



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION VIII

ARIZONA  
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March 29, 2023

By email only to XX

Laura Toenjes, Superintendent  
Kyrene School District  
8700 South Kyrene Road  
Tempe, Arizona 85284

Re: Kyrene School District #28  
OCR Case No. 08-22-1627

Dear Superintendent Toenjes:

On September 30, 2022, the United States Department of Education (the Department), Office for Civil Rights (OCR) received a complaint against the Kyrene School District #28 (the District). The Complainant alleged that the District discriminated against her daughter (the Student) and other students on the basis of race, color, and national origin when it failed to respond to student-on-student harassment that created a hostile environment at the XX Middle School (the School). Specifically, the Complainant alleged that:

1. the District failed to respond appropriately to individual race-based harassment of the Student by other students, despite the notice the Complainant provided to School staff of incidents occurring in May 2022 and September 2022 through the present; and,
2. the District failed to respond appropriately to systemic race-based student-on-student harassment in the School during the 2021-22 and 2022-23 school years.

Because OCR has jurisdiction and the complaint was filed timely, OCR initiated an investigation pursuant to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d et seq., and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, and national origin in any education program or activity operated by a recipient of federal financial assistance from the Department. As a recipient of financial assistance from the Department, the District is subject to Title VI.

## **I. Summary of Investigation and Conclusions**

On October 26, 2022, OCR opened the allegations for investigation in accordance with OCR's *Case Processing Manual* (CPM). OCR's investigation included interviewing the Complainant and two District staff members, and reviewing documents pertinent to the complaint allegations,

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including information, records, and data from the District. During the investigation OCR identified concerns related to the District's compliance with Title VI regarding allegation #1, and the District expressed its willingness to resolve the allegation and OCR's compliance concerns pursuant to Section 302 of the CPM. After carefully considering the information obtained during the investigation, OCR determined that it is appropriate to resolve its concerns about allegation #1 through a Resolution Agreement under Section 302 of the CPM.

OCR also determined that allegation #2 and the related evidence obtained in this investigation raises serious concerns about the District's compliance with OCR's Resolution Agreement in Case No. 08-19-1367, which the District signed on August 22, 2022 (the 2022 Agreement), to resolve OCR's finding that the District failed to respond appropriately to notice of ongoing harassment based on national origin in violation of Title VI. Because OCR is addressing those compliance concerns in the monitoring of the 2022 Agreement, OCR is dismissing allegation #2 from this case number under Section 110(j) of the CPM.

OCR's factual findings to date, analysis, and legal conclusions are set forth in more detail below.

## **II. Factual Findings**

Based on the evidence obtained to date, OCR made the following factual findings.

The Student is a biracial XX-grade student who currently attends the School. She began attending in XX grade in the 2020-21 school year. The Complainant and the Student provided OCR examples of other students' recurring uses of racial epithets and other racially derogatory language that the Student has observed and the Complainant has reported to the School Principal (Principal) during the 2022-23 school year. For example, the Student reported the frequent occurrence of classmates calling students a "[n-word]" and "monkey" in front of classroom teachers without response or correction and other instances of classmates calling a student "ching chong" with a dismissive response from the teacher. Further, the Student reported to OCR that classmates were stating their racial percentages as "a pass to make racist comments," such as when a classmate told other students, "I am 25 % Arabic. So I can bomb people and shoot up schools." The Complainant reported to the Principal this comment and that the Student overheard her classmate state that "[a]ll Muslims are terrorists and turn out to be one!"

The Complainant also reported that students have called the Student "monkey" in class and on the school bus. The Student often overhears students use and direct racial epithets toward other students on the school bus, such as the use of "monkey," "little charcoal," the "[n-word]" or derivations thereof, "ching chong," "crackers," and "beaners." The Complainant and the Student provided a table to OCR listing examples of students' uses of these terms. Throughout the course of OCR's investigation, the Complainant continued reporting occurrences when the Student overheard the use of this language based on race and national origin at School and on the bus.

