



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

May 9, 2017

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

OCR Ref. 06151291

Dr. Margie Pulley, Conservator
Tunica County School District
P.O. Box 758
Tunica, MS 38676

Via first class mail

Dear Dr. Pulley:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint that was filed against the Tunica County School District (TCSD or District), in Tunica, Mississippi. The complainant alleged that the District retaliated against [XXXX] and discriminated against a student (Student) on the basis of sex. Specifically, the complainant alleged that:

1. The District retaliated against the complainant when [XXXX to the end of the allegation]; and
2. The District failed to investigate or otherwise respond to the complainant's notification that the Student, [XXXX XXXX], was sexually harassed by [XXXX to the end of the allegation].

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to the Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104; and Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulations at 34 C.F.R. Part 106. Section 504 prohibits discrimination on the basis of disability; Title IX prohibits 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. §§ 12131 *et seq.*, 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 regulations implementing Section 504, Title IX, and Title II each contain provisions prohibiting retaliation at 34 C.F.R. §§ 104.61, 106.71; and 28 C.F.R. § 35.134, respectively. Because the TCSD is a recipient of Federal financial assistance from the Department and is a public entity, OCR has jurisdictional authority to process this complaint for resolution under Section 504, Title IX, and Title II.

OCR investigated the following legal issues:

1. Whether the TCSD retaliated against the complainant when [XXXX to the end of the parenthesis], in violation of 28 C.F.R. § 35.134 and 34 C.F.R. § 104.61; and
2. Whether the TCSD discriminated against the Student on the basis of sex by failing to provide a prompt and equitable response to address sexually harassing conduct directed at the Student by [XXXX XXXX XXXX XXXX], which was sufficient to constitute a hostile environment, of which it had or should have had notice in or around [XXXX XXXX], in violation of 34 C.F.R. §§ 106.8 and 106.31.

As a preliminary matter, a finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). If 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.

During the course of the investigation, OCR received and reviewed data provided by the District on [XXXX XXXX XXXX], and on [XXXX XXXX XXXX]. This data included the TCSD's relevant policies and procedures, data regarding previous complaints and investigations conducted by the District, and information about the recipient's witnesses. Also during this investigation, OCR conducted interviews with relevant recipient witnesses, on [XXXX XXXX XXXX]; and with the complainant, on [XXXX XXXX XXXX].

Based on a review of the information received, OCR has determined that there is insufficient evidence to support a conclusion of noncompliance under Section 504 or Title II with respect to Issue 1. However, OCR's review of the data collected with respect to Issue 1 revealed concerns regarding the District's Section 504 and Title II grievance policies and procedures. Further, OCR's review of data collected regarding Issue 2 revealed similar concerns regarding the District's Title IX grievance policies and procedures. These concerns will be resolved via the TCSD's compliance with the enclosed voluntary Resolution Agreement executed by the recipient in this case. The bases for OCR's determination in this matter are set forth below.

Issue 1

A. Legal Standard:

Retaliation in violation of the laws that OCR enforces occurs when a recipient, for a retaliatory reason, takes an adverse action against a person. Although the adverse action is usually taken in response to an exercise of protected activity, adverse action done by a recipient with the motive to deter or prevent future protected activity is also prohibited.

OCR recognizes that determining what the recipient's actual motive was for engaging in certain adverse actions will usually require a close examination of all the facts and circumstances. To structure this examination, OCR normally divides the analysis into three stages: (1) determining

some causal link between any adverse action and any protected activity (known as the prima facie case); (2) whether the recipient identifies a facially legitimate reason for the adverse action other than the protected activity; and (3) pretext and/or multiple motives analysis.

Regarding the first stage of its analysis, OCR interprets the regulations it enforces, consistent with case law regarding analogous provisions, to require satisfaction of the following three elements to find a prima facie case of retaliation:

- (1) An individual experienced an adverse action caused by the recipient; and
- (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.

Although all three elements must exist to establish a prima facie case, OCR need not address all three elements if it determines one is missing. For example, OCR could conclude that there is insufficient evidence to support a finding of retaliation if it determined the recipient did not know that the individual engaged or might engage in protected activity, even if it did not have enough evidence to determine whether the individual experienced an adverse action.

If OCR does not find that a prima facie case exists, OCR will conclude that there is insufficient evidence to support a finding of retaliation. If, however, the evidence demonstrates a prima facie case of retaliation, an inference of unlawful retaliation is raised and OCR proceeds to the next stage of the analysis. To ascertain whether this inference might be rebutted, OCR will then determine whether the recipient can identify a non-retaliatory reason for its actions. If such a reason is identified, OCR's investigation proceeds to the third stage. At the third stage, OCR examines the evidence to resolve what the real reason was (or reasons were) for the intimidation, threat, coercion, or discrimination.

B. Findings of Fact:

[XXXX to the end of the Findings of Fact]

C. Analysis & Conclusion:

Under the first stage of the legal framework for retaliation, OCR determines whether the evidence establishes a prima facie case of retaliation. The facts show that the complainant experienced an adverse action when [XXXX to end of sentence]. Similarly, the facts also substantiate the second element of a prima facie case because the recipient had knowledge that the complainant [XXXX to the end of the paragraph].

