



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

June 15, 2023

VIA ELECTRONIC MAIL

Adam Clark Ed.D.  
Superintendent  
Mt. Diablo Unified School District  
clarka@mdusd.org

(In reply, please refer to case no. 09-22-1072.)

Dear Superintendent Clark:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the District. The Complainant alleged that a male student harassed her daughter (the Student) and other female students in her XXXXXX-grade classroom at XXXXXXXXXX XXXXX School (School) on the basis of race and national origin in October of 2021, and that the District failed to respond in a timely, reasonable, and effective manner to notice of the harassment. The Complainant further alleged that the same male student sexually harassed the Student and other female students in October of 2021, and that the District responded in a way that was deliberately indifferent to notice of the harassment.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d-2000d-7, and its implementing regulations at 34 C.F.R. Part 100, which prohibit discrimination based on race, color, and national origin in programs and activities of recipients of federal financial assistance. OCR is also responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulations at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities of recipients of federal financial assistance. The District receives funds from the Department and is therefore subject to Title VI and Title IX and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. Based on the facts gathered to date, OCR found insufficient evidence to support the Complainant's allegations that the District's response to notice of the alleged racial harassment failed to comply with Title VI or that its response to notice of the alleged sexual harassment failed to comply with Title IX. However, during the course of its investigation, OCR found a compliance concern because the District did not notify the Complainant or the Student of their right to file a formal complaint of sexual harassment under Title IX. OCR also found that the District violated Title IX because it had not updated its grievance procedures at the time of the incident at issue to conform to the 2020

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

amendments to the Department's Title IX regulations applicable to sexual harassment.<sup>1</sup> To resolve this violation and OCR's compliance concern, the District entered into the attached Resolution Agreement under Section 303(c) of the Case Processing Manual (*CPM*).

## **I. Legal Standards**

### **A. Race and National Origin Harassment**

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

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

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

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

Once a recipient has notice of a hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. OCR evaluates the appropriateness of the responsive action by assessing whether it was reasonable, timely, and effective. The appropriate response to a hostile

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<sup>1</sup> The amended Title IX regulation applicable to sexual harassment can be viewed [here](https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html). For more information about Title IX, including the new Title IX regulation and related resources, visit OCR's website at <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html>.

environment based on race or national origin must be tailored to redress fully the specific problems experienced as a result of the harassment.

## **B. Sexual Harassment**

Title IX and its implementing regulation at 34 C.F.R. § 106.31(a) prohibit recipients of Federal financial assistance from subjecting students to discrimination based on sex under any of the recipient's education programs or activities. Sexual harassment is a form of sex discrimination prohibited by Title IX, and includes unwelcome conduct that is so severe, pervasive, and objectively offensive from a reasonable person's perspective that the behavior effectively denies the person equal access to a recipient's programs or activities. Once a recipient has actual notice of sexual harassment, recipients must offer "supportive measures," as defined at 34 C.F.R. §106.30, to "complainants," defined as individuals who are alleged to be the victims of sexual harassment. Supportive measures should be designed to provide equal educational access, protect safety, or deter sexual harassment. The regulation at 34 C.F.R. §106.44(a) also requires recipients to inform complainants about the process for filing a formal complaint.

A recipient violates Title IX if: (1) it has actual knowledge of sexual harassment, as defined in the regulation, or allegations thereof in one of its education programs or activities and (2) the recipient fails to respond promptly or responds in a manner that is deliberately indifferent (i.e., clearly unreasonable in light of the known circumstances). A recipient also violates Title IX if a complainant files a formal complaint of sexual harassment and the recipient does not follow the specific procedural requirements in the grievance process outlined at 34 C.F.R. §106.45.

