



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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May 16, 2022

Dr. Shane McCord
Superintendent
Gilbert Unified School District
140 South Gilbert Road
Gilbert, Arizona 85296

By email only to contactus@gilbertschools.net

Re: OCR Complaint No. 08-21-1448
Gilbert Unified School District

Dear Superintendent McCord:

On September 22, 2021, the United States Department of Education (Department), Office for Civil Rights (OCR) received a complaint against the Gilbert Unified School District (District). The Complainant alleged that the District discriminated against his son (Student) on the basis of sex. Specifically, the Complainant alleged that the District failed to provide a prompt and equitable response to his complaint of sexual harassment and treated the Student differently when it stated it would have handled the complaint differently had the Student been female.

Because OCR has jurisdiction and the complaint was filed timely, OCR initiated an investigation pursuant to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Title IX.

Investigation Summary

On December 6, 2021, OCR opened the allegations for investigation in accordance with OCR's *Case Processing Manual* (CPM). During its investigation, OCR reviewed documentation provided by the Complainant and the District, and interviewed the Complainant, the District's Title IX Coordinator (Title IX Coordinator), and the Student's principal (Principal).

Background

The Student is currently attending fourth grade at the XX Elementary School (School) in the District during the 2021-22 school year (SY). At the beginning of the SY, the Student utilized the school bus for transportation between his home and the School.

On September 10, 2021, the Student was riding the bus and was seated with two other students (Students A and B) on a bench seat. The bus driver received a report that afternoon that “another student on the bus was touching a boy’s private parts,” which was reported to the District’s Supervisor for General Education Transportation Routes the morning of September 13, 2021. The Supervisor for General Education Transportation Routes provided a video of the relevant bus ride to the Principal on the same date. The Principal forwarded this email to the Title IX Coordinator. The video evidence demonstrates that the Student and Student A were seated closely together and that the Student and Student B switched seats multiple times while on the bus. According to the Complainant, the Student changed seats in an attempt to get away from Student A. On the same date, Student A’s mother (Parent A) filed a complaint of sexual harassment against the Student regarding the alleged conduct occurring on the bus.¹

The Principal met with the Complainant regarding the allegations against the Student on September 14, 2021. By email to the Principal later that day, the Complainant summarized the Student’s report during the meeting as “self defense of his body” from another student “inappropriately touching him.” He further raised concerns about the possibility that the allegations could be “indicative of grooming and/or abuse” experienced by the complaining student, though he was not aware that Student A was the complaining student at this time. The Principal explained to OCR that the Student was provided an opportunity to explain his side of the situation during this meeting and that, at that time, nothing the Student or Complainant stated led her to believe that they were articulating a complaint of sexual harassment. Rather, it was her understanding that the Complainant was raising concerns about other experiences Student A may have been exposed to apart from the bus incident (i.e., grooming or abuse).

The Title IX Coordinator notified the Complainant of the Title IX investigation opened in response to Parent A’s complaint by letter emailed to the Complainant on September 16, 2021. On September 17, 2021, and in reply to the notification letter, the Complainant contacted the Title IX Coordinator and stated that he wanted to file a formal Title IX complaint on behalf of the Student against Student A. The Complainant explained in his email that the Student was “inappropriately groped” by Student A. He further stated that after Student A asked if the Student was “ticklish,” he stuck his hands up the Student’s shirt while “squeezing his chest...grabbing [the Student] above the knee squeezing and running his hands higher up [the Student’s] legs.” In his complaint to OCR and by phone, the Complainant stated that the Title IX Coordinator required him to fill out a particular form and would not accept his verbal or emailed description of the allegations as a formal complaint. The Title IX Coordinator explained to OCR that she accepts emails in lieu of a complaint form if the pertinent information is included but

¹ Student A initially alleged that the Student touched his genitals during the bus ride on September 10, 2021.

generally forwards the complaint form to complainants to ensure all necessary information is collected. She also explained that the formal complaint form is not accessible on the District’s website.

The Title IX Coordinator replied to the Complainant on September 20, 2021, and provided the District’s Title IX policies and procedures, as well as the District’s formal complaint form. The Complainant filed a formal complaint on the same date. OCR’s review of the submitted complaint confirms that the same description in the Complainant’s original email to the Title IX Coordinator was also provided in the formal complaint form. The Complainant also stated in the complaint that the Student shared this information with the Principal during their previous in-person meeting on the September 14, 2021.

The Title IX Coordinator subsequently determined that the complaint submitted by the Complainant should be dismissed as a “required” dismissal. In an interview with OCR, the Title IX Coordinator explained that her understanding of the allegation had to do with Student A “tickling” the Student, which she did not believe met the criteria for opening a Title IX investigation. According to the District, she did not consider the “tickling” to be conduct on the basis of sex. The Title IX Coordinator further stated to OCR that she did not believe the complaint alleged conduct that met the “second prong” of the Title IX definition of sexual harassment², and a dismissal letter was subsequently issued on September 22, 2021. During the course of the investigation, the District clarified that the Title IX Coordinator was referring to the “objectively offensive” portion of the second definition of sexual harassment, which addresses unwelcome conduct; however, the District stated that the Title IX Coordinator’s analysis did not advance to this portion of review because she did not consider the conduct to be sexual in nature. In the dismissal letter, the Title IX Coordinator wrote that the District was required to dismiss the complaint because it “does not state an allegation of sexual harassment, even if all of the facts are found to be true.” The Complainant did not appeal the District’s determination regarding his complaint.