### **A. Incidents involving the Substitute Teacher**

On September 2, 2022, the Complainant sent an email about “racist comments” in the classroom to a substitute teacher (Substitute), who was serving as a long-term substitute for the School. The Complainant requested that the Substitute move the Student’s seat. The Substitute called and discussed the situation with the Complainant. On October 13, 2022, the Complainant emailed the Substitute and requested that the Student’s seat be moved due to additional “racist comments” regarding classmates “who appear Black,” including the use of the words “Nigk” and “Nigks.” The Complainant expressed concern that the Student had approached the Substitute during class to address the situation, including telling the Substitute that she did not want to “sit next to a racist kid,” and that the Substitute had told the Student to go back to her seat.

In its response to OCR’s requests for information, the District acknowledged the email documentation wherein the Complainant notified the Substitute of the race-based language used in the class. The District informed OCR that the Substitute did not notify School administration of the reported incidents and that they had not been previously aware of the complaint or correspondence with the Substitute until the District discovered them while reviewing emails for its response to OCR’s investigation. During interviews with the School’s Academic and Behavioral Specialist (Specialist) and Principal, OCR inquired about the Substitute and the School’s process for informing substitute teachers of how to report race-based harassment. The Principal explained that she was not aware of the Complainant’s reports to the Substitute and would not have otherwise become aware but for OCR’s investigation. The Principal also revealed that no other reviews were conducted to determine whether the Substitute had received other reports of harassment unrelated to the Complainant’s reports.

When OCR asked about substitute teachers’ understanding of School policies and procedures, the Specialist and Principal referenced a folder of information that the School provides to substitute teachers. The witnesses’ recollections of the information in the folder did not align. The Specialist was certain that the folder contained information about how to report concerns that may arise, but the Principal reported relying on the classroom teacher to identify a point of contact for substitute teachers to report any concerns that may arise in the classroom. In its response to OCR, the District provided a copy of the training slides used to onboard substitute teachers. The training directs the substitute teachers to follow the District’s policies and procedures related to “Harassment, Intimidation, & Bullying,” including to “[a]lways ask for assistance from other regular teachers” and to “[e]nsure the school’s administration” is informed of the incidents. The training also includes a reference to the District’s policies and procedures for submitting complaints of discrimination and multiple slides celebrating diversity among staff and students.

### **B. Bus Incidents**

The Complainant explained to OCR that on September 29, 2022, the Student was sitting on the bus with her friend (Student A), when another student (Student B) called the Student a “monkey” while on the phone. The Complainant reported the incident to the Specialist later that day, and

the School conducted an investigation beginning on October 11, 2022, following the District's fall break from September 30, 2022, through October 10, 2022. The Specialist explained to OCR that Student B admitted to the conduct on the bus and subsequently received one-day of in school suspension and two-days of bus suspension.<sup>1</sup>

During OCR's interviews with the Principal and Specialist, they each explained that the School administrators use an incident tracking system to review frequent or recurring behavioral concerns and that the use of race-based language prompted them to organize a targeted discussion with the students on the bus that the Student rides at the end of January 2023. They also decided to implement lessons through the social studies classes to target the use of respectful and appropriate language. The Specialist indicated that they have not had an explicit conversation with students regarding race. After OCR opened the complaint for investigation, the Complainant informed OCR that she and the Student have reported at least seven additional incidents of students using derogatory, race-based comments or racial epithets while on the bus.

### **III. Legal Standards**

The regulation implementing Title VI, at 34 C.F.R. § 100.3, provides that no person shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program to which Title VI applies. The existence of a hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient constitutes discrimination on the basis of race in violation of Title VI.

To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) a hostile environment based on race existed; (2) the recipient had actual or constructive notice of a hostile environment based on race; and (3) the recipient failed to respond adequately to redress the hostile environment based on race.

Harassment creates a hostile environment when the conduct is sufficiently severe, persistent, or pervasive so as to interfere with or limit an individual's ability to participate in or benefit from a recipient's program. The harassment must in most cases consist of more than casual or isolated incidents to establish a Title VI violation. Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances. OCR will examine the context, nature, scope, frequency, duration, and location of the race-based harassment, as well as the identity, number, age, and relationships of the persons involved. If OCR determines that the harassment was sufficiently severe that it would have adversely affected a reasonable person, of the same age and race as the victim, under similar circumstances, from participating in or enjoying some aspect of the recipient's education program or activity, OCR will find that a hostile environment existed.

