



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

February 28, 2017

Ann Clark
Superintendent
Charlotte-Mecklenburg Schools
P.O. Box 30035
Charlotte, North Carolina 28230-0035

Re: OCR Complaint No. 11-16-1415
Letter of Findings

Dear Superintendent Clark:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on June 21, 2016 against Charlotte-Mecklenburg Schools (the District). The Complainant alleges that the District discriminated against a student (Student A) at XXXX (the School) on the basis of sex. Specifically, the complaint alleges that on and after XXXX, the District failed to promptly and equitably respond to information indicating that another student (Student B) shared a XXXX with other students at the School, and instead suspended Student A from school.

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

In reaching a determination, OCR interviewed the Complainant and reviewed documents provided by the Complainant and the District. After carefully considering all of the information obtained during the investigation, OCR identified compliance concerns. The District agreed to resolve the concerns through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

Background

On XXXX, School administrators suspended Student A, a XXXX student at the School, after learning that she electronically sent a XXXX to a male student (Student B). The District also suspended Student B, who it determined forwarded the XXXX to Student C, along with the message, XXXX.

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

Administrators at the School learned about the incident earlier that day after Student C showed the XXXX to her mother, who reported the incident to the School. School administrators conducted a disciplinary investigation the same day, in which they received statements from Students A, B, and C. That afternoon, the School suspended Student A for three days and Student B for four days under Rule 22 of the District's Code of Student Conduct, which prohibits students' possession of pornographic material.

The District reports that Student A and Student B were separated for the remainder of the 2015-2016 school year, and that Student B now attends a different school.

Legal Standards

The regulation implementing Title IX, 34 C.F.R. § 106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, denied the benefits of, or subjected to discrimination under any education program or activity operated by recipients of Federal financial assistance.

Under Title IX, Districts that receive Federal financial assistance are responsible for providing students with a nondiscriminatory educational environment. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual 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 District's program.

OCR considers a variety of related factors to determine if a sexually hostile environment has been created and considers the conduct in question from both an objective and a subjective perspective. Factors examined include the degree to which the misconduct affected one or more students' education; the type, frequency, and duration of the misconduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment, the size of the school, location of the incidents, and the context in which they occurred; and other incidents at the school. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment. A single instance of rape is sufficiently severe to create a hostile environment.

If a District knows or reasonably should have known about possible sexual harassment that creates a hostile environment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a District's responsibility regardless of whether a student has complained, asked the District to take action, or identified the harassment as a form of discrimination. A District has notice of sexual harassment if a responsible employee actually

knew or, in the exercise of reasonable care, should have known about the harassment. If a District delays responding to allegations of sexual harassment or responds inappropriately, the District's own action may subject students to a hostile environment. If it does, the District will be required to remedy the effects of both the initial sexual harassment and the effects of the District's failure to respond promptly and appropriately.

Even if the sexual harassment did not occur in the context of an education program or activity, a District must consider the effects of the off-campus sexual harassment when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual harassment while at school or in an off-campus education program or activity.

A District should notify a complainant of the right to file a criminal complaint, and should not dissuade a complainant from doing so. Districts should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the complainant in the educational setting. A law enforcement investigation does not relieve the District of its independent Title IX obligation to investigate the conduct.

For Title IX purposes, a District must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the District has taken to eliminate the hostile environment, if the District finds one to exist, and prevent recurrence. Written notice of the outcome of the complaint and any appeal must be provided in writing to both parties. Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to other classes. Additional steps the District may take to remedy the effects of the hostile environment include counseling and academic support services for the complainant and other affected students.

Pending the outcome of an investigation, Title IX requires a District to take steps to ensure equal access to its education programs and activities and to protect the complainant from further harassment as necessary, including taking interim steps before the final outcome of the investigation. The District should undertake 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, and allow the complainant to change academic and extracurricular activities or his or her transportation situation as appropriate. The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. In general, when taking interim measures, Districts should minimize the burden on the complainant. Districts should also check with complainants to ensure that the interim measures are effective and, if ineffective, identify alternatives. In addition, Districts should ensure that complainants or their parents/guardians are aware of their Title IX rights and any available resources, such as advocacy, housing assistance, academic support, counseling, disability

services, health and mental health services, and legal assistance, and the right to report a crime to the school resource officer (SRO) or local law enforcement.

Analysis

OCR determined that the District was placed on actual notice of possible sexual harassment when Student C's mother informed School administrators on XXXX that Student B forwarded Student C a XXXX with the accompanying XXXX. The District informed OCR that although it conducted a disciplinary investigation under Rule 22 of its Code of Student Conduct prohibiting "Pornographic, Profane and/or Violent Material,"¹ it did not conduct a Title IX investigation under its separate "Title IX Grievance Procedures" (the Grievance Procedures) after learning this information because "no complaint, grievance, or request for independent investigation was submitted to or received by the District's Title IX Office, the Title IX Coordinator, or any other district official."² Nevertheless, as stated above, a District who knows or should have known about potential sexual harassment must take immediate and appropriate action to investigate or otherwise determine what occurred. These duties are a District's responsibility, regardless of whether a student has complained, asked the District to take action, or identified the harassment as a form of discrimination.

