



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

XXXX

Dr. Shirley Perry
Superintendent
Carroll County Public Schools
605-9 Pine Street
Hillsville, Virginia 24343

RE: OCR Complaint No. 11-17-1342
OCR Complaint No. 11-17-1409
Resolution Letter

Dear Dr. Perry:

This letter is to advise you of the outcome of the complaints that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on XXXX and XXXX, respectively against Carroll County Public Schools (the Division). The Complainant filed the complaint on behalf of his daughter, a student (the Student) at XXXX (the School). In the complaints, the Complainant alleged that:

1. The Student's XXXX teacher (Teacher A) discriminated against female students, including the Student, on the basis of sex, by:
 - a. Unfairly grading the participation of female students in physical education in comparison to male students, including with respect to a class activity on XXXX; and
 - b. Making inappropriate and harassing comments about the roles and responsibilities of females, including during an incident in class on XXXX.¹
2. In retaliation for the Student filing a complaint of sex-based discrimination/harassment against Teacher A on XXXX, as described in Allegation 1, Teacher A and another physical education teacher/coach (Teacher B) treated the Student differently from other students in XXXX, including when:
 - a. Teacher A "berated" the Student about her grade in front of other students, and Teacher A and Teacher B confronted her in the School hallway on XXXX;
 - b. Teacher A acted in an unprofessional manner toward the Student by:
 - i. XXXX;
 - ii. XXXX;
 - iii. XXXX

¹ The Complainant filed these allegations under OCR Complaint No. 11-17-1409.

c. XXXX.²

Jurisdiction

OCR is responsible for enforcing 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. Title IX also prohibits retaliation against any individual who asserts rights or privileges under the law or who files a complaint, testifies, or participates in an OCR proceeding. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Title IX.

Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Factual Background

At the time of the filing of this complaint, and during the XXXX school year, the Student, who is female, was enrolled in XXXX at the School.

XXXX 3 PARAGRAPHS REDACTED XXXX

XXXX 2 SENTENCES REDACTED XXXX.

During the course of the Title IX Coordinator's investigation, on XXXX, the Complainant reported to the Title IX Coordinator that Teacher B XXXX. XXXX 3 SENTENCES REDACTED XXXX.

Thereafter, during the Complainant and the Student's meeting with the Title IX Coordinator on XXXX, the Title IX Coordinator explained the purpose of the investigation and the investigative process, and obtained information from both the Student and the Complainant regarding the Student's allegations of sex-based discrimination/harassment and retaliation.

Following her review of information and interviews with various witnesses, the Title IX Coordinator issued a compliance report outlining her findings on XXXX. The report indicated that the Title IX Coordinator investigated the alleged (1) discriminatory grading practices; (2) sexist comments made in class; (3) retaliation; and (4) violations of the Student's 1st and 14th Amendment rights. As a result of her investigation, the Title IX Coordinator did not find any evidence of sex-based discrimination/harassment or retaliation; however, she did recommend that the Division take several specific actions to address "the perception of discrimination and sexism." Her recommendations included XXXX 2 SENTENCES REDACTED XXXX. The

² The Complainant filed these allegations under OCR Complaint No. 11-17-1342.

Superintendent agreed with the Title IX Coordinator's findings and agreed to implement the recommendations by letter dated XXXX.

Allegation 1 (OCR Complaint No. 11-17-1409): Sex Discrimination/Harassment

Regarding Allegation 1, the Complainant alleged that Teacher A discriminated against female students, including the Student, on the basis of sex by: (a) unfairly grading the participation of female students in physical education in comparison to male students, including with respect to a class activity on XXXX; and (b) making inappropriate and harassing comments about the roles and responsibilities of females, including during an incident in class on XXXX.

Legal Standards

The Title IX regulation, at 34 C.F.R. § 106.31(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Division's education programs or activities on the basis of sex.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or *prima facie*, case of discrimination. Specifically, OCR determines whether the recipient treated the student less favorably than similarly situated individuals of a different sex. If so, OCR then determines whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the recipient is a pretext, or excuse, for unlawful discrimination.

When investigating an allegation of sex/gender-based harassment or bias, OCR determines whether a recipient responded promptly and effectively to sex/gender-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment. A recipient may also violate Title IX if an employee engages in sex/gender-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the recipient had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the recipient's programs, activities, or services.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

Analysis

As discussed above, on XXXX, the Student complained to the School that Teacher A subjected female students to discrimination on the basis of sex, including through different treatment and

sex/gender-based harassment, as well as retaliation, as discussed in Allegation 2 below. On XXXX, the School referred the Student's allegations to the Division's Title IX Coordinator for investigation.

