



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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December 30, 2016

Mr. Pat Skorkowsky  
Superintendent  
Clark County School District  
5100 West Sahara Avenue  
Las Vegas, Nevada 89148

Re: Clark County School District  
OCR Reference No. 10111376

Dear Superintendent Skorkowsky:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the referenced complaint against the Clark County School District (district). The complaint alleged that, during the 2010-2011 school year, the district discriminated against a student on the basis of sex and retaliated against him.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities that receive federal financial assistance from the Department. The district is a recipient of federal financial assistance from the Department and is subject to these regulations.

OCR investigated the following legal issues:

1. Whether the district properly appointed a Title IX coordinator and disseminated a notice of nondiscrimination, as required by Title IX at 34 C.F.R. §106.8 and 106.9.
2. Whether the district adopted and published grievance procedures that provide for a prompt and equitable response to complaints and reports of sexual harassment, as required by Title IX at 34 C.F.R. §106.8.
3. Whether the district responded promptly and equitably to complaints, reports, and incidents of sex-based harassment of the student by district staff and classmates, as required by Title IX at 34 C.F.R. §106.8 and 34 C.F.R. §106.31.

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

4. Whether the district intimidated, threatened, coerced, or discriminated against the student for the purpose of interfering with a right or privilege secured by Title IX and its implementing regulations, in violation of 34 C.F.R. 100.7(e) made applicable to the Title IX regulations by 34 C.F.R. 106.71.

### **Legal Overview**

The Title IX regulation at 34 C.F.R. §106.31(a) provides generally that, except as provided elsewhere in the regulation, “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity” operated by a recipient.

Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in a school’s program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX.

The Title IX regulations at 34 C.F.R. §106.8 and 106.9 require a recipient to designate a Title IX Coordinator, implement specific and continuing steps to provide notice that it does not discriminate on the basis of sex in its education programs or activities, and adopt grievance procedures.

These regulatory provisions are discussed in more detail below.

### **Summary and Background Information**

For the reasons briefly stated here and discussed further below, OCR determined that the district’s sexual harassment policies and procedures do not comply with the requirements of Title IX. Specifically, OCR determined that the district’s notice of nondiscrimination does not accurately state the district’s legal obligation to not discriminate under Title IX, and fails to clearly refer questions concerning Title IX to the district’s acting Title IX coordinator or to OCR’s Assistant Secretary. The differing, and at times conflicting, provisions contained within the district’s grievance procedures do not support a finding that the district offers a prompt and equitable resolution process. Additionally, OCR determined that the district failed to respond promptly and equitably to complaints of sex-based harassment of the student by district staff and students. The delay of approximately 45 days between the time the accused received written notice and the alleged victim received verbal notice was not prompt or equitable. OCR also found that district staff had notice of possible sex-based harassment by classmates but never

followed up on this information or took any steps to address the alleged name-calling. However, OCR found insufficient evidence that the district retaliated against the student. OCR's findings of fact and analysis are set forth below. To address the compliance concerns identified by OCR during its investigation, the district has agreed to take the actions provided for in the enclosed Resolution Agreement.

The Clark County School District is a public school district located in Las Vegas, Nevada. According to OCR's Civil Rights Data Collection (CRDC), the district is comprised of 361 schools and had a total enrollment of 313,557 students during the 2011-2012 school year. The student who is the subject of this complaint attended XXXXXXXXXXXX during the 2010-2011 school year. According to the CRDC, XXXXXXXXXXXX had a total enrollment of 1,789 students during the 2011-2012 school year.

OCR conducted interviews of the student's parent and district personnel. OCR reviewed the district's policies and procedures regarding bullying, cyberbullying, and harassment, filing harassment complaints, discipline, and student conduct, as well as the district's materials disseminated to the school community regarding these policies and procedures. OCR also reviewed the reports of discrimination, harassment, and retaliation against the student that were made to the district, and documentation of the district's response to each report, including witness statements, staff notes, discipline referral documentation, police statements, discipline records, and documentation of the investigation outcome provided to involved staff. OCR also reviewed the student's education records.

#### **1. Title IX Coordinator**

The Title IX implementing regulation at 34 C.F.R. §106.8(a) requires that a recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the law. The designated employee is referred to by OCR as the Title IX coordinator. The recipient is further required by this regulation to notify all students and employees of the name, office address, and telephone number of the Title IX coordinator.

