student E XXXXXXXXXXXXXXX Student A and XXXXXXXXXXXXXXX. According to the Complainant, all this happened during school in the presence of a XXXXXX who did nothing to stop the conduct. The Complainant alleges that the incident caused Student A to XXXXXXXXXXXXXXX.

The Complainant stated that she complained to the XXXX and XXXXX the day after the incident with Student E and that the School conducted an investigation after which the School XXXXXXXXXXXXXXX. However, because the Complainant did not believe the discipline was sufficiently severe, she met with the XXXXXX and asked what the District intended to do to make sure that any further harassment/bullying of Student A stopped. According to the Complainant, the XXXXX responded that all that he could do was reconvene Student A's IEP team and XXXXXXXXXXXXXXX Student A while he was in school.

The XXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXX, Teacher A, and the District's XXXXXXXXX all confirmed that they knew of the October 8, 2014 incident in which Student E XXXXXXXX Student A, and further knew of the severe emotional distress the incident caused on Student A. The XXXXXXX stated that he conducted a full investigation of the incident at the request of the Principal and that as a result, Student E admitted XXXXXXXXXXXXXXXXXXXXX. Documentation provided to OCR by the District indicates that the XXXXXX prepared an incident report, maintained a record of the investigation, and prepared a report at the end of the investigation.[2] In the post-investigation report, the XXXXXXXX described the investigation he conducted of this incident and stated that, among other things, he interviewed three students, including Student E, and that the student who XXXXXXXXXXXXXXXXXXXXX.

Documentation produced by the District and the testimony of District staff, confirms that after the October 2014 incident, the student responsible XXXXXXXXXXXXXXXXXX, Student E, received a 1.5 day out-of-school suspension. The XXXXX and XXXXXX also stated that following the incident, the School began collecting students' XXXXX before the beginning of the XXXX class to prevent the recurrence of a similar incident. Moreover, the XXXXX stated that the XXXXX and Teacher A, who is also the coordinator and co-founder

[2] The XXXXXX acknowledged that he does not prepare incident reports if an incident is not considered "serious" or result in a disciplinary sanction. He further stated that he might not always take notes and maintain a record of an investigation even if an incident results in discipline.

of XXXXXX, the School's XXXXX program, addressed the XXXXXX class and discussed the District's anti-bullying and XXXXX policy with the students.

Several documents from the District, including IEP notes and logs, also show that the IEP team held a domain meeting on November 5, 2014 to address the severe emotional problems Student A exhibited after the incident. According to the Complainant, at this November 2014 IEP meeting, she informed the team of the behavior Student A exhibited after the incident. Statements from two witnesses who were present during the November 2014 IEP meeting, a case manager who was serving Student A, and a friend of the Complainant, corroborate that the Complainant made this statement to the IEP team. The IEP team decided that Student A would get additional minutes with the XXXXX (a total of 30 scheduled minutes every week) to teach him skills to deal with peer conflict. The team also scheduled a XXXXXX. The XXXXXX presented the results of his evaluation of Student A on January 15, 2015 stating that Student A's "XXXXXXXXXXXXXXX." However, he concluded that "since these difficulties are not currently impacting his education progress, a change in education programming beyond related service support would probably not be beneficial at this time."

Harassment/Bullying by Students F and G

The Complainant alleges that on at least three occasions, from January to February 2015, two XXXXX students, Students F and G, called Student A "XXX," "XXX" and other insults and have XXXXXXX lunch. She states that she complained to the Assistant Principal and that he conducted an investigation, but did not discipline the students involved.

The XXXXX stated she knew of these incidents, but did not know the nature of the harassment. She added that she thought the School investigated these incidents, but did not know the results of the investigation. The XXXXX and XXXXX, however, stated they did not have knowledge of these incidents. Moreover, the School does not have any documentation of an investigation into any reports of harassment/bullying of Student A by Student F or Student G.

