



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

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**REGION V**  
ILLINOIS  
INDIANA  
IOWA  
MINNESOTA  
NORTH DAKOTA  
WISCONSIN

April \_\_, 2017

Ms. Cynthia Scroggins  
Superintendent  
School City of Whiting  
1500 Center Street  
Whiting, IN 46394

Re: OCR Docket #05-16-1242

Dear Ms. Scroggins:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), completed its investigation of the complaint filed against the School City of Whiting (District), alleging discrimination on the bases of race and national origin as well as retaliation.

Specifically, the complaint alleges the following:

1. the District subjected a 9th grade student (Student A) at Whiting Junior-Senior High School (School) to discrimination based on race and national origin during the 2015-2016 school year when teachers and other students harassed Student A based on race and national origin by making derogatory remarks about Student A's race and the District was aware of the harassment but failed to take action in response;
2. the District subjected Student A to discrimination based on race and national origin when it excessively disciplined Student A during the 2015-2016 school year; and
3. the District subjected Student A's parent to retaliation for complaining of discrimination based on race and national origin, in that the District excessively disciplined Student A during the 2015-2016 school year.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d – 2000d-7, and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance from the Department. Title VI also prohibits retaliation. As a recipient of Federal financial assistance and a public entity, the District is subject to Title VI.

During its investigation, OCR reviewed data provided by Student A's parent and the District and interviewed Student A's parent and District personnel. OCR has determined that the evidence is insufficient to establish that the District discriminated against Student A as alleged in Allegation #2 or retaliated against Student A's parent as alleged in allegation #3. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving allegation #1. Discussions

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between OCR and the District resulted in the District’s signing the enclosed Resolution Agreement (Agreement), which, when fully implemented, will resolve the issues raised in allegation #1 of the complaint.

### **Background**

The School’s enrollment for the 2016-2017 school year was 411 students; the demographic breakdown by race/ethnicity was as follows: Black 7 students, Hispanic 248 students, White 142 students, and Multiracial 14 students.<sup>1</sup>

The Corporation’s non-discrimination policy outlined in its “Bylaws & Policies” (Bylaws) states that the District does not discriminate on the basis of race, color, or national origin. The non-discrimination policy identifies the Compliance Officer and provides contact information (address, email address and telephone number). The Bylaws describe the procedures for filing a complaint of discrimination and offer both a formal and an informal complaint procedure. The Bylaws state that investigations will be completed in a timely manner, “ordinarily, within fifteen (15) days of the complaint being received.” Finally, the Bylaws indicate that when the investigation is completed the investigator will send a written report to the Superintendent summarizing the evidence and recommending a finding “based on the evidence and the definition of discrimination provided in the Board Policy and State and Federal law as to whether the Complainant has been subjected to unlawful discrimination.” **The determination is then sent in writing to the parties.**<sup>2</sup>

### **Allegation #1**

#### **Legal Standards**

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), states that no person shall, on the basis of race or national origin, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity by a recipient of Federal financial assistance. 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 is provided in a different manner, from that provided to other students.

Racial or national origin harassment that creates a hostile environment can constitute a form of discrimination prohibited by Title VI. Harassment based on race is intimidation or abusive behavior toward a student based on race or 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 institution’s program. Harassing conduct may take many forms, including verbal acts and name calling, 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.

<sup>1</sup> Student A was identified as White based on enrollment forms.

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

**Comment [RA1]:** Karen please check the standard

To show racial or national origin harassment in violation of Title VI, the evidence must establish that: (1) a hostile environment on the basis of race or national origin existed, *i.e.*, harassing conduct (e.g., physical, verbal, graphic, or written) occurred that was sufficiently severe, pervasive or persistent 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 notice of the hostile environment; and (3) the recipient failed to respond adequately to address the hostile environment. In analyzing claims of harassment based on race or national origin, OCR considers the totality of the circumstances to determine whether a hostile environment has been created. 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.