The Complainant told OCR that during a conversation with the Title IX Coordinator regarding his allegations against Student A, he asked whether the outcome would have been the same had his son been female and that she said it would have been a “different situation.” The District clarified that this conversation occurred on September 20, 2021, and was in response to the Complainant’s inquiry regarding whether law enforcement had been notified of his allegations against Student A. When OCR inquired about this statement, the Title IX Coordinator explained that the Complainant asked whether the outcome (i.e., notifying law enforcement) would have been different had the Student been female and her breasts were groped, to which she responded

² The Title IX regulations define sexual harassment to mean conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30). *See* 34 C.F.R. § 106.30.

it would have been a “different situation.” She indicated her intention was not to state that the Student would have been treated differently had he been female, rather that the facts the Complainant described would have been a “different situation.” The Title IX Coordinator stated that she would have still concluded the complaint submitted by the Complainant should be a mandatory dismissal even if the Student had been female.

Legal Standards

Prompt and Equitable Response

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sexual harassment and sexual assault. In evaluating whether a recipient’s grievance procedures are prompt and equitable, OCR reviews all aspects of a recipient’s policies and practices, including the following elements that are critical to achieve compliance with Title IX:

- 1) notice to students, parents of elementary and secondary students, and employees of the procedures, including where complaints may be filed;
- 2) application of the procedure to complaints alleging discrimination and harassment carried out by employees, other students, or third parties;
- 3) provision for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and other evidence;
- 4) designated and reasonably prompt timeframes for the major stages of the complaint process;
- 5) notice to both parties of the outcome of the complaint and any appeal, if available; and

assurance that the recipient will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others, if appropriate.

Different Treatment

The regulation implementing Title IX, at 34 C.F.R. §106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient of Federal financial assistance.

To determine whether an individual has been discriminated against on the basis of sex, OCR looks at whether there is evidence that the individual was treated differently than individuals of a different sex under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the

preponderance of the evidence must establish that the recipient's actions were based on the individual's sex.

OCR also examines whether there was any evidence to suggest that the recipient treated the student in a manner that was inconsistent with its established policies and procedures or whether there was any other evidence of prohibited discrimination.

Analysis

Based on OCR's review of the documentation available during the investigation and the information obtained during interviews with District staff, OCR has concerns about the District's compliance with Title IX as it pertains to the handling of the Title IX complaint submitted to the District by the Complainant.

First, OCR notes that the District's accessibility of and path to filing a formal complaint is unclear. Though the Complainant provided specific details regarding his allegations by email to the Title IX Coordinator, he indicated that he was told that he must still complete the formal complaint form which was only accessible by contacting the Title IX Coordinator. Likewise, the Title IX Coordinator indicated during the interview with OCR that the formal complaint form was not available online and that she provided it to students and parents upon notification of Title IX concerns. OCR's independent review of the District's website revealed there was a description of the formal form, but that the link to the form was not working properly.

Additionally, while the District explained its reasoning for dismissing the Complainant's formal complaint as a "mandatory dismissal" based on its determination that it did not raise facts which could amount to sexual harassment, OCR finds the explanation unconvincing. The complaint alleged contact between the Student and Student A which included allegations of touching and groping, in addition to tickling. Further, allegations of tickling may amount to unwelcome sexual conduct. It would have been appropriate for the District to make factual determinations regarding the alleged tickling and touching after opening the complaint for investigation, rather than preemptively determining that the facts did not state an allegation of sexual harassment.

Prior to the conclusion of the investigation, OCR discussed its concerns with the District regarding the District's compliance with Title IX, including the concerns outlined above. The District subsequently notified OCR that it was interested in voluntarily resolving OCR's compliance concerns through a Section 302 resolution agreement. The District voluntarily agreed to address the complaint allegations by signing the enclosed Section 302 resolution agreement (Agreement) on May 13, 2022.

Conclusion

Pursuant to Section 302 of the CPM, allegations under investigation may be resolved at any time when, prior to issuing a final determination under CPM Section 303, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them

because OCR's investigation has identified issues that can be addressed through a resolution agreement. The provisions of the resolution agreement must be tied to the allegations and the evidence obtained during the investigation, and will be consistent with applicable regulations. Based on the allegations and the evidence provided, OCR determined that the allegations may be appropriately resolved through an agreement under Section 302 of the CPM.

As noted above, on May 13, 2022, OCR received the District's signed Agreement (enclosed). The provisions of the enclosed Agreement are aligned with the complaint allegations and information obtained by OCR to date in its investigation, are consistent with the applicable regulations, and when fully implemented will address the compliance concerns described in this letter. Accordingly, this complaint is closed as of the date of this letter and OCR will monitor the Agreement to ensure compliance.

OCR is closing the investigative phase of this case 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 to ensure that the commitments made are implemented timely and effectively and that the recipient's policies and practices are administered in a nondiscriminatory manner. When the Agreement is fully implemented, the allegations will have been resolved consistent with the requirements of Title IX and the implementing regulations. If the University fails to implement the Agreement, OCR will take appropriate action, which may include enforcement actions, as described in the Agreement.

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 complainants 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. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law.

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If you have any questions, please contact XX, the OCR attorney assigned to this complaint, at XX or XX.

Sincerely,

/s/

Michael D. Todd
Supervisory Attorney

Enclosure – Resolution Agreement

cc: Ms. Lawton Jackson, Esq.
By Email only to XX