During the time period of this investigation up until the spring of 2016, the district's notice of nondiscrimination (discussed below) designated different employees as responsible for handling complaints of discrimination. Inquiries regarding employment-related discrimination issues, including Title IX, were directed to the district's Diversity, Affirmative Action and Title IX coordinator (Title IX coordinator). Students, parents, and other non-employee program participants who felt discriminated against were directed to initiate a complaint by contacting the principal of the school in question.

Additionally, the notice of nondiscrimination stated that the Executive Director of Instructional Support/Student Activities (Executive Director) could be contacted for concerns related to “athletics and activities, including those related to Title IX.”

The district did not state whether the principals or the Executive Director was designated as the Title IX coordinator for discrimination issues related to students, parents, or other non-employee program participants. Accordingly, up until the spring of 2016, it was ambiguous who the district had designated for the purpose of satisfying the requirements of 34 C.F.R. §106.8 with respect to non-employment related discrimination.

In the spring of 2016, the district amended its notice of nondiscrimination and, in that revised document, the district designated its “acting Title IX coordinator” as the employee responsible for complaints of discrimination not related to disability. Students, parents, and other program participants who want to initiate a discrimination complaint are directed to contact the school principal who will then work with the acting Title IX coordinator in responding to the complaints. The address, telephone number, and e-mail address for the acting Title IX coordinator is provided in the district’s amended notice of nondiscrimination.

For the reasons described above, OCR finds the district currently meets the regulatory requirements for designating a Title IX coordinator. In the agreement resolving this complaint, the district has committed to taking the steps necessary to ensure compliance with Title IX’s requirements as it transitions from an interim to a permanent Title IX coordinator.

## **2. Notice of Non-discrimination**

The Title IX implementing regulation at 34 C.F.R. §106.9 requires that a recipient have a notice of nondiscrimination that: (1) contains information that the recipient does not discriminate based on sex in its educational activities or programs, that Title IX requires the recipient not to discriminate based on sex, and that this nondiscrimination policy applies to students, employees, and applicants for employment, and applicants for admissions; (2) states that questions to the recipient concerning the application of Title IX and its implementing regulations may be referred to the Title IX coordinator or to OCR’s Assistant Secretary; and (3) is disseminated prominently in the recipient’s online and printed publications, including course catalogs, application forms, and bulletins, to students, employees, and applicants for admissions and employment.

At the time of the alleged harassment, the district had in effect a notice of non-discrimination (Notice 1) which stated that the district would not “knowingly discriminate against any person on the basis of race, creed/religion, color, national or ethnic origin, sex, disability, marital status or age, in admission or access to,

treatment of employment in, or participation in its programs and activities, pursuant to federal and state laws” including Title IX. As discussed above, concerns about discrimination involving employees were referred to the district’s Diversity, Affirmative Action Compliance, and Title IX coordinator. Discrimination concerns related to students, parents, and other non-employee program participants were referred to the school principal. The Executive Director was also listed as a contact for concerns related to “athletics/activities including Title IX”. However, as discussed above, it was not clearly stated whether the principals or the Executive Director were designated as the Title IX coordinator for non-employee related discrimination concerns. A reference to OCR was also not included in Notice 1. A copy of Notice 1 was included in the district’s Back to School Reporter publication and on the district’s website.

The district amended Notice 1 (Amended Notice) in the spring of 2016. The Amended Notice includes additional protections against discrimination based on gender identity, expression, or sexual orientation. Students, parents, and other program participants who feel discriminated against and want to initiate a complaint are directed to contact the principal of the school in question. The Amended Notice also states that “the building will work with the designated employee and respond to the inquiry within a reasonable period of time.” The designated employee responsible for resolving complaints concerning “discrimination, not related to disability,” is the acting Title IX coordinator in the Chief Educational Opportunity Office, Educational Opportunity Unit.” A reference to OCR is not included in the Amended Notice. The Amended Notice can be found on the district’s website.

The district’s Amended Notice contains a nondiscrimination statement but it does not accurately state the district’s legal obligation to not discriminate under Title IX. The district’s notice of nondiscrimination is incorrectly limited to instances where the district “knowingly” discriminates on the basis of sex. This is a qualification not provided for in 34 C.F.R. §106.9(a), which states simply that a recipient will not discriminate on the basis of sex. Moreover, as discussed below in relation to harassment by district employees, there may be instances in which a recipient is responsible for discriminatory conduct regardless of whether or not it had either actual or constructive notice of sex-based harassment.

The Amended Notice also fails to clearly refer questions concerning Title IX to the district’s acting Title IX coordinator or to OCR’s Assistant Secretary. Rather, the Amended Notice refers parents to the building principal and states that the principal will work with the designated employee to respond.

