



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

January 23, 2019

By Electronic Mail

Terry Oestreich
Superintendent
Plumas Unified School District
1446 East Main Street
Quincy, California 95971

(In reply, please refer to case no. 09-17-1116.)

Dear Superintendent Oestreich:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Plumas Unified School District (District). The Complainant¹ alleged that the District discriminated against her daughter (Student) on the basis of race. OCR investigated the following issues:

1. Whether the Student was subjected to harassment based on race when she was called derogatory names by classmates, and the District failed to respond appropriately and effectively to notice of the harassment; and
2. Whether the Student was subjected to different treatment on the basis of her race when she was suspended for an altercation at school, but her white peer was not.

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, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance. The District receives funds from the Department and is subject to Title VI and the regulation.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR concluded that the District violated Title VI with regard to Issue 1. OCR also determined that there was insufficient evidence that the District

¹ OCR previously provided the District with the identity of the Complainant and the Student. We are withholding their names from this letter to protect their privacy.

violated Title VI with regard to Issue 2. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

Issue 1: Whether the Student was subjected to harassment based on race when she was called derogatory names by classmates, and the District failed to respond appropriately and effectively to notice of the harassment.

Legal Standard

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 regulations 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 -- severe, persistent, or pervasive -- 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, reasonable, timely, and effective responsive action that is within its authority to end the harassment, eliminate any hostile environment that had 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 if it fails to respond adequately. Once the district has notice of harassment, the responsibility to take appropriate, timely, responsive, 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.

OCR evaluates the appropriateness of the responsive action by assessing whether it was timely and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must timely 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.

Other actions may be necessary to ensure a nondiscriminatory educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Facts

During the 2016-17 school year, the Student was in the XXXXXX grade at a District secondary school (the School). According to data provided by the District, during that year the School enrolled XXX students. Ninety-one percent of the students at the School were white; one student was identified as African American. According to California Department of Education data, five students were identified as mixed race. The Student is mixed race, African American and white.

The Student transferred into the School at the beginning of the 2016-17 school year with an individualized education program (IEP), which identified her disability as XXXXXXXXX XXXXXXXXXXXX. She was assigned for the majority of her instruction to the XXXXXX XXXXXXXXXXXX XXXXXXXX X XXXXXXXX XXXXXXXXXXXX XXXXXXXX XXXXXXXX XX XXXXXXXX XXXXX XXXXXXXX XXX XXXXX XXXXXXXX XXX XXXXXXXX XXXX XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXX XXXXXXXX.² She left the District at the end of the 2016-17 school year and enrolled in X XXXXX XXXXXXXX XXXXXXXX.

District and School Policies and Procedures

The District has adopted a board policy prohibiting bullying and requiring the District and schools to adopt strategies for preventing bullying. The policy states that students are “encouraged” to notify school staff when they, or another student, are being bullied. Complaints of bullying are to be investigated and resolved in accordance with site-level grievance sexual harassment grievance procedures as set forth in an Administrative Regulation (AR) concerning sexual harassment. The policy does not specifically mention race-based bullying or harassment. The AR refers only to sexual harassment, but requires an investigation resulting in a written report that is presented to the complaining student and the person accused. It also requires the principal, within two weeks after receiving a complaint, to determine whether the student who complained has been further harassed.

The District has also adopted a Bullying, Harassment, or Intimidation Reporting and Documentation Protocol, which requires staff members who become aware of bullying,

² X---paragraph redacted---X.

harassment, or intimidation attempts to immediately notify the principal through a documented referral for discipline. The protocol defines bullying, harassment or intimidation as intentional verbal, physical or written conduct that creates a hostile environment and is motivated by a personal characteristic, including race; or is threatening or seriously intimidating. The principal is required to conduct an investigation, document investigation findings, and create an action plan, and reintegration support plan on a Bullying, Harassment or Intimidation Investigation Form. He/she is then expected to work with available school staff to develop a plan of support for the victim and communicate the plan to the impacted party and his/her parent. He/she is also expected to develop a plan of support and supervision for reentry of the respondent and a plan of support and supervision for identified impacted party(ies).

