



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

October 11, 2017

VIA ELECTRONIC MAIL

Dr. Gregory A. Franklin
Superintendent
Tustin Unified School District
300 South C Street
Tustin, California 92780

(In reply, please refer to case no. 09-13-1474.)

Dear Superintendent Franklin:

This letter is to inform you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has resolved the above-referenced complaint against the Tustin Unified School District (District). The complainant alleged that the District discriminated against the Student based on race and sex/gender.¹

Specifically, OCR investigated the following four issues:

1. Whether the Student was subjected to peer racial harassment, and whether the District failed to respond promptly and equitably to notice of the harassment under 34 C.F.R. § 100.3(a) and (b).
2. Whether the District provided the Student/complainant with a prompt and equitable resolution to their complaint of harassment on the basis of sex/gender, and if applicable, whether the District's failure to provide a prompt and equitable response allowed the Student to be subjected to a hostile environment on the basis of sex/gender that denied or limited the Student's ability to participate in or benefit from the District's program under 34 C.F.R. §§ 106.8 and 106.31.
3. Whether the District is in compliance with Title IX regarding: (a) the development and dissemination of notice of nondiscrimination pursuant to 34 C.F.R. § 106.9 and the designation and notice of a Title IX coordinator pursuant to 34 C.F.R. § 106.8(a); and (b) the adoption of policies and procedures to provide for the prompt and equitable resolution of complaints that comply with Title IX and the regulation pursuant to 34 C.F.R. § 106.8(b).
4. Whether the District disciplined the Student differently based on race compared to a Latino student involved in the same incident in violation of 34 C.F.R. §100.3(a) and (b).

¹ OCR informed the District of the identities of the complainant and the Student when the investigation began. We are withholding their names from this letter in order to protect their privacy.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the bases of race, color, or national origin, and Title IX of the Education Amendments of 1972 (Title IX), as amended, 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 programs and activities operated by recipients of Federal financial assistance. The District receives funds from the Department and is subject to Title VI, Title IX, and the regulations thereunder.

To investigate this complaint, OCR interviewed the complainant and District employees and reviewed documents and other information provided by both parties. The District entered into the enclosed Resolution Agreement (Agreement) that, when fully implemented, is intended to address all of OCR's noncompliance findings and compliance concerns.

The applicable legal standards, the facts gathered, and the reasons for OCR's determinations are summarized below.

LEGAL STANDARDS, FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Issue 1: Whether the Student was subjected to peer racial harassment, and whether the District failed to respond promptly and equitably to notice of the harassment under 34 C.F.R. §100.3(a) and (b).

Legal Standards

The regulations implementing Title VI, at 34 C.F.R. § 100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. School districts are responsible under Title VI and the regulation for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities

A district violates Title VI and the regulations if the evidence shows that: (1) the harassing conduct (physical, verbal, graphic, or written) on the basis of race, color, or national origin is sufficiently serious so as to limit or deny a student's ability to participate in or benefit from the services, activities or privileges provided by a district; (2) the district had actual or constructive notice about the harassment; and (3) the district failed to take an appropriate, prompt, and effective responsive action that is within its authority to end the harassment, eliminate any hostile environment that has been created, prevent its recurrence, and, where appropriate, remedy the effects of the harassment on the student who was harassed.

Under the Title VI and the regulations, once a district has notice of harassment of a student on the basis of race, color or national origin by another student that took place in a district program, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of the student, but rather for its own discrimination in failing to respond adequately. Once the district has notice of harassment, the responsibility to take appropriate and effective action is the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. So long as an agent or responsible employee of the school received notice, that notice will be imputed to the school.

In analyzing claims of harassment under Title VI, OCR first considers the totality of the circumstances to determine whether a hostile environment has been created, *i.e.*, whether the harassing conduct is sufficiently severe, persistent or pervasive that it denies or limits a student's ability to participate in or benefit from the recipient's program. These circumstances include the type of harassment, context, nature, scope, frequency and severity, age, race, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved. It also considers whether other incidents motivated by race have occurred at the school to this complainant or others.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, appropriate, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment from recurring, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The steps taken should be reasonable, timely, age-appropriate, tailored to the specific situation, and effective. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Factual Findings

The Student is African American. During the 2012-13 school year, the Student was in ninth grade at a high school (School) in the District. In March 2013, the Student was found eligible for special education services for a Specific Learning Disability, and an Individualized Education Program (IEP) was developed for him.

Nearing the end of the 2012-13 school year, on May XX, 2013, the Student was involved in a fight on campus. While several other students may have contributed to the fight, the fight was primarily between the Student and a Latino student (Student 2). The complainant told OCR that the fight started because Student 2 and his friends (not identified by the complainant) were using gender-based, sexual, and racial slurs against the Student. The complainant told OCR that when she met with one of the assistant principals (AP1) the day after the fight, she told him that the Student was a victim of hate crime.

Immediately after the fight, on May XX, 2013, the District collected hand written statements from the two students involved in the fight (*i.e.*, Student and Student 2) and from four witnesses:

- The Student wrote in his statement that a group of students were making a racist joke; Student 2 then pushed and took a "swing" at him, so the Student punched him in the head.
- Student 2 wrote that the Student had made a sexual comment to a male student (Student 3), to which they replied, "[T]hat's gay." When they got up to leave, the Student said that he was going to beat them up.
- Student 3 wrote that the Student had gestured to him about wanting to have sex with him. As Student 2 and Student 3 were walking away, Student 2 stated, "[T]hat's gay." The Student then pushed Student 2, who pushed the Student in return, and then the Student punched Student 2.
- Student 4 wrote that the Student had told Student 3 that he wanted to have sex with him. The Student pushed Student 2 first, who pushed him back, and then the Student punched Student 2.
- Student 5 wrote that Student 2 had called the Student a "nigglet" based on a videogame/animated character and described the Student as "gay."