Because the Amended Notice, as written, incorrectly limits the district's obligation and does not clearly refer all Title IX matters to the acting Title IX coordinator, the district has committed to revising the Amended Notice under the agreement.

### **3. Grievance Procedures**

The Title IX implementing regulation at 34 C.F.R. §106.8(b) states that a recipient shall adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by Title IX.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment complaints. However, any procedures used to adjudicate complaints of sexual harassment, including disciplinary proceedings, must afford the complainant and the accused a prompt and equitable resolution. OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for

- Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed.
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties.
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.
- Designated and reasonably prompt timeframes for the major stages of the complaint process.
- Notice to the parties of the outcome of the complaint.
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.

The district has at least three regulations relevant to assessing the framework for resolving harassment complaints. Both Notice 1 and the Amended Notice referred to Regulation 1213.1, which could reasonably be understood by parents to be the appropriate process to follow if they would like to file a complaint/grievance.

Regulation 1213.1 was first adopted on July 11, 1963, and last revised on April 22, 2004. The regulation is posted on the district's website. The regulation describes itself as "the proper procedure to be utilized by persons who have concerns." However, the regulation does not specifically state its application to complaints alleging harassment carried out by employees, other students, or third parties.

According to Regulation 1213.1, the district has an informal process whereby individuals with a concern may confer with an employee and/or supervising staff member to resolve their concern. It is the responsibility of the site administrator to advise the concerned individual of the procedure, to resolve concerns, and to assist them in obtaining a Public Concern Form. Concerns that are not resolved informally may be submitted in writing to Public Affairs using the Public Concern Form (CCF-660).

Regulation 1213.1 has designated timeframes for the resolution and appeal of a complaint. Specifically, within two working days, the district is required to send an acknowledgement of receipt of the concern. A supervising administrator is required to consult with the person filing the concern within three school days of receipt, unless the person filing the concern agrees to a delay. The administrator then conducts an investigation within eight school days, unless the person filing the concern agrees to a delay. If an employee is the focus of the concern, the employee will be made aware of the specific concerns and given the opportunity to comment, explain, and present facts in response. The regulation is silent as to whether similar rights are afforded when a student is the focus of the concern.

Regulation 1213.1 affords notice to the parties of the outcome of the complaint. Specifically, it states that the administrator's response will be in writing and copies provided to all parties involved. If the response is unsatisfactory, the person has the right to appeal within five working days and Public Affairs will then notify the next appropriate administrator that the concern is still unresolved. It is not stated whether the individual accused of harassment also has the right to appeal. The second administrator has five working days to provide a decision. If the second administrator's written response is also unsatisfactory, the concern may continue to be referred up the chain of command within the same five working day timelines, until it reaches the superintendent. The superintendent may issue a final decision in the matter, or refer the concern to an independent mediator. The final decision by the superintendent will be provided within

ten working days of receipt. There is no further description of the next steps if an independent mediator is chosen.

Regulation 1213.1 does not state an assurance that the school will take steps to prevent recurrence of any harassment and correct its discriminatory effects on the complainant and others, if appropriate.

In addition to Regulation 1213.1, the district's Back to School Reporter publication contains an article providing information regarding district policies and regulations that specifically prohibit student harassment. This publication describes a separate grievance complaint procedure contained in district Regulation 5141.2.

Regulation 5141.2 is not referenced in either Notice 1 or the Amended Notice. It was adopted on April 23, 1998, and last revised on June 28, 2001. The regulation specifically states that it applies to complaints alleging harassment carried out by employees, other students, or third parties. It also includes a definition of harassment, as well as examples of prohibited conduct.

Regulation 5141.2 states that any student who feels that he or she is a victim of harassment should immediately contact his or her teacher and/or principal, unless the principal or teacher is believed to be part of the harassment, in which case contact should be made with the appropriate assistant regional superintendent. The opportunity to present witnesses and other evidence is required by Regulation 5141.2. The principal must inform parties of the disposition of the complaint and take appropriate follow-up actions in an attempt to ensure there are no further incidents or retaliation. The regulation does not designate timeframes for the major stages of the complaint process; rather, investigations are to be conducted in accordance with Regulation 4110.

Regulation 4110 governs employment discrimination, harassment, and sexual harassment. It was adopted on June 28, 2001, and last revised on April 12, 2012. The internal investigative procedures described in this regulation do not designate timeframes for the major stages of the complaint process. Instead, it states that the supervising administrator will notify the Executive Manager, Diversity and Affirmative Action Programs (Executive Manager) "as soon as possible" after receiving an oral or written complaint. Additionally, it is unclear how notice of the outcome is provided to the parties. Regulation 4110 states that, if the Executive Manager conducts the investigation, he or she will "submit a written and/or oral report" to the supervising administrator, who will then take appropriate action.