## **II. Facts**

The Student is a white XXXXXX-grade female who reported to the School on October XX, 2021, that she and other female students witnessed and were subjected to harassing comments by a Latino male student (Student 1) during class and on school grounds that day. She reported that Student 1 made comments consisting of vulgar expressions directed at students based on race/national origin and sex. In her school witness statement dated October XX, 2021, the Student said that Student 1 said "X---redacted content---X" during their XXXXXXXXXXXX class. The Student also stated that Student 1 also said "many racist and homophobic things." She did not state that the comments were directed at her. In her interview with OCR, the Student stated that Student 1 said "X---redacted content---X," talking about women in general, and used the "N" word toward her two friends XXX XXX XXXXX. She told OCR that Student 1 also called one of her friends, who is transgender, a "XXXXXXXXXX." The Complainant asserted that School staff did not stop the comments and that as a result, the next day, the Student confronted Student 1 XX XXX XXXXXXXXXXX XXXXXX X XXXXXX XXXXX and they had a physical altercation. Based on the confrontation, the Student received a harsher sanction than Student 1. The Complainant filed this complaint with OCR three days after the confrontation, and the Student left the School after it imposed her suspension.

The Student told OCR that she heard Student 1's comments in XXXXXXXX and XXXXXXXXXXXX classes. The Student told OCR that she reported the comments to her XXXXXXXX teacher, but that she did not report the comments to the XXXXXXXXXXXX teacher.

According to a statement by the XXXXXXXX teacher, the Student made one report to the XXXXXXXX teacher of Student 1's comments about XXXX on or around the time the Student made a written complaint to the School on October XX, 2021. The teacher noted that she did not hear the comments and that both students were seated on opposite sides of the classroom, with very little opportunity to be in close proximity to each other.

In response to the report by the Student, administrators interviewed the Student, Student 1, and other students who may have heard Student 1's comments. Witness statements indicated that one student who described herself as the Student's friend stated that the Student told her that Student 1 said that "X---redacted content---X." Another friend of the Student confirmed that Student 1 said "X---redacted content---X." A male student indicated that the Student's statement about Student 1 was not accurate, and that Student 1 "never made XXXX jokes." Another student reported that the Student "thought [Student 1] said the N-word but he didn't." Student 1 denied making any comments about XXXX or using the N-word.

The District told OCR that it responded to the Student's report by providing counseling to the Student and Student 1. The District also told OCR that the Student did not agree to participate in a restorative circle with Student 1 and communicated to School staff that she felt that the issue was addressed.

The Student told OCR in an interview that on October XX, 2021, the Student confronted Student 1 XX XXX XXXXXXXXXXXX XXXXXXX X XXXXXXX XXXXXX about what Student 1 had said, he pushed her, so she hit him in the face, and then he started punching her in the stomach until her two friends pulled her away. The Student's handwritten notes about the incident provided to OCR by the Complainant were similar: the Student went up to Student 1 to talk to him about the things he said, he pushed her, she then punched him in the face, and he responded by punching her in the stomach. According to the vice-principal, staff interviewed a total of 16 students and three teachers about the incident. One student reported that the Student "confronted [Student 1] about XXXX jokes" but did not specify hearing any comments at the time of the fight. Another student witness said that Student 1 made comments but the witness could not understand what Student 1 was saying at the time of the confrontation. Other student witnesses made comments only about the fight, not what triggered it.

Both students were interviewed about the confrontation and received suspensions: the Student received a X-day suspension and Student 1 received a X-day suspension. School administrators said they assigned a harsher consequence to the Student because she initiated the confrontation, particularly after she had told administrators the previous day that the matter between her and Student 1 had been addressed.<sup>2</sup>

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<sup>2</sup> The Complainant was upset that the Student received X more days of suspension than Student 1 and believes the School suspended the Student to allow Student 1 to avoid the consequences for his prior comments. OCR did not find that the longer suspension was an unreasonable response to notice of the comments because the Student confronted Student 1 and threw the first punch at his face after telling administrators that the comments had been addressed the day before.

According to the principal, the Complainant communicated to the School that she felt her daughter was justified in initiating the fight because of Student 1's use of offensive words the prior day. The principal stated that the School had conducted an investigation of the Student's written statement and found conflicting evidence that Student 1 made the alleged comment about XXXX. The principal said that she did not believe that the Student's written statement about the comment was a Title IX complaint, but nonetheless referred the Complainant to the District's Director of Secondary Support. This Director is not the staff member identified as the District's Title IX Coordinator.

