



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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DALLAS, TEXAS 75201-6831

REGION VI  
ARKANSAS  
LOUISIANA  
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TEXAS

Ms. Tyrene Gardner, Superintendent  
Shirley School District  
199 School Drive  
Shirley, Arkansas 72153

Reference: OCR Case No. 06131419  
Shirley School District

Dear Ms. Gardner:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint filed against the Shirley School District (SSD or District), Shirley, Arkansas. The complainant alleged that the SSD discriminated against [XXXX] (the Student) on the basis of sex ([XXXX]) and disability (XXXX to end of parenthesis), and that the SSD engaged in retaliation.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance from the Department, or from an agency that has delegated investigative authority to the Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulations, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulations, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulations, at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. The Title IX implementing regulation, at 34 C.F.R. § 106.71, also prohibits retaliation. The SSD is a recipient of Federal financial assistance from the Department and is a public educational institution. Therefore, OCR has jurisdictional authority to investigate allegations of discrimination and retaliation filed against the SSD under Section 504, Title II, and Title IX.

In the course of this investigation, OCR reviewed information provided by the SSD and the complainant, including applicable policies and procedures, the Student's educational records, and discipline records. OCR also obtained information through interviews with the complainant, SSD staff, the Student, and witnesses identified by the complainant.

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

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence. When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

Based on our analysis of the information obtained during this investigation, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with Title IX with respect to Issue 1. However, OCR determined there is insufficient evidence to support a conclusion of noncompliance with Section 504, Title II, and Title IX with respect to Issues 2 and 3. Provided below is an explanation of how OCR reached this determination.

**Issue 1:**

Whether the SSD discriminated against the Student on the basis of sex by failing to take prompt and effective responsive action to address sexually harassing conduct by other students or recipient staff members, which was sufficient to constitute a hostile environment, of which it had or should have had notice during the [XXXX-XXXX] school year, in violation of Title IX, at 34 C.F.R. § 106.31

**Legal Standard**

Title IX and its implementing regulations prohibit discrimination based on sex. Sexual harassment of students is a form of prohibited sex discrimination. To investigate or otherwise resolve issues of sexual harassment of students, OCR considers whether: (1) the recipient has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures; (2) the recipient appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the recipient has taken immediate and effective correction action responsive to any harassment that the investigation determined took place, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.

In accordance with the Title IX regulations, each recipient is required to “implement specific and continuing steps to notify . . . students and parents of elementary and secondary school students . . . that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by Title IX . . . not to discriminate in such a manner.” 34 C.F.R. § 106.9(a). The Title IX regulations also require that each recipient “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX].” 34 C.F.R. § 106.8(b). OCR has identified a number of elements in evaluating whether a school’s grievance procedures provide for a prompt and equitable resolution of sexual harassment complaints. The following elements are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;

- Application of the procedures 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;
- Notice to parties of the outcome of the complaint;
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Finally, Title IX requires that each recipient “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with [Title IX] or alleging any actions which would be prohibited by [Title IX].” 34 C.F.R. § 106.8(a). Recipients are further required to notify all of their students and employees of the name, office address, and telephone number of the employee or employees designated as their Title IX Coordinator(s). 34 C.F.R. § 106.8(a).

Regardless of whether the student who was allegedly harassed, or his or her parent, decides to file a formal complaint or otherwise request action on the student’s behalf, upon receiving notice of alleged sexual harassment, the recipient must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial. If OCR determines that a recipient has responded promptly and appropriately to notice of alleged sexual harassment, OCR will find insufficient evidence of a violation of Title IX.

### **Findings of Fact**

The complainant alleged that the Student was sexually harassed [XXXX] [XXXX] [XXXX] when another student (“Student A”) told [XXXX] that “[XXXX] [XXXX] would [XXXX] [XXXX] .” The complainant indicated that the Student responded by making a comment about Student A’s [XXXX] identity when [XXXX] called him a “[XXXX XXXX].” The complainant asserted that the Student had done nothing wrong because what the Student said could have been worse.