The extent of a recipient's responsibilities when an employee harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aids, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context including the type and degree of responsibility given to the employee to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally; the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place; where and when the harassment occurred; the age and educational level of the student involved; and as applicable, whether, in light of the student's age and educational level and the way the institution is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

In cases involving allegations of harassment of elementary and secondary school students by an employee during any school activity, as in this case, consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in racial harassment, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. These steps are the recipient's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action and whether or not the recipient has "notice" of the harassment. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

The regulation implementing Title VI does not contain an explicit requirement that recipients adopt and implement complaint procedures to address allegations of discrimination based on race, color or national origin. However, grievance procedures that encompass race 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 Title VI discrimination.

### Facts

Student A's parent said Student A was subjected to numerous verbal taunts during the 2015-2016 school year related to her ethnic identity (Pakistani ancestry) by both teachers and students. A teacher [was this Teacher A or a different teacher?] told OCR that others became aware of Student A's ancestry during a class session when students had to tell the class something about themselves, and Student A mentioned her ancestry. Student A's parent stated that several school officials made racially charged remarks, referring to Student A as a terrorist and "Osama Bin Laden." She also stated that a teacher (Teacher A) stated that Student A would never amount to anything just like her ancestors. Additionally, she told OCR that on March 3, 2016, Student A was subjected to race based bullying, but did not provide other details about the incident. The parent asserted that she followed up with the school via email but that the school failed to respond. In the email, the parent said Student A had "tolerated coaches joking about bombs in their shoes....and being called a rag head, terrorist and more."

Teacher A told OCR that she was unaware of Student A's race or national origin until OCR launched its investigation and she was notified of the allegations. Teacher A stated that she has not made any racially insensitive remarks and is not aware of any other staff or students making any such remarks. She specifically denied that she told Student A that she would "never amount to anything just like her ancestors." She further stated that Student A did not complain to her about discrimination or bullying, nor did Student A's parents.

The Principal said she was unaware of Student A's national origin and noted that the school data filled out by the parent identified Student A as White with no national origin indicated. OCR's review of the data it received from the District confirmed this.

The Principal stated that after reviewing the March 3, 2016 email, which was the first report of race/national origin harassment of Student A she had received, she encouraged the parent to fill out an electronic complaint form. The parent refused to do so. Nevertheless, the Principal spoke with the students involved in the March 3, 2016 incident and after reviewing snapchats making fun of Student A based on her weight, she determined that the conduct did not involve race or national origin harassment. The Principal explained that evidence indicated that Student B had been teasing Student A about her weight. The Principal said Student B received a suspension for the teasing incident but withdrew from the school before serving the suspension.

With regards to the alleged harassment by teachers, the Principal stated that the parent would not give her specific names, and Student A also refused to provide names or details about the asserted harassment. The Principal said she did not investigate further because she did not know who to question. The Principal advised the parent verbally of her determination concerning the complaint about the March 3 incident. To date Student A has not filed a formal complaint of discrimination or harassment under the Bylaws.

### Analysis and Conclusions

OCR has determined that allegation #1 is appropriate for resolution under Section 302 of the CPM. The District expressed interested in resolving the allegation and OCR would need to interview Student A, the former Superintendent, and student witnesses in order to complete its investigation of this allegation.

The agreement requires the District to take the following actions: provide all administrators, teachers and staff effective training on the District's policies and procedures prohibiting harassment based on race or national origin; provide training to all District staff who are directly involved in processing, investigating and/or resolving complaints or other reports of such harassment; provide an orientation program for all students which will address harassment based on race or national origin; investigate the allegations identified in Student A's March 3, 2016 report of harassment against staff and students during the 2016-2017 school year and also investigate whether any District staff had knowledge of additional reports of harassment of Student A during the 2016-2017 school year but failed to take action to report and/or investigate such harassment, then take appropriate action upon OCR's approval of the findings and proposed actions; and maintain documents relating to specific complaints or other reports of discrimination or harassment of students based on race or national origin.

OCR will monitor the District's implementation of the agreement.

## **Allegation #2**

### **Legal Standard**

The regulation implementing Title VI, at 34 C.F.R § 100.3(a), states that no person shall, on the basis of race or national origin, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity by a recipient of Federal financial assistance. 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 is provided in a different manner, from that provided to other students.

