



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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March 23, 2018

Mr. Mark A. Baker
Superintendent
Northeast School Corporation
406 North Vine Street
Hymera, Indiana 47855

Re: OCR Docket #05-16-1068

Dear Mr. Baker:

This is to advise you of the completion of the complaint resolution activities by the U.S. Department of Education (Education), Office for Civil Rights (OCR), of the above-referenced complaint filed against Northeast School Corporation (Corporation) alleging discrimination based on sex.

Specifically, the complaint alleged that the Corporation subjected a female high school student (Student A) to discrimination based on sex when it failed to respond appropriately once it became aware in XXXXXXXX that a male student (Student B) had sexual assaulted Student A in XXXXXXXX and that other students subsequently subjected Student A to sexual harassment.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibits discrimination based upon sex in any educational program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the Corporation is subject to Title IX.

During its investigation, OCR reviewed data provided by Student A's guardian and the Corporation and interviewed Corporation students and personnel. Based on its investigation, OCR determined using a preponderance of the evidence standard that the Corporation failed to comply with Title IX with regard to the requirement to provide a prompt and equitable grievance procedure. Prior to OCR making a finding as to whether the Corporation failed to respond appropriately to a hostile environment created for Student A, the Corporation signed the enclosed Resolution Agreement (Agreement) to resolve this issue and also to correct the identified violation. The reasons for OCR's determinations are explained below.

Legal Standards

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, be denied the benefits of, or be subjected to discrimination in education programs or activities operated by recipients of financial assistance from the Department.

Hostile Environment Created by Sexual Harassment

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, regardless of the sex of the student. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is so severe, persistent, or pervasive that it denies or limits a student's ability to participate in or benefit from the recipient's program or activities.

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 conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age of the alleged harasser and the subject of the harassment; the size of the school, the 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.

Nature of the Recipient's Responsibility to Prevent and Address Sexual Harassment

The Title IX regulations establish the following procedural requirements that are important for the prevention or correction of sex discrimination, including sexual harassment.

- *Publish Notice of Non-discrimination*

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires a recipient to implement specific and continuing steps to notify all applicants for admission and employment, students and parents, employees, 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 educational programs or activities, and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient's Title IX Coordinator or to OCR.

- *Designate Title IX Coordinator*

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, including any investigation of any complaint communicated to the recipient alleging noncompliance with Title IX or its implementing regulation. The Title IX Coordinator must have knowledge of the requirements of Title IX and of the recipient's own policies and procedures on sex discrimination. If a recipient designates more than one Title IX Coordinator, then one coordinator should be designated as having ultimate oversight responsibility of all complaints to ensure consistent practices and standards in handling complaints. Further, the recipient is required by the Title IX implementing regulation, at 34 C.F.R. § 106.8(a), to notify all students and employees of the name (or title), office address, email address, and telephone number of the designated employee(s).

- *Respond When It Knows or Should Have Known*

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.

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. If an investigation or other inquiry reveals that sexual harassment created a hostile environment, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment if one has been created, prevent the harassment from recurring and, as appropriate, remedy its effects. These duties are a recipient's responsibility regardless of whether or not the student who was harassed makes a complaint or otherwise asked the recipient to take action. If, upon notice, a recipient fails to take prompt and effective corrective action, the recipient's own failure has permitted the student to be subjected to a hostile environment. If so, the recipient will be required to take corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the student that could reasonably have been prevented had the recipient responded promptly and effectively.

Even if the sexual harassment did not occur in the context of a recipient's programs or activities, a recipient must consider the effects of the off-campus sexual harassment when evaluating whether there is a hostile environment on campus or in an off-campus program or activity because students often experience the continuing effects of off-campus sexual harassment while on campus or while participating in an off-campus program or activity.

In situations where reported sexual harassment may constitute a criminal act, a recipient should notify a complainant¹ of the right to file a criminal complaint with local law enforcement, and should not dissuade a complainant from doing so either during or after the recipient's internal Title IX investigation. Additionally, recipients should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed,

¹ The term "complainant" as used throughout this letter refers to an individual who is the subject of alleged sexual violence or other types of sexual harassment.

must take immediate steps to protect the complainant and allow continued access to the recipient's programs and activities. A law enforcement investigation does not relieve the recipient of its independent Title IX obligation to investigate the conduct or otherwise respond to the conduct.