When a recipient has conducted its own investigation of allegations, as is the case here, OCR typically does not investigate the allegation anew; rather, OCR reviews the recipient's actions to determine if the recipient provided a comparable resolution process, that is, fully investigated the allegations, under the appropriate legal standard, and secured remedies that meet OCR's standards.

Here, the Division, specifically the Title IX Coordinator, conducted a prompt investigation of the Student's allegations of sex/gender-based discrimination/harassment and retaliation. Following the Student's complaints to the Assistant Principal on XXXX and XXXX, and receipt of the Student's complaint on XXXX, the Title IX Coordinator issued a notice of her investigation on XXXX. The Title IX Coordinator gathered documentation from Teacher A and Teacher B, School administrators, and from the Complainant and Student; interviewed relevant parties and other witnesses; and reviewed video recordings. On XXXX, the Title IX Coordinator issued her findings to the Superintendent. In turn, the Superintendent adopted the Title IX Coordinator's findings, including her recommendations, by letter dated XXXX, noting that, even though the Division did not find that any discrimination, sexism, or retaliation had taken place, "there appears to be the perception of discrimination and sexism."

During the course of OCR's investigation, the Division expressed a willingness to resolve Allegation 1 (OCR Complaint No. 11-17-1409) through a Resolution agreement pursuant to Section 302 of OCR's *Case Processing Manual*. OCR reviewed the data submitted by the Division including its policies, investigative report, and supporting documents as well as its interviews with the Complainant and Student to inform the development of an appropriate Resolution Agreement.

OCR has identified a preliminary concern about the Division's response to the Student's concern of sex/gender-based discrimination and harassment under Title IX. The Division's policy states that whether an "action or incident constitutes a violation of this policy requires a case by case determination based on all of the facts and circumstances revealed by a complete and thorough investigation." Here, OCR has concerns about the basis on which the Division made its determinations as stated in the Title IX Coordinator's investigation or compliance report (Compliance Report). OCR has concerns that the Division did not provide a comparable resolution process, that is, fully investigated the allegations under the appropriate legal standard, and secured remedies that meet OCR's standards.

Specifically, with respect to Allegation 1(a), in which the Complainant alleged that Teacher A discriminated against female students, by unfairly grading their participation in comparison to male students, the Division found that there was no evidence of discriminatory grading practices. However, the Division's finding does not appear to be supported by the information described in the Compliance Report, which reflects the average grades for boys and girls, and may not provide a complete picture, given the ratio of girls to boys in the class and the very low grades of

one or two boys that lowered the average grade. OCR would need to review additional information and interview Teacher A to determine how he graded students in his class.

Further, regarding Allegation 1(b), in which the Complainant alleged that Teacher A discriminated against female students, by making inappropriate and harassing comments about the roles and responsibilities of females, including during an incident in class on XXXX, OCR has similar concerns that the information in the Compliance Report may not support the findings. The Compliance Report cites a Centers for Disease Control and Prevention statistic regarding the rate of injury for women in non-fatal bathroom incidents was 72% higher than that of men,³ which is unrelated to Teacher A's comment comparing men and women cleaning the bathroom in a discussion of hazardous chemicals. OCR would need additional information to determine how the information factored into the Division's conclusion that Teacher A's comments were based on the curriculum.

Further, it is unclear what definition of harassment the Division used to reach its conclusion related to the discriminatory or harassing comments. The Compliance Report states that six of the eight students interviewed by the Title IX Coordinator (excluding the Student) were not bothered by Teacher A's comments and did not believe they were sexist; and that the majority of the girls in the class did not feel uncomfortable XXXX, though they believed boys were aggressive. While students' subjective beliefs are relevant to the analysis of whether comments were sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in the Division's programs, students' feelings about Teacher A's comments and about XXXX are not determinative of whether Teacher A's actions were in violation of Title IX, particularly at the elementary and secondary level. OCR would need more information about the Division's investigation to know what factors the Title IX Coordinator applied and whether she determined that the comments were not sufficiently serious as to interfere with or limit a student's, including the Student's, ability to benefit from the Division's programs and activities.

As stated above, based on OCR's review of the Division's investigation to date, OCR has concerns about the manner in which the Division reached its determinations regarding the Student's allegations. OCR has determined that resolving the allegation is appropriate. To resolve this concern, OCR would need to interview Division staff and student regarding Teacher A's comments and grading practices. Further, OCR would need to obtain additional information about the Division's Title IX investigation process, the legal standards applied, and the Division's findings.