The District provided OCR with its Title IX Grievance Procedures in effect at the time of the complainant’s allegation of sexual harassment. The SSD had a general policy statement prohibiting discrimination based on sex pursuant to Title IX. The policy statement was an addendum attached to the [XXXX-XXXX] SSD Student Handbook (Handbook). The SSD had designated a Title IX coordinator, and included in its notice of nondiscrimination the name or title and telephone number of the contact person designated to coordinate the SSD’s efforts to comply with Title IX. The SSD’s grievance procedures

did not include designated and reasonably prompt time frames for all stages of the complaint process; application of the procedures 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; and an assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

OCR also reviewed the District’s 2016-2017 Title IX Grievance Procedures. The 2016-2017 procedures were missing the same items as found in [XXXX-XXXX] referenced above.

Regarding the incident of alleged sexual harassment, the District’s data indicates that, during the [XXXX-XXXX] school year, the Student was [XXXX] [XXXX] [XXXX] and in the [XXXX] [XXXX] at Shirley XXXX School (SES). OCR reviewed student records provided by the SSD for the Student, as well as for Student A, (a [XXXX-XXXX][XXXX] school student) who was involved in the [XXXX], [XXXX], incident. The evidence reflected that these two students were engaged in a brief verbal altercation [XXXX] [XXXX] [XXXX] [XXXX] when Student A made the sexually-harassing comment as alleged by the complainant. During an OCR interview, the Student stated that [XXXX] called Student A an “[XXXX]” after Student A [XXXX] the [XXXX] comment. The Student further stated that neither [XXXX], nor any other students on [XXXX][XXXX] [XXXX] that day, reported the incident to the SSD, but he did report the incident to the complainant on [XXXX XXXX]]. OCR interviewed the [XXXX] [XXXX] who was [XXXX] [XXXX] [XXXX] and [XXXX] denied hearing the Student’s [XXXX] comment, but he indicated that [XXXX] heard Student A’s comment. The complainant then notified the [XXXX] [XXXX] of the incident by a handwritten letter on [XXXX], [XXXX], in which [XXXX] requested that the Student not be [XXXX] to [XXXX] [XXXX] to a [XXXX] [XXXX] [XXXX] was [XXXX] [XXXX] in the alleged incident of sexual harassment. Furthermore, the [XXXX] letter included Student A’s sexually harassing comment. The [XXXX] [XXXX] forwarded the letter that day to the SSD administration for further processing.

During an interview, an SSD administrator informed OCR that after the SSD was notified by the complainant of the incident, the SSD began an investigation on [XXXX], [XXXX]. The investigation included interviews of the Student and Student A, as well as witnesses present at the time of the incident. OCR’s review of the statements of the students that were collected during the SSD’s investigation indicated that Student A admitted to the sexually harassing statement referenced above and the Student admitted to the [XXXX] [XXXX] [XXXX]. Based on the investigation, the SSD determined that the two students made inappropriate comments to one another during a verbal altercation. The District determined that the incident was a violation of the District’s Code of Conduct by [XXXX] [XXXX] and [XXXX] [XXXX] student to [XXXX] e [XXXX] of [XXXX] -[XXXX] [XXXX] ([XXXX]). The evidence indicates that [XXXX] [XXXX] were [XXXX] [XXXX] but the Student [XXXX] [XXXX] [XXXX] [XXXX] [XXXX] because the complainant [XXXX] [XXXX] [XXXX] [XXXX] [XXXX] the [XXXX] the [XXXX] was to be [XXXX]. Once the SSD completed its investigation, the SSD notified the complainant and the parents of Student A of their findings. The complainant confirmed that there

were no further incidents between these two students after the [XXXX] [XXXX] [XXXX], and [XXXX] did not allege any other incidents of sexual harassment of the Student.

