



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 12, 2017

Ms. Kristen Jordison, Head of School
BASIS-Scottsdale
10400 N 128th St
Scottsdale, AZ 85259

Re: BASIS-Scottsdale
OCR Case Number: 08-16-1676

Dear Ms. Jordison

This is to notify you of the disposition of the referenced complaint filed against BASIS-Scottsdale (School), alleging that the School discriminated against Students A and B, a current and a former student at the School, on the basis of their race (black) and retaliated against Students A and B.

Specifically, the complaint alleges that the School subjected Students A and B to discrimination based on their race when other students subjected them to racial harassment (i.e. calling them derogatory names, posting derogatory images to social media and circulating these images to students in the School, and physically harassing Students A and B), and that the School was aware of the harassment and did not take steps reasonably calculated to end the harassment, prevent its recurrence, and remedy its effects.¹

In addition, the complaint alleges that the School retaliated against Students A and B because they complained about racial harassment when it took actions designed to push them out of the School.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d-d7, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. In addition, individuals filing a complaint, participating in an investigation, or asserting a right under Title VI, are protected from intimidation or retaliation by 34 C.F.R. § 100.7(e). As a recipient of Federal financial assistance from the Department, the School is subject to Title VI.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the School, interviewed the Complainant and Students A and B, and interviewed current and former School staff, and staff from the charter corporation that provides support to the School.

¹ During OCR's investigation, the Complainants reported that students at the School continued to harass Student A during the 2016-17 school year and the School was aware of the harassment but did not take appropriate action in response to the harassment.

OCR determined that there was insufficient evidence to conclude that the School discriminated against Student B as alleged or retaliated against Students A and B. The reasons for these determinations are set forth below. In addition, prior to the conclusion of OCR's investigation, the School requested to resolve the allegation that it discriminated against Student A as alleged.

Legal Standards

The Title VI implementing regulation, at 34 C.F.R. § 100.3(a), provides 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 of a recipient. The Title VI regulation at 34 C.F.R. § 100.3(b)(1)(ii) also prohibits a recipient, on the basis of race, 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.

Harassment

A violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment i.e., harassing conduct (e.g., physical, verbal, graphic, or written) 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. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice (as discussed below). Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.

To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment. Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances, with particular attention paid to the factors discussed below.

To determine whether a racially hostile environment exists, it must be determined if the racial harassment is severe, pervasive or persistent. OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved. The harassment must in most cases consist of more than casual or isolated racial incidents to establish a Title VI violation. Generally, the severity of the incidents needed to establish a racially hostile environment under Title VI varies inversely with their pervasiveness or persistence.

Grievance Procedures

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. 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 discrimination prohibited by Title VI.

Retaliation

Title VI of the Civil Rights Act of 1964, 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 it 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. To find a *prima facie* case of retaliation, each of the following three elements must be established:

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.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

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.

FACTUAL BACKGROUND

Students A and B, respectively, were xxxxxxxxxxxxxxxxxxxx grade students at the School at the beginning of the 2015-16 school year. According to the Complainants, Students A and B were harassed on the basis of their race by a group of approximately five other School students throughout the school year and the School was aware of the harassment but did not take appropriate action in response to the harassment.

Student A - Harassment

The evidence showed that several students made comments related to Student A's race during the 2015-16 and 2016-17 school years.² The evidence also showed that the Complainants

² The evidence also establishes that some of the incidents the Complainants reported did not suggest that Student A was harassed because of his race. For example, the Complainants

reported to the School that the students allegedly posted pictures of Student A on Instagram with racially derogatory captions, but that the students deleted the pictures before Student A, the Complainants, or the School could create a ‘screen capture.’ In addition, the evidence showed that Student A reported some of the conduct to the School, but did not report other conduct to the School. Moreover, Student A told OCR that, frequently, there were no witnesses to the conduct because the students were careful to engage in the conduct outside of the earshot of other students or teachers.