- The campus supervisor who broke up the fight wrote that the Student appeared to have been the aggressor during the fight.

The complainant provided OCR with a copy of the Student's written statement that she said was given to AP1 on May XX, 2013, three days after the fight. The copy that was given to OCR was typed (*i.e.*, not written in the Student's handwriting), and was not signed or dated. According to this statement, since the beginning of 2013, Student 2 and his friends, who were not identified by name, called him "hoto," which the Student understood to mean "gay" in Spanish; the Student's written statement did not state when, where, and how often the word was used, or why the Student believed the word was used in reference to him. The Student's written statement also stated that Student 2 had called him a gender-based slur. The Student wrote that he did not report the name calling because he was afraid and embarrassed. In describing what led to the fight on May XX, the Student wrote that Student 2 had called him the N-word, used the word "hoto" in conversing with his friends in Spanish (which the Student presumed was in reference to him), and said aloud that the Student was "gonna show up with a dress and purse tomorrow."

According to the District, upon receipt of the Student's May XXXX written statement, AP1 conducted an investigation by interviewing the Student's classroom teachers and aides, observing classroom interactions between students and teachers, and working with the classroom teachers to make sure that the Student and his peers had a more structured learning environment and fewer opportunities for student interactions that were not teacher-directed. The District told OCR that it concluded that there was no evidence of harassment in the classroom.

The District did not provide OCR with any documentation of the investigation. The complainant told OCR that she was not informed that an investigation had been conducted, the outcome of the investigation, how she could appeal the outcome, and what actions, if any, were taken as a result of the investigation.

On February X, 2014, the Student enrolled at another high school in the District. In April 2014, the complainant informed OCR that the Student had not experienced any incidents of bullying or discrimination at the new school. The complainant has not contacted OCR since April 2014 to report any incidents of harassment or other concerns.

Analysis & Conclusions of Law

In the case at hand, the allegation of racial harassment stemmed from the use of the N-word during the May XX, 2013 incident. The Student wrote in his written statement following the fight that the other students had made a racist joke that included the N-word. Another student (Student 5) wrote that Student 2 had called the Student a "nigglet" based on a videogame/animated character.

Neither the complainant nor the Student identified and reported any other incidents of racial name calling to the District or to OCR. While the use of the N-word is highly offensive and can under some circumstances be sufficient to establish a racially hostile environment, OCR determined that, in this case, the single incident of name calling was not sufficiently severe, pervasive or persistent to establish racial harassment. There was no indication that the Student had been subjected to repeated instances of racial name calling, or that other students had used racial slurs or made racial jokes aside from this one instance on May XX, 2013. As discussed further below, OCR did not find any other evidence of discrimination against the Student or different treatment on the basis of race. Based on these facts, OCR did not find that the Student was subjected to peer racial harassment.

Issue 2: Whether the District provided the Student/complainant with a prompt and equitable resolution to their complaint of harassment on the basis of sex/gender, and if applicable, whether the District's failure to provide a prompt and equitable response allowed the Student to be subjected to a hostile environment on the basis of sex or gender that denied or limited the Student's ability to participate in or benefit from the District's program under 34 C.F.R. §§ 106.8 and 106.31.

Legal Standards

The regulations implementing Title IX, at 34 C.F.R. § 106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. School districts are responsible under Title IX and the regulation for providing students with a nondiscriminatory educational environment. Sexual or gender-based harassment of a student can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities.

Under the Title IX and the regulations, once a school district has notice of possible sexual or gender-based harassment between students, 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 harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the school district fails to take appropriate responsive action. These steps are the district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the district to take action. A recipient must consider the effects of off campus misconduct when evaluating whether there is a hostile environment on campus or in an off campus education program or activity. This includes a review of misconduct that did not occur in the context of an education program or activity but may have had such an impact.

In determining whether a hostile environment based on sex has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the age, sex and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical.

Factual Findings

As noted above under Issue 1, the Student submitted two written statements following the fight on May XX, 2013. In addition to alleging racial harassment, the Student's written statements raised allegations of gender-based harassment in the form of name calling (such as "hoto") and a comment that the Student was going to show up to school wearing a dress and carrying a purse.

In the fall of the following (2013-14) school year, on October XX, 2013, the complainant submitted a uniform complaint to the District, asserting a new allegation that another student (Student 6) was using

sexual slurs against the Student every day during their second period class since the school year started. This allegation of harassment was limited to the new school year, and the complainant did not include the allegations that the Student had been called racial and sexual slurs in the 2012-13 school year.

The uniform complaint was assigned to the Director of Assessment and Evaluation (Director) as the lead investigator and to two other individuals as assistant investigators.² The District met with the complainant and the Student on November XX, 2013. During the meeting, the Student identified two students in the second period class who may have witnessed the name calling; the complainant and Student acknowledged at the meeting that they did not report the name calling by Student 6 prior to filing the uniform complaint.

