



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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

May 22, 2018

Cindy Martin
Superintendent
San Diego Unified School District
4100 Normal Street, Room 2219
San Diego, California 92103

Sent via electronic mail only

Re: OCR Docket #09-17-1594

Dear Superintendent Martin:

This letter is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), against the San Diego Unified School District (District). Specifically, the complaint alleges that the Student¹ was subjected to harassment by other students based on his race and national origin when students used derogatory phrases and words towards him, and the District failed to respond appropriately and effectively to notice of the harassment.

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.

During its investigation, OCR reviewed information provided by the Complainant and the District, and interviewed the Complainant and Principal. Prior to concluding its investigation and to address the issues alleged in this complaint, the District, without admitting to any violation of law, expressed an interest in a voluntary resolution pursuant to section 302 of OCR's Case Processing Manual², and OCR determined it was appropriate to do so. The legal standards, facts gathered to date, compliance concerns identified, and a summary of the terms of the voluntary Resolution Agreement (Agreement) are summarized below.

¹ OCR notified the District of the identity of the Student when the investigation began. OCR is withholding his name from this letter to protect his privacy.

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

Legal Standard

The Title VI implementing regulations, at 34 C.F.R. §100.3(a) and (b), provide that a recipient of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others. 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 regulation 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 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 regulation, 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.

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 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. If a district grievance procedures encompass race it must apply such procedures consistently and in a manner that does not constitute Title VI discrimination.

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.

On July 17, 1970, pursuant to its authority under Title VI, the Department of Education issued a memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (hereinafter May 25th memorandum). The May 25th memorandum clarified OCR policy under Title VI on issues concerning the responsibility of school agencies to provide equal educational opportunity to limited English proficient national origin minority students.

The May 25th memorandum states that school districts must adequately notify national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate. School districts have an obligation to ensure meaningful communication with Limited English Proficient (LEP) parents in a language they can understand and to adequately notify LEP parents of information about any programs, service, or activity of a school district that is called to the attention of non-LEP parents.

Facts

On July XX, 2017, the Complainant in this case, who is a XXXX XXXXXXXX XXXXXXXXXXXX XX XXXXX XXXXXXXX XXXX School (School), filed a complaint with OCR. The Complainant is not related to the Student in this case. The Complainant stated that on at least two occasions the Student complained about other students making comments regarding his Arabic-Muslim heritage and family. The Complainant also reports that the Student hated the School and wished to leave. While the Complainant was able to assist OCR in getting a signed Privacy Act consent form, the Student and his family have been inaccessible to OCR.

At the time of the incident, the Student in this case was a XXXXXXXXXXXX XXXXXXXXXXXX at the School. The Student has since transferred to another school in the District. The Student, who is

Arab, was born in the Republic of Iraq and has been a permanent resident of the United States since XXX XXX XX XXX. The Principal reported that the Student's parents' first language is not English, that their English proficiency is limited and that the Student's sister often served as a translator for the School and parents.

On February XX, 2017, an image representing a plane crashing into two buildings and the Student's name were posted to an electronic board during the Student's XXXXX period XXXXXXXX XXXXXXXX class at the School. The software used to post the image is called "Kahoots", a third party program not managed by the District. The use of existing District technology combined with the Kahoots software allows students to use an electronic device such as a laptop, smartphone or tablet to display content created on their individual device on a large electronic board that is visible to everyone in the classroom. The District describes Kahoots as "an interactive computer program used in the classroom so a teacher may solicit answers to questions, poll students, gather feedback, etc." According to witness statements taken by the vice-principals, the classroom teacher noticed the image and removed it from the board. According to the District's investigative report, the Student was so upset by the incident that he immediately left the classroom and reported the incident to School administrators.

The following day, the Principal assigned two vice-principals to investigate the incident and spoke to the class about appropriate behavior and use of technology. One vice-principal attempted to contact the parents and inform them of the incident, but she only was able to leave a voicemail in English.