OCR determined that School personnel did conduct a disciplinary inquiry on XXXX, and obtained written statements from Students A, B, and C. Accordingly, OCR will examine whether the District's disciplinary investigation was otherwise consistent with Title IX and the Grievance Procedures. OCR determined that the Grievance Procedures require, in part, that a District principal conduct an investigation of sexual harassment allegations within 15 calendar days of receiving notice, that complainants have the right to file both a Title IX grievance and a criminal complaint simultaneously, that the District provide complainants with interim measures, and that the District provide the parties with notice of the outcome in writing. The Grievance Procedures further state that a principal will investigate to determine whether the actions at issue constitute a sexually hostile environment, and, if found, "will take prompt and effective steps in an attempt to end the harassment, eliminate the hostile environment, and prevent its recurrence...." OCR also notes that these procedures refer specifically to "complaints" of sexual harassment.³

¹ OCR found that Rule 22 suggests that District administrators input, among other codes, the code "Harassment-Sexual" into its DPI/Powerschool system for this type of offense. In spite of this suggestion, OCR found that the District still chose not to investigate this issue consistent with their separate sexual harassment/Title IX procedures.

² In a subsequent submission to OCR, the District denied that the decision not to conduct an investigation under its Title IX policy and procedure was made because no complaint, grievance or request for investigation was submitted to the District. Rather, the District stated that while the District was aware of its obligation to investigate possible sexual harassment even in the absence of a formal complaint, here, the School "use[d] disciplinary procedures to resolve possible sexual harassment," and that "no separate investigation was deemed warranted, outside of the school-based investigation." The District further argued that the disciplinary investigation was compliant with Title IX. OCR finds that this subsequent position is not supported by the documentation produced by the District for the reasons stated herein.

³ OCR reviewed and approved the District's policies and procedures pertaining to Title IX student harassment in March 2016 as part of an agreement to resolve a different OCR compliance review, OCR Case Number 11-13-5002. OCR reminds the District that it has an affirmative obligation under Title IX to respond to both actual and constructive notice of possible sexual harassment, and that this obligation exists regardless of whether a complaint is filed with the District. To ensure that all District employees are aware of and meet this affirmative obligation, OCR

The District’s investigation showed that Student B asked Student A for XXXX and that he sent Student A XXXX. In her handwritten statement, Student A wrote that when Student B asked for her XXXX, she XXXX but he asked XXXX and said XXXX. She further stated that she was XXXX and XXXX. There is no evidence that, despite receiving this information during the disciplinary investigation of the incident, School personnel followed up with Student A or other students at the School to determine what, if any, impact Student B’s unauthorized sharing of an XXXX of Student A had on Student A, Student C, and other students at the School.

The District maintains the School’s investigation revealed no evidence that Student B sent XXXX to anyone other than Student C. However, Student C wrote in her statement that Student B sent XXXX (emphasis added). The evidence indicates that the School failed to investigate whether the distribution of XXXX to Student C or, potentially, other students in the District constituted sexually harassing conduct that could result in a sexually hostile environment in contravention of Title IX or the Grievance Procedures.

Additionally, written statements by School personnel revealed that they accessed Student B’s phone and saw not only the XXXX involving Student A, but also XXXX as well as conversations with “other girls” containing “sexually explicit” language. School personnel’s investigative notes also state that Student B admitted to requesting XXXX from “several girls,” not just Student A. Finally, the District provided, and OCR reviewed, Student B’s disciplinary file, which states that in XXXX, Student B viewed an “inappropriate website” during a class and read it aloud to other students. While it is unclear whether the “inappropriate website” was of a sexual nature, there is no evidence that School personnel considered whether Student B had a history of unwelcome conduct of a sexual nature and if so, how such conduct may have impacted students at the School.

The Complainant informed OCR that School personnel reported the incident to law enforcement on XXXX, and provided a copy of the police report. Additionally, the Complainant informed OCR that School personnel instructed her that she could pursue a criminal complaint against Student B. However, the District did not effectively notify the Complainant of her right to file a Title IX grievance, regardless of whether she chose to file a criminal complaint. Additionally, filing of a criminal complaint would not have relieved the District of its obligation to conduct a Title IX investigation.

Lastly, the District did not provide, nor could OCR find, any evidence to indicate that District provided either Student A, Student B, or their respective parents with notice of the outcome of their investigation in writing, as required by Title IX.⁴

recommends that the District revise its policies and procedures to make explicit that the District must respond to sexual harassment that it knows or reasonably should know about, regardless of whether a complaint is filed.

⁴ According to the District, it provided Student A with interim measures, such as separating Student A and Student B for the remainder of the year, and offering outside counseling and intervention services, although it did not offer the counseling or interventions until after the Complainant initiated communication about it. Additionally, it did not offer these measures until after the completion of the disciplinary investigation.

Based on the above, OCR finds that the District knew or reasonably should have known of possible discriminatory harassment, and failed to respond appropriately under its Title IX Grievance Procedures. Furthermore, while the District began a discipline-focused investigation promptly, it did not respond appropriately by following up on relevant information learned during the disciplinary investigation related to a potential sexually hostile environment for both Student A as well as other students at the School. Namely, the District failed to examine whether Student B's alleged XXXX constituted unwelcome conduct of a sexual nature that denied or limited Student A's ability to participate in, or benefit from, the District's programs, or whether this conduct rose to the level of a sexually hostile environment under Title IX. Similarly, the District failed to examine whether related behavior by Student B against other students at the School violated Title IX. Additionally, the District did not provide the parties with written notice of the outcome of the investigation. Accordingly, OCR finds that the District's investigation was not fully consistent with Title IX or the Grievance Procedures.

Conclusion

On February 27, 2017, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issues raised. As stated in the Agreement entered into by the District on February 27, 2017, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or 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 District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Samantha Shofar, the OCR attorney assigned to this complaint, at 202-453-5929 or Samantha.Shofar@ed.gov, or Kathryn Love, another OCR attorney assigned to this complaint, at 202-453-6948 or Kathryne.Love@ed.gov.

Sincerely,

/s/

David Hensel
Supervisory Attorney, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Jill Sanchez-Myers, Senior Associate General Counsel (via email)