On December X, 2013, the District interviewed Student 6 and the two student witnesses identified by the Student. The District also interviewed the following School staff: School principal, two assistant principals, second period teacher, the Student's special education aide, and another aide in the second period classroom. None of the witnesses, including the Student's aide, who was with him during second period, stated that they had heard any name calling or had received any report or complaint of harassment made by the Student. The witnesses consistently portrayed the Student as the one who engaged in sexually inappropriate behavior in the classroom, such as dancing in a sexually provocative manner, making sexual overtures toward other students, and playing music loudly containing lyrics about private body parts. The two assistant principals at the School also stated that they had never received a formal or informal complaint of sexual harassment/gender-based harassment or discrimination from the Student prior to the uniform complaint.

The District issued its written decision (Decision) on December XX, 2013. The 17-page Decision contained detailed information regarding: the complainant's allegations; the District's investigative actions/approach; the evidence gathered; the standards applied; the District's analysis of the evidence; and the District's determination/outcome for each of the allegations. The District concluded that the evidence did not show that: (a) the Student had been called sexually inappropriate names by Student 6 or by other students, or that (b) the Student had reported the name calling to School personnel or that any School personnel had heard or witnessed the name calling. The Decision included details of interviews conducted and documents reviewed.

Although the District concluded that no harassment on the basis of sex had occurred, the District agreed to undertake the following eight proactive/corrective steps to improve the overall School climate against harassment and to address the Student's peer relationships. In May 2016, the District confirmed that it had completed all eight steps and provided documentation to OCR as appropriate:

1. Conduct small group training for students at the School on what constitutes discrimination/harassment, sexual harassment, and bullying. The District told OCR that small group training at the School was provided by one of the assistant principals in January and February 2014.
2. Offer a structured peer mediation session to the Student and Student 6. The District told OCR that the Student had declined the District's offer of a peer mediation session.

² Because the investigators were acting on behalf of the District, they are referred to in this letter as the District.

3. Revisit the IEP team's recommendation of school-based counseling for the Student (the complainant had previously rejected the IEP team's offer of counseling for the Student). The District provided documentation to OCR that on March XX, 2014, the IEP team offered individual counseling (30 minutes, twice a month) to the Student to support his behavior and peer interactions, to which the complainant agreed.
4. Restructure the Student's second period class to allow for less time to engage in non-academic conversations with peers and help all students remain focused on their academic work. The District told OCR that it sent a behavioral support specialist in January 2014 to work with the second period teacher to restructure behavioral expectations and classroom management strategies. According to the District, the School had about a month to implement these changes before the Student voluntarily transferred to another school in the District.
5. Provide additional training to the Student's morning and afternoon "shadow" aides on how to support a more structured learning environment for the Student. The District told OCR that the shadow aides were provided with strategies and instruction to provide more direct behavioral support (instead of just observational support) to the Student and to work more closely with the Student's teachers. Again, according to the District, the School had about a month to implement these changes before the Student voluntarily transferred to another school in the District.
6. Invite the Student to a meeting with one of the assistant principals to discuss how and to whom instances of sexual harassment and discrimination/harassment should be reported. The District told OCR that one of the assistant principals met with the Student to discuss harassment and bullying and informed the Student to report harassment and bullying directly to her.
7. Revise the School's discipline assemblies at the beginning of the school year to address how and where to report discrimination and sexual harassment. The District provided OCR with a copy of the revised training slides, and OCR confirmed that these topics were addressed in the revised training slides.
8. Require students to sign in and document their participation in the discipline assemblies and their understanding of the District's policies against discrimination, sexual harassment, and bullying. The District provided OCR with a copy of the form that students are required to sign after attending the annual discipline assembly.

On January X, 2014, the complainant appealed the District's uniform complaint findings to the California Department of Education (CDE), which rendered its decision on July X, 2015. The CDE reviewed the complainant's uniform complaint filed with the District, the District's Decision, the complainant's appeal to CDE, the District's investigative file, and the District's complaint procedures. It upheld the District's conclusion of insufficient evidence of peer harassment on the basis of sex in the form of name calling by Student 6 in Fall 2013, and stated that the District's findings of fact were supported by substantial evidence.

Analysis & Conclusions of Law

Where the allegations filed with OCR have been investigated through a recipient's internal grievance procedures, OCR reviews all documentation of the recipient's investigation and resolution of the complaint to determine whether the recipient provided a resolution and remedy using legal standards and a process that meet the regulations enforced by OCR. If OCR finds that the recipient has met these requirements, OCR generally will not conduct its own independent investigation. If OCR finds that the recipient has not met these requirements, OCR will conduct its own independent investigation.

The Student's two written statements in May 2013 raised allegations of gender-based harassment (in addition to racial harassment, which was discussed above under Issue 1) in the form of name calling. The Student's statements indicated that he was called gender based slurs "and was the subject of a derogatory comment based on gender stereotyping (e.g., that he will show up to school wearing a dress and carrying a purse). The Student wrote that he did not report the name calling because he was afraid and embarrassed.

In response, the District told OCR that it conducted an investigation that as described did not address whether the harassing conducted had occurred, but rather was limited to talking to his classroom teachers and aides and working with teachers to enhance classroom structure. The investigation did not include the statements already received by the District from the Student's peers wherein they stated that such comments had been made in the context of the May 2013 incident. It also did not include an interview with the Student or any additional students, or examining whether the alleged harassment was taking place outside the classroom. The District did not provide OCR with any documentation of the investigation that was conducted; the complainant was not aware that the District had conducted an investigation or the outcome. OCR is also concerned by the assistant principals' comments during the District's subsequent investigation of the uniform complaint that they had received no report or complaint of discrimination involving the Student prior to the uniform complaint.