XXXXX of XXXXXXX

The Complainant also asserts that on January 27, 2015, Student A's binder was XXXXXX with XXXX, such as "XXXXXXXXXXXXXXX." The XXXXXXX acknowledged to OCR that he was aware of the vandalism. He stated he investigated it by interviewing several students, but was not able to find the person responsible for the XXXXX. The XXXXXXXXX documented his investigation of this incident.

Harassment/Bullying by Student H

Finally, on February 5, 2015 a XXXXXX student, Student H, allegedly XXXXXXXXXXXXXXXXXXX. On February 9, 2015, the Complainant complained about the incident to the XXXXXX. According to the Complainant, the XXXXX stated that he would investigate the incident. The XXXXX stated that other than the binder incident, he did not know of any other incidents after the October 2014 incident. The XXXXXX stated she knew of this incident and thought that the School investigated and could not determine whether Student H XXXXXX.

Effects of Harassment/Bullying on Student A

Information obtained during the investigation of this complaint indicates that the bullying and harassment to which Student A has been subjected in School at least since the 2013-2014 school year has had a negative effect on him, causing, among other things, XXXXXXXXXX since at least March 2014. Student A's service provider between January 2, 2013 and January 22, 2014 XXXXXXXXXXXXXX. She stated that during the time she worked with him, Student A was successful in dealing with other XXXXX, but that during that same period he became increasingly XXXXXXXXX. XXXXXXXXXXXXXXX at the XXXXX since August 2014, confirmed that XXXXXXXXXXXXXXX.

Other evidence shows that school bullying has caused or contributed to Student A's XXXXXXXXXXXXXXX. Statements from the District teaching staff show they knew since about March 2014 the emotional impact the bullying to which he has been subjected in School was causing Student A emotional distress. The evidence also shows that since March 2014 Student A has XXXXXXXXXXXXXXX at other times, including after the October 2014 incident. In fact, Therapist B stated that since she began providing services to Student A in August 2014, he has continued to exhibit these XXXXXXXXXXXXXXX "on and off" as a result of peer harassment and bullying. Therapist B also commented that Student A has communicated to her that as a result of the harassment and bullying he has suffered, and especially as a result of the October 2104 incident, he does not trust that the School can do anything to XXXXXXXXXXXXXXX.

Other District Responses

In addition to the actions stated above with respect to certain incidents, early in the 2013-2014 school year, Teacher A co-founded a program called XXXXX, after she was approached by a student who had been the victim of bullying who wanted to form a group for students to address bullying. Students who join XXXXXX sign a policy in which they agree to help others who are in need with such daily tasks as homework, to step in when they see acts of bullying, and to act as liaisons between teachers and students. The group currently has 35 members, the majority of whom are 6th and 7th grade students. XXXXXX XXXXXX in November 2014.

Applicable Regulations and Legal Standards

Discrimination Generally

The Title VI implementing regulation, at 34 C.F.R. § 100.3(a), provides that no person shall, on the basis of race or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of a recipient. The Title VI regulation at 34 C.F.R. § 100.3(b)(1)(ii) also prohibits a recipient, on the basis of race or national origin, from providing any service or other benefit to a student that is different, or from providing such service or benefit in a different manner than it is provided to other students.

The Title IX implementing regulation, at 34 C.F.R. § 106.31(a), prohibits a recipient from, on the basis of sex, excluding a person from participation in, denying a person the benefits of, or subjecting a person to discrimination under any academic, extracurricular, or other program or activity operated by a recipient of federal funding. Additionally, the regulation, at 34 C.F.R. § 106.31(b)(1)-(4), provides that a recipient may not, on the basis of sex, treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services, or provide aid, benefits, or services in a different manner; deny any person such aid, benefit or service; or subject any person to separate or different rules of behavior, sanctions, or other treatment.

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 or benefits from Federal financial assistance. The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in this complaint do not provide greater protection than the applicable Section 504 regulations and has, therefore, applied the relevant Section 504 standards in its analysis of this complaint.

