



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200  
SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

April 28, 2016

Bryon Schaefer, Ed.D.  
Superintendent  
Kern High School District  
5801 Sundale Avenue  
Bakersfield, CA 93309

(In reply, please refer to OCR Docket Number 09-14-1338.)

Dear Superintendent Schaefer:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Kern High School District. The complainant alleged that the District discriminated against a student on the basis of sex and gender.<sup>1</sup> Specifically, OCR investigated the following issues:

- (1) Whether the Student was subjected to sexual and gender-based peer harassment and the District failed to provide a prompt and equitable response to notice of the harassment, and
- (2) Whether the Student was subjected to different treatment because of gender non-conformity when the Student received harsher discipline than the other student involved in the same incident.

OCR investigated the complaint under the authority of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits discrimination on the bases of sex and gender in programs and activities operated by recipients of Federal financial assistance. The District receives funds from the Department and is subject to Title IX and the regulation.

OCR began gathering evidence through interviews of the Student and Complainant's witness, and reviewing documents and other information provided by the witnesses and by the District. Prior to the conclusion of the OCR investigation, the District, without admitting to any violation of the law, expressed an interest in voluntarily resolving Issue 1. Under Article III, Section 302 of OCR's Case Processing Manual, a complaint may be resolved before the conclusion of an investigation when the recipient expresses an interest in such a resolution and agrees to a resolution that is aligned with the complaint allegations and consistent with applicable regulations. On April 27, 2016, the District provided OCR with a signed Agreement to Resolve

---

<sup>1</sup> OCR previously provided the District with the identity of the complainant and student. We are withholding their names from this letter to protect their privacy.

(Agreement). As such, OCR is closing the investigative phase of Issue 1 as of the date of this letter.

With regard to Issue 2, after careful review of the information gathered in the investigation, OCR concluded that the District was in compliance with Title IX. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

*Issue 1: Whether the Student was subjected to sexual and gender-based peer harassment and the District failed to provide a prompt and equitable response to notice of the harassment.*

### **Legal Standards**

The Title IX implementing regulations, at 34 C.F.R. §106.9, require a recipient to implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary students, employees, sources of referral of applicants for admission and employment, and unions or professional organizations that it does not discriminate on the basis of sex in its educational programs and activities. The notification must also identify the responsible employee designated under 34 C.F.R. §106.8(a) as the Title IX Coordinator.

The Title IX implementing regulations, at 34 C.F.R. §106.8(b), require a recipient to adopt and publish grievance procedures providing for a prompt and equitable resolution of student and employee complaints alleging sex discrimination.

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 complaints alleging discrimination 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 discrimination and to correct its effects.

### **Facts Gathered to Date**

The following facts gathered to date are relevant to OCR's analysis.

- When OCR initiated its investigation of this complaint, the Student last attended Central Valley High School – a continuation school in the District. At the time of the Student's interview with OCR, he had decided not to complete his education with the District.
- The Student informed OCR that he was bullied and harassed by other students based on his sexual orientation and failure to meet the gender norms of his peers. He informed OCR that

he was called derogatory names based on his appearance and sexual orientation, and was subjected to verbal taunts of a sexual nature. The Student informed OCR that he was getting into physical fights with other students who were harassing him, which led to his being disciplined and in February, 2014 expelled.

- The Student informed OCR that he felt that teachers had heard some of the verbal harassment, but did nothing to stop it. He also stated that he told school staff about the harassment, but he could not tell OCR who he told. The Student also stated that he provided notice of the harassment to District officials at his February, 2014 expulsion hearing, where he told the expulsion panel that he experienced harassment at the school based on how he dresses, acts, and speaks.
- During the course of OCR's investigation, the District went through a leadership transition and informed OCR that it was in the process of identifying and reviewing its Board Policies and Administrative Regulations that address harassment. The District maintains policies and administrative regulations that provide for a uniform complaint procedure to address complaints of discrimination and harassment (Board Policy 1312.3), address sexual harassment (Board Policy 5145.7), address discrimination and harassment (Board Policy 5145.3) and address sexual harassment related to personnel (Board Policy 4119.11), but the District informed OCR that they were reviewing the existing policies and intended to update their corresponding Administrative Regulations.
- The District also provided OCR with internal guidance documents to personnel on how complaints of discrimination and harassment on the basis of sex should be addressed. OCR identified inconsistencies between the formal policies and between the internal guidance with respect to the name of the applicable grievance procedure, the point(s) of contact for bringing a complaint of discrimination or harassment, the appropriate channel for reviewing a complaint of sex or gender harassment if it was brought by personnel or against personnel, and the appropriate procedure for addressing complaints based on sex, sexual orientation, gender, or gender identity or expression.
- The District informed OCR that it first learned that the Student experienced harassment at the February, 2014 expulsion hearing. The District informed OCR that after the evidentiary hearing, the Student, his family and the Student's attorney were informed of the Uniform Complaint Procedure should the Student want to file a complaint about the harassment. The Student did not submit a complaint.
- In response to the Student's report of harassment, the District informed OCR that the School's principal went to the Student's school to speak "with the Gay students about their experiences at Central Valley." The principal, in a May 9, 2014 letter to the Kern County Board of Education, stated that these students were identified based on School staff knowing they were gay. The principal interviewed two students (one male and one female student). It is not clear to OCR whether the two students interviewed had an option not to

participate in this informal survey and/or whether they were told how the information was going to be used.