The District Uniform Behavior Expectations document categorizes the use of racial slurs as a “level one” offense, for which suspension or alternative consequences may be imposed. The discipline matrix included in this document lists consequences for “use of slurs either verbally or in writing based on race, religion, ethnic background, or nation origin...” The penalty for a first offense is “alternative consequences to suspension”, for a second offense, a one to two day suspension, and for a third offense, a three to five day suspension and possible recommendation for the alternative education program or for expulsion.

The School principal informed OCR that, in general, when harassment is brought to his attention, he talks to the student who is accused and explains the process, which begins with a warning and then proceeds to suspension for a subsequent offense. He stated that, because he knows the parents of all of the students at the School, they generally respond honestly. He stated that he consistently follows the District discipline matrix in responding to all referrals, including those for racial harassment.

Chronology of Events

The Student informed OCR that she was called racial names throughout the year of her enrollment at the School. She said that students called her a “N---”, a frizzy haired circus clown, “mop head”, gorilla, “Rafiki” (a baboon character in *The Lion King*), and other race-based names. As described further below, School records show that it had notice of racially harassing name-calling by peers towards the Student by at least October XX, 2017. However, the Student stated that, almost on a daily basis, students called her names or made gorilla noises at her in the school hallways. She said the harassment was worst in XXX XXXXXXXXXXXX classroom, where all of the other students were white, but that it also occurred in the halls and in other classrooms. She stated that, all together, about ten to twenty students called her names over the course of the year. Most of the time, teachers were not present when this occurred, but she believes that some of her teachers witnessed the name calling.

The School principal informed OCR that every time he received notice that other students had used harassing language to the Student, he followed the established process, by warning the students and, the one time that the behavior recurred, by suspending the offending student.

He stated that, prior to the 2016-17 school year, he had never needed to take steps beyond warning students in order to stop any harassment that was reported to him.

The Student told OCR that she talked to the principal frequently about her treatment by other students, beginning in September 2016. She stated that, after a while, she stopped telling the principal about new incidents because she believed he did not do anything in response. She said that, instead of reporting the comments, she would fight or run out of the classroom and get in trouble. She said that when she got in trouble for lashing out at other students when they called her names, she did not believe he was receptive to her attempts to explain.

School records show that the Student complained to school staff as early as September XX, 2016, that one classmate (Student D) was making derogatory remarks about her on social media (e.g. "that bitch is going to get what she deserves") and that another student (Student C) was spreading rumors that she had been arrested for breaking windows. There is no record of a response to this report.

The principal informed OCR that he created an ongoing summary of his interactions with the Student, which he updated as incidents occurred. According to this summary, on October XX, 2016, the Student was brought to the office by a teacher for using profanity in class. The summary states that the Student told the principal that she had been reacting to other students calling her a clown, and that she had witnesses to this behavior. The principal responded by explaining to her "that she is the common denominator in these incidents on a daily basis." The Student informed OCR that on the day in question, other students were calling her a clown, and an "Afro circus," because of her Afro. The Student received detention periods as a consequence of this referral.

On October XX, 2016, the XXXXXXXXXXXX teacher referred a student (Student A) for discipline for directing remarks that he characterized as "racial slurs" (e.g. frizzy haired circus animal) at the Student, even after the teacher told him multiple times to stop. Student A was assigned after-school detention. The Student was referred on the same day for calling a white student racial names (cracker, honky, white boy, etc.). She was also given detention. There was no written record of further investigation of either incident.

According to the principal's summary, on October XX, 2016, the principal told the Student to "shut up" after hearing her shout "f—you" to another student (Student B) from the football field. The account states that the Student started to provide an excuse, but that he cut her off, saying "I didn't ask for your opinion or your excuses, you just do what I tell you." Later that day, Student B was referred to the principal for using abusive language in XX XXX class that she shared with the Student. The School obtained written statements about the events of the day from the Student, Student B, and three other students. According to these statements, during the lunch period, when the students were on the football field, Student B had kicked a ball, which hit the Student, who told her to stop. Student B then told the student "go back to Africa you hoe ass N---." One of the statements states that the Student responded by yelling "f--- you" at Student B. According to the accounts of both the Student and Student B, in XXX class

later that day, Student B again called the Student a N----. Student B was assigned detention periods in connection with this incident and required to complete a written assignment.

On November X, 2016, the XXXXXXXXXXXX XXXXX teacher again referred Student A for calling the Student a gorilla. Student A was assigned an hour work detail and, according to the referral form, was told that the next referral for racial slurs would result in suspension.

