



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

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August 19, 2019

Dr. Patricia O'Connor
Superintendent
Whitley County Consolidated Schools
107 N. Walnut St.
Columbia City, IN 46725

Re: OCR Docket #05-19-1138

Dear Dr. O'Connor:

This is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Whitley County Consolidated Schools (District) alleging discrimination on the basis of race.

Specifically, the complaint alleged the following:

1. in XXXXXX, the Whitley County Consolidated Schools (District) subjected two multi-racial XXXXXX school students (Student A and Student B) and two multi-racial XXXXXX school students (Student C and Student D) to discrimination based on race when other students subjected them to racial harassment that created a hostile environment for them, and the District was aware of the hostile environment but failed to take appropriate action in response;
2. in XXXXXX, the District subjected Student A, Student B, Student C, and Student D to discrimination based on race when it suspended them from the bus and from school;
3. in XXXXXX, the District subjected Student A, Student B, Student C, and Student D to discrimination based on race when the bus driver removed them from the bus in the midst of a bus route; and
4. in XXXXXX, the District subjected Student B to discrimination based on race when it transferred her to a different bus route.

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 at 34 C.F.R. Part 100, which prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the District is subject to Title VI.

During its investigation, OCR reviewed data provided by the parent of Students A, B, C, and D and the District and interviewed Students A, B, C, and D, their parents, District employees, and other District students. Prior to the completion of OCR's investigation of Allegation #1, the District expressed interest in resolving the allegation and, on July 23, 2019, signed the enclosed

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

Resolution Agreement to resolve this allegation. OCR has determined that there is insufficient evidence to establish a violation of the applicable regulations with regard to the remaining allegations in this complaint. The basis for OCR's determination is set forth below.

Legal Standards

The Title VI implementing regulation, at 34 C.F.R. § 100.3(a), provides, in relevant part, that no person shall, on the basis of race, 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 from the Department.

Title VI prohibits intentionally treating students differently on the basis of race. In determining whether a recipient subjected an individual to discrimination on the basis of race, OCR considers whether the recipient treated similarly situated individuals differently on the basis of race. If evidence of different treatment is found, OCR then determines whether the reasons offered by the recipient for the different treatment are legitimate or a pretext for unlawful discrimination. Additionally, OCR examines whether the information shows that the recipient treated the individual in a manner that is inconsistent with its established policies, practices and procedures or whether any other evidence of discrimination based on race exists.

Racial harassment that creates a hostile environment is a form of race discrimination prohibited by Title VI. A racially hostile environment is harassing conduct that is 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. If a racially hostile environment existed and the recipient had notice of the hostile environment, the recipient must respond adequately to address the hostile environment. Appropriate and effective responsive action should be 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 student who was harassed. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Allegation #1

Facts

Student A did not attend school in the District in XXXXXX and was in XXXXXX grade at XXXXXX, in XXXXXX. Student B was in XXXXXX grade at XXXXXX in XXXXXX and in XXXXXX grade at XXXXXX in XXXXXX. Student C was in XXXXXX grade at XXXXXX in XXXXXX and in XXXXXX grade at XXXXXX in XXXXXX. Student D was in XXXXXX grade at XXXXXX in XXXXXX and in XXXXXX grade at XXXXXX in XXXXXX.

Students A, B, C, and D identified several instances of racial harassment that had occurred in XXXXXX, and the District also provided OCR with documentation regarding numerous reports made by one of the students and/or their parents, including several instances of use of the N-word. In particular, OCR received information regarding four specific incidents of racial harassment in the XXXXXX school year, all of which involved Student B at XXXXXX. During

the XXXXXX school year, at XXXXXX, documentation and testimony identified four specific incidents of alleged harassment of Student A, six specific incidents of alleged harassment of Student B, and one specific report of alleged harassment of both Student A and Student B. At XXXXXX, documentation and testimony identified six specific incidents of alleged harassment of Student C and two specific incidents of alleged harassment of Student D in the XXXXXX school year.

Testimony by District personnel and documentation from the District indicated that the District took steps to investigate each report of alleged harassment. The District generally interviewed the alleged perpetrator but did not produce documentation to OCR that it identified and interviewed witnesses in all cases. In one case, the Dean of Students (Dean) told OCR that he could not identify any witnesses, but an email message from another District employee reported other students had witnessed the incident. Three XXXXXX students interviewed by OCR confirmed that they had heard other students call Student A and/or Student B the N-word but said they were not interviewed by District personnel as part of an investigation of any alleged racial harassment of Student A or Student B.