The complainant filed a uniform complaint on October XX, 2013, alleging sexual harassment by Student 6 in the following (2013-14) school year. OCR reviewed the District's investigation and resolution of the uniform complaint and determined that the District provided a resolution and remedy to the allegations raised in the uniform complaint using legal standards and a process that met the regulations enforced by OCR. In this regard, the District obtained all relevant evidence, including through interviews with administrators, teachers, aides, and students. The District's investigation did not produce any evidence that the Student was harassed by Student 6 (or by any other student) in the new school year. Despite its finding, the District identified and completed eight proactive steps to address the Student's peer relationships and the overall climate at the School, including additional student training regarding sexual and gender-based harassment and offering a peer mediation session and weekly counseling for the Student. The complainant appealed the District's findings to CDE, which upheld the District's findings and procedures.

In summary, while OCR has compliance concerns about the adequacy of the District's response to notice of harassment in May 2013, OCR's concerns have largely been addressed by the proactive steps taken by the District. No individual remedy is warranted for the Student given the actions already taken by the District that included an offer of a peer mediation session, individual counseling, and a meeting with a School administrator. Similarly, no remedy is warranted for the School given the actions taken by the District to improve the School's climate. However, OCR continues to have a compliance concern regarding the School administrators' comment that they had had never received a formal or informal complaint of

sexual harassment/gender-based harassment or discrimination from the Student prior to the uniform complaint. In order to address this concern, the District has entered into the attached Agreement that requires the District to provide training to all school administrators and to issue a written guidance to all employees on what constitutes unlawful discrimination on the basis of sex/gender and how to identify and report complaints/allegations of harassment.

Issue 3: Whether the District is in compliance with Title IX regarding: (a) the development and dissemination of notice of nondiscrimination pursuant to 34 C.F.R. § 106.9 and the designation and notice of a Title IX coordinator pursuant to 34 C.F.R. § 106.8(a); and (b) the adoption of policies and procedures to provide for the prompt and equitable resolution of complaints that comply with Title IX and the regulation pursuant to 34 C.F.R. § 106.8(b).

1. Notice of Nondiscrimination and Title IX Coordinator

Legal Standards

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation implementing Title IX (Title IX coordinator), including investigation of any complaint communicated to the recipient alleging any actions which would be prohibited by the regulation implementing Title IX.

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in any educational program or activity which it operates, and that it is required by Title IX and its implementing regulation at 34 C.F.R. Part 106 not to discriminate in such a manner. This notice of nondiscrimination must include a statement that inquiries concerning Title IX may be referred to the Title IX coordinator or to OCR and must include contact information, including the name (or title), address, and phone number for the Title IX coordinator.

Factual Findings

The District has two levels of Title IX coordinators, who are also referred to in the District as compliance officers – one at the District level and one at each school site. Until recently, the District Title IX coordinator was the Director of Assessment and Evaluation (Director). At the beginning of the investigation, OCR requested but did not receive documentation of any specialized training that was provided to school Title IX officers, aside from the general training provided to all employees, or any documentation that described or distinguished the responsibilities of the District-level from the school-level Title IX coordinator.

During the 2013-14 school year, the District told OCR that it provided notice of nondiscrimination and Title IX coordinator to students, parents, and employees in several ways, including: through District board policies that were available for public download on the District's website; through the annual "Parent/Student Rights and Responsibilities" booklet given to parents and guardians; through the annual Student Handbook given to students; through periodic school newsletters that were required to publish the District's nondiscrimination/harassment policies; though Title IX posters that were posted on campus;

through an announcement in the local county newspaper; and through a set of Annual Notices given to employees.

OCR reviewed these notices and identified several areas of noncompliance, as follows:

- The 2013-14 “Parent/Student Rights and Responsibilities” booklet directed complaints of discrimination to be filed with the Director, and provided her contact information, including her name, title, and phone number, but it did not state that the Director was also the District Title IX coordinator. It also contained an abbreviated version of the District’s sexual harassment policy that prohibited sexual harassment, but contained no reference to the Title IX coordinator or to whom complaints of sexual harassment should be addressed. The booklet did not mention that complaints of discrimination could also be filed with OCR.
- The 2013-14 Student Handbook for the School contained a sexual harassment policy that made no reference to the Title IX coordinator. The 2013-14 Student Handbook included a statement that complaints of discrimination and harassment should be filed “with the school or District,” but did not provide a name, title, or contact information. The 2013-14 Student Handbook did not mention that complaints of discrimination could also be filed with OCR.
- The 2013-14 student newsletters and Title IX posters reviewed by OCR did not state that complaints of sex discrimination could be filed with OCR.
- The 2012-13 Annual Notices given to employees contained a general nondiscrimination statement and a sexual harassment policy, neither of which mentioned or referred to the District Title IX coordinator. For example, the sexual harassment policy stated that employees should report sexual harassment to the “appropriate District administrator” or the “immediate supervisor of the accused employee,” without also stating that sexual harassment could be reported to the District Title IX coordinator or to OCR.
- The 2013-14 notice in the local county newspaper directed all complaints to be filed with the Director, who was identified by name, title, address and phone number, but the notice did not state that the Director was also the District Title IX coordinator or that inquiries or complaints could also be directed to OCR.

