



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, D.C.

August 14, 2014

Via Facsimile and Regular Mail

Dr. Karen Garza
Superintendent
Fairfax County Public Schools
8115 Gatehouse Road
Falls Church, Virginia 22042

Re: OCR Complaint No. 11-12-1529
Resolution Letter

Dear Dr. Garza:

This letter is to notify you of the outcome of a complaint that was filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department), on September 19, 2012 against the Fairfax County Public Schools (Division). The complaint alleged the Division and School discriminated against the Student on the basis of sex when it failed to promptly and appropriately respond to complaints of a sexually hostile environment created by other students at the School.

OCR initiated an investigation of the complaint under to its authority to enforce certain federal civil rights statutes and regulations, including Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving Federal financial assistance. The University is a recipient of Federal financial assistance and is subject to the provisions of Title IX.

Legal Standards

The regulation implementing Title IX at 34 C.F.R. §106.31(a) provides that 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 education program or activity operated by a recipient of Federal financial assistance. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX.¹ Sexual harassment is unwelcome conduct of a sexual

¹ The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague Letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (Apr. 4, 2011), for further clarification on this topic, see "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), which is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also OCR's 2010 Dear Colleague Letter on Harassment and Bullying, which is available at:

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nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

In determining whether this denial or limitation has occurred, OCR examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred in the division; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently serious to create a hostile environment. It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. Consequently, in using the factors discussed previously to evaluate incidents of alleged harassment, it is always important to use common sense and reasonable judgment in determining whether a hostile environment has been created.

When a school knows or reasonably should know of possible sexual harassment including sexual violence or other sexual harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. If an investigation reveals that sexual harassment created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. But a school should not wait to take steps to protect its students until students have already been deprived of educational opportunities.

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual harassment allegation and should provide the complainant with periodic updates on the status of the investigation. It should notify the complainant of his or her options to avoid contact with the alleged perpetrator. For instance, the school division may prohibit the alleged perpetrator from having contact with the complainant pending the results of the investigation. When taking steps to separate the complainant and the alleged perpetrator, a school division should minimize the burden on the complainant and thus should not, as a matter of course, remove the complainant from classes while allowing the alleged perpetrator to remain. In addition, school divisions should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling services, victim advocacy, academic support, and, if appropriate, their right to file a complaint with local law enforcement. If the school determines that the sexual harassment occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary.

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (Oct. 26, 2010); OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, which is available at:

<http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (Jan. 19, 2001).

If a school delays responding to allegations of sexual harassment or responds inappropriately, the school's own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual harassment that could reasonably have been prevented had the school responded promptly and appropriately. For example, if a school's ignoring of a student's complaints of sexual assault by a fellow student results in the complaining student having to remain in classes with the other student for several weeks and the complaining student's grades suffer because he or she was unable to concentrate in these classes, the school may need to permit the complaining student to retake the classes without an academic or financial penalty (in addition to any other remedies) in order to address the effects of the sexual violence.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Title IX does not require a school division to provide separate grievance procedures for sexual harassment complaints; however, a school division's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. If a school uses its student disciplinary procedures to meet its Title IX obligation to resolve complaints of sexual violence promptly and equitably, it should recognize that imposing sanctions against the perpetrator, without additional remedies, likely will not be sufficient to eliminate the hostile environment and prevent recurrence as required by Title IX. School divisions need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. School divisions should take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint. At a minimum, under Title IX, the divisions must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

In addition, if there is an incident involving potential criminal conduct, the school division must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified. But a school division's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve a school division of its independent Title IX obligation to investigate the conduct. Although a school division may need to delay temporarily the fact-finding portion of a Title IX investigation while

the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school division must promptly resume and complete its fact-finding for the Title IX investigation. Moreover, the criminal investigation should not prevent a school division from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the community while the law enforcement agency's fact-gathering is in progress. These duties are a school division's responsibility, regardless of whether a student has complained, asked the division to take action, or identified the harassment as a form of discrimination.

Further, a school division should provide training to employees about its grievance procedures and their implementation. A school division should provide such training to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, law enforcement unit employees, administrators, guidance counselors, health personnel, and other employees. A school division needs to ensure that its employees are trained so that they know to report harassment to appropriate officials, and so that employees with the authority to address harassment know how to respond properly.

Analysis

In this case, OCR's initial investigation found that the Division did immediately conduct an inquiry into most allegations of sexual harassment brought by the Student and her parent. However, OCR identified some possible concerns with the adequacy of the Division's investigation, its analysis of the information collected, and the Division's apparent treatment of the incidents of alleged harassment as discrete, isolated occurrences rather than addressing the broader issue of a potentially hostile environment at the School.

In addition to reviewing information about the Division's response to the reports of sexual harassment involved in the instant case, OCR reviewed a random sample of incidents of disciplinary offenses and consequences that involved conduct of a sexual nature at middle and high schools in the Division, which the Division was required to report to the State. We did this in lieu of reviewing the Division's response to other complaints or notice of sexual harassment in the Division because the Division informed OCR that it does not compile such information and does not have a way to access such information because it is not kept in a centralized location. In reviewing the random sample of disciplinary offenses, OCR found some instances in which the Division's response to the offenses may not have been prompt and appropriate under Title IX. In many of the incidents reviewed, while the Division disciplined the accused, it was not clear whether it put in place interim measures to ensure no contact between the victim and the accused during the investigation of the offenses, counseling for the victim, training for the accused or other students at the schools, or other remedies to address a sexually hostile environment. In addition, in several of the reports the school provided no written information to support its investigation and conclusion that sexual harassment had occurred.

OCR has further concerns that the Division does not have a system to track reports of sexual harassment to determine whether there may be a hostile environment at a particular school, whether individual schools are responding in a prompt and appropriate manner to reports of

sexual harassment, whether the Division's efforts to educate students regarding sexual harassment are effective, or whether school-based investigations of reports of sexual harassment are prompt and equitable.

Prior to the completion of OCR's investigation, the Division expressed an interest in resolving the complaint. Pursuant to Section 302 of OCR's Case Processing Manual, OCR discussed resolution options with the Division. On August 11, 2014 the Division signed the enclosed agreement. The provisions of the agreement are aligned with the issues raised in the complaint and information obtained during the course of OCR's investigation and consistent with the applicable regulations. OCR will monitor implementation of the agreement. Through implementing the agreement, the Division will ensure it is meeting the following commitments, among others:

- Division staff will respond immediately and appropriately to reports of sexual harassment.
- The Division will provide appropriate interim measures to protect the alleged victim of sexual harassment while its investigation is under way.
- When sexual harassment is found to have occurred and created a hostile environment, the Division will respond promptly and effectively through measures that may include discipline, support for the victim, counseling or education for the harasser, and broader education for the school community.
- The Division's grievance procedures will provide for prompt and equitable resolution of complaints of sexual harassment and will be clear and easy to use.
- The Division will maintain a centralized database that will allow it to track incidents of sexual harassment at different schools to identify where a hostile environment may be developing and other important issues.

We have advised the Student that the Division may not harass, coerce, intimidate, or discriminate against her because she filed a complaint or participated in the complaint resolution process. If this happens, she may file another complaint alleging such treatment. Also, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

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

We appreciate the Division's cooperation during the resolution of this complaint. If you have any questions, feel free to contact Samantha Shofar at 202-453-5929 or Samantha.Shofar@ed.gov or Josephine Evola at 202-453-5908 or Josephine.Evola@ed.gov.

Sincerely,

/s/

Rachel Glickman
Team Leader
District of Columbia Office