Harassment Generally

Harassment based on race/national origin, sex or disability is a form of discrimination prohibited by the above regulations. Harassing conduct may take many forms, including verbal acts and name calling, as well and nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the individual allegedly subjected to harassment.

Race/national origin, sex and/or disability harassment may constitute a hostile environment based on race/national origin, sex and/or disability. OCR determines whether conduct constitutes a hostile environment by examining the totality of the circumstances. These circumstances include the context, nature, scope, frequency, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved.

Whether the conduct in question is described as "bullying," "hazing," or "teasing," such labels do not determine how a recipient is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. Thus, when misconduct that falls under a recipient's anti-bullying policy is on the basis of race, national origin, sex, or disability, the recipient is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR. In the event that a recipient limits its response to a specific application of its anti-bullying disciplinary policy, the recipient may fail to properly consider whether the misconduct also results in discriminatory harassment.

Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. The actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Thus, students who do not conform to sex stereotypes are protected from sex-based discrimination under Title IX.[3]

A recipient is responsible for addressing harassment incidents about which it has notice. Generally, a recipient has "notice" of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. In some situations harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extra-curricular activities, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the recipient on notice. In some situations, if the recipient knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents.

Race/National Origin Harassment and Hostile Environment

Race/national origin harassment is intimidation or abusive behavior toward a student based on race/national origin that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the recipient's program. To establish a violation of Title VI under a hostile environment approach, the evidence must establish that: (1) a hostile environment existed, *i.e.*, harassing conduct (physical, verbal, graphic, or written) on the basis of race/national origin occurred that was sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an

[3] See OCR policy statements, including "Questions and Answers on Title IX and Sexual Violence," issued on April 29, 2014 and found at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

individual to participate in or benefit from the services, activities or privileges provided by a recipient; (2) the recipient had actual or constructive notice of the hostile environment; and (3) the recipient failed to respond adequately to address the hostile environment.

Disability and Sex Harassment and Hostile Environment

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward an individual based on disability that creates a hostile environment by interfering with or denying an individual's participation in or receipt of benefits, services, or opportunities in the recipient's programs.

Sex harassment is unwelcome conduct based on sex. Conduct is unwelcome if the student did not request or invite the conduct and regarded it as undesirable or offensive. Such conduct can include unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal, or physical conduct of a sexual nature. Sex harassment creates a hostile environment when unwelcome conduct based on sex in recipient's program or activity is sufficiently serious to deny or limit an individual's ability to participate in or benefit from the program or activity.

To establish a violation of Section 504, Title II or Title IX under a hostile environment approach, the evidence must establish, based on the totality of the circumstances, that: (1) a hostile environment existed, *i.e.*, harassing conduct on the basis of disability or sex occurred that was sufficiently serious so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient; (2) the recipient had actual or constructive notice of the hostile environment; and (3) the recipient failed to respond adequately to address the hostile environment.

Once a recipient knows or reasonably should know of possible sex or disability based harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a recipient's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the individual(s) involved, the size and administrative structure of the recipient, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. At the conclusion of a recipient's investigation, both parties must be notified, in writing, about the outcome of the complaint, i.e., whether harassment was found to have occurred.

If a recipient delays responding to allegations of harassment or responds inappropriately, the recipient's own inaction may subject the student to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial harassment and the effects of the recipient's failure to respond promptly and appropriately.

Recipient's Response to Address Hostile Environment

If an investigation reveals that harassment created a hostile environment based on race, sex, or disability, then the recipient is required to take immediate and appropriate action reasonably calculated to end the harassment, eliminate any hostile environment that has been created, prevent its recurrence and, where appropriate, remedy the effects of the harassment on the individual(s) subjected to the harassment. The corrective action taken by the recipient should be tailored to the specific situation. A series of escalating responses, including escalating consequences for the harasser, may be necessary if the initial steps are ineffective in stopping harassment. With respect to disability and sex harassment, 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.