OCR determined that the district's sexual harassment policies and procedures do not provide for the prompt and equitable resolution of sexual harassment complaints as required by Title IX in, at least, the following respects.

OCR found that the district has at least two grievance procedures that govern resolution of harassment complaints. Additionally, one of the procedures incorporates by reference the grievance procedures applicable to resolution of employment discrimination complaints. None of these three grievance procedures contain all the requisite elements necessary to establish a prompt and equitable procedure.

Specifically, OCR found that Regulation 1213.1 does not specifically state its application to complaints alleging harassment carried out by employees, other students, or third parties. The regulation also does not include an assurance that the school will take steps to prevent recurrence of any harassment and correct its discriminatory effects on the complainant and others, if appropriate. While Regulation 5141.2 does include these elements, it fails to designate timeframes for the major stages of the complaint process.

Finally, these regulations, when taken together, create an ambiguity regarding where a student or parent who wishes to file a complaint regarding harassment should go. According to the Regulation 1231.1, the complainant should file with Public Affairs. However, Regulation 5141.2 says that the complaint should be raised with the principal or assistant regional superintendent. Neither regulation refers to the district's acting Title IX coordinator. Additionally, regulations 1231.1 and 5141.2 afford differing standards regarding how notice of the outcome will be afforded the parties and whether there is a right to appeal.

As stated above, a grievance procedure cannot be prompt or equitable unless students and parents know it exists, how it works, and how to file a complaint. The differing, and at times conflicting, provisions contained within the district's grievance procedures do not support a finding that the district offers a prompt and equitable resolution process. Accordingly, OCR has determined that the district's grievance procedures do not comply with the requirements of Title IX.

#### **4. District's Response to Alleged Harassment of the Student**

As noted above, sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in a school's program, in violation of the Title IX regulation at 34 C.F.R. §106.31. Recipients generally provide aid, benefits, and services to students through the responsibilities they give to employees. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students

engaging in sexual harassment, the recipient is responsible for the discriminatory conduct regardless of whether it had notice of the conduct, and the recipient must remedy the effects of such conduct. In contrast, with respect to harassment by students or other third parties who are not employees, a recipient is responsible only for harassment about which it knew or should have known.

Once a school knows, or is imputed to have known, of possible sexual harassment of students, whether carried out by employees, other students, or third parties, it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. If a school's inaction as to student or third-party harassment allows a student to continue to be subjected to a hostile environment, then the school is responsible for remedying the effects that reasonably could have been prevented had it responded promptly and effectively. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

*Alleged Harassment by District Employee*

The student is recognized as a student with a disability under the Individuals with Disabilities Education Act. He was enrolled in theXXXXXXXXXXXX during the 2010-2011 school year. On March 1, 2011, the student's parents made a verbal report to the school dean about inappropriate comments that were allegedly made by the student's special education teacher. The parents submitted a written statement on March 2, 2011, providing detailed information about the comments. Specifically, the parents reported that the student left them a voicemail message on January 10, 2011, in which the special education teacher could be heard speaking in the background and saying, "I love you, [student], I love you," in a falsetto voice. The parents also reported that, while talking with the student on February 25, 2011, about a meeting they had with the student's special education and mathematics teachers, the student reported to his parents that an incident occurred where the special education teacher held a pencil to his crotch and told the student to "come and get it." According to the parents, the student told them he had reported the incident to the special education classroom's instructional aide (IA), who told him the teacher was probably joking but that he should tell his parents. The parents' report indicated that the student could not remember the specific date of this incident.

Between March 1 and 4, 2011, the dean and principal investigated the parents' allegations. With respect to the pencil incident, administrators interviewed the student, the special education teacher, and the IA, and obtained written statements. The student's written statement indicates that after the teacher said, "Come and get it," the student replied "No." The teacher then said, "Come on [student], I'm just giving you a taste of

your own medicine,” and tried to hand him the pencil. According to the dean, none of the other students in the class were interviewed because the student told him that no other students witnessed the incident. During the district’s investigation and in interviews with OCR, the teacher denied ever holding the pencil as described or making the alleged comments. The IA stated that she never heard the teacher make any such statement, nor did the student report the statement to her.

The administrators determined that, because the student could not identify when the alleged pencil incident occurred and the teacher denied that it happened, there was insufficient evidence to substantiate that the pencil incident took place.