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<sup>1</sup> Following the School's investigation, the Specialist and the Complainant discussed the placement of the Student's and Student B's seats on the bus, and the Complainant disagreed with the Specialist's decision to move Student B toward the front of the bus near the bus driver. The Specialist explained to OCR that when a student displays behavioral concerns, the best approach is to move the student closer in proximity to staff, rather than farther away (*i.e.*, the back of the bus), which may ultimately aggravate the behavior.

A school may be found to have violated Title VI if it has failed to correct a hostile environment based on harassment of which it has actual or constructive notice. A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient.

Once a recipient has notice of a hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. OCR evaluates the appropriateness of the responsive action by assessing whether it was reasonable, timely, and effective. The appropriate response to a hostile environment based on race must be tailored to redress fully the specific problems experienced as a result of the harassment.

#### **IV. Analysis and Conclusions**

Below OCR explains its analysis applying the legal standards above to the factual findings to date to reach the following conclusions regarding Allegations 1 and 2.

##### **A. Allegation #1: The District failed to respond appropriately to race-based harassment of the Student by other students.**

OCR found that the District knew of allegations of derogatory, race-based comments directed toward or in the vicinity of the Student at least three times: in classes with the Substitute on September 2, 2022, and October 13, 2022, and on the bus on September 29, 2022. The District's response to these incidents raises concerns regarding the District's compliance with Title VI.

##### **1. Compliance Concerns Involving Substitute Teachers**

The District reported that it was not aware that the Substitute had received complaints of students making race-based comments in the Student's class prior to OCR opening this investigation. However, after becoming aware of this information, the District did not take steps to ensure that substitute teachers report complaints of harassment so that the District can respond adequately to eliminate and redress any hostile environment based on race, as required by Title VI. For instance, though the District confirmed that the Substitute is no longer working at the School, the District did not review the Substitute's email correspondence for other reports or complaints that may have gone without notification to administration. Further, interviews revealed inconsistencies in how the School informs substitute teachers about the appropriate points of contact if concerns arise in class. The Specialist told OCR that the School provides a folder to substitute teachers that informs them of the process for addressing behavior issues. But the Principal told OCR that it was the classroom teacher's responsibility to identify a point of contact for the substitute teacher. Although the District directs substitute teachers to ask for assistance from the regular classroom teacher for reporting discrimination in the classroom during the onboarding training, the preceding information raises compliance concerns for OCR

based on the potential for race-based harassment to continue in classrooms taught by substitute teachers who may not be notifying School administration of observed or reported harassment or other discrimination.

## **2. Compliance Concerns About Bus Incidents Involving the Student**

OCR found that the District responded to the incident between the Student and Student B on the bus by conducting a timely investigation and disciplining Student B.<sup>2</sup> However, the Complainant has raised additional concerns about continued and on-going use of derogatory, race-based comments by other students on the bus. According to the Principal and Specialist, the School recently conducted targeted discussions with students on the bus about the use of appropriate and inappropriate language, yet the conduct appears to continue. Despite the District's knowledge of the persistent use of racial epithets on the bus, the District has not implemented any individualized relief for the Student or had an explicit conversation with students regarding race.

On February 28, 2023, during the course of this investigation, the District expressed an interest in voluntarily resolving allegation #1 and OCR's related compliance concerns through a resolution agreement. Under Section 302 of the CPM, a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and when OCR has determined that identified concerns can be addressed through a voluntary resolution agreement. OCR determined that a resolution of its concerns about allegation #1 and the District's responses to the Complainant's and the Student's reports of ongoing racial harassment at the School and on the bus is appropriate under Section 302. The enclosed Resolution Agreement provides individual relief to the Student to resolve these concerns.

The Complainant's and the Student's reports of ongoing harassment on the bus raise concerns for OCR regarding the District's compliance with the 2022 Agreement and Title VI, including the District's duty to take steps to eliminate a known hostile environment and fully redress any problems arising from it. Section IV of the 2022 Agreement requires annual training of all District staff on Title VI's prohibition of discrimination based on race, color, and national origin. The training requirements include District bus drivers and their responsibility to report incidents of possible harassment and how to recognize, prevent, and respond appropriately to such reports. Section VI of the 2022 Agreement also requires a Student Information Program to educate District students about the prohibition on harassment based on race, color, and national origin, how to report such harassment to the District, and the disciplinary consequences for such harassment.