The Complainant informed OCR that she removed the Student from the School during December 2016 and January 2017 because of the harassment she was experiencing. The Student confirmed that she left the School "because of what they [other students] were doing." The Complainant attempted to enroll the Student XXX XXX XXXXXXXX in a different school district; when this was unsuccessful, she returned to the School.

The Student informed OCR that the harassment increased after she returned to the School on approximately February X, 2017. On February X, 2017, the XXXXXXXXXXXX XXXXX teacher referred a student (Student C) for calling the Student a gorilla. The referral slips says that Student C had been warned about this behavior, "and is now on step 2". There is no written record of an investigation of this incident, but Student C was suspended.

On February X, 2017, the Student completed an incident report stating that Student A and another student (Student E) were calling her fat and making jokes about her race. She stated that Student E called her "fat, N----", that she left the room crying, and that "I'm sick of them talking about race". The report also stated that two students warned her not to tell, and said that they would make a riot to "free Student C". There is no written record of any investigation of her report, but according to notes on the report, both boys were to be put on step one of the 48900(k) protocol. Discipline reports confirm that both students were given warnings, pursuant to "step 1 of harassment policy."

On March X, 2017, the XXXXXXXXXXXX XXXXX teacher referred a student (Student F) for calling the Student "Simba" and telling her she must have fallen out of a tree when she came into class with an ice pack on her knee. According to the discipline record notes, Student F admitted to having used racial slurs to the Student before, "but not since she returned to school". Student F received a warning for the March X incident.

The Complainant informed the superintendent by email on March X, 2017 that the Student had been "approached from other children in a racist manner" and was referred for discipline when she left the classroom in response to this behavior, instead of being provided a safe place to go.

The Complainant sent an email to the principal on March XX, 2017, complaining that the Student had been called racist names, and that another student had called the Student "Rafiki". The email noted that the Student was no longer being called "gorilla", but was instead called Rafiki. The email also raised concerns that the Student was referred for discipline when she ran out of the classroom when she "was called racist names [and] didn't know how to cope and deal with it."

The principal informed OCR that he talked to all of the Students in the XXXXXXXXXXXX class about the Rafiki incident, and had pulled the Student aside for a separate conversation about it. He stated that she told him the term was not offensive and that they were just “screwing around.” He reported replying that it was not appropriate to do so. The Student remembered talking to the principal about being called Rafiki, but denied telling him the students were only joking around.

OCR also reviewed evidence that the Student accused teachers and classmates of being racist, and that these accusations were a source of concern to staff. For example, the principal’s log states that, on October XX, 2016, he received a call from a concerned parent stating that the Student “calls kids racist on a regular basis.” On November XX, 2016, she was referred for refusing to comply with a teacher’s instructions and instead saying “you hate black people, don’t you,” a remark the teacher considered “inflammatory and disrespectful.” The Student told OCR that she called other students racist when they used racial slurs towards her, but that she was told to stop without any inquiry into the reasons for her use of the term.

In an interview with OCR, the Student’s XXXXXXXXXXXX XXXXX teacher stated that he had referred students for discipline any time he heard them calling the Student names. He stated that he did not always tell the Student that he had done so; at times, he would tell her that the students were in trouble, at other times, the other students would simply be out of the classroom. He stated that he did not always hear what students said to each other, but that he was always listening. He stated that name calling went back and forth between the Student and others. He also stated that the Student may have called others “racist,” but that many students used the same term as a “buzzword.”

The principal informed OCR that the Student’s behavior was frequently extremely disruptive, especially at the beginning of the school year. According to his summary, at the beginning of the school year, the Student created disturbances in the hallways and the lunchroom, and the locker room. Other School staff also expressed concerns about the Student’s behavior. School records confirm that the Student was referred for discipline seventeen times before she left the School in December, mostly for being uncooperative and defiant in class, cursing at teachers, refusing to work, and walking out of class. She was referred an additional seven times after she returned to the School in February 2017, for leaving classes and campus without permission and for yelling at other students.

The Complainant stated that the Student was disciplined on several occasions for actions she had not taken, or singled out for discipline for group activities. She also stated that the Student sometimes left class when she was being called racial names and was then subjected to discipline for doing so. OCR found evidence that the Student’s referrals on at least two occasions³ may have been connected to other students’ use of racial slurs toward her.

