



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, DC

September 26, 2018

Dr. Dennis Carter
Division Superintendent
Smyth County Schools
121 Bagley Circle
Suite 300
Marion, VA 24354

Re: OCR Complaint No. 11-18-1199
Resolution Letter

Dear Dr. Carter:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on March 1, 2018 against Smyth County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School). The Complainant alleges that the Division discriminated against the Student on the basis of sex. Specifically, the complaint alleges that the School failed to respond promptly and equitably to incidents of sex-based harassment and bullying of the Student by other students that created a hostile environment, from approximately XXXXX, 2018 through XXXXX, 2018.

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 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 pursuant to Section 302 of OCR's *Case Processing Manual*. Following is a summary of the relevant legal standards and information obtained by OCR during the investigation.

Allegation and Background

The Student enrolled at the School on Thursday, XXXX, 2018. The Complainant alleged to OCR that another student [Student A] subjected the Student to multiple acts of sex-based harassment and bullying between XXXX, 2018, the day after the Student enrolled in the School, and approximately XXXX, 2018. The Complainant alleged that the Division failed to promptly and equitably respond to the incidents of sex-based harassment and bullying, thereby subjecting

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the Student to a hostile environment. As a result, the Complainant stated that the Student has been XXXXX XXXXX XXXXX XXXXX, and does not want to return to the School.

Investigation

However, the Division denied to OCR that the Student, the Complainant, or anyone else initially reported incidents of sex-based harassment and bullying to Division staff, as alleged. Rather, the Division asserted that five days after the Student enrolled in the School, on Tuesday, XXXX, 2018, the Student reported to one of her teachers (Teacher 1)¹ and another teacher (Teacher 2) that two unidentified students in the “fifth block” of classes were bothering her, and that a third unidentified student bumped her in the hallway.² The Student informed Teachers 1 and 2 that she was “on the verge” of XXXXX XXXXX XXXXX against these students, but did not want to get into trouble. Because the Student’s bus was arriving, Teachers 1 and 2 directed the Student to see the AP in the morning to address this issue.³

The next day, Wednesday, XXXX, 2018, the Student reported to the AP that there was “drama” involving friends of XXXXX. The Student explained to the AP that these students were “picking up where [they] left off after XXXXX.”⁴ However, the Student reported to the AP that “it’s fine.” In response to the Student’s report, the AP investigated by reviewing all hallway video from XXXX, 2018, around the fifth “block” of classes. The AP found no evidence that the Student was bumped in the hallway. The Division stated that up until this point, neither the Complainant nor the Student had alleged or otherwise indicated that other students were harassing or bullying the Student on the basis of her sex.

Instead, the Student reported to the Nurse and the AP that a student that she was able to identify [Student A] was jealous of her XXXXX; and that Student A began spreading a rumor XXXXX⁵. The Student told the Nurse that she wanted to confront Student A with School personnel present. Because the school day was almost over, the AP stated that she would either meet with the Student and Student A together, or individually. The AP also advised the Student not to engage Student A in any way, including on social media and that she should come directly to her office the next morning to avoid any issues.

The next day, on XXXX, 2018, the Student reported to the AP that another student (Student B) told her that Student A said in the auditorium that morning that the Student XXXXX.⁶ The

¹ Teacher 1 taught the Student during the second and fifth “block” of classes.

² The Division asserted that prior to XXXX, 2018, neither the Student nor the Complainant notified Division staff regarding issues with other students. Rather, on XXXX, 2018, the Student left class during fifth block without permission and could not be located. The Division provided OCR with email correspondence between Teacher 1 and the School’s Guidance Counselor supporting its assertions. Teacher 1 spoke with both the Complainant and the Student about the Student’s unapproved absence. In response, the Student explained to Teacher 1 that she suffered from XXXXX and needed to leave the room at times. Teacher 1 requested that the Student inform her of any further occurrences so that she could send her to the School Nurse. Teacher 1 also followed-up with the Student, and the Student informed her that she was not having any issues in the classroom.