To update this section, on January 30, 2017, OCR reviewed the notice of nondiscrimination and Title IX coordinator available on the District website for the 2016-17 school year:

- The “Statement of Non-Discrimination” on the District website prohibited discrimination/harassment on a number of protected bases, including on the basis of sex/gender. It identified the Director, by name and title, for handling complaints of discrimination and provided her address and telephone number, but did not identify the Director as the District Title IX coordinator or refer to OCR, although it did contain a link to another webpage called “Complaint Information,” (described below) that provided this information.
- The “Complaint Information” clearly stated that the District prohibited discrimination on the basis of sex/gender, identified the Director (by name and title) as the “District’s Title IX Coordinator for Nondiscrimination” and provided her address, telephone number, and e-mail address; it stated that

complaints may also be filed with OCR with a link to OCR's website. It contained links to the District's nondiscrimination/harassment policy, sexual harassment policy, and uniform complaint procedure (UCP; described in more detail below), which all prohibited discrimination on the basis of sex/gender and identified the Director as the District's lead compliance officer, whose responsibilities included compliance with Title IX; they also identified a site compliance officer by title (in most instances, the school principal) for each school in the District, and provided the site compliance officer's address and phone number. The UCP policy stated that complaints may also be filed with OCR.

- The 2016-17 "Parent/Student Rights and Responsibilities" booklet contained a section entitled, "Non-Discrimination," which prohibited discrimination on a number of protected bases, including on the basis of sex/gender. It informed parents that complaints of discrimination should be filed with the Director and provided her name, title, and phone number. As before, the sexual harassment policy contained in the booklet failed to identify the Director as the District Title IX coordinator or indicate to whom complaints should be filed or that complaints may also be filed with OCR.
- The 2016-17 Student Handbook for the School contained a section called "Program Compliance and Complaint Procedures," which stated that complaints of harassment and discrimination may be filed with the "school or the District," or with "government agencies," but did not identify the government agencies or the school/District employee by name or title. The 2016-17 Student Handbook contained a separate section on "Sexual Harassment," which identified the assistant principal as the School's "Title IX complaint manager," and provided the assistant principal's name, title, and phone number. OCR notes that the assistant principal was not the site compliance officer identified in District board policies (the board policies identified the School principal as the site compliance officer). The 2016-17 Student Handbook did not indicate that the District has a lead compliance officer (i.e., the Director) with whom complaints may be filed or that complaints may also be filed with OCR.
- The 2016-17 Annual Notices to employees contained a section entitled, "Equal Opportunity/Non-Discrimination," which prohibited discrimination and harassment based on protected characteristics that included sex/gender. The nondiscrimination statement directed employees to contact either the Deputy Superintendent of Personnel Services (address and phone number provided) or the "Equity/Title IX Coordinator" who was identified as the Director of Student Services (address and phone number provided) to obtain procedures for reporting a complaint. The Annual Notices contained a separate section on "Sexual Harassment," which stated that sexual harassment should be immediately reported to his/her supervisor, the principal, a District administrator or the superintendent, but did not include the Director in this list or identify the Director as the District's lead compliance officer or Title IX coordinator. The Annual Notices contained a separate section on the District's UCP, which identified the Director for receiving complaints of discrimination/harassment and provided the Director's address, telephone number and email address; there was no mention of OCR in the Annual Notices.

On July 31, 2017, OCR again reviewed the District website and found that the District Title IX coordinator has changed. The District Title IX coordinator is now the District Director of Educational Services, but District board policies have not been updated with the name or title of the new District Title IX coordinator.

Analysis & Conclusions of Law

The District has policies that clearly prohibit discrimination on the basis of sex/gender in District schools and in school programs and activities. In 2013-14, while the notice of nondiscrimination was adequately disseminated, including in the packet of Annual Notices provided to employees, school newsletters and rights and responsibilities booklet provided to parents/students, and the county newspaper, the notice did not identify the Director as the District Title IX coordinator. While the 2013-14 rights and responsibilities booklet and the notice in the local county newspaper stated that complaints should be filed with the Director, it was not evident that this person was the District Title IX coordinator and the responsibilities of the Title IX coordinator as specified under Title IX were not identified. The notice in the School's 2013-14 Student Handbook and the 2012-13 Annual Notices to employees did not make any reference to the District Title IX coordinator, including that such a position existed in the District and that the Director was the District's Title IX coordinator, or alternatively, that inquiries could be made and complaints could be filed with OCR. While school Title IX coordinators were identified at the school sites themselves, they were not identified in the District notices through the distribution channels required by the Title IX regulations. In summary, the District's notice of nondiscrimination did not meet the requirements of Title IX and its implementing regulations because it did not adequately inform students, parents, and staff that the District had a Title IX coordinator, identify the Title IX coordinator by name or title, and provide notice that complaints could also be filed with OCR.

With respect to the notice provided in the 2016-17 school year available on the District website (as of January 30, 2017), OCR has identified noncompliance because the District was again inconsistent in identifying the Director as the District Title IX coordinator/lead compliance officer and in providing notice that complaints may also be filed with OCR. For example, the notice regarding the prohibition against sexual harassment contained in various publications, including the 2016-17 rights and responsibilities booklet, the 2016-17 Student Handbook for the School, and the 2016-17 Annual Notices to employees, did not identify the Director as the District Title IX coordinator or include that inquiries about Title IX could be made to OCR. In addition, some notices provided inconsistent information as to the identity of the relevant Title IX coordinator. For example, the School's 2016-17 Student Handbook identified the assistant principal as the site Title IX officer, while the District board policies identified the school principal as the site compliance officer. In another example, the District's 2016-17 Annual Notices to employees identified the Director of Student Services (and not the Director of Assessment and Evaluation) as the "Equity/Title IX Coordinator." Furthermore, the District's website as of July 31, 2017, shows that the District Title IX coordinator has been changed to the Director of Educational Services, but the District board policies available on the District website have not been updated with the name/title of the new Title IX coordinator.