### **Legal Analysis**

OCR first analyzed whether the recipient has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures. OCR noted that the SSD disseminated policy prohibiting sex discrimination under Title IX and their grievance procedures was located in the Student's hand book. However, as noted earlier the SSD's grievances procedures contained deficiencies because they failed to include designated and reasonably prompt time frames for all stages of the complaint process; application of the procedures 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; and an assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Thus, OCR determined that the SSD's disseminated Title IX grievance procedures as written are not in compliance with Title IX.

Next, OCR analyzed whether the recipient appropriately investigated or otherwise responded to allegations of sexual harassment. OCR's investigation revealed that the SSD was notified of the [XXXX] [XXXX], [XXXX] incident on [XXXX] [XXXX], [XXXX]. The SSD began an investigation on [XXXX] [XXXX], [XXXX], which consisted of interviewing the two students involved and witnesses to the incident. During the investigation on [XXXX] [XXXX], [XXXX], the Student and Student A acknowledged making a [XXXX] and [XXXX][XXXX] to each other. As a result investigation, the SSD's applied the section identified as *Prohibited Conduct* in the SSD's Handbook for the [XXXX] -[XXXX] school year, which stated that violations of the SSD's Code of Student Conduct included "behavior that taunts, degrades or ridicules another person based on race, ethnicity, national origin, sex or disability." The SSD notified the complainant and Student A's parents of the outcome of the investigation on [XXXX] [XXXX], [XXXX].

Lastly, OCR analyzed whether the recipient has taken immediate and effective correction action responsive to any harassment that the investigation determined took place, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. OCR's investigation revealed that the SSD took immediate action on [XXXX] [XXXX], [XXXX] once they were notified of the incident. The SSD indicated that both students were counseled about their actions and statements that were made. Furthermore, SSD took action to separate Student A from the Student [XXXX] [XXXX] [XXXX].

### **Conclusion**

Based on the deficiencies found in the District's Title IX grievance policy referenced above, OCR found sufficient evidence of a violation of Title IX by the District with respect to Issue 1.

To address the Title IX violation referenced above, the SSD voluntarily signed the enclosed Resolution Agreement (Agreement) on XXXX XXXX. OCR has determined that the Agreement,

when fully implemented, will resolve the above-identified deficiencies. Under the Agreement, the District will revise its Title IX policy and grievance procedures to ensure that these policies and procedures provide for the prompt and equitable resolution of complaints alleging sex discrimination. OCR will actively monitor the implementation of the Agreement.

## **Issue 2**

Whether the SSD discriminated against the Student on the basis of disability by failing to provide regular or special education and related aids and services deemed necessary to meet the Student's individual educational needs (e.g., when it failed to conduct a manifestation determination hearing for the Student prior to making a significant change in placement) and thereby denied the Student a free appropriate public education during the [XXXX XXXX] school year in violation of Section 504, at 34 C.F.R. §§ 104.33 and 104.35, and Title II, at 28 C.F.R. § 35.130

## **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.33(a), requires public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education, as specified at 34 C.F.R. § 104.33(b)(1), is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with disabilities as adequately as the needs of individuals who are not disabled are met and is based, in part, upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.35 and 104.36. In addition, 34 C.F.R. § 104.33(b)(2) provides that implementation of an individual education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), specifically requires a recipient that operates a public elementary or secondary education program to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in a regular or special education program or any subsequent significant change in placement. When the proposed exclusion of a child with a disability is permanent (expulsion), for an indefinite period, or for more than ten consecutive school days, the exclusion constitutes a "significant change in placement." In addition, a series of suspensions that are each ten or fewer days in duration but exceed ten days in the aggregate may create a pattern of exclusions that would constitute a "significant change in placement." To implement a disciplinary exclusion for a qualified student with a disability that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student pursuant to Section 504, at 34 C.F.R. § 104.35.