³ As described above, on October XX, the Student used profanity in class in response to being called a “clown”. On March X, 2017, the Student was referred for yelling at a student who joked about the Student’s knee injury. The following day, a student was referred for using racial slurs in connection with remarks about the same knee injury.

The Student entered the School with an IEP that identified her primary disability as XXXXXXXXXX XXXXXXXXXXXX, and with a record of disabilities that could affect her behavior. Interviews with the principal and teachers suggested that, for the most part, staff did not consider the impact of her disability on her behavior.

The principal informed OCR that he met often with the Student, and he had asked her if she was being called racial names periodically, although he had not asked during the several weeks prior to OCR's May XX, 2017, interview with him. He stated that he had checked in with her about how she was doing generally. The Student denied that such check-ins had occurred.

OCR found no evidence that the principal had completed a written investigative report regarding any of the racial incidents involving the Student that teachers referred to him. The District did not provide evidence that any of the forms included with the Bullying, Harassment or Intimidation Reporting and Documentation Protocol were completed, including a Reporting Form, an Investigation Form, or an Action Plan or Re-integration Support Plan.

The superintendent informed OCR that the former Special Education Local Plan Area (SELPA) director had investigated the matter and had been in frequent communication with the Complainant and the School principal. The superintendent acknowledged that the SELPA director had not maintained any written records of her investigation or documented the actions she had taken. The former SELPA director was not available for an interview by OCR.

Impact

The Student informed OCR that many of these incidents made her feel "really sad." She stated that she gained weight over the course of the year, and did not feel pretty, or that she belonged at the School. She said that she went into the restroom and cried because other students made her feel so bad. She also reported XXXXXXXX XXXXXXXX. She reported that the harassment affected her grades, which were XXX XX XXX XXXXXXXX, because she could not concentrate in XXX XXXXXXXXXXXX XXXXX, and that she had a large number of absences because she did not want to go to school. The Student also reported that "I don't let people talk to me like that" and that she therefore got in trouble for fighting.

The Student's mother informed OCR that, at the end of the 2016-17 school year she was concerned that the Student might XXXX XXXXXXXX. She stated that the Student often cried, and said she wasn't worthy enough, and there was no place in the world for her, since she was different. The Student also told her mother that she XXX XXXXX XX XXXX XXXX XXX XXXXX.

The principal stated that, by the end of the school year, the Student was calmer and her behavior had improved. Other teachers reported that they had not observed changes in her weight or demeanor over the course of the year.

The Student left the School after the 2016-17 school year and enrolled in X XXXXX XXXXXXXX XXXXXXXX which offers a program that XXXXXXXX XXXXXXXXXXXX XXXXX XXXX X XXX XXXX XXXXXXXX XXXX XXXX. The Student reported that she was doing well there and received the help she needed. Her mother informed OCR that although the Student was doing well at her current school, she missed being in a “regular” school, primarily because of the absence of socialization and extracurricular activities.

OCR interviewed the Student’s XXXXXXXX teacher at the XXXXXXXX XXXXXXXX. The teacher described the Student as “friendly but very cautious” when she arrived at the school, and said that throughout the year, the Student had told her stories about being called racial names at the School that did not change with the passage of time. She stated that although she had heard stories about the Student being disruptive and angry at the School, the Student had not been disrespectful to her or rude to other students in her class.

Analysis

Hostile Environment

In analyzing whether a school district has discriminated against a student on the basis of race by failing to respond appropriately to a racially hostile environment, OCR first considers whether the student was subjected to a harassment that is sufficiently severe, pervasive, or persistent so as to interfere with, or limit the ability of a student to participate in, or benefit from, the school district’s educational program. In determining whether harassment is severe, pervasive, or persistent, OCR examines the context, nature, scope, frequency, duration and location of racial incidents, as well as the identity, number and relationships of the persons involved.