When taking steps to separate an alleged target of harassment from the alleged perpetrator during and subsequent to an investigation, a recipient should minimize the burden on the alleged victim, and thus should not, as a matter of course, remove the alleged victim from his or her classes while allowing the alleged perpetrator to remain. A recipient may also be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. In addition to counseling and taking disciplinary action against the harasser(s), effective corrective action may require changes to the recipient's overall services or policies.

A recipient may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond depending on how widespread the harassment was and whether there have been any prior incidents. The recipient 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 recipient'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.

Bullying and the Denial of a Free Appropriate Public Education (FAPE)

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires a recipient that operates a public elementary or secondary education program or activity to provide a free appropriate public education (FAPE) to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability.

Bullying on any basis of a student with a disability who is receiving disability-related services can result in the denial of FAPE. Accordingly, under Section 504, as part of a recipient's appropriate response to bullying on any basis, the recipient should determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse

changes in the student's academic performance or behavior. If the recipient suspects the student's needs have changed, the recipient must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

Notice of Nondiscrimination

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires that recipients implement specific and continuing steps to notify applicants for employment, students, and others that it does not discriminate on the basis of sex in the education programs or activities it operates. The regulation implementing Title IX, at 34 C.F.R. § 106.9(b), requires recipients to include the notice of non-discrimination in each announcement, bulletin, catalog, or application form that it makes available to the persons described above, or which is otherwise used in the recruitment of students. The notice of nondiscrimination must state that the recipient does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner. The notice must state that questions regarding Title IX may be referred to the recipient's Title IX Coordinator or to OCR.

The Section 504 regulation, at 34 C.F.R. § 104.8, requires recipients to notify participants, beneficiaries, applicants, and others that the recipient does not discriminate on the basis of disability in violation of Section 504. If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, it shall include in those materials or publications a statement of the nondiscrimination policy.

Grievance Procedures

The regulation implementing Title VI does not contain an explicit requirement that recipients adopt and implement grievance procedures to address allegations of discrimination based on race or national origin. However, grievance procedures that encompass race or national origin discrimination can be part of a prompt and effective response to harassment or other forms of discrimination prohibited by Title VI. In addition, a recipient that has adopted discrimination complaint procedures must apply the procedures in a manner that does not constitute discrimination prohibited by Title VI.

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 student and employee complaints alleging any action that would be prohibited by Title IX, including sexual harassment. The recipient's grievance procedures must apply to complaints filed by students alleging discrimination by employees, other students, or third parties. Title IX does not require a recipient to provide separate grievance procedures for sexual harassment

complaints. However, a recipient's grievance procedures for handling discrimination complaints must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.

Similarly, the Section 504 regulation, at 34 C.F.R. § 104.7, requires recipients that employ fifteen or more persons to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging action prohibited by Section 504, including disability harassment.

OCR has identified a number of elements in evaluating whether a recipient's grievance procedures provide for the prompt and equitable resolution of complaints of discrimination and harassment. These include:

- Notice to students and employees of the grievance procedures, including where complaints may be filed, as well as contact information for the recipient's Title IX and Section 504 coordinators, including name, address and telephone number;
- Adequate definitions of prohibited harassment, with specific examples and an explanation that the procedures apply to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;
- Written notice to both parties of the outcome of the complaint; and,
- An assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Analysis

The Complainant alleges that the District discriminated against Student A on the bases of XXXXXXXXXXXXXXX since the 2012-13 school year because the District was aware that District students subjected Student A to XXXXXXXXXXXXXXX based on his XXXXXXXXXXXXXXX and failed to respond appropriately.

Hostile Environment Based on Race, Sex and Disability

OCR finds that Student A was subjected to XXXXXXXXXXXXXXX that was sufficiently severe, and to XXXXXXXXXXXXXXX harassment that was sufficiently serious, that it created a hostile environment based on race, sex and disability that interfered with his ability to participate in or benefit from the District's services and activities.

The evidence establishes that in October 2014, a District student XXXXXXXXXXXXXXX.