In determining whether the District subjected an individual student to discrimination on the basis of race or national origin or the District's discipline policies, practices and procedures discriminate on the basis of race or national origin, OCR considers whether the District treats similarly-situated students differently on the basis of race or national origin. If evidence of different treatment is found, OCR then determines whether the reasons offered by the District for the different treatment are legitimate, non-discriminatory reasons and whether they are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the information shows that the District treated particular students in a manner that is inconsistent with its established policies, practices and procedures or whether any other evidence of discrimination based on race or national origin exists.

### **Facts**

The parent asserted that Student A was disciplined more harshly than other students because of her race and national origin, as she was suspended for minor infractions such as being tardy, wearing prohibited clothing (sweatpants), not completing homework and failing to attend detention. The District does not maintain records as to its students' national origins or ancestries.

The District provided a copy of the student handbook which contains the school's discipline code and explains the progressive discipline policy. With regard to tardies, the discipline progresses from a warning for a first offense, to a one hour detention for the second offense. A third tardy incurs a 2 hour detention. A fourth tardy or more will result in the student being assessed an absence. Eight (8) absences in a semester will cause the student to receive an incomplete for the class in which they received the absences. In addition, a student who fails to serve a detention is subject to further discipline which could include the detention being rescheduled, depending on the reason for failing to attend, or an In-School Suspension (ISS). If a student fails to serve an ISS, it may be rescheduled, depending on the reason for the failure to attend, or lead to an Out of School Suspension (OSS).

OCR reviewed Student A's attendance and discipline records which show that Student A had eight absences that involved missing the entire day of school and 34 absences for part of the school day. She was tardy to her first period class 21 times. Student A's parent acknowledged that Student A was often tardy, stating that she "has a difficult time getting her up and ready for school in the morning." OCR's review confirmed that the discipline Student A received was consistent with the student code sanctions for each of the absences and tardies recorded.

Contrary to the parent's assertion, District records indicate that Student A was not suspended for tardies but for failure to serve detentions that were assigned as a result of the excessive number of tardies. Student A's parent did not deny that Student A skipped detentions but argued that she believed they were unfair. In the fall, Student A skipped detention four times with two of those skipped detentions resulting in a one-day and then a two-day ISS and one resulting in a one-day OSS. In the spring Student A skipped six detentions with two of those skipped detentions resulting in a one-day and then a two-day ISS and two resulting in a one-day and then a three-day OSS.

In addition to tardies and absences, the school uses progressive discipline in responding to other types of misconduct, including the behaviors mentioned below for which Student A was disciplined. For this conduct, the discipline policy requires a one hour detention for the first offense, a two-hour detention for the second, and one day ISS for the next two offenses. Additional offenses lead to multiple day ISS and OSS and ultimately the option to expel a student after eight offenses.

In addition to the discipline for not serving detentions referenced above, Student A received the following discipline for unacceptable behaviors: a one hour detention on December 1, 2015, for wearing sweatpants, a one hour detention on January 26, 2016, for not carrying or presenting school identification, a class suspension on February 8, 2016, for "failure to obey," a two hour detention on February 26, 2016, for wearing athletic pants, a two hour detention on April 12, 2016, for uncooperative behavior and refusing to obey, an OSS on April 13, 2016, for

uncooperative behavior and refusing to obey and expulsion on May 11, 2016, for “repeated incidents of student misconduct.” Each of the offenses was assigned discipline in accordance with the District’s progressive discipline system. **Student A’s parent did not deny that Student A engaged in the misconduct for which she was disciplined.**

Data provided by the District revealed 203 infractions of failure to serve detention, committed by 80 students. Student A had ten of the 203 failures to serve detentions, and no other student had more than six such infractions. The student who missed six detentions was given discipline in the exact same manner Student A was at the point of her sixth infraction.

OCR’s data review did not reveal a race pattern in issuing discipline for misconduct. Rather the discipline issued for misconduct similar to Student A’s actions was consistent with the code provisions and sanctions issued to students of all races who engaged in such conduct.

The data also revealed that one other student, who is Hispanic, was expelled for repeated incidents of student misconduct, during the 2015-2016 school year. The data identified the students by race but not by national origin.

#### Analysis and Conclusions

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

OCR finds that Student A was not subjected to excessive or different discipline based upon race or national origin. OCR determined that while Student A was frequently disciplined, the discipline was a direct result of Student A’s failure to adhere to the standards outlined in the District’s code of conduct. OCR determined that Student A was disciplined in accordance with the code for each of the infractions. Furthermore OCR reviewed the data of students with similar infractions and determined that they were disciplined in the exact same manner.