Additionally, at all times during this investigation, the District has had two levels of Title IX coordinator/compliance officers – one at the District level and one at the school level. OCR has compliance concerns with respect to whether school site compliance officers have received sufficient training to carry out their responsibilities and with respect to how the District Title IX coordinator ensures coordination of the District's efforts to comply with the regulations.. The District did not provide OCR with documentation of any additional Title IX training that was provided to site compliance officers, and none of the documents reviewed by OCR described or distinguished the responsibilities of the District-level from the school-level compliance officer.

To resolve the noncompliance and compliance concerns identified above, the District has entered into the attached Agreement that requires the District to provide training to all compliance officers specific to their Title IX responsibilities and to review all of its current publications where the notice of nondiscrimination

appears and to revise the publications as needed to ensure that they provide notice of the current District Title IX coordinator where appropriate.

2. Complaint Procedures

Legal Standards

The regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires that a recipient adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by the regulation implementing Title IX. OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to file complaints alleging harassment by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects.

Factual Findings

OCR reviewed three sets of District policies for this section – the District's nondiscrimination/harassment policy (N/H Policy), sexual harassment policy (SH Policy), and uniform complaint policy (UCP). The District revised these policies several times during the investigation of this complaint, last revised in October/November 2016. This section reviews the policies that were in effect at the start of the investigation in the 2013-14 school year and the current policies publicly available on the District website (as of July 31, 2017).

2013-14 School Year

The District's N/H Policy, at BP 5145.3 (adopted July 8, 2013), prohibited discrimination and harassment on a number of protected bases, including sex and gender, "at any District school or school activity." The policy designated the Director (by title) as the coordinator for nondiscrimination to handle complaints of discrimination, and provided the Director's address and phone number. The policy also stated that all complaints of discrimination would be processed under the District's uniform complaint procedures.

The District's SH Policy, at BP/AR 5145.7 (adopted in August 2013), required the District to investigate allegations of sexual harassment and to take prompt and appropriate actions to end the harassment and address its effects on the victim. The SH Policy contained a grievance procedure, and in conflict with the District's N/H Policy that required all discrimination complaints to be handled through the UCP, the SH Policy stated that all "behavior prohibited by the District's Nondiscrimination/Harassment Board Policy" would be handled through the grievance procedure stated in the SH Policy; the SH Policy made no reference to the District's uniform complaint procedure. The grievance procedure specified in the SH Policy required the school site to conduct an impartial investigation and to issue a written report to both parties within 30 days (extension allowed for good cause) that included the decision, the reasons for the decision,

a summary of the steps taken during the investigation, and any corrective actions required to address the harassment and to prevent further harassment. No appeal process was specified.

The District's UCP policy, found at BP/AR § 1312.3 (adopted February 2013), provided clear information on filing a complaint, the investigation of the complaint, and the issuance of a final written decision. Specifically, the UCP required the Director to conduct an impartial investigation by collecting all documents and interviewing all relevant witnesses and to issue a written decision within 60 days (unless extended by written agreement with the complainant) to the complainant containing the findings of fact, evidence gathered, conclusions of law, disposition of the complaint, rationale for such disposition, corrective actions if warranted, and notice of the complainant's right to appeal. Appeals were to be filed with the California Department of Education.

Current Policies

The District's current N/H Policy (revised Oct. 10, 2016) prohibits discrimination/harassment against "any student" on the basis of sex. The policy expressly applies to off campus conduct that "may have an impact or create a hostile environment at school." It states, "[r]egardless of whether a complainant complies with the writing, timeline, and/or formal filing requirements, all complaints alleging unlawful discrimination . . . shall be investigated and prompt action taken to stop the discrimination, prevent recurrence, and address any continuing effect on students." The N/H Policy identifies the Director as the "District Lead Compliance Officer" to coordinate compliance for all federal and state civil rights laws, including Title IX, and this person is also the responsible employee to handle complaints under the UCP related to discrimination, including sex discrimination; in addition, it identifies a site compliance officer for every school in the District (typically the school principal) and provides their contact information.

The District's current SH Policy (revised Oct. 10, 2016) prohibits sexual harassment of students "by anyone," "at school or at school-sponsored or school-related activities," including a student who experiences "off-campus sexual harassment that has a continuing effect on campus." Students may report sexual harassment to his/her teacher, the principal, or any other school employee. A school employee who receives a report or observes an incident of sexual harassment is required to notify the school principal or the District compliance officer within one school day, regardless of whether the alleged victim files a complaint. The SH Policy requires an investigation utilizing the uniform complaint procedures. The SH Policy states that "every sexual harassment allegation that involves a student . . . shall be investigated and prompt action shall be taken to stop any harassment prevent recurrence, and address any continuing effects on students," including taking appropriate interim measures. The SH Policy identifies the same District compliance officer and site compliance officers as in the N/H Policy.

The District's current UCP policy (revised October and November 2016) applies to any complaint alleging unlawful discrimination against any person in District programs and activities, including discrimination on the basis of sex. Complaints must be filed no later than six months from the date of occurrence or from when the complainant first obtained knowledge of the facts of the alleged discrimination (can be extended up to 90 days). Within 10 business days of receiving a complaint, the compliance officer will begin an investigation that includes collecting all available documents, reviewing all available records, individually interviewing the alleged victims, alleged offenders, and other relevant witnesses, and visiting any reasonably accessible locations, and will issue its decision in writing to the complainant and respondent within 60 calendar days of the District's receipt of the complaint (unless the complainant agrees in writing to an extension of the timeline; the District will inform the respondent of any extension). The decision will

include findings of fact, conclusions of law, the rationale for such disposition, corrective actions to address the allegations (such as corrective actions imposed on the individual found to have engaged in the conduct; individual remedies offered or provided to the subject of the complaint; and systemic measures to eliminate a hostile environment and prevent recurrence); and any follow-up procedures to prevent recurrence or retaliation and for reporting any subsequent problems. Either the complainant or respondent may file a written appeal of the District's decision to the CDE within 15 days of receiving the District's decision. The UCP also states that complaints of discrimination may be filed with OCR within 180 days of the alleged discrimination and provides OCR's web address. The UCP identifies the same individuals as in the N/H Policy and SH Policy as the District and site compliance officers and provides their complete contact information.