In this case, the Student reported being called names every day throughout the school year. The Student was unable to recall each specific date on which racial terms were used towards her, and School staff denied that this occurred as often as the Student and the Complainant reported. However, school records show that other students were referred to on at least six different occasions for calling the Student a “frizzy haired circus animal,”(on October XX, 2016), a gorilla (on November X, 2016 and February X, 2017), a “hoe ass N---“ and a fat N---- (on October XX, 2016, and February X, 2017), and Simba (on March X, 2017). Four of these incidents occurred within two weeks of each other in October and early November. An additional record shows that, when the Student was referred for using profanity in a class on a different occasion, she informed the principal that she had been called a “clown”. Although School records do not reflect additional incidents of racial slurs, both the principal and the XXXXXXXXXXXX XXXXXXXX teacher acknowledged that they were not aware of the content of all interactions among students. OCR found based on the Student’s credible testimony, that it is likely that she was called names, including “gorilla” and “Rafiki,” on more occasions than those that appear in District referral records.

In evaluating the severity of racial incidents, OCR takes into account the relevant particularized characteristics and circumstances of the victim. In particular, OCR considers “the victim’s age

and race when evaluating the severity of racial incidents” at a school. At the time these derogatory racial slurs were directed at the Student, she was a XX year old student with XX XXXXXXXXX disability. During the year in question, only six of the XXX students in the School were identified as African American or mixed race, while 91% of the students at the School were white. The Student spent XXXX XX XXX XXX in a classroom with XXXXX XXXX XXX students, the rest of whom were white. All but one of the students who were referred for addressing racial slurs to the Student were in the XXXXXXXXXXXX XXXXX, and the Student reported that most of the students who harassed her were in that class. Under these circumstances, a reasonable African American student would already be acutely aware that she stood out as different from most of her peers.

The Student reported to OCR that the harassment made her feel sad and angry. She reported gaining weight and staying home from school as often as she could throughout the year, and that she got into fights with other students. She stated that XXX XXXX XXXXXXXX. Her mother confirmed to OCR that, by the end of the Student’s year at the School, she discussed XXXXXXXX XXXXXXXX XX XXXXXXXX XXXXXXXX XX X XXXXX.

OCR concluded that, even if the Student was subjected only to the slurs that were reported directly to School administrators, the terms used against the Student were race-based, and, based on the derogatory nature of the terms and the frequency with which they were used, were severe, pervasive, and persistent. In making this determination, OCR took into account the Student’s status as one of the few African- American XXXXXX XXXXXX students in the an overwhelmingly white school, as well as the fact that much of the harassment occurred in a small classroom in which XXX XXXXXXXX XXX XXXXXXXX XX XXX XXXXXXXX XXXXXXXXXXXX and in which she was the only African- American student. OCR further found that the harassment interfered with the Student’s ability to benefit from the School program because of her sadness and anger, her frequent referrals for disruptive behavior⁴, and her lack of interest in attending school. OCR therefore concluded that the Student was subjected to a racially hostile environment.

Notice

Once OCR concludes that a student has been subjected to a racially hostile environment, it next considers whether the recipient received notice of the harassment. In this case, School personnel disagree with the Student and the Complainant as to the extent of the harassment. There is no dispute, however, that the principal had notice of at least the incidents described above on October XX and XX, and November X, 2016, and on February X and X, and March X, 2017, for which students were referred to him for discipline. In addition, OCR reviewed an email from the Complainant to the principal on March XX, 2017, stating that the Student had

⁴ While there is evidence suggesting that the Student’s behavior may have been disruptive independent of the harassment directed towards her, some of the incidents for which she was referred were directly related to the name-calling she was experiencing. In addition, according to information provided by her XXXXXXXX teacher, she has not been disrespectful or disruptive in her current educational placement.

been subjected to race-based comments, including being called Rafiki, and that she found them distressing. OCR concluded that the School had actual notice of enough incidents that it should have known name-calling by other students had created a racially hostile environment for the Student.

Response

A school district that has notice of a racially hostile environment has a legal duty to take reasonable steps to eliminate it. While the nature of a reasonable response differs based on the circumstances, the district must conduct a full investigation to determine what happened. The response must be “tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment.”

OCR found that, at least two of the times when students were referred for using racial slurs towards the Student, on October XX, 2016 and February X, 2017, the principal investigated the charge by obtaining statements from the Student, and, in the first case, from other student witnesses. The principal also informed OCR that when he heard that the Student was called Rafiki in March 2017, he talked to the Student and other students in the XXXXXXXXXXXX XXXXX. In other situations, including instances where students were referred to him for calling the Student a “frizzy haired circus animal,” (on October XX, 2016), a gorilla (on November X, 2016 and February X, 2017), a fat N---- (on February X, 2017), and Simba (on March X, 2017) there is no evidence that he conducted investigations beyond discussing the incident, and the reasons it was inappropriate, with the referred student.