With respect to the teacher’s falsetto comment in the background of the voicemail message, the principal spoke to the teacher about it and determined that, while it was a bad joke, it was not sexually inappropriate. When interviewed by OCR, the teacher said that the student told him he was calling a female former student, and he repeated the student’s name in a falsetto voice during the call to tease the student. The teacher said he later learned the call had been made to the student’s parents, not another student as the student had reported, and he discussed the incident with the student’s parents and apologized.

On or about March 4, 2011, the parents requested that the student be transferred out of the teacher’s special education class. The parents’ request was granted. The special education teacher was verbally notified of the outcome of the investigation and that the concerns would not be pursued further. The parents were not notified of the outcome.

On March 16, 2011, the student provided a written statement indicating that, sometime in mid-September 2010, prior to transferring out of his special education class, a classmate called him “gay.” The student responded, “How about you go suck a dick?” When the classmate replied affirmatively, the special education teacher from the prior special education class told them both to stop and said, “[The student] probably sucks his own dick.”

The dean investigated the student’s March 16, 2011, allegation concerning the special education teacher and on March 16 and 17, 2011, spoke to two of the three other students in the classroom and the IA who were all allegedly present during the incident. The dean asked each student and the IA if the teacher ever made inappropriate comments in the classroom. One student reported that the teacher once told them about an incident where he was stopped at the Mexico-U.S. border and was strip-searched, but that he had never said anything else inappropriate. The second student said that he had never heard either the teacher or the IA make any inappropriate comments but that the student who is the subject of this complaint made several inappropriate comments, including “suck my

dick” to the teacher, and tried to start fights. The IA’s statement indicated that she never heard the teacher make the alleged comments. During an investigatory conference with the special education teacher, the teacher denied the allegation.

Administrators determined that: (1) the other persons who were allegedly present did not corroborate the student’s account, (2) the teacher denied ever making the statement, and (3) the student was vague about when the incident occurred. Accordingly, there was insufficient evidence to substantiate that the incident occurred.

On March 28, 2011, the dean wrote a memorandum summarizing the investigation findings and concluded that the evidence was insufficient to substantiate that the teacher had made the statement to “come and get it” concerning the pencil or the comment the teacher allegedly made in mid-September 2010. The memo did, however, direct the teacher to “always maintain professionalism when communicating with both parents and students.” The teacher was provided with the memorandum about the outcome of the investigation on March 28, 2011. The parents were not provided with written or verbal notice of the outcome of the investigation until a meeting on May 12, 2011, which the district convened to address an unrelated matter concerning the student’s behavior. The principal told OCR that he did not inform the parents about the outcome of the investigations because district administrators had told him that the investigation of the teacher was a confidential personnel matter.

#### *Alleged Harassment by Peers*

The parent informed OCR that the student is XXXXXXXXXX for which he is subjected to harassment by classmates. However, according to the parent, district staff never addressed this harassment with classmates. Rather, district staff asked the student to change his behavior in order to avoid the harassment.

On May 9, 2011, the student’s mathematics teacher sent an e-mail to the school dean, the special education facilitator, and the school psychologist about the student.

The e-mail states:

I had a conversation with [the student] today in the hallway. Had to ask him to leave class. He was walking around swinging his hips and flipping his hands. We heard quite a few mumbled “fag” words, [the IA] asked him to stop. He played dumb...stop what? So I asked him to step outside and talked to him about how the entire school is laughing at him because of that. I told [the school psychologist] because I don’t want him to think anything I said was inappropriate. Personally, I think it’s better coming from a man

than me. Maybe you [the dean] can follow up on this...It's causing a lot of disruption in class.

After receiving the e-mail on May 9, the dean met with the student later that day to discuss the hallway conversation. At the dean's request, the student provided a written statement regarding the incidents of May 9, 2011, which states:

[The teacher] told me to go out to the hallway and told me I wasn't in trouble. So I said ok and I went out there. [She] told me that people were saying that I walk like a fag and a queer. I said 'ok.' [She] said 'But [you're] not a fag' and I said 'ok' to make [her] stop saying that in front of other teachers and the worse [sic] was when the bell rang but thank god [she] stop[ped].