As noted above, the District policies have not been revised to show that the District has a new Title IX coordinator (the Director of Educational Services).

Analysis & Conclusions of Law

Prior to the revisions made to District policies in October/November 2016, the District policies provided for two distinct grievance procedures for responding to complaints of sex discrimination that were in conflict with each other. The N/H Policy and the UCP required an investigation using the UCP grievance procedure, while the SH Policy required an investigation under its own procedures. Students did not have adequate notice of which procedure would be used to address reports and complaints of discrimination or harassment on the basis of sex because the policies did not cross-reference each other or provide information about how the District would choose the applicable procedure. Furthermore, neither grievance procedure addressed whether it applied to discriminatory acts carried out by employees and third parties and to off-campus acts in evaluating whether there is a hostile environment on campus or in an off campus education program or activity. Additionally, the UCP required written notice of outcome to be issued to complainants only (and not to respondents), the appeal right was not equitably provided because only complainants could appeal, and the policies lacked an assurance that the District would take steps to prevent recurrence of the harassment and to correct its discriminatory effects on the complainant and others as appropriate. Accordingly, OCR found that the policies and procedures in effect during this time period were not in compliance with Title IX and its implementing regulations.

The District revised its N/H Policy, SH Policy, and UCP in October/November 2016, eliminating the conflict and confusion arising from the dual grievance procedures described above; now, all complaints of sex discrimination are investigated and resolved through the UCP. The revised policies require dissemination to students, parents, and employees; the N/H Policy and SH Policy explicitly address off-campus conduct that may create a hostile environment on campus – while the UCP does not explicitly address off-campus conduct, it is worded broadly to encompass off campus conduct since it applies to any complaint of unlawful discrimination against any person, without any qualifiers or limitations; N/H and SH policy require an investigation of sex discrimination complaints using the UCP grievance procedure, which provides for an adequate, reliable, and impartial investigation and reasonably prompt timeframes for major stages of the grievance process (60 days); the UCP requires written notice of the outcome and appeal rights to be provided to both parties; and all three policies contain an assurance that the District will take steps to prevent recurrence of the harassment and correct its discriminatory effects on the complainant and others, if appropriate. Accordingly, OCR found that the October/November 2016 policies are in compliance with Title IX and its implementing regulations.

As discussed above, OCR has a compliance concern because the District policies do not reflect the new District Title IX coordinator. This concern is resolved by the attached Agreement that requires the District to review its publications and to make changes, as needed, to provide notice of the Title IX coordinator that meet the regulations.

Issue 4: Whether the District disciplined the Student differently based on race compared to a Latino student involved in the same incident in violation of 34 C.F.R. § 100.3(a) and (b).

Legal Standards

The Title VI regulations, at 34 C.F.R. § 100.3(a) and (b), provide that a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. To determine whether a school district has discriminated against a student on the basis of race in the discipline process, OCR looks at whether there is evidence that the student was treated differently than students of other races under similar circumstances, and whether the treatment has resulted the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. To find a violation, the preponderance of the evidence must establish that the school district's actions were based on the student's race.

Factual Findings

As described above under Issue 1, the Student, who is African American, was involved in an incident with a Latino student (Student 2) on May XX, 2013. The Student was suspended for five days, while Student 2 was not sanctioned. The complainant alleged to OCR that the Student was disciplined more severely than Student 2 based on race.

As discussed above, the District investigated the incident, which included obtaining written statements from six individuals, including the two students involved in the incident. Four of the six individuals (Student 2, Student 3, Student 4, and the campus supervisor) described the Student as initiating the physical attack. According to the District, the Student hit Student 2 in the face multiple times, causing a cut above the right eye, and kicked him in the chest. The local police department was called and the Student was arrested for assault and subsequently released to his parent.

The District addresses student behavior using its Progressive Discipline Matrix (Matrix). OCR reviewed the Matrix, dated May 28, 2014 and June 5, 2015. The Matrix lists offenses under the California Education Code (EC) 48900³ for which a student may be suspended or expelled, and for each infraction, provides examples of the covered behavior and interventions/disciplinary action appropriate for first, second, and repeated infractions. The Matrix also provides further explanation and examples of expellable offenses under EC 48915. The Matrix notes that while a number of violations are listed under both EC 48900 and EC 48915, EC 48915 violations are "reserved for more serious cases and carry an expectation that expulsion will be considered/recommended even on a first offense."

³ Specifically, EC 48900 (a)-(r), EC 48900.2 & 212.5, EC 48900.3, EC 48900.4, and EC 48900.7.