The Student told OCR that she stopped reporting incidents of harassment because she believed they were not being taken seriously. In two cases, the principal’s notes provide evidence suggesting why the Student might have reached this conclusion. In one instance on October XX, 2016, when the Student was referred for using profanity, she complained that students in the class were calling her a clown and offered witnesses. The principal’s notes indicate that he dismissed this statement, responding that she was the “common denominator” in these incidents. On another occasion October XX, the principal’s notes show that he responded to the Student’s use of profanity on the field by telling her to “shut up” and cutting her off when she tried to explain. Only later that day, when the other student was referred for using a racial slur in class, did the principal learn that the Student had used profanity in response to being called a N---- by the same student.

OCR found evidence that the principal and the XXXXXXXXXXXX teacher did not always inform the Student or the Complainant that they had taken action in response to their complaints. The XXXXXXXXXXXX teacher informed OCR that he did not always inform the Student when he referred other students for using racial slurs towards her. The Student’s statements to OCR reflect her belief that, in most cases, students who called her names did not face consequences, even when she was warned or referred for responding to those names. The records created by

the principal that OCR reviewed suggest that although the principal frequently talked to the Student, the focus of these discussions was on the Student's behavior and not on the behavior of those around her.

The discipline records provided by the District shows that the first time each student was referred to the office for using a racial slur toward the student, the principal disciplined him or her by imposing penalties that were consistent with the disciplinary matrix: alternatives to suspension including warnings, detention, an assignment to work in the office, or an assignment to write an essay. One student (Student C) was suspended for a day after his second offense. OCR also noted, however, Student A was referred three times for calling the Student racial slurs without receiving second-level consequences, and that, although Student F admitted to having used slurs toward the Student in the past, he was only given a warning when he did so again in March 2017.

The totality of the evidence shows that the School's response to reports that the Student was repeatedly subjected to racial slurs was not effective in ending the harassment. The School was aware that the Student had been called racial slurs on at least three occasions in the two weeks between October XX and November X, 2016, and on three more occasions within the first six weeks after she returned to school in February. Despite these repeated incidents, OCR did not find evidence that the School conducted an adequate investigation to determine what was occurring and whether additional actions were needed to ensure that such slurs did not continue.⁵ OCR found that, instead, the School responded to the incidents of harassment as a series of one-time events rather than as components of an environment that, taken as a whole, was hostile to the Student on the basis of her race. While all of the students referred for directing racial slurs toward the Student were individually counseled or disciplined, the number of referrals of students who used such racial slurs should have provided notice to the School that the actions being taken were not effective in stopping the harassment. Even when students A and F called the Student racial slurs on more than one occasion, they did not receive escalating consequences, no additional actions were taken to ensure that they, or other students, did not use such slurs again.

OCR also did not find evidence that teachers or administrators took into account the cumulative effect on the Student of other students' use of racial slurs towards her. OCR did not find evidence that additional actions, including training or other interventions, new policies, or other steps designed to clearly communicate the message that the School would not tolerate harassment and would be responsive to student reports of harassment. OCR also found little evidence of efforts to assess the impact of repeated slurs on the Student and determine what measures were needed to remedy the effects of the harassment.

⁵ See, for example, *HaZi v. Gus Construction Co, Inc.*, 842 F.2d 1010 (8th Cir. 1988)(employer will be liable for failing to discover what is going on and to take remedial steps when actions are so numerous, egregious, and concentrated as to add up to campaign of harassment), cited in 1994 Guidance.

While not required by Title VI's implementing regulations, where a District has adopted procedures for addressing incidents of harassment that are "motivated" by race or national origin, as here, OCR's analysis also includes an assessment as to whether they were consistently implemented. Here the procedures require an investigation, the creation of a written report that is provided to the alleged victim, the creation of an action plan for stopping the harassment and remedying its effects, and the development of a re-integration support plan to ensure that an individual who is found to have harassed another student does not repeat the offense. While the SELPA director may have conducted an investigation, there was no documentation of her findings, or that she or School staff took the follow-up actions required by District policy.