The evidence showed that when Student A or the Complainants, his parents, reported the conduct to the School, the School responded to the report. Among other things, the School interviewed Student A and the students who were allegedly harassing him, interviewed teachers who may have witnessed the incidents, sought to identify other witnesses, met with Student A and the Complainants to discuss the alleged harassment, contracted with an outside agency to provide an assembly for students regarding bullying and cyberbullying, modified access to certain websites on the School’s network, sent reminders to the School community about its policies regarding bullying and cyberbullying, invoked disciplinary measures against students the School found to have engaged in misconduct or to have made comments related to Student A’s race, and escalated those disciplinary measures when the harassment (by other students) continued. The evidence also established that no student whom the School found to have made race-related comments to Student A repeated the misconduct after receiving a disciplinary sanction.

Finally, the evidence demonstrated that the alleged racial harassment persisted through OCR’s investigation.

Student A- Retaliation

Although the complaint alleges that the School retaliated against Student A because the Complainants reported harassment against Student A, neither the Complainants nor Student A pointed to any adverse action taken by the School against Student A.³

Student B – Harassment and Retaliation

In addition, the Complainants also assert that in September 2015 they informed the xxxxx xxxxx xxxxxxx xxxxxxxxxx xxxxx that the same students who had been posting pictures of Student A on the internet surrounded Student B in the hallway, taunted him with racially derogatory language – such as “blackie’s brother,” and pushed him to the ground causing a scratch on his forehead. Although the alleged harassment occurred in a School hallway, neither the Complainants nor Student B could identify any other students who allegedly witnessed the incident.

The Complainants assert that they told the xxx about the alleged harassment of Student B, but that the xxx told them “boys will be boys” and took no further steps to respond to their report.

reported that a student sent Student A a message using an internet application that informed him that a student at the School liked him.

³ The Complainants assert that a police officer, called by the School to investigate harassment against Student A “interrogated” him and made him feel as if he had engaged in inappropriate conduct. However, the police officer is not an employee or agent of the School.

The Complainants also assert that shortly after they informed the XXX of their concerns, Student B's grades began to drop and he began to receive disciplinary referrals.

The XXX told OCR that the Complainants told her only that several students had "scratched" Student B. The XXX told OCR that the Complainant did not provide the names of the other students or assert that they had made racially derogatory comments to Student B and, instead, told her that she had "handled" the incident. The XXX denied that she told the Complainants that "boys will be boys"

The Student B's disciplinary record indicates that multiple teachers referred Student B to the XXX because of in-class infractions. On September 30, 2015, he was referred to the office for allegedly writing graffiti on the bathroom wall. The Complainants told the School that Student B does not curse and therefore could not have made the graffiti. On October 9, 2015, Student B received two disciplinary referrals – for talking and roughhousing (along with two other students) during a School lockdown drill and for being chronically unprepared for class. Teacher A, who created the referrals, denied that he reported Student B's alleged misconduct because of the Complainant's reports to the XXX or even being aware of the Complainant's reports. On November 3, 2015, Student B was referred by two separate teachers. One teacher reported that Student B and another student were using a sink to fill water balloons; another teacher reported that Student B and another student planned to frequently "sign out for student hours in lunch" to aggravate School staff. Finally on November 18, 2014, a teacher reported that Student B and another student frequently disrupted class by getting out of their seats to talk to each other.

The XXX told OCR that Student B did not receive a formal disciplinary consequence for any of the six incidents, but acknowledged that after several incidents she talked with Student B or the Complainants about his conduct in an effort to convey the School's behavioral expectations. None of the disciplinary referrals indicate that the School imposed any disciplinary consequence on Student B.