On October 5, 2017, the Division signed a Resolution agreement pursuant to Section 302 of OCR's *Case Processing Manual* to resolve Allegation 1 (OCR Complaint No. 11-17-1409).

Allegation 2 (OCR Complaint No. 11-17-1342): Retaliation

³ We note that the statistic cited relates to slip-and-fall injuries, and not to the subject of discussion, use of hazardous chemicals in the bathroom, during class. Further, the attachments that support the Compliance Report include a lesson that discusses household hazards, which says that toddlers, not women, are at greatest risk for accidents involving household chemicals.

With respect to Allegation 2, the Complainant alleged that the Division retaliated against the Student after she filed a complaint against Teacher A and Teacher B on XXXX, as described above in Allegation 1, when Teacher A and Teacher B treated the Student differently from other students in XXXX, including when: XXXX 3 SENTENCES REDACTED XXXX.

Legal Standards

The Title IX regulation, at 34 C.F.R. § 106.71, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Title IX or who files a complaint, testifies, assists, or participates in a proceeding under Title IX.

When analyzing a claim of retaliation, OCR will consider: 1) whether the complainant/injured party engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the recipient took an adverse action against the complainant/injured party; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the recipient's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

OCR determined that the Student engaged in a protected activity by filing complaints with the School beginning XXXX, regarding her concerns that Teacher A discriminated against/harassed female students on the basis of sex. OCR determined that the Division was aware of the Student's protected activity, when the Assistant Principal responded to the Student's concerns via email on XXXX and when the Division initiated an investigation of her concerns on XXXX.

OCR next considered whether the Division took adverse actions against the Student as alleged above. An adverse action is something that could deter a reasonable person from engaging in further protected activity. Petty slights, minor annoyances, and lack of good manners do not normally constitute adverse actions. OCR determined that the Division's actions, if true, constituted adverse actions against the Student in isolation and/or in totality.

However, prior to scheduling interviews of School staff, and confirming whether the Division's took adverse actions against the Student, as alleged; determining whether there was a causal connection between the alleged adverse actions and the Student's protected activity; and determining whether the Division's stated legitimate, non-retaliatory reasons were a pretext for discrimination, the Division expressed interest in resolving Allegation 2 (OCR Complaint No. 11-17-1342) under Section 302 of OCR's *Case Processing Manual*.

Moreover, as discussed above, during the course of investigation, OCR learned that the Complainant also raised the same concerns of retaliation to the Division, which the Division investigated. In the investigation, the Title IX Coordinator determined that Teacher A and Teacher B did not retaliate against the Student. OCR has preliminary concerns about the

Division's investigation of the Student's retaliation allegations, including whether the Division used appropriate legal standards for analyzing retaliation based on its Compliance Report.⁴ As such, OCR has concerns that the Division did not provide a comparable resolution process, that is, fully investigated the allegations, under the appropriate legal standard, and secured remedies that meet OCR's standards.

OCR has determined that resolving the allegation is appropriate, as OCR would need to interview Division staff and students, in order to determine whether and how the events occurred. Further, OCR would need to obtain additional information about Division and School policies, procedures, and practices pertaining to the use of cell phones, leaving class to use the restroom, leaving class to see the School Nurse, and the Pledge of Allegiance. Lastly, OCR would need to obtain information about the Division's Title IX and retaliation investigation process, the legal standards applied, and the Division's findings.

On October 5, 2017, the Division signed an agreement to resolve Allegation 2 (OCR Complaint No. 11-17-1342).

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on October 5, 2017 which, when fully implemented, will resolve the allegations raised in these complaints. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division is in compliance with the statutes and regulations at issue in the cases. Failure to implement the Agreement could result in OCR reopening the complaints.

This concludes OCR's investigation of the complaints. 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 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, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

⁴ The Title IX Coordinator gathered information from Teachers A and B regarding the incidents of alleged retaliation. In making findings, the Title IX Coordinator noted that video footage of some incidents was unavailable. Then, the Title IX Coordinator concluded retaliation did not occur without additional analysis.

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 Division's cooperation in the resolution of this complaint. If you have any questions, please contact Judy Briggs, the OCR senior investigator assigned to this complaint, at 202-453-5902 or judy.briggs@ed.gov, or Amy Williams, the OCR attorney, at 202-453-5933 or amy.williams2@ed.gov.

Sincerely,

/s/

Letisha Morgan
Team Leader, Team II
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Bradford A. King, Esq.