## **Findings of Fact**

The complainant alleged that the Student had served more than [XXXX] days in [XXXX] during the [XXXX - XXXX] school year. The complainant asserted that the SSD did not conduct an evaluation to determine if the behavior that led to [XXXX] suspension was a manifestation of [XXXX] disability.

OCR interviewed the Student. The Student initially stated that [XXXX] served [XXXX] days in [XXXX], but later stated that [XXXX] may have served [XXXX] or [XXXX] days of [XXXX]. The Student was unable to recall the dates on which [XXXX] served [XXXX], but indicated that [XXXX] [XXXX] [XXXX][XXXX] in the spring semester than in the fall semester.

OCR reviewed data submitted by the District. The SSD determined that the Student was a qualified individual with a disability due to [XXXX] [XXXX] [XXXX] [XXXX] and [XXXX], and placed the Student on a Section 504 plan to help meet the Student's individual educational needs, on [XXXX] [XXXX], [XXXX]. OCR's review of the Student's discipline records indicated that the Student was assigned [XXXX] days of [XXXX] on [XXXX] [XXXX], [XXXX]; [XXXX] days of [XXXX] on [XXXX] [XXXX], [XXXX]; and [XXXX] day of [XXXX] on [XXXX] [XXXX], [XXXX]. However, OCR's interviews with SSD staff revealed that the Student only [XXXX] [XXXX] days of [XXXX] during the [XXXX] – [XXXX] school year because the Student did not serve the [XXXX] [XXXX], [XXXX], suspension, and the SSD did not require [XXXX] to make up that suspension (according to information obtained during interviews with the SSD and the complainant). When OCR notified the complainant that the Student's discipline records indicated that [XXXX] was assigned [XXXX] days of [XXXX] for the school year, of which [XXXX] served [XXXX] days, the complainant stated that [XXXX] was unable to identify the specific dates of [XXXX] suspensions, and [XXXX] disagreed that the Student served less than [XXXX] days of [XXXX]. The complainant provided OCR with the name of a witness to corroborate [XXXX] allegation that the Student served more than [XXXX] days in [XXXX].

During an interview with the witness proffered by the complainant, the witness (an [XXXX] [XXXX]) notified OCR that [XXXX] recalled the Student serving [XXXX] days in [XXXX] for the school year.

### **Legal Analysis**

OCR's review indicates the SSD found the Student was a qualified individual with a disability due to [XXXX] [XXXX] [XXXX] [XXXX] and [XXXX], and placed the Student on a Section 504 plan to help meet the Student's individual educational needs, on [XXXX] [XXXX], [XXXX]. OCR further found that in making the above evaluation and placement decision, the group drew upon information from a variety of sources (including [XXXX] [XXXX] and parental input), which was documented and carefully considered. Regarding whether the Student was subjected to a significant change in placement, OCR found a conflict in the evidence. While the complainant reported that the Student was [XXXX] for greater than [XXXX] days, the District reported that [XXXX] served only [XXXX] days and was [XXXX] for only [XXXX] days total during the school year. And the complainant's witness corroborated the District's assertion that the Student was not [XXXX] for greater than [XXXX] days.

A preponderance of the evidence indicates that the Student was not subjected to a significant change in placement. Therefore, OCR determined that there is insufficient evidence to establish a violation of Section 504 or Title II with respect to Issue 2.

### **Issue 3**

Whether the SSD retaliated against the Student by assigning the Student XXXX XXXX of in-school suspension (ISS) during the [XXXX] -[XXXX] school year because the complainant complained to the SSD about an incident of sexual harassment, in violation of Title IX, at 34 C.F.R. § 106.71.

### **Legal Standard**

In order for an allegation of retaliation to be sustained, OCR must determine whether:

1. An individual experienced an adverse action caused by the recipient;
2. 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 is some evidence of a causal connection between the adverse action and the protected activity.