A review of the Matrix shows that racial or sexual name calling could violate one or more of the following: EC 48900(r) (Bullying), EC 48900.4 (Harassment), and EC 48900.2 & 212.5 (Sexual Harassment). The Matrix shows possible disciplinary consequences that include a one-to-five day suspension (no recommendation for expulsion) for a high school student who violates one of these sections for the first time. The Matrix also shows that a high school student who engages in a fight that results in minor injuries may be charged with violating EC 48900(a)(2) (Willfully Used Force or Violence Upon Another Person Except in Self-Defense); a possible disciplinary consequence for a first offense is a five-day suspension and recommendation for expulsion. The Matrix states that in cases of serious injury, the student should be cited for fighting under EC 48915(a)(1) (Battery with Serious Injury), and recommended for expulsion.

Following the May XX, 2013 incident, the Student was charged with causing serious injury and cited with violating EC 48915(a)(1), along with EC 48900(k) (General Disruption). Consistent with the disciplinary consequence for violating EC 48915(a)(1) as noted in the Matrix, the Student was suspended for five days and recommended for expulsion. The District told OCR that Student 2 was not suspended because witness statements showed that he was walking away when he was beat up; the District did not charge Student 2 with any violations of the EC and took no disciplinary action against Student 2 for the racial and sexual slurs.

A manifestation determination meeting for the Student was held on May XX, 2013. The team determined that while the Student's behavior was not a manifestation of his identified disability, the Student may have had unidentified, additional disabilities that impacted his behavior. Expulsion proceedings were suspended pending a functional behavioral analysis. The team also offered the support of a special education aide and weekly counseling for the Student; the complainant accepted the behavioral assessment plan and the special education aide, but did not accept the weekly counseling. A functional behavioral analysis was conducted in October 2013, and a behavior intervention plan was developed and put in place for the Student.

A review of Student's disciplinary record for the 2012-13 school year shows that he had eight disciplinary referrals prior to the May 2013 incident in question, including a five-day suspension in January 2013 for a fight with a different Latino student (not Student 2); the District investigated the incident and concluded that it had been a mutual fight, so both students received the same consequence of a five-day suspension. A behavior contract was developed for the Student following the January 2013 incident. The other referrals were for tardies and general disruption.

According to the District, Student 2 was also an individual with a disability and was receiving special education services at the time of the May 2013 incident. Student 2 had eight disciplinary referrals in 2012-13 prior to the May 2013 incident, for tardies, general disruption, and truancy.

Analysis & Conclusions of Law

In assessing whether the Student was subjected to different treatment, OCR first looks at whether the students are similarly situated, including whether the conduct they engaged in was comparable, any history of prior offenses, mitigating circumstances, and how District policies categorize the conduct with respect to both the offense and the sanction. Here, OCR found that the Student and Student 2 were not similarly situated because they did not engage in comparable conduct during the incident in question and they did not have comparable disciplinary histories.

While Student and Student 2 shared some common characteristics (e.g., they were both individuals with disabilities, were subject to the same behavioral expectations and school discipline policies, and they each had eight disciplinary referrals prior to the May XX incident), their conduct during the incident in question was not similar or comparable. The witness statements collected by the District showed that, while their behavior at the start of the incident may have been similar – both students had engaged in harassing behavior towards another student – the witness statements were consistent in describing the Student as the one who then initiated the physical fight or assault against Student 2. Witnesses identified the Student as the one who threw the first punch and then continued to hit Student 2 and kick him in the chest, causing injury to Student 2. The District identified the Student's offense as EC 48915(a)(1), Battery with Serious Injury. OCR notes that the District did not provide a reason for why Student 2 was not disciplined for the alleged derogatory comments; nevertheless, OCR notes that even if the District should have taken action to address Student 2's conduct, the Matrix provides that name calling, even on the basis of a protected category, is a less severe offense than a physical assault resulting in serious injury. According to the Matrix, for a first time offense, a high school student can be expelled for causing physical injury (either under EC 48900(a)(2) or EC 48915(a)(1)), while the same student cannot be expelled for name calling that constitutes bullying or harassment (under EC 48900(r), EC 48900.4, or EC 48900.2 & 212.5). In addition, OCR found that the Students were not similarly situated because the Student had a prior incident involving physical assault, while Student 2 did not.

OCR considered other evidence to support its conclusion that the Student's discipline for the May XX incident was not based on race. First, OCR reviewed the separate incident in which the Student was previously involved in a fight with a different Latino student in January 2013. For that incident, both students received the same discipline (a five-day suspension) because the District's investigation revealed that the fight had been mutual. The District's handling of this fight between the Student and another Latino student, where students of different races were given equal punishment for a similar offense, provides further evidence that the Student's discipline for the May XX incident was due to the severity of his conduct in physically attacking Student 2 and not due to his race. Second, a review of the disciplinary histories of the Student and Student 2 show that when they had committed the same offense, their disciplinary consequences were comparable. For example, for tardies, they both received detentions, until the third tardy, at which point they both received a Saturday school. For truancy, they both received detention, and for general disruption, they both received detention, counseling, and/or parent conference that culminated in a one-day on-campus suspension for repeat offenses. The fact that Student and Student 2 were given the same punishment for the same type of offense on prior occasions further supports the inference that the Student was not treated more severely than Student 2 for a fight in May 2013 based on race. Accordingly, OCR found insufficient evidence of noncompliance with Title VI and its implementing regulation with respect to this issue.

Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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.

OCR will monitor the implementation of the Agreement until the District is in compliance with the statute(s) and regulation which were at issue in the case. When fully implemented, the Agreement is intended to address all of OCR's violation and compliance concerns in this investigation.

Please be advised that the District may not harass, coerce, intimidate, retaliate, 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 another complaint alleging such treatment.

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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact David Howard or Jenny Moon at the San Francisco OCR office at (415) 486-5555.

Sincerely,

/s/

Kana Yang
Acting Team Leader

Enc.