



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

January 28, 2015

Dr. Steven M. Constantino
Superintendent
Williamsburg-James City County Public Schools
117 Ironbound Road
P.O. Box 8783
Williamsburg, Virginia 23187

Re: OCR Complaint No. 11-14-1295
Letter of Findings

Dear Dr. Constantino:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the above-referenced complaint, received on August 4, 2014, against Williamsburg-James City County Public Schools (the Division). The Student's parents (the Complainants) filed the complaint on behalf of their daughter (the Student) alleging that XXXX School (the School) discriminated against the Student on the basis of sex. Specifically, the complaint alleged that the School failed to promptly and equitably respond to instances when the Student was subjected to peer harassment based on sex.

OCR enforces 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 from the Department. Because the Division receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

As part of its investigation, OCR requested and reviewed information submitted by the Complainants and the Division and conducted interviews with the Complainants and Division personnel. Based on its consideration of all the information obtained, OCR concludes that there is insufficient evidence to support a finding that the Division discriminated against the Student as alleged. However, during the investigation, OCR identified a violation with the Division policy for addressing sex discrimination complaints and the School's implementation of that policy. Specifically, OCR found that not all School personnel interviewed had a clear understanding of what constitutes sexual harassment and of the Division's Title IX complaint policy/procedure. Additionally, the Division does not have a formal process in place to apprise the Title IX Coordinator of school-level sexual harassment complaints designed to enable the Coordinator to identify, assess, and address any systemic problems. OCR also found that the Division's policy for addressing sex discrimination complaints, including sexual harassment complaints, falls short of meeting the requirements of Title IX. To resolve OCR's concerns, the Division has entered into the enclosed Resolution Agreement.

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

Law and Analysis

Peer Sexual Harassment

Legal Standard

Sexual harassment of a student, including sexual violence, can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities. In determining whether a hostile environment based on sex has been created, OCR evaluates whether the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the school division's program. OCR examines all the circumstances, 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 parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors. While the school division is not directly responsible for off-campus conduct not part of a division program or activity, it must consider that conduct in assessing the effect, if any, on campus harassment.

Once a school division has notice of possible sexual harassment of a student by another student it is responsible for determining what occurred and responding appropriately. The division is not responsible for the actions of the alleged harasser, but rather for its own discrimination should it fail to respond immediately and appropriately. A school division may violate Title IX if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the division knew or reasonably should have known about the harassment; and (3) the division fails to take appropriate responsive action. These steps are the division's responsibility regardless of whether the student who was harassed makes a complaint.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt and equitable. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the division must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, the school division should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and address the effects of the harassment. If, upon notice, the division has failed to take prompt and effective corrective action, it must remedy the effects on the victim that could reasonably have been prevented had the division responded promptly and effectively. The division must also take steps reasonably calculated to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Factual Background

According to the complaint, the Student, an XXXX at the time, was subjected to sexual harassment by her peers at the School since she was in the XXXX. After reviewing information provided by the Division, OCR determined, and the Student's mother (the Complainant) confirmed, that the allegations of harassment distilled down to five reported incidents. However, only three of the incidents fall within OCR's 180-day jurisdictional timeframe. Because the two earlier incidents involved a different alleged perpetrator and distinct circumstances, OCR found no indication of a pattern of sexual harassment that would warrant incorporation of the first two untimely incidents. Accordingly, OCR's

analysis centers on the three most recent incidents of alleged harassment; all of which occurred between March and June of 2014. A discussion of these incidents follows.

XXXX 5 PARAGRAPHS REDACTED XXXX

The next school day, Monday, March 31, 2014, the Complainants met with the Principal, the Assistant Principal, the Counselor, and the SRO. As the result of the meeting, additional schedule changes were made to ensure that the Student and Student A did not have any classes or lunch together. It was agreed that if the Student had any concerns she would continue to go to her teachers who would report the information immediately to an administrator. The Student's homeroom teacher,¹ in whose room she typically ate lunch, would serve as a special point of contact for the student. Additionally, it was agreed that the Student would report to the counseling office at the end of each day to provide a written summary of her day to the Counselor or the Assistant Principal and talk with them about any concerns.²

According to School personnel, from the first reported incident in March, all of the students involved were told to stop interacting with one another. The Student's teachers, in particular her homeroom teacher, were told to look out for her, particularly during transition times. Nonetheless on April 1st, Student A wrote comments about the Student and the Complainant on the planner belonging to another student (Student D). The matter was investigated and it was determined that the Student had been the first to write on Student D's planner in which she claimed to "own" Student D. In turn, Student A wrote a note on the planner indicating that the Student does not "own" Student D. Rather Student A indicated that Student D was hers, not the Student's. She further commented that the Student "can go suck on something. Just cause I left that class because of her mom doesn't mean she can run stuff. Your (sic) only mine and I'm not sharing!!!"³ Student A served a five day in-school suspension for her actions. In addition, School administrators met with Student A and her parents and advised them that any further confrontation by Student A would result in after-school detention or suspension.