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<sup>2</sup> OCR determined the District's decision to move Student B to the front of the bus near the driver was an appropriate response under the circumstances.

**B. Allegation #2: The District failed to respond appropriately to systemic race-based student-on-student harassment in the School during the 2021-22 and 2022-23 school years.**

The Complainant alleged that the District failed to respond to systemic race-based harassment at the School and on the bus due to the frequent and recurring use of racial epithets and derogatory language. The Complainant and Student provided examples of multiple instances where the Student observed and the Complainant reported the use of race-based language in the School and on the bus during the 2022-23 school year that the Student experienced as having created or perpetuated a racially hostile environment.

Prior to the filing of this complaint, the District entered into a 2022 Agreement to resolve OCR's finding that the District failed to respond adequately to notice of hostile environment harassment on the basis of national origin. Under the Agreement, the District has issued a statement to all District parents/guardians, students, and employees in Fall 2022 that it does not tolerate harassment on the bases of race, color, or national origin and that it encourages students, staff, and families to report harassment to their building principal pursuant to District policies and procedures. The District also conducted a review of its policies and procedures to ensure that it adequately addresses the Title VI prohibition on discrimination based on race, color, and national origin, and has since adopted and disseminated the policies and procedures to all District staff. Further, the District recently provided its proposed training materials for all staff and investigative staff for OCR's review and approval. The District is currently meeting with outside entities, as it develops its Student Information Program, which OCR anticipates will be delivered to all middle schools by the end of this school year. Finally, the 2022 Agreement requires the District to conduct a climate survey at District middle schools before the end of this school year and OCR anticipates receiving an update about the District's progress soon.

Under Section 110(j) of OCR's *Case Processing Manual* (CPM), OCR may close an allegation when OCR has recently addressed or is currently addressing the same allegation(s) involving the same recipient in a compliance review, directed investigation or an OCR complaint.

OCR determined that the examples provided by the Complainant and Student reflect the recurrence of race-based and national origin-based harassment on the School's campus, some instances of which OCR confirmed in the course of its investigation. However, OCR also determined that the systemic allegation of the District's failure to respond to race-based harassment (allegation #2) is currently being addressed in the monitoring of the 2022 Agreement. The 2022 Agreement provides for District-wide remedies, including policy review and revision, as well as staff training. Moreover, that Agreement focuses on the middle schools throughout the District, including the School, providing both programming for students and a climate survey within the next six months. Because OCR determined that systemic allegation #2 raises serious concerns in OCR's monitoring of the District's compliance with the 2022 Agreement, OCR is closing this allegation under Section 110(j) of the CPM as of the date of this letter.

## **V. Conclusion**

As explained above, OCR is closing the investigation into allegation #2 pursuant to Section 110(j) of the CPM. The District voluntarily agreed to address OCR's concerns regarding allegation #1 by signing the enclosed Agreement on March 29, 2023. When fully implemented, the Agreement will resolve the remaining allegation raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the complainant(s) and the information that was obtained during OCR's investigation, and the provisions of the Agreement are consistent with the applicable statute and regulations. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statute and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, which may include enforcement actions.

OCR is closing the investigative phase of the case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of the case will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring phase of the case is complete, OCR will close case number 08-22-1627 and will send a letter to the Complainant and to the District stating that the case is closed.

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. Complainants 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), 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, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.



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If you have any questions, please contact Colleen Brooks, the attorney assigned to this case, at 303-844-0196 or [Colleen.Brooks@ed.gov](mailto:Colleen.Brooks@ed.gov).

Sincerely,

/s/

Michael D. Todd  
Supervisory Attorney

Attachment: Resolution Agreement

cc: Brittany J. Reed  
Attorney  
Gust Rosenfeld P.L.C.  
*By email only to XX*

Jordan Ellel  
Tempe Tri-District General Counsel  
*Via e-mail only to XX*

Tom Horne  
State Superintendent of Public Instruction  
Arizona Department of Education  
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