The mathematics teacher informed OCR that, on May 9<sup>th</sup>, she was sitting in the back of the classroom when the student got out of his seat and began to rub his genitals against her arm. The math IA yelled at him to stop. The student repeatedly said, "What?" He then proceeded to walk away, "flapping" his arms and moving his hips in an exaggerated way. The teacher confirmed that she heard classmates calling the student a "fag." The teacher told the student to go out into the hallway, where she asked, "What are you doing?" The student responded, "You think I'm a fag." The teacher said, "That's not what I'm talking about." The student responded, "You think I'm queer." The teacher said she realized she was not going to get anywhere and ended the conversation.

In response to OCR's questioning regarding whether the mathematics teacher told the student that he should change the way he was walking, the mathematics teacher stated:

No, [the student] told me that the kids were laughing at him and calling him a 'fag.' I told him that maybe he should stop walking that way, but that wasn't what I was talking about and kept trying to get the conversation back to what he was doing to me.

The mathematics teacher also told OCR that, other than the comments on May 9<sup>th</sup>, she never saw classmates harass the student. Rather, she felt that the student was the one who harassed female students and staff. She described incidents in which the student would tell her she "looked very sexy today" and would blow kisses to her and female classmates. It became a serious concern for her, so she and the special education teacher had a conference with the student's parents on February 25, 2011. According to the teacher, during this conference, the parents reported that the student had complained

about being bullied and laughed at by other children at an off-campus party because he was acting effeminate.

The school psychologist informed OCR that he received the mathematics teacher's May 9<sup>th</sup> e-mail and met with the student on May 10, 2011. According to the psychologist, it was his understanding that the mathematics teacher told the student that the way he was walking would draw attention and classmates would pick on him. The psychologist told the student that the teacher was trying to help the student behave in ways that would help him not get picked on. The psychologist did not believe that the mathematics teacher said anything about whether the student was gay or not. According to the psychologist, what was being reported to him by the mathematics teacher was that the student was acting in an exaggerated manner and that it was a behavior as opposed to the way the student normally walked.

The IA informed OCR that she was present for the incident on May 9<sup>th</sup>. The IA said she was sitting by the student and the mathematics teacher was sitting in the back of the classroom. The student got up and walked up to the teacher, but the teacher pulled away. The student did it again and then tried to get behind her. The IA told the student twice to stop and go to the front of the classroom. The teacher then took the student out into the hallway, but the IA said that she did not know what they talked about.

The IA reported to OCR that she knew the teacher was going to speak with the student about the way he was walking so that he would not be teased, but said that she was not aware of whether the teacher did so when they were out in the hallway. She described the student's way of walking as "a wiggle, feminine, but more so, the hands out and the pinky up." The IA told OCR that she did not see or hear teasing from classmates, but said that she "was sure they did." After class, the IA said that she spoke to the teacher to confirm whether the student was in fact rubbing himself on the teacher's arm, as she had perceived. The teacher confirmed to her that the contact occurred. The IA also informed OCR that the student once reported to her that another classmate had called him "gay," but could not recall the details of when the incident occurred. She told OCR that she reported the matter to the counselor, but did not know how the matter was addressed after she reported it.

A dean told OCR that, other than the May 9, 2011, incident, he was only aware of two other incidents involving classmates making comments to the student. On January 24, 2011, a female classmate announced to other students that the student was bisexual. The district investigated that incident, suspended the female student, and spoke with her about appropriate ways to speak about other students. The second incident occurred on March 28, 2011, when a classmate called the student a "fag," and the student responded by putting a post-it note on the back of the classmate's shirt that stated, "I'm gay."

Both students were disciplined, but because it was determined that the student had developmental disabilities and did not understand the meaning of the word “fag,” the situation was addressed with the involvement of his special education team, parents, and teachers.

The dean said that he did not investigate whether classmates called the student a “fag” on May 9, 2011, because it was his understanding that the teacher had addressed the issue with the class. The math teacher stated that she did not follow-up with the class and took no further action because she assumed the dean or psychologist would follow-up after she notified them of the incident.

The IA who worked in the student’s original special education class and in the student’s reading, English, and social studies classes (a different person than the math IA) said that the student never reported any harassment to her. The IA said that she never saw classmates making fun of the student or calling him names but that she had seen the students go back and forth with making fun of each other. The IA said that, in her experience, the student had issues with not respecting personal space and making frequent comments with a lot of sexual innuendo. She also filed a formal statement with the district on May 13, 2011, about the student inappropriately touching her chest.

A second dean reported that she had received one report from the student earlier that year. The student told the dean that a classmate had called him a “sex toy,” but there were no witnesses to that incident.