It is evident from the description of the XXXXXX provided by multiple witnesses and in documentation produced by the District that this incident was harassment of a XXXXX and XXXXXX nature. In addition, given the circumstances under which the incident occurred, OCR concludes that the incident was sufficiently severe and serious that it created a hostile educational environment for Student A based on XXXXXXXXX. The evidence shows that by the time this incident occurred, Student A had been subjected to at least one year of XXXXXXXXXXXXXXX, some of which raised civil rights implications. The XXXXX and the XXXXXX stated, for instance, that during the 2012-2013 school year the Complainant had communicated to them that she was concerned Student A was being bullied in and/or out of school. Both the Complainant and Student A recalled that the harassment/bullying that occurred that school year included XXXXXXXXXXXX. Additionally, the October incident occurred within a few months after what at least three members of the District staff categorized as Student A's "worst year" at the XXXXXXX school. These staff members reported that Student A was subjected to on-going bullying by the same student during the 2013-2014 school year that "escalated" from XXXXXXXXXXXXXXX.

According to the Complainant, she informed the School that some of XXXXXXX to which Student A was subjected allegedly included race and sex-based insults such as "XXXXX," "XXXXX," and "XXXX." The bullying during this school year also had such a negative effect on Student A, that he began experiencing XXXXXXXX, which were more clearly manifested after the October 2014 incident.

OCR considered the conduct in question from both an objective perspective and the subjective perspective of Student A and considered the totality of the circumstances in evaluating whether Student A has been subjected to a hostile environment based on his XXXXXXXXX. OCR notes that the harassment/bullying Complainant brought to the District's attention during the 2012-2013 school year suggests that the conduct was based, in part, on Student A's XXXXX, and at least one of the harassment/bullying incidents that occurred during the 2013-2014 school year was based, in part, on XXXXXXX. OCR also considered the other incidents of bullying and harassment during this time period in conjunction with the XXXXXXX of October 2014 (a single, severe incident) and determined that the totality of the circumstances created a hostile environment based on race/national origin, sex and disability that interfered with Student A's ability to participate in or benefit from the District's services and activities

Furthermore, the evidence shows that Student A continued to be subjected to harassment/bullying after the October 2014 incident. While none of these additional incidents was based explicitly on Student A's XXXXXXXXXXXXXX, one incident involved two female students calling Student A XXXXXXXXXXX, and the XXXXXXXX involving Student H in February 2015 was subjectively offensive to Student A in view of the severe October 2014 cell phone incident. Considering these incidents from an objective and subjective perspective under the totality of the circumstances and in conjunction with the harassment/bullying from the previous school years, OCR concludes that the totality of the

circumstances support a finding of an hostile educational environment experienced by Student A.

District Failed to Respond Adequately After Receiving Notice of Hostile Environment

OCR also finds that the District failed to take appropriate action reasonably calculated to end the harassment, eliminate the hostile environment that had been created, prevent its recurrence and, remedy the effects after receiving notice that Student A was being subjected to a hostile environment based on XXXXXXXXXXXXXXX. Additionally, based on the information provided OCR finds that the District did not provide the Complainant with prompt and equitable responses to her reports of XXXXXXXXXXXXXXX based harassment. Going back to the 2012-2013 school year, and continuing during the 2013-2014, District staff members acknowledged that the Complainant repeatedly informed them of her concern that Student A was being harassed/bullied in and/or out of school by his classmates. However, the District staff that was put on notice of the possible hostile environment to which Student A was subjected most times did not inform key District administrators and/or officials to ensure the District responded appropriately by conducting investigations to determine whether Student A was being subjected to a hostile environment. Even when the District took action to respond to Complainant's concerns, as it did during the 2013-2014 school year, its response was not adequate to address the hostile environment and its effects on Student A. District administrators did not determine what had occurred because they were not fully informed of everything their staff knew regarding Student A's experience at the XXXXXXXX.