Records provided by the District indicate that on November X, 2021, a non-binary student reported that Student 1 looked at them and said, "look at the XXXXXXXXXXXX." A student submitted a statement indicating that he saw this student go up to Student 1 during XXXXXXXXXXXX class and aggressively confront him. School staff confirmed that Student 1 admitted to making the comment before the confrontation and apologized. The school attempted to convene a restorative justice circle/counseling session with both students, but the non-binary student expressed discomfort with participating in such a session. Staff reported hearing no ongoing concerns from the non-binary student.

A week after the fight XX XXX XXXXXXXXXXXX, teachers reported that a group of students were acting aggressively toward Student 1, including "flipping him off" in class "because he hits girls" and physically assaulting him. Student 1 reported that he feared "being jumped." School administrators responded by working with small groups of students and suspending two students for threatening Student 1. Student 1's mother also removed him from school for a short period of time. School staff reported that Student 1 and the group of students were no longer interacting.

The District told OCR that, in addition to investigating the Student's report, the School took other actions during the fall of 2021 to prevent harassment on the basis of race and sex. OCR interviewed a school counselor, who reported that she developed a training about race-based harassment for students at the School that included definitions of microaggressions and racially derogatory language, including use of the "N word." The School provided the training to XXXXX grade students in the fall of 2021 and to XXXX and XXXXXXX grade students in March 2022.

The School's counselors reported that they also developed and delivered sexual harassment training in all XXXXXXXXXXXX classes in all grades in November of 2021. The presentation contained definitions of sexual harassment and examples in a XXXXXXXXXXXX context that prompted students to consider the impact of comments and if something said would make someone uncomfortable and would be considered offensive. The presentation also discussed bullying and the role of bystanders.

In the 2021-22 school year, the School also developed voluntary and non-exclusionary affinity groups for Latinx, Black, and LGBTQ students. Counselors attend to provide prompts, but the groups mostly serve as an open forum for students to discuss relevant issues in a safe space. For example, students recently reported that X---redacted content---X. The counselor said that based on this information, she followed up with the student in question to provide counseling and guidance. The counselor and the site administrators reported that the trainings and development

of the affinity groups were intended to prevent incidents similar to the ones reported by the Student.

During its investigation, OCR discovered that the District had failed to update its board policies and administrative regulations to comply with the 2020 amendments to the Title IX regulation governing sexual harassment. For example, the District had no policy in place to maintain the detailed records about Title IX sexual harassment complaints that are now required by the Title IX regulation at 34 C.F.R. §106.45(b)(10). After OCR completed its investigation, the District issued revised Title IX policies on April 12, 2023.

### **III. Analysis**

Under Title VI, OCR evaluates a recipient's response to reports of race-based harassment to determine if steps taken were reasonable, timely, and effective to end the harassment. Here, in response to reports made by the Student about Student 1, School administrators interviewed sixteen students and three teachers, addressed the issues with Student 1 directly, developed and delivered training on racial harassment to all students, and initiated voluntary and non-exclusionary affinity groups so that students had a "safe space" to discuss any issues of concern. Neither the Student nor the Complainant reported any further incidents. Based on this evidence, OCR found that the District's response to the comments attributed to Student 1 were reasonable, timely, and effective to end any harassment based on race or national origin that occurred.

Under Title IX, sexual harassment includes unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive from a reasonable person's perspective that the behavior effectively denies the person equal access to a recipient's programs or activities. A recipient violates Title IX under the Department's regulations if: (1) the recipient had actual knowledge of sexual harassment or allegations thereof in one of its education programs or activities; and (2) the recipient failed to respond promptly or responded in a manner that was deliberately indifferent. Here, the facts indicate that the Student and Complainant did not file a formal complaint of sexual harassment with the District, but the School was on notice of allegations of an inappropriate sex-based comment about XXXX made by Student 1.

In response to those allegations, School staff collected relevant information by interviewing nineteen individuals, provided counseling, and attempted to convene restorative justice sessions to resolve the conflict between Student 1 and the Student. School staff also developed and delivered sexual harassment training to all students in the school. Based on the evidence obtained, OCR found that the District's response to actual notice of alleged sexual harassment of the Student was not deliberately indifferent under the Title IX regulation at 34 C.F.R. §106.44(a). OCR also found that there was insufficient evidence to conclude that the District failed to respond promptly and effectively to the comment that Student 1 allegedly made about a transgender student being "a XXXXXXXXXXXX." Specifically, OCR found that the District promptly interviewed relevant witnesses and took action when Student 1 later admitted to using the term, including securing an apology from the offending student, offering the targeted student the opportunity for a restorative circle, and initiating a voluntary and non-exclusionary affinity group to support LGBTQ students. OCR also found no evidence of any further incidents targeting this student after the District's action.