If any one of these elements cannot be established, then OCR finds insufficient evidence of a violation. If, however, all of the aforementioned elements are established, OCR inquires as to whether the recipient can identify a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR considers whether the reason given is merely a pretext for retaliation; in other words, whether the reason is not credible or believable.

### **Findings of Fact**

The complainant alleged that the SSD retaliated against the Student by assigning [XXXX] to [XXXX] day of [XXXX] on [XXXX] [XXXX], [XXXX] after [XXXX] complained to the SSD that [XXXX] was subjected to sexual harassment by Student A.

The findings of fact with respect to the Student's [XXXX] [XXXX], [XXXX] suspension and the complainant's complaint that the Student was sexually harassed by Student A are discussed under Issue 1 above.

### **Legal Analysis**

OCR determined that the Student was subjected to an adverse action when the Student was assigned [XXXX] day of [XXXX] by the SSD. OCR determined that the recipient knew that the complainant was engaged in a protected activity, when [XXXX] sent a note to the [XXXX] [XXXX] on [XXXX] [XXXX], [XXXX] alleging sexual harassment. The evidence also reveals the inference of a causal connection between the Student's assignment to [XXXX] on [XXXX] [XXXX], [XXXX] and the SSD notification of the sexual harassment incident on [XXXX] [XXXX], [XXXX].

With the *prima facie* case of retaliation established, OCR next considered whether the SSD had a legitimate, non-retaliatory reason for the adverse action. During interviews with OCR, the SSD

[XXXX] [XXXX] stated that, during the course of its investigation of the complaint made by the complainant, the SSD interviewed the Student, who notified the SSD that [XXXX] made an [XXXX] comment to Student A about [XXXX] [XXXX] (“[XXXX] [XXXX]”) and that [XXXX] [XXXX] XXXX [XXXX] [XXXX]. The SSD determined through student interviews that [XXXX] [XXXX] were engaged in conduct that violated the SSD’s Code of Conduct. As a result, [XXXX] [XXXX] [XXXX] and [XXXX] [XXXX] were [XXXX] [XXXX] [XXXX] of [XXXX], in accordance with the SSD’s Student Handbook. OCR determined the above reflects a legitimate, non-retaliatory reason for the District’s action.

OCR next determined whether the District’s purported reason for the adverse action was pretext for discrimination. Pretext may be shown by evidence that the explanation for the adverse action is not credible or believable or that treatment of the complainant was inconsistent with treatment of similarly situated individuals or established policy or practice. OCR’s investigation did not reveal any direct evidence of pretext. Additionally, OCR found no indirect evidence of pretext. OCR’s investigation did not reveal any evidence indicating that the Student was treated inconsistently before or after the SSD received notice of the complainant’s protected activity. In particular, OCR obtained evidence that the [XXXX] [XXXX] [XXXX] for [XXXX] [XXXX] [XXXX] that [XXXX] [XXXX] [XXXX] and [XXXX] the complainant’s protected activity, in the same manner. OCR’s investigation did not reveal any similarly situated students treated differently than the Student, or any evidence that the SSD deviated from any established policy or practice in its dealings with the Student upon receiving notice of the complainant’s protected activity. In particular, Student A [XXXX] [XXXX] [XXXX] [XXXX] [XXXX] [XXXX] [XXXX] in the [XXXX], in accordance with the SSD’s Student Code of Conduct. Therefore, OCR determined that there is insufficient evidence of a violation of Title IX with respect to Issue 3.

This concludes the investigation stage of the complaint and should not be interpreted to address the SSD’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. The complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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 personal privacy.

If you have questions or concerns regarding this letter, please contact [XXXX] [XXXX], the investigator assigned to this matter, at ([XXXX]) [XXXX] -[XXXX], or [XXXX] [XXXX], Team Leader, at ([XXXX]) [XXXX] -[XXXX].

Sincerely,

Taylor D. August  
Director, Dallas Office  
Office for Civil Rights

Enclosure: As Stated.