Regarding the third element of a prima facie case, the evidence does not establish a causal connection between the adverse action and the complainant's protected activity. [XXXX to the end of the paragraph]

Because a preponderance of the evidence did not establish a causal connection between the adverse action and the protected activity, a prima facie case of retaliation was not substantiated. Therefore, OCR finds insufficient evidence to support a conclusion of noncompliance under Title II and Section 504 with respect to Issue 1.

Issue 2

A. 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). 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.

B. Investigative Summary:

The complainant alleged that TCSD never responded to [XXXX] notification, provided to [XXXX XXXX XXXX XXXX XXXX XXXX XXXX], that a [XXXX] student (Student) was sexually harassed when [XXXX to the end of the sentence].

OCR reviewed the District's notice of nondiscrimination, notice of its Title IX Coordinator, and its Title IX grievance policies and procedures. OCR's analysis of this information revealed that the District has a policy prohibiting sex-based discrimination in violation of Title IX and that "[c]omplaints of sexual discrimination/harassment shall be handled in accordance with Policy JB-P C Students Complaints of Sexual Discrimination/Harassment – Title IX Procedures." However, OCR was unable to locate the policy referenced by searching the online site containing the TCSD's policies to which the District directed our office. Further, the evidence obtained by OCR revealed that the District has not provided training to its Title IX coordinator, [XXXX to the end of the sentence].

Regarding the complainant's report of sexual harassment of a student by [XXXX XXXX], the information provided by the District shows that [XXXX to the end of the sentence]. The complainant did not allege [XXXX XXXX XXXX] any conduct of a sexual nature. [XXXX to the end of the paragraph]

During a [XXXX XXXX XXXX], interview with OCR, the complainant also provided information regarding [XXXX to the end of the paragraph].

OCR reviewed [XXXX to the end of the paragraph].

Prior to the completion of OCR's investigation, on [XXXX XXXX XXXX], the District informed OCR that it was interested in resolving the complaint allegation under Issue 2. Section 302 of OCR's *Case Processing Manual* provides that a complaint may be resolved at any time when, prior to the conclusion of an investigation, the recipient expresses an interest in resolving the allegation. On [XXXX XXXX XXXX], OCR approved the District's request to resolve Issue 2 prior to the conclusion of the investigation.

Furthermore, in its review of the data submitted by the District regarding this complaint, OCR found concerns regarding the District's Section 504 and Title II grievance policies and procedures (i.e., they refer complaints, whether based on a denial of a FAPE or based on other discrimination in violation of Section 504, to the same "group of knowledgeable people" who may have discriminated initially). Further, the Section 504 and Title II grievance procedures are comingled with its procedures used to identify, evaluate, and place students for Section 504 services. Under these current comingled procedures, and in response to an individual's complaint of disability discrimination regarding a student, the District would convene a group of knowledgeable persons to determine "whether the student is handicapped under Section 504," and, if so, "what accommodations are required . . . to allow the student an equal [educational] opportunity." Such measures alone may not redress disability discrimination complaints unrelated to the provision of accommodations for a given student, such as disability discrimination alleged by staff or third parties. Additionally, the procedures do not contain

several elements required by OCR to ensure a prompt and equitable resolution of a grievance, pursuant to the regulations. For instance, because the procedures refer complaints of disability discrimination to the same group of knowledgeable people who may have discriminated initially, the procedures do not provide an opportunity for an adequate, reliable, and impartial investigation. Moreover, the current Section 504/Title II grievance procedures do not provide an assurance that any violations will be addressed, and steps will be taken to prevent a recurrence. Finally, the District did not have a designated Section 504/Title II coordinator during the [XXXX-XXXX] school year.

The District voluntarily submitted the enclosed Resolution Agreement (Agreement) to resolve Issue 2 and the separate, above-referenced concerns regarding the District's Section 504 and Title II grievance procedures. The Agreement was signed by the District on May 8, 2017. The Agreement requires the District to revise its Section 504, Title II, and Title IX policies and procedures; and to train all District employees on the revised policies and procedures. OCR has determined the provisions of the Agreement are aligned with the complaint allegations and appropriately resolves them. Further, OCR accepts the Agreement as an assurance the District will fulfill its obligations under Section 504, Title II, and Title IX with respect to this complaint. The dates for implementation and specific actions are detailed in the enclosed Agreement. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding this complaint. However, OCR will actively monitor the District's implementation of the Agreement. Please be advised that if the District fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts.

This concludes the investigation stage of this complaint and should not be interpreted to address the TCSD'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 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 anyone because they have filed a complaint or participated in the complaint resolution process. If this happens, the person may file a complaint alleging such treatment.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this document 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.

Thank you for your cooperation during the investigation and resolution of this case. If you have any questions about this letter, please contact Cristin Hedman, the attorney assigned to investigate the complaint, at (214)-661-9647, or via email, at Cristin.Hedman@ed.gov. You may also contact Timothy D. Caum, Supervisory Attorney, at (214)-661-9648 or Timothy.Caum@ed.gov.

Sincerely,

Taylor D. August
Director
Office for Civil Rights
Dallas Office

Enclosure: Signed Resolution Agreement

CC: [XXXX to end of CC line]