The School produced Student B's grade reports, which indicate that his grades declined from mostly As and Bs during the 2014-15 school year and the first grading period of the 2015-16 school year to include some Ds and Fs during the second grading period. Teacher B, Student B's XXXXXX Teacher, referred him and nine other students to "lunch club" on September 4, 2015, because he had not met a certain performance threshold. Teacher A referred Student B to the School's XXXX xx xxxxxxxx (XXXX) for support services because he had not been following instructions or working in class. Teacher C reported to the XXXX on October 1, 2015, that Student B frequently came to class unprepared. An October 1, 2015 email from the XXXX indicated she planned to talk to the Complainants about Student B's performance on October 5, and a November 12, 2015 email from the XXXX informed the Complainants that Student B continued to struggle in several classes. The November 12, 2015 email indicated that it was a "follow up to . . . previous weekly meetings." The Complainants responded to the November 12, 2015 email indicating that they were "completely unaware" of Student B's grades.

In the spring 2016, when the Complainants reported harassment of Student A to the School, the Complainants requested an explanation for the drop in Student B's grades. The School

conducted an audit of his grades, which was provided in the School's data response, which indicated that Student B had multiple missing assignments and poor test scores.

OCR's investigation did not reveal evidence that the School's audit was not accurate. OCR interviewed one of Student B's teachers who told OCR that Student B, along with several other students, frequently did not come to class prepared.

Student B withdrew from the School on December 18, 2015. The Complainants assert that Student B withdrew from the School because the School had not responded to their reports of harassment. Although the Complainants frequently emailed the School to report concerns after February 2016, neither the Complainant nor the School provided OCR any email that demonstrated the Complainants wrote to the XXX or any other School official expressing a concern that students were harassing Student B or that the drop in his grades or disciplinary referrals were retaliation for reporting that other students had scratched him. In addition, the Complainants did not describe to OCR any other specific actions of alleged racial harassment experienced by Student B about which the School knew or should have known.

ANALYSIS

Harassment of Student A

Prior to the conclusion of OCR's investigation, the School requested to resolve the allegation that it discriminated against Student A, based on his race, when it was aware that he was subject to racial harassment by other School students but did not take steps reasonably calculated to end the harassment, prevent its recurrence, and remedy its effects. The provisions of the resolution agreement are aligned with this allegation and consistent with the applicable regulations.

The evidence establishes that Student A was subjected to racial harassment during the 2015-16 and 2016-17 school years when several students directed race-based comments to Student A. The evidence also establishes that the School responded to each incident of harassment of which it was aware. The School investigated each incident by interviewing Student A, the students allegedly harassing him, any students who were reported to have witnessed the incident, and any teachers supervising at the time of the incident. In addition, after each incident, the School determined whether any race harassment had occurred and responded to it. The School's response included: reprimanding students, informing students that discriminatory comments were not tolerated at the School, contacting the students' parents, advising them that future comments would result in disciplinary consequences, holding two meetings with Student A's parents to discuss the students' comments and the School's response, contracting with a public interest organization to provide a program to School students on bullying and cyber-safety, and suspending students.

Although the Complainants assert that the students harassed Student A throughout the 2015-16 school year, they did not point to any specific instances of harassment. Moreover, Student A told OCR that when students harassed him there were no witnesses, including teachers, and that, he sometimes did not report the harassment to the School.

Based on the above described information and the School's interest in resolving the allegation, OCR drafted a resolution agreement to fully address the allegation.

To resolve the allegation that the School did not take steps reasonably calculated to respond to the harassment of Student A of which it was aware, the School agreed to enter into a resolution agreement (the Agreement) with OCR on March 20, 2017. The provisions of the Agreement are aligned with the complaint allegation, and they are consistent with the applicable regulations.

OCR will monitor the School's implementation of the Agreement until the School is in compliance with the statutes and regulations at issue in this case. OCR looks forward to receiving the School's first monitoring report, which is due by April 30, 2017.

Harassment of Student B

The Complainants assert that multiple students harassed Student B based on his race during the 2015-16 school year. The Complainants, however, point only to a single incident of which they made the School aware – that multiple students surrounded and “scratched” Student B, while calling him names.