OCR determined that the district’s response to the student’s complaints of sex-based harassment by district staff was not prompt and equitable as required by Title IX. Specifically, OCR found that the parents orally complained to the district on March 1, 2011. On March 2 and 16, 2011, the district received written statements complaining about comments allegedly made by the student’s special education teacher. The district conducted an investigation of the allegations and determined that the evidence did not substantiate the allegations. A district administrator then drafted a memorandum summarizing the investigation’s findings and provided it to the special education teacher on March 28, 2011. However, the district did not provide a similar notice to the student’s parents. Rather, approximately 45 days later, during a meeting with the student’s parents on May 12, 2011, regarding an unrelated matter, the principal verbally informed the parents of his determination that the evidence was insufficient to substantiate the March allegations.

The district’s position is that it was not required to provide written notice of the outcome to the student under Regulation 5141.2. While the district acknowledges that written notice would have been required under Regulation 1231.1, the district argues that the

student never completed a Public Concern Form and, therefore, the complaint was not governed by the grievance procedures contained in Regulation 1231.1.<sup>1</sup> A recipient's obligation to provide notice arise under Title IX, and a recipient cannot rely upon its own procedural requirements to justify a failure in providing the required Title IX notice. The delay of approximately 45 days between the time the accused received written notice and the alleged victim received verbal notice was not prompt or equitable.

As for the alleged peer harassment, OCR found that district staff had notice of possible sex-based harassment from at least the following: on January 24 when a classmate announced the student was bisexual, on February 25 when the student's parents complained of bullying, on March 28 when the student was called a name, and on May 9 when the mathematics teacher overheard derogatory comments made by classmates. However, there is no evidence that the district followed up on this information or took any steps to address the alleged name-calling. While a dean told OCR that he thought the math teacher had spoken to the other students in her class regarding the May 9<sup>th</sup> name calling, the mathematics teacher states that she did not follow up with the other students about this incident, as she thought it would be handled by someone else. The only evidence of steps taken to address any incident is the mathematics teacher taking the student into the hall to discuss the other students' reaction to his behavior. The information the mathematics teacher provided to OCR in interviews, that she did not counsel the student to walk differently in order to avoid harassment from classmates, was inconsistent with the information she provided to district administrators in an e-mail dated May 9<sup>th</sup>.

In sum, OCR determined that the district's response to the student's complaints of sex-based harassment by an employee did not comply with Title IX and that the district failed to respond promptly and equitably to complaints, reports, and incidents of sex-based harassment of the student by classmates of which it had notice as required by Title IX.

## **5. The District's Alleged Retaliation**

The Title IX implementing regulation at 34 C.F.R. §106.71 incorporates the prohibitions against retaliation found in the Title VI of the Civil Rights Act of 1964 regulations at 34 C.F.R. §100.7(e). As applied to Title IX, the regulation provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for

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<sup>1</sup> The principal offered OCR a different explanation. He said he refrained from providing similar notice to the student because he believed it was a confidential personnel matter. If the alleged harasser is a teacher, administrator, or other non-student employee, the Family Educational Rights and Privacy Act (FERPA) would not limit the school's ability to inform the complainant of any disciplinary action taken. See, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* n.102 (January 19, 2001).

the purpose of interfering with any right or privilege secured by the Title IX regulations, or because he or she has made a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under Title IX.

In determining whether retaliation occurred, OCR reviews (1) whether the complainant or alleged injured party engaged in a protected activity; (2) whether the complainant or alleged injured party experienced a materially adverse action by the recipient; and (3) whether there is a causal connection between the protected activity and the materially adverse action. If the evidence demonstrates a prima facie case of retaliation, OCR reviews whether there is a facially legitimate, non-retaliation reason for the adverse action that is not pretextual.

According to the parent, the student's mathematics teacher retaliated against the student by falsely accusing the student of rubbing his genitalia on her after the parent raised complaints of sex-based harassment on May 9, 2011.

The student's mathematics teacher sent an e-mail to the school dean at 11:25am on May 9<sup>th</sup> in which she reported the hallway conversation that she had with the student about the way he walked. The school dean spoke with the student that day and telephoned the student's parent at work to inform her of what the teacher reported. According to the parent, during the May 9<sup>th</sup> conversation with the dean, she complained to the dean that the classmates who made derogatory comments about the student had not also been taken into the hallway by the mathematics teacher.

The dean informed OCR that he was not aware at the time of his May 9<sup>th</sup> call with the parent that the IA and mathematics teacher were raising concerns that the student engaged in inappropriate physical contact with the teacher.

OCR asked the teacher why her May 9, 2011, e-mail did not include information about the student's alleged inappropriate contact. The teacher indicated that she was in shock, the incident was embarrassing, and she did not want to put such sensitive information in an e-mail.