- *Offer Interim Measures*

It may be appropriate for a recipient to take steps to ensure equal access to its programs and activities and to protect either or both parties as necessary, including taking interim measures prior to an investigation or while an investigation is pending. The recipient should take these interim measures promptly once it has notice of the harassment allegation. The individualized interim measures implemented and the process for implementing those measures will vary depending on the facts of each case.

In assessing the need for a party to receive interim measures, a recipient may not rely on fixed rules or operating assumptions that favor one party over another, nor may a recipient make such measures available only to one party. Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education. The Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' needs.

- *Immediate and Appropriate Action to Address Retaliation*

When a recipient knows or reasonably should know of possible retaliation, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Title IX requires recipients to protect against retaliation; at a minimum, this includes making sure that individuals know how to report retaliation, making follow-up inquiries to see if any retaliation or new incidents of harassment have occurred, and responding promptly and appropriately to address any new or continuing concerns.

- *Respond to Requests for Confidentiality*

If a complainant requests that his or her name not be revealed to the accused or asks that the recipient not investigate or seek action against the accused, the recipient should inform the complainant that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the accused. The recipient should also explain that the recipient will take strong responsive action if retaliation occurs. If the complainant still requests that his or her name not be disclosed or that the recipient not investigate or seek action against the accused, the recipient will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the complainant.

- *Adopt, Publish and Implement Grievance Procedures*

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual violence and other types of sexual harassment. The procedures for addressing and resolving complaints of sex discrimination should be written in language that is easily understood, should be easily located, and should be widely distributed.

OCR has identified a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the recipient:

- 1) provides notice of the grievance procedures to students and employees of the procedures, including where complaints may be filed;
- 2) applies the procedures to complaints alleging sex discrimination and harassment carried out by other students, employees or third parties;
- 3) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- 4) designates and follows reasonably prompt timeframes for the major stages of the complaint process;
- 5) notifies the parties of the outcome of the complaint; and
- 6) provides assurance that the recipient will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred and to remedy its discriminatory effects, as appropriate.

There is no fixed time frame under which a recipient must complete a Title IX investigation. OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case. In addition, a recipient should ensure that all designated employees have adequate training as to what conduct constitutes sex discrimination and are able to explain how the grievance procedure operates.

Any rights or opportunities that a recipient makes available to one party during the investigation should be made available to the other party on equal terms.

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a recipient should provide written notice to the responding party of the allegations constituting a potential violation of the school's Title IX policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date

and location of the alleged incident. Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s Title IX policy. If the complaint presented more than a single allegation, a decision should be reached separately as to each allegation.

Recipients are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.

If a recipient chooses to allow appeals of its decision regarding responsibility and/or disciplinary sanctions, the recipient may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.

Background

The Corporation’s Policies and Procedures

The Corporation’s policies are available on its website.²

Corporation Policy 2260 (Nondiscrimination and Access to Equal Opportunity) says the Corporation does not discriminate on the basis of sex, among other factors, identifies two Corporation principals, by title only, as “compliance coordinators” to whom to direct complaints of discrimination, and provides the mailing address and telephone numbers for these individuals; the policy does not identify these individuals specifically as Title IX coordinators. Policy 2260 also says individuals who report discrimination will be informed of their right to file with OCR.

Corporation Policy 5517 (Anti-Harassment) contains a prohibition against sexual harassment, and a grievance procedure for complaints of sexual harassment. Policy 5517 prohibits unlawful harassment, including sexual harassment, in all Corporation operations, programs, and activities. It encourages students, members of the Corporation community, and third parties to “promptly report incidents of unlawful harassment ... to an administrator, supervisor or other [Corporation] official,” and requires all Corporation employees to report any incident of alleged harassment that is observed by or reported to the employee.

Policy 5517 also sets forth a complaint process that may be used by any “members of the Corporation community or third party” who believes he or she has been subjected to harassment.

