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OFFICE FOR CIVIL RIGHTS

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September 4, 2018

Dr. Thomas S. Tucker, Superintendent
Douglas County School District Re 1
620 Wilcox Street
Castle Rock, CO 80104-1739

By Email Only to District Counsel: wjacobs@dcsdk12.org

Re: Douglas County School District
OCR Case Number: 08-15-1114

Dear Superintendent Tucker:

This letter advises you of the resolution of this complaint alleging that Douglas County School District (District) discriminated on the basis of sex. Specifically, the Complainant alleged that the District failed to properly respond to an incident of peer on peer sexual harassment of her son (Student).

Because we have the authority and the complaint was filed timely, we initiated an investigation of the complaint under the authority of Title IX of the Education Amendments of 1972 and its implementing regulation at 34 Code of Federal Regulations Part 106, which prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the District is subject to these laws and regulations.

During the course of our investigation, before we had made any findings, the District indicated its desire to voluntarily enter into an agreement to ensure compliance with the Title IX designation, notice, and procedural requirements of Title IX as required under 34 C.F.R. § 106.8(a) & (b). Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint, OCR believes that doing so is appropriate, and the remedies align with the allegations.

On September 4, 2018, we received the District's signed Resolution Agreement (enclosed). OCR is closing the investigative phase of this case as it relates to the Title IX designation, notice, and procedural requirements of Title IX, effective the date of this letter. The case is now in the monitoring phase. OCR will closely monitor the recipient's implementation of the Agreement until the District fulfills the terms of the Agreement and is in compliance with Title IX and its implementing regulations. If the District fails to implement the Agreement, OCR will take appropriate action, which may include enforcement actions, as described in the Agreement.

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

Concerning the remaining legal issue, whether the District responded promptly, thoroughly, and effectively to the Complainant's complaint of sexual harassment of the Student, OCR completed a full investigation. In reaching a determination, OCR reviewed documents provided by the District and interviewed the Complainant and District staff. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence of a violation of Title IX regarding its response to the incident of peer on peer sexual harassment of the Student. The reasons for our conclusions are set forth in this letter.

Background

The Student was a XXXX in Douglas County High School (School) during the 2014-2015 school year. On Friday October 3, 2014, the Complainant and the Student met with the School Resource Officer (SRO) assigned the responsibility of the School and reported that an incident involving several male students had occurred in a locker room at the School earlier in the school year. The Student reported that two months earlier during the first two weeks of school (August 2014), he was sexually harassed in the School's locker room between classes. That day, the SRO notified the School of the complaint and two Assistant Principals (APs)¹ for the School met with the Student and the Complainant. The Student provided a written statement.

Specifically, he stated that he entered a locker room to change clothes following his Power Weights class. Upon entering the locker room the Student overheard two other students (Male 1 and 2) asking a third student (Male 3) to show his "pubes" to see if he had shaved and that if Male 3 refused to show his pubes he was "gay." After Male 3 rebuffed the request by Male 1 and Male 2, the pair directed their attention to the Student and instructed him to tell Male 3 that Male 3 was a "fag" if he didn't show them his pubic area. Like Male 3, the Student also rejected their request, responding with, "You guys are fags!" According to the Student, Male 3 then departed the area and the attention of Males 1 and 2 was then focused on him. Males 1 and 2 cornered the Student and asked him to show them his pubic area but the Student refused, stating that he was not gay. In addition to their verbal request of him, the Student stated that Male 1 also grabbed and tugged at his shorts in an effort to make him show whether or not he shaved his pubic area. The Student slapped the hand of Male 1 away. Eventually the Student relented and showed them his pubic area, because he was cornered and the pair was refusing to let him leave until he complied with their request. After showing his pubic area to Males 1 and 2, the Student reported that they then loudly called him a "faggot" and "gay."

Based on details provided in the Student's statement, the SRO initiated a law enforcement investigation into the alleged offenses of "assault, menacing, and harassment". Concurrent with the initiation of the law enforcement investigation, the 2 APs conducted the School's own independent investigation and notified the School's Principal of the complaint. Additionally,

¹ Two APs were designated to handle the investigation since one Assistant Principal handles any complaint involving XXXX graders (the Student was in XXXX grade) and the other because he is the School's Athletic Director and the incident involved multiple students who were athletes. The Student was a member of the XXXX team. Male 1 and Male 2 participated in XXXX and XXXX respectively.

that day, the APs met with the Complainant and the Student and obtained the Student's statement.