Another incident was reported on May 16, 2014, when the Complainant texted the Principal that Student A and Student B "were talking about the situation on Facebook again." The Complainant indicated that she had spoken with the boy whose post had started the girls' exchanges and had asked that he delete the entire post, which he subsequently did. The Complainant told the Principal that she was sharing the information with the Principal "in case things start stirring up at school again." The Principal requested that the Complainant provide her with screen shots of the Facebook exchanges. The posts consisted of the boy expressing disapproval of the way that Student A treated the Student and explaining that that was why he no longer talks to Student A. In her on-line response, Student A defended her actions in talking with the Student's boyfriend and said that the Student had cussed out her sister and had made up a bunch of lies about Student A and her friends. In her on-line response, Student B said that the Student was upset that Student B was dating someone and had called Student B a "whore" and said that Student B "sucks d***." According to Student B, the controversy had all started with the Student spreading stuff about her. School staff conducted an investigation, including interviewing the boy and speaking with his mother. They also reviewed copies of the posts provided

¹ The Principal shared the teacher's email address and telephone number with the Complainants who reached out to her.

² With the Complainant's permission, School staff subsequently modified the daily check in procedure. Instead of writing daily summaries, the Student would fill out a "How I Am Feeling" checklist during the day to indicate how each particular class had gone. When she turned the checklist in to the Counselor or Assistant Principal at the end of each day, the Student could also share any specific concerns. The Counselor or Assistant Principal would then contact the Complainant to provide an update of the Student's day and discuss any areas of concern. This process continued through the end of the school year.

XXXXX PARAGRAPH REDACTED XXXX

by the Complainant. School staff concluded that Student A and Student B had not initiated the discussion but rather were responding to the post originated by the boy who was a friend of the Student and that none of the posts was threatening. Once the Facebook post was deleted, the School closed its investigation.

A final incident was reported on XXXX, when the Complainant contacted the SRO and informed him that the Student had been assaulted by Student A outside during dismissal. The Principal immediately investigated the matter. She first spoke with Student A and then with a male student who was identified by the Complainant as having been present. Both denied that there had been any type of confrontation between the Student and Student A. Based on the information gathered, the Principal believed that there may have been some accidental contact between Student A and the Student when the Student had approached the male student standing near Student A to give him a “high five.” When the Principal contacted the Complainant later that day and explained the information that had been gathered, the Complainant admitted that Student A’s actions may have been a nudge but maintained that because the Student had called crying hysterically, the Complainant knew that it had been bad. The Principal assured her that the incident would continue to be looked into. The next day one of the Assistant Principals continued to investigate the incident by obtaining statements from the Student, other students present, and interviewing the bus driver who drove the Student home. Based on his investigation, the Assistant Principal concluded that any physical contact between Student A and the Student had been inadvertent.

Following this last incident, the Principal asked all of the Student’s teachers to have heightened awareness toward the Student for the rest of the school year to help keep her safe. To avoid any further, even accidental interactions between the Student and Student A, the Principal offered to modify the Student’s Standards of Learning (SOL) test schedule and have an administrator escort the Student into school to take the SOL tests. The Complainants chose to accompany her to the School and wait while she took the tests. On June 18th, Division staff held a transition meeting with staff from the School and staff from the high school the Student would be attending. The Student is currently enrolled at the high school.

Discussion

As noted above, there was considerable conflict between the Student and some of her peers between XXXX. However, only a small portion of it involved name-calling of a sexual nature and information obtained during the School’s investigations indicated that the Student may have engaged in similar name calling in addition to being the subject of the name-calling. Moreover, much of the negative interactions among the students occurred off school grounds through social media. The majority of the incidents cited by the Complainants involved the manifestation of interpersonal conflict between the Student and other students unrelated to anything of a sexual nature. Even considered in its totality, the conduct of Student A and Student B toward the Student was not sufficiently severe to constitute sexual harassment. A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that discrimination occurred. When there is a significant conflict in the evidence, and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law. OCR concludes that the preponderance of the evidence does not support that the Student was subjected to a hostile environment based on sex.

Absent evidence that (i) the conduct of the Student’s peers constituted harassment based on sex, and that (ii) the Division knew or should have known that the conduct was related to sex, OCR cannot find that the Division failed in its obligation to promptly and appropriately respond to respond to the Complainant’s reports that the Student was discriminated against as alleged.