Policy 5517 identifies two individuals by title only, including the Athletic Director of North Central High School (School), as the Corporation’s “Anti-Harassment Compliance Officers,”

² <http://www.neola.com/northeast-in/>

and provides their telephone numbers and mailing addresses. Policy 5517 requires an investigation to be completed “in a timely manner (ordinarily, within fifteen (15) business days of the complaint being received).” At the conclusion of the investigation, the Compliance Officer or designee will prepare and deliver a written report to the Superintendent. The policy says, “Absent extenuating circumstances, within five (5) business days of receiving the report of the Compliance Officer or the designee, the Superintendent must either issue a decision regarding whether the complaint of harassment has been substantiated or request further investigation. A copy of the Superintendent’s decision will be delivered to both the Complainant and the Respondent.” If the Superintendent requests additional investigation, the additional investigation is to be completed within five business days, after which the Superintendent issues a written decision.

Policy 5517 provides for an appeal process by either party. Within 20 days after an appeal, the Board of Education meets with the parties, who have the opportunity to provide evidence and witnesses; a copy of the Board’s disposition is sent to each party within ten business days of the meeting.

The Corporation’s 2017-2018 School-Family Handbook (Handbook), which is available on the Corporation’s website,³ outlines the student code of conduct (the Code). The Code prohibits harassment, and includes sexual harassment in its description of prohibited conduct. The Handbook states the sanctions which may be imposed for violation of the Code, and the discipline procedures that will be followed in administering the Code. The Handbook also includes a Title IX grievance form for sexual harassment complaints.

The Anti-Harassment Compliance Officer

The athletic director informed OCR that he was not aware of his role as an anti-harassment compliance officer until the week prior to OCR’s on-site. The School’s principal advised OCR that because of the size of the School, most parents and students report issues directly to him, regardless of whether there is someone else identified in a Corporation policy as a contact person.

Training

Corporation personnel indicated that there had not been specific training regarding Title IX or sexual harassment, but that sexual harassment was a topic that was part of mandatory bullying training for staff members. Students interviewed by OCR also indicated that they had not received training on the Corporation’s sexual harassment policies and procedures, although sexual harassment may have been presented as a topic generally during health class.

³ <http://www.nesc.k12.in.us/Downloads/NCHS%20Handbook%202017-18-%20Approved-7-31-173.pdf>

Facts

Student A was enrolled as XXXXXX student at the School in the XXXXX school year. On the evening of XXXXX, Student A's guardian informed the principal that in XXXXX, Student A had been XXXXX. The principal said he advised Student A's guardian XXXXX.

The next morning, Student A's guardian contacted the principal by phone and indicated that she wanted the District to remove Student B from the School and not permit him to play in that night's XXXXX. The principal told OCR the School did not have a basis for removing Student B from school or extracurricular activities, but said he advised Student A's guardian that the School would put in place XXXXX. This XXXXX was not in written form but was communicated to the students at some point before XXXXX.

The following week, the guardian met with School personnel to discuss Student A's schedule. At that time, Student A and Student B were in XXXXX together. The School's counselor said because of the size of the School, there is only one section of XXXXX, and only two sections of XXXXX, both of which are required classes, and only two sections of the XXXXX in which Student A and Student B were enrolled. The second section of XXXXX were both offered in XXXXX. The principal said that Student A's guardian asked about XXXXX as an option, and the Corporation agreed to offer XXXXX if Student A's guardian provided XXXXX.

On XXXXX, Student A's guardian provided XXXXX. The Corporation XXXXX immediately thereafter, and Student A remained XXXXX through the end of the XXXXX semester.

According to the Superintendent and the principal, during a phone conversation shortly after the report of XXXXX, Student A's guardian requested that the Corporation XXXXX. Student A's guardian denied to OCR that she XXXXX.

Student A's guardian informed the Corporation the first week in XXXXX that Student A wanted to XXXXX, beginning that week. The principal and counselor met with Student A's guardian the next day. The principal said Student A was adamant that she not be XXXXX. He said that this requirement and the limited number of course offerings made it difficult to assure that Students A and B were not XXXXX. The Principal said Student A's guardian suggested XXXXX, and they agreed that Student A would receive XXXXX and come to school XXXXX. Student A's guardian asserted that the School should have XXXXX.