On May 10, 2011, the IA reported to the assistant principal the student's alleged inappropriate contact with the mathematics teacher and filed a written report about it. Upon learning of the IA's report, the dean spoke with the mathematics teacher, who confirmed the student's inappropriate contact. The mathematics teacher filed a police report concerning the student's alleged contact the following day. There is no evidence that the IA or the mathematics teacher were aware of the May 9<sup>th</sup> phone call between the dean and the parent in which the parent raised concerns about the mathematic teacher's handling of the May 9<sup>th</sup> classroom incident.

After receiving the teacher and IA's reports, district administrators began investigating the allegations against the student and placed the student on an emergency expulsion until a conference could be held with the student's parents and staff on May 12, 2011. The student was kept out of school through May 12, 2011.

As part of the investigation, the student provided another written statement, which says that on May 9, 2011, he went to sharpen his pencil. He walked back to go to his seat and the IA was telling him to go around. He did. The student denied that he touched the mathematics teacher.

During the May 12, 2011, meeting, the principal verbally informed the parents of the outcome of the investigations concerning the parents' March 2011 allegations regarding the special education teacher. The district also informed the parents of the outcome of the investigation of the mathematics teacher and IA's allegations regarding the student's alleged inappropriate contact, and told the parents that the student's account differed significantly from the statements of the mathematics teacher and the IA, and that the other students were facing the front of the room and did not see what happened. The principal informed the parents that the district felt the teacher's and IA's accounts were credible and that the student would be subjected to discipline for inappropriately touching the mathematics teacher.

At the May 12, 2011, meeting, the principal also explained that under the district's progressive discipline policy, the student was facing expulsion. However, because of his status as a special education student and the number of days he had already been excluded from school for disciplinary reasons, the student was allowed to return to school on May 13, 2011, pending the outcome of a manifestation determination meeting. Although he was allowed to return to school, he was placed in a different class and was told to stay away from the mathematics teacher.

On May 19, 2011, the district conducted a manifestation determination meeting. The team reviewed the student's disciplinary history and other student records, and determined that the student's alleged behavior with the mathematics teacher was disability related. A new behavior plan was developed for the student.

OCR determined that the student's parents criticized the mathematics teacher's handling of the hallway conversation and questioned district administrators as to why the comments of the other students were not addressed by the teacher. OCR found that the parents' complaint constitutes a protected activity under Title IX.

OCR also established that on May 10, 2011, both the mathematics teacher and the IA filed reports concerning the student's in-class behavior on May 9, 2011. However, there was no evidence that the mathematics teacher or the IA were aware of the complaint raised by the student's parents prior to filing their May 10, 2011, statements.

Accordingly, a prima facie case of retaliation was not established. Furthermore, OCR determined that the district identified legitimate, non-pretextual reasons for pursuing the disciplinary action against the student. These include the student's prior disciplinary history, administrators' beliefs that the mathematics teacher's and IA's reports of the student's behavior were credible, and the seriousness of the allegation.

Therefore, OCR determined that the evidence does not support a finding that the district intimidated, threatened, coerced, or discriminated against the student for the purpose of interfering with a right or privilege secured by Title IX and its implementing regulations in violation of 34 C.F.R. §106.71.

### **Summary of Resolution Agreement**

The district and OCR entered into discussions regarding the compliance concerns identified by OCR during the investigation. The district signed the enclosed Resolution Agreement, which, when fully implemented, will remedy the violations of Title IX identified by OCR. Under this agreement, the district will (1) revise its notice of nondiscrimination and grievance procedures; (2) provide notice to District staff, students, and parents regarding the revised notice of nondiscrimination and grievance procedures; (3) provide training to district staff and students at XXXXXXXXXX regarding the revised notice of nondiscrimination and grievance procedures; (4) ensure that the Title IX coordinator is appropriately trained; and (5) provide individual remedies to the student. OCR will monitor the district's implementation of the agreement.

### **Conclusion**

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the district's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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.

This concludes OCR's investigation of the complaint. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the district may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, an individual may file a separate complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR appreciates the district's cooperation throughout the investigation and resolution of this complaint. If you have any questions, please contact me at (206) 607-1672 or by e-mail at [kelli.lydon.medak@ed.gov](mailto:kelli.lydon.medak@ed.gov).

Sincerely,

Kelli Lydon Medak  
Supervisory Attorney

Enclosure: Resolution Agreement

cc: Steve Canavero, Superintendent of Public Instruction  
Deputy General Counsel