OCR recognizes that many of the racial slurs were made in the context of escalating verbal conflict between the Student and her classmates, and that teachers and administrators viewed her behavior as more consistently disruptive than that of many of the students accused of harassing her. OCR also recognizes that the principal and teachers at the school took actions to address the Student's behavior, including maintaining classroom logs and contacting her mother, as well as referring her frequently for discipline. While School personnel were within their rights to take steps to address the Student's disruptive behavior, they were nonetheless required to ensure that other students did not respond to her with slurs that targeted her race. This requirement was especially important in light of her status as one of the few African American students in the School.

Based on all of the information discussed above, OCR concluded that the District violated Title VI by failing to respond effectively to racial harassment of the Student by her classmates at the School. On January 22, 2019, the District signed a Resolution Agreement, in which it agreed to work with a consultant to create a School action plan for preventing and addressing race-based harassment, including training for staff and students. The District also agreed to ensure that the Student is able to participate in scholarships and international study opportunities to the same extent that she would if she were currently enrolled at the School. A copy of that Resolution Agreement is attached to this letter. OCR has determined that these actions, when fully implemented, will resolve the areas of violation identified in this case.

Issue 2: The Student was subjected to different treatment on the basis of her race when she was suspended for an altercation at school, but her white peer was not.

Legal Standard

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 in 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. Evidence of racially discriminatory intent can be either direct or circumstantial. Circumstantial evidence is evidence that allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances.

Facts

On September XX, 2016, the Student was involved in a fight with another XXXXXX XXXXXX student (Student 2) which resulted in a two day suspension. Student 2, who is white, was not suspended.

The Student informed OCR that the fight resulted from a verbal altercation between the Student and one of her friends on one side, and Student 2 and one of her friends on the other. She stated that she and Student 2 were "throwing back words at each other," culminating in Student 2 sarcastically suggesting that the Student get a XXXXXX out of Student 2's backpack. The Student reached for Student 2's backpack, they pushed each other, and they fought. The Student reported that Student 2 fought back.

The principal investigated the reported fight by gathering written statements from the Student, Student 2, and six other student witnesses. OCR reviewed these statements, which included varying accounts of the incident. Several students confirmed the exchange about the XXXXXX, but others stated that the Student was yelling at Student 2, and began hitting her, and that Student 2 was crying and trying to get away.

The principal informed OCR that no adults had seen the fight, and that it took place in an area without security cameras. The District provided a statement from a XX teacher, who said that another student (Student 3) had told him that the Student had slapped her face, and that he went out of the gym to find the Student. He stated that he saw the Student walking away and screaming something he could not understand, and that he had told the Student to stop, but she did not do so. In her written statement, the Student acknowledged that the XX teacher had told her to stop shortly before the fight, but that she had not done so.

The principal told OCR that his understanding of the incident was that there had been a verbal dispute between students during XX, and that the XX teacher had told the Student to stay where she was while he dealt with something else. The principal stated that, rather than complying with the XX teacher's request, the Student had run after Student 2, come up from behind her, grabbed her backpack, and then pulled her hair.

Two of the student statements stated that, prior to the fight, the Student had slapped Student 3 in the face. The Student denied doing so, and there were no witnesses. The principal told OCR that, after he had talked to the Student and Student 2 about their fight, Student 3, who is

white, had come into the office and told him that the Student had slapped her. The principal said that he told Student 3 that, if there were no witnesses, he could not impose consequences, and that he had not done so.

The Complainant alleged that the Student was suspended for a second day because of her alleged altercation with Student 3, but that this altercation had not happened. The principal stated that he did not discipline the Student for this alleged slap because it was not on camera, and there were no witnesses. He stated that his decision to suspend the Student for two days, and not to suspend Student 2, was based on the Student's refusal to comply with the XX teacher's instruction to stop, and his understanding that, rather than stopping, the Student had pursued Student 2 and initiated the fight. He stated that teachers are expected to prevent fights where possible, and that the Student's defiance of the XX teacher's instruction prevented the teacher from stopping the fight.