According to the District, the vice-principals initiated their investigation on February XX, 2017, by interviewing the Student and nine of a possible 33 students, who were enrolled in the advanced biology class. According to the principal, the only students who were interviewed were those identified as witnesses by the Student. The School did not determine exactly how many students viewed the image. After the incident, the classroom teacher spoke with the class about classroom expectations for technology use in his class. The vice-principal's interview notes indicate that one of the students reported that there was a similar incident earlier in the school year where an image of an explosion and a reference to the Student was posted to a board at the front of the classroom. From February XX to March X, 2017, the vice-principals conducted interviews and re-interviews. The vice-principals determined that the incident did in fact occur but they were unable to identify the responsible party, as the third party software allows students to post anonymously. According to the District's investigative report, following the incident and investigation School administrators made contact with the Student three times to check in, see how he was doing and offer him counseling.

The District has adopted the Uniform Complaint Procedure as its grievance procedure for addressing complaints of discrimination and harassment on the basis of race, color, or national origin. This procedure includes that the District is required to provide written notice of the outcome and that the investigator must document the specific steps taken in conducting the investigation. Additionally, the procedure mandates that, the written report shall contain the summary of the facts, findings of fact based on the evidence gathered and conclusions of law,

the disposition of the complaint, the rationale for disposition, description of any corrective action (if warranted) to remedy any harm, including remedies for the victim.

Resolution and Conclusion

On at least two occasions, School students made visual images that included the Student's name and likened him to a terrorist. The February XX incident involved the image of an airplane crashing into two buildings and the Student's name, which was posted using District electronics during class time and seen by an unspecified number of students in the class. The District received actual notice of the incident on February XX, 2017, when the teacher saw the image on the board and also received notice of the complaint on the same day when the Student informed School Administrators. During the investigation, the District took note of a similar incident earlier in the school year where an image of an explosion with the Student's name was again posted to a board at the front of the classroom. The Student reasonably interpreted the images to mean that other students were saying that he had some relation to the terrorist attack on the World Trade Center. Harassment of a student who is from or is perceived to be from the Middle East through the creation and distribution of images portraying him as a "terrorist" during a District activity or program can be a form of national origin discrimination, if the harassment is sufficiently severe, persistent or pervasive and it limits or denies the Student's access to the District's education program. According to the District's investigative report, the February XX incident caused the Student to immediately leave the classroom.

OCR notes that in response to notice of the February XX incident, the District took timely, responsive action by interviewing the Student and nine other students, re-interviewing several students, and checking-in on the Student subsequent to the incident. However, OCR identified several areas of concern. First, OCR did not receive any information as to why the District did not have notice of the first incident, if it also occurred in a District classroom, and/or whether the District responded. Second, OCR did not receive any documentation showing that the District assessed whether the two incidents taken together resulted in a hostile environment on the basis of national origin for the Student. If the two incidents combined resulted in a hostile environment for the Student based on national origin, the District would be required to take steps to end the harassment, remedy its effects, and prevent its recurrence. Also, District records indicate that a vice-principal left a voicemail in English for the Student's parents, even though the District was aware that the parents have limited English proficiency. As such, the facts gathered to date reflect that the District may have only provided the Student's parents with information about the outcome of the investigation in a language that they could not understand. OCR also notes that while the District has a District-adopted written grievance procedure for addressing reports and complaints of harassment on the basis of national origin, the initial evidence reviewed raises a concern that it was not followed in this matter. In order to complete the investigation, OCR would need to interview more District witnesses, the Student and/or his parents.

Prior to OCR reaching a compliance determination, on May XX, 2018, without admitting to any violation of law, the District signed the enclosed Agreement, which, when fully implemented, is intended to address the allegation in the complaint. Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. OCR will monitor the implementation of the Agreement until the District is in compliance with its terms. 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. 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.

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. The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

OCR thanks XXXX XXXX and XXX XXXXXX for the courtesy and cooperation extended to OCR during its investigation. If you have any questions, please contact our office at (415) 486-5555.

Sincerely,

/s/

Judith O'Boyle
Acting Team Leader

Enclosure

cc: XXX XXXXXX, Assistant General Counsel II
XXXX XXXX, Uniform Complaint Compliance Officer