OCR also considered whether the District's response to actual notice of the Student's allegation of the XXXX comment met the Title IX requirement to offer supportive measures to the "complainant" (i.e., the target of the alleged sexual harassment) and to inform the complainant of their right to file a formal complaint. OCR found that the School provided supportive measures in the form of counseling to the Student and an opportunity to participate in a restorative justice process, which she declined. However, OCR has a compliance concern about the District not notifying the Complainant or the Student about the right to file a formal complaint of sexual harassment under Title IX. Although the Complainant discussed her concerns with the school principal, particularly with respect to the suspension of the Student and Student 1's alleged comments about XXXXXX XXXXX, the principal told OCR that she did not consider the Student's complaint a "Title IX matter" and did not inform the Complainant about the District's Title IX complaint process or refer her to the Title IX coordinator. OCR did not find evidence that the School provided the Student or Complainant with information about the Title IX formal complaint process for sexual harassment or that the District realized that the Complainant's allegation about the disparate discipline of the two students also had Title IX implications.

OCR also determined that the District was not in compliance with Title IX because it had not updated its Title IX policies to include the obligations in the Title IX regulations that took effect on August 14, 2020, including the recordkeeping requirements in 34 C.F.R. § 106.45(b)(10).

Prior to the completion of OCR's investigation of this matter, the District agreed to take action to ensure that School administrators are trained to recognize what types of allegations are subject to the Title IX grievance process for sexual harassment, which must be triggered by a formal complaint, and which are not allegations of sexual harassment and therefore subject to Title IX's prompt and equitable grievance procedures. The District also agreed that it would make any further changes needed to its sexual harassment policies and procedures to be consistent with current Title IX requirements.

#### **IV. Conclusion**

In sum, the facts indicate that the District took action to address and resolve incidents in which the Student reported race-based comments. OCR also confirmed that the School responded and took action to respond to a report by a student that they were described as a "XXXXXXXXXX" by Student 1. However, OCR identified a concern regarding the District not having notified the Student or Complainant about the formal Title IX complaint process, as required by the Department's Title IX regulation for sexual harassment. OCR determined that, pursuant to CPM Section 302, it was appropriate to address the complaint through a Resolution Agreement with the District prior to the completion of the investigation.<sup>3</sup> OCR also determined that the District has not updated its sexual harassment policies and procedures (including Board Policy 5145.7 and Administrative Regulation 5145.7) to comply with the Title IX regulations that took effect on August 14, 2020. As a result, OCR determined that those policies are not compliant with Title IX and its current implementing regulations, and the District will resolve this violation through a Resolution Agreement under Section 303(c) of OCR's Case Processing Manual.

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<sup>3</sup> See Case Processing Manual (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

The Resolution Agreement requires the District to revise its sexual harassment policies and procedures to comply with the current Title IX regulations, to direct District employees to notify the Title IX Coordinator of all formal complaints and reports of sexual harassment, to provide training to District employees regarding this obligation and the revised Title IX policies and procedures, to maintain records of the District's responses to reports and formal complaints of sexual harassment, and to report to OCR about the School's responses to such reports. 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. When fully implemented, the Agreement is intended to address the Title IX violation and compliance concern OCR identified in this case. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement and the Title IX statutory and regulatory obligations at issue in this case.

OCR's determination in this matter 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.

As to the Complainant's allegation regarding the District's failure to respond appropriately to harassment based on race or national origin under Title VI, the complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, 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 District. The District 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 District.

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, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or filed a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a separate retaliation complaint with OCR.

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 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 me at (415) 486-5513, or at [ava.m.dealmeida-law@ed.gov](mailto:ava.m.dealmeida-law@ed.gov).

Sincerely,

/s/

Ava De Almeida Law  
Team Leader

Enclosure

Cc: Cesar Alvarado, Associate General Counsel  
Jennifer Sachs, Chief of Educational Services