OCR further finds that while the District took multiple steps to respond promptly to the October 2014 XXXXXXXX after receiving notice, its actions were not reasonably calculated to and did not eliminate the hostile environment that had been created, prevent its recurrence or remedy the effects in light of the severity of the incident and Student A's history of on-going bullying by his peers. Specifically, it is undisputed that District staff conducted and documented an investigation of the incident that resulted in the discipline of the student who XXXXXXXXXX Student A. However, given the totality of the circumstances in this case, the response was not sufficient. First, the District did not determine what had occurred, as it did not expand the focus of its investigation of the incident beyond the students identified by the Complainant or the students in the XXXXX classroom to determine how XXXXXXXXXXXXXX students. Second, the documentary evidence of the investigation shows that the District treated the October 14 incident as an ordinary bullying incident and, despite its clear XXXXXX context, it did not determine whether the incident was based on Student A's XXXXXXXXX, or whether it created a hostile environment for Student A based on his XXXXXXXXXXX. Finally, the District conducted its investigation as if it was inquiring about an isolated incident and did not consider the totality of the circumstances or determine whether the incident was part of a larger pattern of harassment towards Student A.

Moreover, the District's response to the known harassment did not remedy its effects. Although Student A received additional minutes with the Social Worker to teach him XXXXXXXXXX response to the October 2014 incident, this action did not remedy the effects of the hostile environment as this service was insufficient to address the cumulative effects of the harassment/bullying Student A had endured during his prior year(s) in the XXXXXXXX. In fact, despite the fact Student A has been receiving more XXXXXXX minutes after the October 2014 incident, his XXXXXXX reported to OCR that Student A continues to suffer XXXXXXXX and reports that Student A does not trust that the District can keep him safe from further bullying and harassment.

Additionally, although the District also responded to the October 2014 incident by facilitating a discussion among students in Student A's XXXXX class on the District's policies on bullying and XXXXXXX and instituted a practice of XXXXXXXX in that particular class, this action was not a sufficient response considering the severity of the incident and Student A's history of on-going bullying. The District did not address the XXXXXXX's educational environment as a whole (e.g., by providing effective training to all staff and students on the District's anti-bullying and harassment policies) and students continued to harass Student A during the 2014-2015 school year. Furthermore, regarding these additional incidents, OCR concludes that despite having notice of them, the District again failed to consider whether each of those incidents was part of a pattern of harassment or whether the incident created or contributed to a hostile environment based on XXXXXXXXXXX.

For all of these reasons, OCR finds sufficient evidence to conclude that the District failed to take immediate and appropriate action reasonably calculated to end the harassment, eliminate the hostile environment that had been created, prevent its recurrence and, remedy the effects of the harassment on Student A after receiving notice that Student A was possibly being subjected to a hostile environment based on XXXXXXXXXXXX, in violation of XXXXXXXXXXXXXX.

Denial of a Free Appropriate Public Education (FAPE)

OCR concludes that the bullying of Student A by his peers during his XXXXX years resulted in the denial of a free appropriate public education (FAPE) for Student A that the District failed to timely and effectively address. The evidence shows Student A is a student with XXXXXXX who has received special education and related aids and services from the District for many years. The District knew that as a result of the continuous bullying to which he was subjected during the 2013-2014 school year, and possibly as early as the 2012-2013 school year, Student A exhibited XXXXXXXXX that should have caused the District to convene Student A's IEP team to determine whether his needs had changed to such an extent that his IEP was no longer providing him meaningful educational benefits. District staff members reported they had knowledge that Student A exhibited XXXXXXXXXXXX in front of a XXXXXXXXXX in the XXXXXXXXX around March 2014, but the District did not take any action to ensure he continued to receive FAPE. In fact, the District did not

convene the IEP team until November 2014, after Student A again expressed similar behavior following the October 2014 bullying incident.