Title IX Policy/Procedure and Title IX Coordinator

Legal Standards

The Title IX implementing regulation, at 34 C.F.R. §106.8(a), requires a school division to designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under Title IX (the Title IX Coordinator), and a division must notify all students and employees of the name or title, office address, and telephone number of the designated coordinator. A Title IX Coordinator’s core responsibilities include overseeing the school division’s response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX Coordinator must have knowledge of the requirements of Title IX, of the school division’s own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school division. To accomplish this, the Title IX Coordinator must be informed of all reports and complaints raising Title IX issues,⁴ even if the report or complaint was initially filed with another individual or office or if the investigation will be conducted by another individual or office. The school division should ensure that the Title IX Coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

A school division must ensure that the employee designated to serve as Title IX Coordinator has adequate training on what constitutes sexual harassment, including sexual violence, and that he or she understands how the division’s grievance procedures operate. The Title IX implementing regulation at 34 C.F.R. §106.8(b) requires a school division to adopt and publish grievance procedures providing for a prompt and equitable resolution of student and employee complaints alleging sex discrimination. OCR examines a number of factors in evaluating whether a school division’s grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, and third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint and any appeal; and an assurance that the division will take steps to prevent further harassment and to correct its discriminatory effects on the complainant, if appropriate.

Further, a school division should ensure that its employees are sufficiently knowledgeable about its grievance procedures and their implementation. A school division should impart this information 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 sufficiently knowledgeable 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.

Discussion

⁴ As per OCR guidance, there may be an exemption for school counselors.

As part of its investigation, OCR reviewed the Division’s complaint process and the procedures in place to investigate claims of sex discrimination, including sexual harassment. OCR also interviewed the Division’s Title IX Coordinator whose name and contact information is published on the Division’s website. The Title IX Coordinator reported that she received reports of sexual harassment only in instances when the complaint was not resolved at the building level. That is, she only learns of Title IX complaints if a parent complained to her directly or appealed the decision/remedy of the school. And, even in those cases, the appeal might go directly to her supervisor. Thus, if the allegations were handled at the school-level, though she may learn about it incidentally, there is no process in place for her to receive information about a peer sexual harassment complaint or to keep a generalized accounting of all such complaints made across the Division.

Additionally, interviews with School personnel indicated they some did not have an adequate understanding that sexual harassment can encompass sexually offensive language. Though the Title IX Coordinator and the Principal informed OCR that sexual harassment could include verbal harassment and taunting of a sexual nature, other School staff interviewed did not understand that sexual language or epithets based on sex might be sufficiently serious to qualify as sexual harassment and, as such, trigger their responsibilities under the Division’s sexual harassment/sexual violence process/procedure.

Further, OCR found that although the Division has a policy in place to address allegations of sexual harassment and violence, the policy fails to satisfy the requirements of Title IX. Specifically, OCR found that the Division’s complaint policy concerning sexual harassment and sexual violence is in two locations.⁵ First, a policy entitled “Sexual Harassment/Sexual Violence” is on the web among other Division School Board policies. Second, the policy, under the same heading, is repeated verbatim in the Student Code of Conduct. As written, the policy does not require written notice of the outcome of the investigation to either the complainant or the respondent and remains silent on the opportunity for both the complainant and the respondent to submit witnesses and evidence during the investigation. Additionally, there are no designated timeframes for the investigation/adjudication except that the investigation should commence no later than ten days from the initial report of harassment. Finally, in contravention of OCR guidance, the policy encourages the complainant to work out his or her concerns directly with the alleged harasser, which is not appropriate for complaints of sexual violence.

Conclusion

Although OCR found insufficient evidence to support the Complainant’s allegation with regard to the Student, OCR finds that the Division violated Title IX because the Title IX Coordinator does not receive information pertaining to complaints of sexual harassment/sexual violence, School employees are not knowledgeable of what constitutes sexual harassment, and the Division’s policy for addressing Title IX complaints fails to comply with Title IX requirements. To resolve these concerns, the Division entered into the enclosed Resolution Agreement. OCR will monitor the Division’s implementation of the Resolution Agreement.

⁵ The Student Code of Conduct also contains a complaint process for “Equal Education Opportunities/Nondiscrimination” that states, “[e]qual educational opportunities shall be available for all students, without regard to race, national origin, gender, ethnicity, religion, disability or marital or parental status. Educational programs shall be designed to meet the varying needs of all students.” The policy continues “[a]ny student who believes he or she has been the victim of prohibited discrimination should report the alleged discrimination as soon as possible to one of the compliance officers designated below or to any other school personnel.” Based on this description, student sexual harassment/violence complaints could be reported through this process, which is different than the one entitled “Sexual Harassment/Sexual Violence.” Included in the enclosed Resolution Agreement is a provision ensuring that the Division makes it clear which policy controls allegations of sexual harassment/violence.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. 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 Division may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a 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. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the assistance and cooperation provided by Division staff and by Pakapon Phinyowattanachip, Counsel for the Division, during the resolution of this complaint. If you have any questions, feel free to contact Betsy Trice at (202) 453-5931 or via email at betsy.trice@ed.gov.

Sincerely,

/S/

Kay Bhagat
Team Leader
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Pakapon Phinyowattanachip, ReedSmith (via email)