The next day, Saturday October 4th, through Tuesday October 7th, APs interviewed the three other males (Males 1, 2, and 3), and took written statements from each of them. The statements of all three corroborate most details provided by the Student. Although the Student reported that Male 3 had departed the area after refusing to show his pubic area, Male 3 stated he was present throughout the duration of the incident. The three males contended that after the Student showed his pubic area, all of the students departed the area and there was no name-calling directed at the Student.

During the investigation, the Student was excused from the Power Weights class on Friday the 3rd for a XXXX, and also on Tuesday the 7th and Thursday the 9th.²

The APs concluded their investigation and determined, in collaboration with the Principal, that Male 1 and Male 2's behavior constituted a violation of the District's conduct policies. The team determined the conduct warranted an event label of "detrimental behavior," which is defined in the conduct code as:

Behavior on or off school property which is detrimental to the welfare, health, or safety of that student, other students, or of school personnel including without limitation, behavior which creates a threat of physical harm to the student, other students, or school personnel.

As a result of determining that Males 1 and 2 violated the conduct policy, on October 8th, the School imposed a sanction of two days out-of-school suspension for Males 1 and 2. The School notified each student's parents of the School's decision during a meeting. The School further determined Male 1, who allegedly touched the Student's shorts, would immediately be removed from the Power Weights class he had with the Student. Males 1 and 2 served their suspensions and had returned to school on October 21st.³ Following each of their suspensions, both males and their parents attended a mandatory re-admission meeting. In the meeting each student was counseled that should either of them engage in similar behavior in the future, additional discipline could be imposed. The School also provided copies of all 4 student's statements to the SRO who then provided all of the documents to the investigator handling Douglas County Sheriff's Office's (DCSO) concurrent investigation of the matter. Finally, Males 1 and 2 were each suspended from participation in 2 athletic games for the sports they participated in.

On October 23rd, the AP responsible for XXXX graders then met with the Student and the Student's mother. The AP notified the mother that disciplinary action had been taken, but did not disclose what form of discipline was imposed because of FERPA concerns. The AP also informed the Student during the meeting of his opportunity to meet with the AP and his counselor when needed. The Student confirmed he met with the AP on several occasions before he withdrew from the School in January 2015. The Student reported during his meetings that no

² The Power Weights class the Student took was on XXXX days.

³ The week of October 13-17 was fall break.

further action had been taken against him by any of the males or others as a result of his complaint.

Legal Standard

The Title IX regulation at 34 C.F.R. § 106.31 provides generally that no person shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of student(s) that creates a hostile environment can result in the denial or limitation, on the basis of sex, of students' ability to participate in or receive education benefits, services, or opportunities and thereby violate Title IX.

Under the Title IX and the regulations, once a school district has notice of potential sexual harassment of student(s), it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A school district may violate Title IX and the regulations if: (1) the district knew or reasonably should have known about potential harassment on the basis of sex; and (2) failed to take prompt, thorough, and effective responsive action. These duties are the district's responsibility, regardless of whether a student has complained, asked the district to take action, or identified the underlying conduct as a form of discrimination.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response will differ depending upon the circumstances. However, in all cases, the district must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred and if a hostile environment existed for the complainant(s) or others.

Whether a hostile environment based on sex exists depends on all the circumstances, including the degree to which the misconduct affected one or more students' education; the type, frequency, and duration of the misconduct; the identity of and relationship between the alleged harasser and the subject(s) of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment, the size of the school or district, location of the incidents, and the context in which they occurred; and other incidents at the school or district. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. For example, a single instance of rape is sufficiently severe to create a hostile environment.

Once the district knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred; and if the conduct occurred, whether a hostile environment existed for the complainant(s) and for others. A district has notice of harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment.