Based on the above, OCR determined that the evidence is not sufficient to establish that the District subjected Student A to discrimination based on race or national origin with regard to allegation #2.

#### **Allegation #3**

##### Legal Standards

The regulation implementing Title VI, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

A recipient engages in unlawful retaliation when a recipient takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected

activity in the future. In analyzing an allegation of retaliation, OCR considers whether a *prima facie* case of retaliation has been established; if so, then whether there is a facially legitimate non-retaliatory reason for the adverse action; if so, then whether the facially legitimate non-retaliatory reason is a pretext for retaliation or whether the recipient had multiple motives for taking the adverse action. A *prima facie* case of retaliation requires evidence of the following: (1) an individual experienced an adverse action caused by the recipient; and (2) at the time it took the adverse action, the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there was some evidence of a causal connection between the adverse action and the protected activity.

If all of the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action. OCR determines whether the legitimate, non-retaliatory reason is credible by considering all relevant evidence, such as changes in the treatment of the individual after the protected activity occurred, the proximity in time between the protected activity and the adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, and the recipient's deviation from established policies or practices.

#### Facts

Student A's parent asserted that on numerous occasions she complained about the treatment of Student A and that shortly thereafter her daughter was suspended. As an example she indicated that she called the school on April 20, 2016, to complain about the harassment of Student A. She said that a few days later Student A was suspended.

OCR interviewed District personnel and they indicated that the first time Student A's parent complained of racial or national origin discrimination was on March 3, 2016. Student A's parent has been unable to provide any documentary evidence to contradict this assertion.

Student A was suspended 4 times after the parent's March 3, 2016 complaint for the following misconduct:

- failure to attend an assigned detention
  - A one day OSS issued on March 18, 2016
  - A three day OSS issued on March 22, 2016
- uncooperative behavior and refusing to obey
  - A five-day OSS issued on April 13, 2016
- repeated incidents of student misconduct
  - A 10-day OSS and recommendation for expulsion issued 4/26/16

When the 10-day suspension was over, Student A was expelled on May 11, 2016, until the end of the school year (June 1, 2016), for repeated incidents of student misconduct. The District denied that the discipline or expulsion was retaliatory and stated that the discipline was consistent with its Code and treatment of other similarly situated students. The discipline records confirm that

Student A received the discipline outlined in the District’s progressive discipline procedures and those other students who committed the same number of acts of misconduct as Student A received the same sanctions.

The District indicated that none of the other parents of the disciplined students complained of discrimination based on race or national origin.

#### Analysis and Conclusions

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

The evidence established that the District’s suspension of Student A constituted an adverse action, and that the adverse action occurred after Student A’s parent engaged in a protected activity of which the District was aware (her March 3, 2016 e-mail complaining about race and national origin discrimination). Due to the proximity in time between the protected activity and the adverse action, OCR has inferred a causal connection and determined that a *prima facie* case of retaliation is established.

The District provided as its justification for the discipline the fact that Student A engaged in misconduct prohibited by the Code and that the discipline was in accordance with the District’s specified system for progressive discipline which is published on its website. Data from the District confirmed that the discipline of Student A was in accordance with the District’s policy and with the treatment of similarly-situated students. OCR notes in this regard that Student A had received discipline consistent with the Code prior to the parent’s protected activity. Therefore, OCR concluded that the District’s reason for the discipline was genuine and not a pretext for retaliation.

Based on the above, OCR determined that the evidence is not sufficient to establish that the District subjected Student A or her parent to retaliation for the parent’s complaint of race and national origin discrimination

#### **Overall Conclusion**

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.

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

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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.

We wish to thank you and your staff for your cooperation and courtesy during our investigation. In particular, we would like to thank Mr. Joseph L. Curosh, Jr., District counsel. If you have any questions, please contact Kendrick Washington, Civil Rights Attorney, at (312) 730-1670 or by e-mail at [Kendrick.Washington@ed.gov](mailto:Kendrick.Washington@ed.gov).

Sincerely,

Jeffrey Turnbull  
Team Leader

Enclosure

cc: Mr. Joseph Curosh, Jr.