Among the actions the District took in response to incidents it could substantiate were an in-school suspension of one student, a removal of one student from a bus stop, placement of students on behavior contracts, and counseling of students about the inappropriateness of making racially offensive remarks. In some other cases, the documentation from the District did not indicate what actions the District took that were calculated to prevent recurrence of the misconduct. The evidence established that the District addressed each alleged incident individually and did not suggest that it considered whether broader escalating steps should be taken to address a possible hostile environment at its schools. In addition, no documentation indicated that District personnel referred the students' parents to the formal discrimination complaint procedure in connection with these incidents.

Analysis and Conclusions

OCR has concerns about the District's response to incidents of racial harassment. In particular, OCR has concerns that in the face of evidence of a hostile environment the District staff did not appropriately investigate the misconduct, or respond in a manner reasonably designed to eliminate the hostile environment and prevent recurrence, and did not consider whether the number of incidents occurring suggested the need for an escalated overall response to address a potential hostile environment school-wide. Prior to OCR making a finding, the District expressed interest in resolving the case under Section 302 of OCR's *Case Processing Manual*, and OCR determined that such a resolution is appropriate.

Allegations #2 and #3

Facts

XXXXXX Bus Incident

Students A, B, C, and D were all suspended in connection with an incident that resulted from their removal from the bus in XXXXXX. The XXXXXX School Principal (Principal) said that the situation occurred in the midst of an emergency dismissal drill in the District on XXXXXX. She said that the buses pick up students from the middle school and high school and bring them to XXXXXX, then students are reorganized onto the the buses they usually ride to get home.

Student A said that while their bus driver was waiting for the rest of the buses to arrive so they could leave, a student with “anger issues” (Student E) got on the bus. She said the bus driver got into Student E’s face and started yelling at her. A statement from the bus driver said he directed Student E to sit in the front of the bus, and she “became totally irrational, threw her belongings on the floor and into the seat, screamed at the top of her lungs and refused to sit there because of the person sitting in the seat in front of her.” Student B said she told the bus driver that his actions were going to make the situation worse.

The Principal said that she approached the bus because the students were very loud, and she heard cussing as she approached. She said that she became aware that Student E was upset at her seat assignment, and she advised Student E to move back a seat. The Principal said Student B told her not to talk to Student E and that she was making things worse, and Student E started yelling. She said Student B blocked the Principal in the aisle and said the Principal was disrespectful and did not know anything. The Principal said Student B and Student E both yelled at her, including cussing, and she then removed Student E from the bus to the office.

The bus driver’s statement said that after the Principal removed Student E from the bus, Student B continued to scream at him and sprayed cologne on others on the bus, that the Principal returned and told Student B to put the cologne away, and Student B “told [the Principal] she was stupid, cussed her out, and dropped the F-bomb several times.” The Principal confirmed that the bus driver told her Student B had sprayed cologne in someone’s face, she told Student B to put it away, and Student B started yelling and cussing at her. She said she then removed Student B from the bus and asked a teacher to escort her to the office.

The bus driver’s statement said that once Student B was off the bus, Student A, Student C, and Student D “started screaming obscenities and cussed me out from the back of the bus.” He said the Principal then came back on the bus and told the three students to leave the bus, but they refused and “were cussing all the time.” He said that when the Principal “forcefully” told them again to leave the bus, they complied. The Principal told OCR that the situation was “out of control” and needed to be addressed immediately by removing the students from the bus.

The next day, the Superintendent convened a meeting attended by administrators from XXXXXX, at which the Principal and bus driver described what happened during the emergency drill. The Superintendent said the group reached a consensus that all of the students involved

would be XXXXXX. She said the discipline was for disobedience and insubordination and cussing out the Principal. She said Student E, who is white, received the same disciplinary consequences as Students A, B, C, and D.¹ The District's discipline records indicated that the students all received a XXXXXX plus that the students other than Student B received a XXXXXX. The Dean said that the District also initiated the case conference process to consider a change in XXXXXX after the incident (discussed further under Allegation #4 below). The Dean said every student received the same consequences because they were all involved.

Other Disciplinary Incidents

Student A and Student B both received a XXXXXX in XXXXXX for insubordination. The discipline records provided by the District indicate that Student A and Student B disregarded repeated instructions to get off their phones, that Student A refused to go to class and Student B refused to come to the office, and that Student B repeatedly cussed. Student A said she and Student B went to talk to the Dean because another student had threatened to jump one of them; she said he told her to put her phone away and go to class and tried to keep Student B there without her. Student A said she refused to go to class and to put her phone away. The Dean said there have been other students who have received similar discipline for similar conduct; in particular, he said he suspended two students, one of whom is white, for such conduct in XXXXXX.

Student B received a XXXXXX in XXXXXX for defiance. The District's discipline records say Student B refused a directive from the resource room teacher to get off her phone and follow her behavior plan to take a break, refused directives from the principal to leave the hallway and go to the resource office, and called several XXXXXX personnel "all you motherf***ers." The Dean said they were trying to get Student B to step into the office to get out of the hallway as the passing period was about to start but she would not comply. He said they called Student B's father and put him on the speaker phone to try to get Student B to come into the room.