- The District also provided OCR with a one page summary of a survey administered to the students at Central Valley High School. The District received 61 student responses and concluded that a hostile environment did not exist. The following is a summary of some of the relevant responses:
  - With respect to the question about whether students felt they were treated fairly regardless of race and sex, 37 students responded that they strongly agreed that they were treated fairly, 16 students responded that they were not sure if they were treated fairly, two students responded that they disagreed that they were treated fairly, and two students responded that they strongly disagreed that they were treated fairly.
  - 25 students responded that they did not feel comfortable reporting being bullied on campus.
  - 33 students responded that they felt that a staff person would help them if the student reported a problem, but 24 students stated they were not sure if a staff person would help them.

### **Analysis**

Based on the policy guidance documents provided in the District's data response, there are discrepancies between how District designees are directed to investigate complaints of discrimination and harassment. The guidance and other forms of notice of the existing policies discuss different, multiple, and overlapping processes to review complaints of discrimination, harassment, and complaints of discrimination and harassment. The various policies and procedures provided to OCR also contain conflicting information about the appropriate protocol for reviewing a Title IX complaint of sex or gender-based harassment. The guidance does not provide clear and consistent direction for staff, parents/guardians or students about how to report sex-based discrimination and harassment and which process will be used and when and how, if at all, the Title IX coordinator will be involved. OCR also had concerns about the scope of the investigation conducted related to the Student's oral complaint and whether the School had promptly and equitably investigated and resolved the issues raised. As described above, and in the conclusion below, the District voluntarily entered into an agreement to resolve these concerns with OCR.

*Issue 2: Whether the Student was subjected to different treatment by receiving harsher discipline than the other involved student in the same incident because of his gender non-conformity.*

### **Legal Standards**

Under the Title IX regulations at 34 C.F.R. §106.31(a) and (b), a district may not treat individuals differently on the basis of sex with regard to any aspect of services, benefits, or opportunities it provides. Section (b) states that a district may not, on the basis of sex, subject any person to

separate or different rules of behavior, sanctions, or other treatment in providing an aid, benefit, or service.

To determine whether a student has been discriminated against on the basis of sex under Title IX, OCR looks at whether there is evidence that the student was treated differently than students of the other sex under similar circumstances, and whether the treatment has resulted in the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the district's actions were based on the student's sex.

### **Facts**

- The Student informed OCR that on December 3, 2013, his peer (student B) called him a "faggot" and threatened to beat him up. The Student informed OCR that student B is a heterosexual male who conforms to gender norms. The Student and student B got into a physical fight that day. The Student said he did not start the fight with student B. He stated that he approached student B thinking that they would talk things out, but instead the situation became aggressive.
- The District recommended that the Student be expelled for his participation in the fight, and the Board agreed to expel the Student after an evidentiary hearing held in February, 2014. Student B was suspended for his participation in the incident.
- The District informed OCR that they conducted an investigation of the December X, 2013 fight that led to the Student's expulsion hearing. A written witness statement stated that the Student was observed calling student B a "faggot" and "gay," and threatened to "take care of" student B. The witness testified at the February evidentiary hearing that the Student frequently used those terms with other students. On January 23, student B's written statement stated that he would hear the Student "tell people that they were faggots and gay and when people would tell him that stuff back he would get mad..."
- The District stated that they also used evidence from the Student's social media posting a video that showed the Student as the aggressor (holding Student B down and punching him) and claiming that he beat student B up.
- During the hearing, the Student testified that student B called him a "faggot" and that student B threatened to assault him. The Student asserted that his behavior was a response to the School being a hostile environment for gay students. The District stated that the Student was asked to provide details to support this assertion, but neither the Student nor his attorney provided additional information. The District stated that the Student did not present, and the School personnel involved in addressing the fight did not recall, any prior

information about whether the Student informed School personnel that he was experiencing harassment.

- The District informed OCR that the Student received harsher discipline than student B for the same fight in December, 2013 because the Student had a much lengthier discipline history than student B – including two prior transfers to the County community school program pursuant to other expulsions. The District provided OCR with the discipline history of both students confirming their position.

### **Analysis**

The evidence showed that the Student received harsher discipline for the December, 2013 fight than the other involved student (student B) who is gender conforming. The District's non-discriminatory reason for providing Student with harsher discipline was that the Student had a longer history of discipline and was the instigator of the December physical fight. The District provided OCR with the discipline history of both students confirming the difference in their discipline history. The Student's social media showed that the Student also took credit for winning the fight indicating that it was mutual, and that he was not acting in self-defense. This evidence supported the District's non-discriminatory reason for providing the Student with harsher discipline that was not a pretext for discrimination under Title IX. OCR concluded that there was insufficient evidence to support a conclusion of noncompliance with respect to Issue 2.

### **Summary of Conclusions and Resolution**

As described above with respect to Issue 1, the District, without admitting to any violation of the law, informed OCR of its interest in voluntary resolution of this complaint. The resolution agreement describes steps the District will take to retain a consultant(s) to support the District in addressing discrimination and harassment that might be experienced by the District's gender non-conforming youth, including but not limited to lesbian, gay, bisexual, and transgender youth; revise its Administrative Regulations and complaint procedures that apply to sexual and gender-based harassment complaints consistent with Title IX and its implementing regulations; provide professional development to personnel on issues related to responding to gender-based harassment; and administer a survey instrument to evaluate, and if necessary address, whether and how the District community experiences sexual or gender-based harassment.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Student concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the agreement until the District is in compliance with Title IX and the regulations at issue in the case.

OCR's determination in this matter should not be interpreted to address the Recipient's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

Please be advised that the Recipient may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Tammi Wong, at (415) 486-5555.

Sincerely,

/s/

James M. Wood  
Team Leader

CC: Sloan R. Simmons, Lozano Smith