If the investigation reveals that a hostile environment exists or has existed, the district must take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser, when appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district should also take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Analysis & Conclusion

The Complainant alleged that the District was deliberately indifferent⁴ to the alleged sexual harassment the Student was subjected to and that the District “did nothing about it.” Additionally, the Complainant added that the Student continued to be harassed by Males 1 and 2 when they “taunted him”, and that a friend of them spat at the Student, and that the District was or should have been aware of it. The Complainant provided no further information.

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. In this case, we find that the evidence does not support a determination by a preponderance of the evidence that the District failed to provide a prompt and equitable response to an incident of peer on peer sexual harassment of the Student. Rather the evidence demonstrates that the APs met with the Complainant and the Student immediately after the School received notice from the SRO of the locker room incident. Additionally, the APs continued their investigation through the weekend on Saturday October 4th to Tuesday October 7th, by interviewing all identified witnesses. Based upon all statements, the District determined that the evidence supported the Student was subjected to the conduct he described. As a result, the two males who the Student accused of the misconduct were disciplined, as described above.

With respect to ongoing harassment, taunting, and the spitting incident, OCR interviewed the Student who provided clarification. He stated that after the incident, he had no further interactions with Males 1 and 2. Regarding taunting, he stated that he believed “everybody” knew about the incident and gave him “looks,” but added that nobody said anything to him. He did state that his Power Weights teacher told him that he was “too weak from missing too much school,” but admitted that he had skipped the class numerous times and was weak as a result of not lifting weights. Regarding the spitting incident, the Student explained that one day after

⁴ OCR does not apply a “deliberately indifferent” standard to its review of a District’s response once on notice of possible sexual harassment. The deliberate indifference standard is applied in the context of Title IX civil litigation.

basketball practice a friend of Males 1 and 2 spat over the balcony from a floor above at the Student. However, he stated that he never told anyone at the School and that nobody else witnessed it. He confirmed that one of the APs met with him a few times to check in on him, but that he did not report to her any other incident.

During interviews with the Principal and the 2 APs, none expressed that the Student reported any form of harassment, taunting, or retaliation; or the spitting incident after the School took disciplinary actions against Males 1 and 2. One AP acknowledged that the Student reported to her that he had felt uncomfortable going to the Power Weights class. When she told the Student that Male 1 would be removed from the class and inquired if he was comfortable with it, the Student affirmed.

Based on the preponderance of the evidence, we determined the District responded promptly, took appropriate steps to understand what occurred and to address the behaviors in compliance with Title IX. The District investigated this allegation immediately. Upon finding that the alleged sexual harassment had occurred, the District responded by imposing a two day out of school suspension on both students, removed one of the students from the weight-lifting class with the Student, suspended both from two athletic events, and met with both students and their parents to explain the consequences for repeated similar behavior or retaliation towards the Student. The District also met with the Student and his parent to explain that the investigation had found the Student's claims to be true and that the two identified students were being disciplined. Additionally, the District also encouraged the Student to meet with his AP and counselor if needed. We find that the District's actions were designed to stop the harassment and eliminate the hostile environment, as well as remedy the effects of the harassment on the student who was harassed. We also found that the behaviors did not recur after the District took these steps. Therefore, we determined that there is insufficient evidence to find that the District failed to provide a prompt and effective response to an incident of peer on peer sexual harassment of the Student.

This concludes our investigation of this complaint. We are closing our investigation of this complaint effective the date of this letter. We will continue to monitor the Agreement that was reached to ensure compliance with the Title IX designation, notice, and procedural requirements of Title IX as required under 34 C.F.R. § 106.8(a) & (b). This letter addresses only the issues discussed in this complaint and should not be interpreted as a determination of the District's compliance or noncompliance with Title IX, or other Federal civil rights laws in any other regard. The Complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Please also note that the complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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 any questions or concerns, please feel free to contact XXXX, Equal Opportunity Specialist and primary contact for this case, at XXXX or by email at XXXX, or me at XXXX.

Sincerely,

/s/

Thomas M. Rock
Supervising General Attorney

Enclosures – Copy of Resolution Agreement

cc (w/o enclosures): Honorable Katy Anthes
Colorado Commissioner of Education