Student B received a XXXXXX in XXXXXX for fighting. She said another student (Student F) called her names and then hit her, then Student B hit Student F. Statements by student witnesses confirmed that both students threw punches, and Student B wrote in a statement that she "beat [Student F's] ass." The Dean said that anytime a student fights, it automatically results in XXXXXX. The XXXXXX Principal and the Dean said there were punches thrown by both students; they said and documentation from the District confirmed that Student F, who is white, received the same discipline as Student B for the incident.

Student B received a XXXXXX in XXXXXX for twisting a male student's nipple. Student B said this conduct did not occur. Student B said the students were standing in line and the male student said he would pinch her nipples; she said she told him if he did, then she would pinch him. The District provided a copy of an email from another District employee indicating that she saw Student B "pinch and twist a male student's chest in the area of the nipple." The Dean said the incident was horseplay, so XXXXXX was a sufficient consequence.

¹ Student D said she was told to sit down and did so, but she was kicked off the bus with Student B and Student C (and received the same discipline) anyway.

OCR obtained no information from the District or the parents to indicate that similarly situated white students were treated more favorably than Students A, B, C, and D for similar misconduct.

Analysis and Conclusions

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

In this case, the evidence established that Students A, B, C, and D engaged in misconduct on the bus on XXXXXX. While Student D indicated that she had not done so, information from the District, including the report from the bus driver, indicates that the four siblings all engaged in misconduct on the bus. They received the same consequence as a white student who engaged in similar conduct; in particular, they were all XXXXXX on the date of the incident and subsequently received XXXXXX and, with the exception of Student B, a XXXXXX.

With regard to the additional incidents, the evidence established that Student A and Student B engaged in misconduct together on one occasion in XXXXXX and received the same consequence as other students, including at least one white student, who engaged in similar conduct. The evidence further established that Student B engaged in additional misconduct on three additional occasions and, on the one occasion when a white student was involved in the same incident, she received the same consequence as the white student. OCR found no information to indicate that white students had engaged in similar misconduct and received lesser sanctions.

Based on the above, the evidence is insufficient to establish that Students A, B, C, and D were subjected to discrimination based on race when they were XXXXXX in XXXXXX and when they XXXXXX in XXXXXX.

Allegation #4

Facts

The Dean said Student B was re-assigned through the case conference process. He said Student B had two previous bus incidents prior to the XXXXXX incident. Documentation from the District indicated that the bus driver had referred Student B for “cussing and dropping the ‘F’ bomb numerous times in [his] face” on XXXXXX and for standing up and refusing to sit down while the bus was in motion on XXXXXX. The Dean said the District typically removes students from the bus after the third bus incident. However, he said that Student B was a student with a disability who had an Individualized Education Program (IEP) in place, so the appropriate transportation was determined through the case conference process.

The District provided OCR a copy of a case conference report dated XXXXXX, which indicated that Student B “has had several bus write ups ... regarding cussing/verbal language and refusal to follow directives.” The report said Student B would receive XXXXXX starting XXXXXX “to provide [Student B] with a more structured and supported environment with less

distractor/enticers.” Student B’s father signed the report to grant his consent to implement it and acknowledge that he had been informed of his right to challenge the IEP through a due process hearing. The parent did not challenge the IEP.

OCR obtained no information from the District or the parents to indicate that similarly situated white students were treated more favorably than Student B.

Analysis and Conclusions

The evidence established that Student B was transferred to a different bus as a means of meeting her disability-related needs, using the appropriate process for determining services for students with disabilities, with the decision made by a group of individuals knowledgeable about Student B and the placement options. Student A’s father consented to the transfer and acknowledged the right to challenge the decision through a due process hearing request but did not do so.²

Based on the above, the evidence is insufficient to establish that Student B was subjected to discrimination based on race when she was transferred to a different bus route in XXXXXX.

Overall Conclusion

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.

The letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.

The complainant has a right to appeal OCR’s determination regarding allegations #2, #3, and #4 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR’s determination, OCR will forward a copy of the appeal form or

² The regulation implementing Section 504 of the Rehabilitation Act of 1973 (Section 504), at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s disability. The regulation implementing Section 504, at 34 C.F.R. § 104.36 requires a recipient that operates a public elementary or secondary education program or activity to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.

written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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 another 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 privacy.

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

We wish to thank you and District personnel for the courtesy and cooperation extended to OCR during the investigation. In particular, we wish to thank John Whiteleather and Amy Steketee Fox, District attorneys. If you have any questions regarding this letter, please contact me at (312) 730-1611 or by email at Jeffrey.Turnbull@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Ms. Amy Steketee Fox