The School acknowledges that the Complainants reported that several students scratched Student B, but denies that the Complainants informed it that the students also made racially derogatory comments and that the Complainants identified the students. The evidence demonstrates that the Complainants immediately and frequently emailed the School when Student A experienced harassment or when they believed the School had not sufficiently responded to incidents of harassment directed at Student A. However, the evidence contains no emails from the Complainant at or around the time other students scratched Student B asserting either that the students' conduct was racially motivated or that the School had not sufficiently responded. In addition, the record indicates that Student B acknowledged that there were no witnesses to the alleged harassment and that he did not report the harassment to any School staff. Accordingly, OCR cannot establish that the School had knowledge of a potentially hostile environment.

Based on careful consideration of all of the evidence and for all the reasons stated in this letter, OCR has determined that there is insufficient evidence to conclude that the School discriminated against Student B when it allegedly failed to respond appropriately to incidents of harassment of which it was aware.

Retaliation

The Complainants assert that after they reported the race-harassment of Student B, the School retaliated against him by pushing him out of the School by disciplining him and lowering his grades. The Complainants assert that Student B suffered adverse actions in that the School began disciplining him and lowering his grades. Subjecting a student to unwarranted disciplinary infractions or knowingly awarding a student lower grades could be considered adverse actions in that they would deter a reasonable person from making or supporting an allegation of discrimination.

The Complainants engaged in protected activity when they reported harassment of Student A to the School in spring 2016.

However, there is insufficient evidence for OCR to determine that the School subjected Student B to unwarranted discipline. Student B's disciplinary record indicates that, although he was referred to the office, the XXX did not impose discipline on him after any of the referrals. Moreover, one of Student B's teachers told OCR that Student B frequently came to class unprepared or engaged in distracting behavior, which was the basis of the referral.

In addition, there is insufficient evidence for OCR to determine that the School purposefully lowered Student B's grades. Emails between the School and the Complainants indicate that several of Student B's teachers had concerns about Student B's academic performance and sought to provide him additional assistance. Moreover, when the Complainants' requested an explanation for Student B's grades, the School conducted an audit that revealed missing assignments and poor test scores, a conclusion supported by the statements of one of Student B's teachers to OCR.

Even if it were the case that the disciplinary referrals and Student B's declining grades constituted an adverse action, there is insufficient evidence for OCR to conclude that there was a causal connection between the Complainants' protected activity and the adverse actions.

Although the Complainants assert that they told the School's XXX in September 2015 that other students harassed Students A and B because of their race, the XXX denied that the Complainants made such allegations. As noted previously, the evidence demonstrates that, later in the school year, beginning in February 2016, two months after Student B left the School, Student A and the Complainants informed the School, either verbally or by email, about instances of alleged harassment and repeatedly questioned the School's response to the harassment. There is no evidence in the record to indicate that the School was aware that the Complainants intended to complain about race-harassment and retaliated against Student B in anticipation of those complaints.

Based on careful consideration of all of the evidence and for all the reasons stated in this letter, OCR has determined that there is insufficient evidence to conclude that the School retaliated against Student B as alleged.

The complaint asserted that the School also retaliated against Student A. OCR's investigation did not indicate that the School subjected Student A to an adverse action. The Complainants assert that a police officer interrogated Student A at the School after they had reported harassment, but the police office is neither an employee nor an agent of the School. Further, the police officer met with Student A as a result of the School alerting law enforcement about the alleged harassment directed towards Student A.

Based on careful consideration of all of the evidence and for all the reasons stated in this letter, OCR has determined that there is insufficient evidence to conclude that the School retaliated against Student A as alleged.

This concludes OCR's investigation of the complaint and should not be interpreted to address the School'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.

Please be advised that the School 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. The Complainant may also 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.

We wish to thank you for the cooperation extended to OCR during our investigation. In particular, we thank Lynne Adams, Counsel, for her assistance throughout OCR's investigation. If you have any questions, please do not hesitate to contact Patrick Alexander, Civil Rights Attorney, by phone at 303-844-3473, or by e-mail at Patrick.Alexander@ed.gov.

Sincerely,

Sandra J. Roesti
Supervisory Attorney

cc: Lynne Adams, Counsel
Enclosure