Although District staff, including its officials, administrators and teachers, expressed concern for Student A's academic and personal well-being, which is evident in many of the actions they took in response to the bullying of Student A by his peers, they failed to adequately communicate with each other or otherwise ensure the District's actions were effective to enable Student A to receive the FAPE to which he was entitled. Notably, key District administrators and officials (the XXXXX, XXXXXX and XXXXXX) were not informed by their own staff that Student A had exhibited XXXXXXXXXXX as a result of the harassment/bullying to which he was subjected, especially during the 2013-2014 school year, and Student A's IEP team did not meet to determine whether his IEP needed to be revised in light of this information.

The lack of communication among District staff further reflects a lack of effective training with respect to the effects of harassment/bullying on students with XXXXXXX. While the District provides training to administrators and staff on how to recognize and respond to bullying, the District staff who were aware of the bullying of Student A and the effects it was having on him consistently did not report this information to District administrators and/or officials during his years attending the XXXXXXX.[4]

Based on the foregoing, OCR finds that Student A was denied FAPE as a result of the effects of the bullying and that the District failed to remedy the denial of FAPE in a timely and effective manner in violation of Section 504.

Notice of Nondiscrimination

Lastly, OCR finds that the District's EEO Policy does not comply with regulations implementing Title IX and Section 504. The EEO policy is not readily available on the District's website nor is it contained in the District's Student Handbook. As such, OCR determined that the District does not adequately notify members of the school community of its nondiscrimination policy.

Conclusion

Therefore, after carefully considering all the evidence, OCR concludes that the District did not take immediate and appropriate action reasonably calculated to end the harassment, eliminate the hostile environment that had been created, prevent its recurrence and, remedy the effects of the harassment on Student A after receiving notice that Student A was being

[4] OCR's October 21, 2014 Dear Colleague letter states that as a best practice, schools should train all staff to report bullying to an administrator or school official who can promptly convene a student's IEP or Section 504 team to make sure a student who is the victim of bullying is receiving FAPE or determine whether the student's FAPE needs have changed.

subjected to a hostile environment based on XXXXXXXX, and that the bullying to which Student A was subjected during his XXXXXX years resulted in the denial of FAPE services that the District failed to remedy in a timely and effective manner, in violation of XXXXXXXXXXXXXXXXXXXXXXX.

To resolve the above-described XXXXXXXXXXXXXX determinations, the District agreed to enter into a resolution agreement (the Agreement) with OCR on June 23, 2013. Under the terms of the Agreement the District will, among other things:

- issue a statement that it does not tolerate any acts of harassment or bullying on any basis, including XXXXXXXXXXXXXXXXXX;
- review and revise, with OCR's approval its EEO Policy, Harassment/Bullying Policy, Uniform Grievance Procedure, Bullying Policy and student code of conduct;
- provide effective training to all District personnel, including staff charged with supervising students and staff directly involved in processing, investigating and/or resolving complaints, on the District's revised Policies and code of conduct;
- develop and provide an orientation program for all students, administrators, staff, employees, agents, security officers, counselors, and coaching staff, that will provide information on the prohibition against harassment on all bases, including race, color, national origin, sex and disability, a review of the District's Policies and code of conduct, including the disciplinary sanctions related to findings of violations of those policies and code of conduct, and provide students with the name and contact information of a District employee whom the students may contact to report harassment or bullying; and
- provide retrospective and prospective individual relief to Student A to ensure that he is not subjected to harassment or bullying on any basis, including race, national origin, sex, and/or disability on District grounds and in District sponsored activities.

OCR will monitor the District's implementation of the Resolution Agreement until the District is in compliance with the statutes and regulations at issue in this case. The full and effective implementation of the Resolution Agreement will address all of OCR's XXXXXXXXXXXXX compliance findings.

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.

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. The Complainant may also 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.

We wish to thank you and the District's officials, administrators and staff for the cooperation extended to OCR during our investigation. In particular, we thank XXXXXXXXX, Esq., for her assistance throughout OCR's investigation. If you have any questions, please do not hesitate to contact Alonzo Rivas by phone at 312-730-1684, or by e-mail at Alonzo.Rivas@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

cc: XXXXXX, Esq.
Enclosure