The District has issued Uniform Behavior Expectations, which includes a chart outlining the consequences for a range of offenses. The principal informed OCR that he follows this chart for all discipline. The consequence for a first offense for the willful use of force or causing or attempting to cause physical injury, the offense for which the Student was suspended, is a one to three day suspension. The Behavior Expectations document includes an explanation for this offense, which states that "an individual must do everything possible to avoid a conflict," and that "an incident will be considered a mutual fight when two students engage in a physical altercation, regardless of who initiated the conflict."

The principal stated that he was not familiar with the provision in the guidance regarding "mutual conflict," but believed it was intended to ensure that, when it is not clear who the aggressor is, the right student is suspended. He stated that he frequently suspends only one participant in a fight.

The District provided records regarding the six other fights that resulted in suspensions during the 2016-17 school year. All of the students involved were white. Two of these fights were found to involve mutual combat. One began as a play fight, and, according to the principal, the students involved reported themselves to the principal and both were suspended for one day. The other fight began as a dispute between two students, one of whom was allegedly filming the other without his permission to post on social media; both students were suspended for one day. The remaining four fights resulted in a suspension of only one student, each for at least two days. In one instance, a white student hit Student 2 in the face and was suspended for two days.

The Complainant also informed OCR that she believed that the Student was frequently referred for discipline for minor infractions. OCR reviewed the Student's referral records, which includes 26 referrals, for offenses ranging from tardies to major disruption. On nine occasions, the Student allegedly walked out of class or off campus. Most of these referrals resulted in detentions; two resulted in in-school suspensions. OCR also reviewed the referral records of the nine other students in XXXXXXXXXXXX class, who were referred between one and 17

times for offenses ranging from eating in class to “hands to self” to using slurs based on race, sex, and disability. Most students were assigned detention; some were required to work in the office for a designated period of time. Four students received out of school suspensions for an obscene act (going to X XXX XXX web site on a school computer), fighting (3 students), repeated disruption, and using a racial slur.

Analysis

The Complainant alleged that the Student was subjected to different treatment on the basis of race when she was suspended for two days as the result of a fight, while the other student involved was not suspended. The evidence confirmed the Complainant’s allegations with respect to the disciplinary actions imposed on each student. OCR also determined that the District Uniform Behavior Expectations state that a fight will be considered mutual when two students engage in a physical altercation, regardless of who initiates it.

OCR found that the fight was not observed by any teachers or staff, and that the principal determined what happened, and what disciplinary action should be imposed, based on the statements of other students and information provided by a teacher about his interaction with the Student immediately before the fight. OCR found that student accounts varied, with some accounts stating that the Student attacked Student 2, who was trying to get away, while others portrayed a mutual fight. All of the accounts identified the Student as having started the physical portion of the altercation.

The principal stated that he had imposed the discipline, and suspended the Student for two days rather than the minimum penalty of one day, because of her failure to comply with a teacher’s direction to stop and talk to him. He informed OCR that he believed that, without the Student’s defiance, the fight would not have occurred.

OCR found that there was evidence that the fight between the Student and Student 2 was mutual under the definition included in the District’s Uniform Behavior Expectations, and that, under the policy, both students should have been disciplined. The principal informed OCR that regardless of this policy, he consistently suspended students who he found were the aggressor in fights. OCR’s review of School discipline records confirmed the principal’s account. These records show that, in four of the six additional fights that occurred during the 2016-17 school only one of the students in the altercation/incident was suspended, each of them for two or more days. In light of this information, OCR concluded that the preponderance of the evidence did not establish that the Student was treated differently in connection with the September 2016 fight because of her race.

The complainant also expressed concern that the Student was referred for discipline an inordinate number of times. OCR found that while the Student was referred more often than any of her white classmates in XXX XXXXXXXXXXXX class, most of the other students in the class were also referred multiple times, for similar reasons as the Student. OCR did not find

sufficient evidence of different treatment to establish a violation of Title VI in connection with this allegation.

Conclusion

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 complainant concurrently. When fully implemented, the resolution agreement is intended to address the non-compliance finding. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

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. 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 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.

The complainant has a right to appeal OCR's determination as to Allegation 2 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete, inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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.

If you have any questions about this letter, please contact Katherine Riggs, Civil Rights Attorney, at Katherine.L.Riggs@ed.gov or 415-486-XXXX.

Sincerely,

/s/

Ava De Almeida Law
Acting Team Leader