The principal and Superintendent informed OCR that they learned XXXXX. The principal sent a letter to Student A's guardian dated XXXXX, stating that XXXXX. Student A's guardian responded by letter dated XXXXX. Student A's guardian wrote that XXXXX. The principal responded by letter dated XXXXX, reiterating that XXXXX. Student A's guardian denied to OCR XXXXX.

On multiple occasions, Student A's guardian reported to the Corporation that Student A had been subjected to harassment by other students upon returning to the School. The principal said Student A's guardian reported XXXXX.

Student A also said she had heard that XXXXX. Student A identified XXXXX.

The principal said Student A’s guardian reported XXXXX.

Student A said that on XXXXX, as she was leaving the School, XXXXX.

Student A’s guardian said that in the hallway in XXXXX.

Student A’s guardian said that on XXXXX.

The principal said that the same week, Student A’s guardian reported that XXXXX.

Student A did not XXXXX due to XXXXX. Student A’s guardian opined to OCR that the School could have XXXXX.

The principal said he offered Student A the opportunity to XXXXX. The principal also said XXXXX. The counselor said XXXXX. Student A’s guardian said XXXXX.

Student F

Student A’s guardian informed OCR that another female student (Student F⁴) had been XXXXX. Student F’s parent told OCR that in XXXXX, Student F reported that she had been XXXXX. Student F’s parent said she talked to the principal and counselor at the School and also XXXXX.

According to the principal, he received the report about XXXXX a few weeks before XXXXX. He said the School put XXXXX and removed Student F from XXXXX.

Student F’s parent confirmed that the School officials put in place XXXXX. Student F’s parent said the School administration told Student F’s teachers she could be XXXXX. She said the School also XXXXX.

Student F’s parent XXXXX. The principal said that he received a report XXXXX.

Student F’s parent said Student F XXXXX.

The Corporation did not investigate Student A or Student F’s complaints or issue a determination in response to their reports of XXXXX.

Analysis and Conclusions

In making a determination regarding compliance, OCR must often weigh conflicting evidence to determine whether a preponderance of the evidence substantiates the allegation.

⁴ Student F in this letter is the same student as identified as Student B in the Agreement.

Prior to the conclusion of its investigation, the Corporation expressed an interest in resolving the complaint allegation. OCR determined that it is appropriate to resolve the allegation at this juncture, because OCR has not issued a final determination as to whether the Corporation violated 34 C.F.R. § 106.31 by failing to respond appropriately to a hostile environment allegedly created for Student A as a result of XXXXX.

However, OCR has found that the Corporation, in violation of 34 C.F.R. § 106.8(b), did not provide a prompt and equitable grievance procedure when it was notified of conduct that could be sexual harassment. The Corporation's efforts to provide interim measures were not individualized and appropriate in light of the fact that they XXXXX. The Corporation provided neither Student A nor Student F an investigative determination. While the Corporation asserted that Student A's guardian stated she did not want XXXXX, Student A's guardian denied this and there is no contemporaneous confirmation in this regard. Additionally, the Corporation was independently obligated under Title IX to investigate the conduct and or otherwise respond to the conduct while taking immediate steps to XXXXX. To the extent the Corporation was under the belief that XXXXX, the Corporation did not determine whether it could XXXXX.

Additionally, the Corporation has not trained personnel to be responsible for conducting Title IX investigations, and one person was not aware he was identified as anti-harassment contact person until shortly before OCR's on-site. OCR determined that the Corporation has failed to designate a responsible employee to coordinate its efforts to comply with and carry out its Title IX responsibilities in violation of 34 C.F.R. § 106.8(a).

The enclosed Agreement resolves the violation of Title IX referenced above, as well as the resolution of the complaint allegation as to the alleged failure to respond appropriately to a hostile environment.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Corporation'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 Corporation 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 complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, 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.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR wishes to thank the Corporation for the courtesy and cooperation extended to OCR during its investigation. In particular, we wish to thank Mr. Mark Scudder, Counsel for the Corporation. If you have any questions, please contact Salina Gamboa, Senior Equal Opportunity Specialist, at 312-730-1627 or by email at Salina.Gamboa@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Mr. Mark Scudder