³ Testimony by Division personnel did not indicate that the Principal was involved in this incident or called the Student’s report “nonsense,” as the Complainant alleged to OCR.

⁴ The Student informed School staff that she attended XXXXX in the Division.

⁵ The Complainant alleged to OCR that the Student reported that Student A also said that her parents were “XXXX XXXXX”; however, the Division asserted that the Student did not report such information at this time.

⁶ The Complainant alleged to OCR that the Student reported to School staff that Student A also: XXXXX. The Division denied that the Student reported any such information at this time.

Division also stated and provided a video recording indicating that the Student XXXXX XXXXX Student A from XXXXX; the AP imposed a 5-day out-of-school suspension (OSS) on the Student for five days for “fighting”.⁷

Nevertheless, the AP investigated the Student’s claim that Student B heard Student A making the alleged inappropriate and sexually harassing comments about the Student. Specifically, the AP interviewed Student B, who denied hearing Student A make the alleged comments, or any comments about the Student at all, only that Student A commented that the Student looked at her “wrong” when they passed in the hallway. The AP also interviewed the Student’s XXXXX (Student C), who stated that she also did not hear Student A make any comments about the Student but that she had heard from others that Student A said things about the Student’s family. However, Student C also acknowledged “playing both sides.” The AP stated that although she was unable to substantiate that Student A made any harassing comments to the Student, as had been reported to her, she contacted Student A’s guardian on XXXXX, 2018, and explained that the School will hold students accountable for any misconduct and that she should monitor Student A’s social media use.

Thereafter, the Division stated that following her OSS, the Student returned to the School on XXXX, 2018.⁸ At that time, the Division stated that the Complainant expressed concerns regarding the Student’s interactions with Student A. The AP advised the Complainant that the School had investigated the Student’s complaints about Student A’s disparaging comments, as previously discussed, but that the Division was unable to substantiate her complaints. The AP also informed the Complainant that she had encouraged Student A’s guardian to monitor her social media use, and she recommended that the Complainant do the same with respect to the Student.

Thereafter, on XXXXX, 2018, the Student reported to the School’s Resource Officer (SRO) that there was a threat XXXXX, as the Complainant also alleged to OCR. In response, School staff reviewed video footage and determined that four students had entered the restroom in that timeframe, including the Student. The other three students did not XXXXX. The Division stated that the Student initially denied writing the threat but eventually confessed to the misconduct when she was informed that XXXXX XXXXX XXXXX.

The Division stated that as a result of this last incident, it imposed a 10-day OSS on the Student days for “making a threat,” beginning XXXXX, 2018, and that it scheduled a XXXXX XXXXX at a XXXXXX center for the Student on XXXXX, 2018, to be followed by a meeting with School personnel on XXXXX, 2018. After conducting the XXXXX, the XXXXX team recommended that the Student not return to the School for the remainder of the XXXXX XXXXX and instead receive homebound instruction services. The Division scheduled a readmission meeting for XXXXX, 2018; however, neither the Complainant nor the Student attended. The meeting was rescheduled for XXXXX, 2018, at which time, the Complainant and the Student stated that they preferred that the Student continue on home instruction.

⁷ In addition, the Division provided OCR with documentation indicating that the Student (or at least someone with the Student’s screenname) posted a warning/threat in a Snapchat post on the evening of XXXXX, 2018, stating, XXXXX. A male student reported the post to School staff. When asked about the post, the Student asserted to the AP that someone had posed as her. The Division informed OCR that based on the post, it assessed that the Student may have planned the physical assault on Student A.

⁸ In the interim, the Complainant filed the instant OCR complaint on XXXX, 2018.

The Division provided OCR with documentation indicating that while the Student was serving her second OSS, the Complainant sent two “Notice[s] of Harassment” (the Notices) to the Principal, which were signed by a notary public on XXXXX, 2018, and delivered on XXXXX, 2018. The Notices included some of the same or similar incidents of harassment, as described above; however, the Complainant added additional incidents that were not previously reported to the Division, or she otherwise “amended” the incidents to include information not previously reported to the Division.⁹

The two additional “new” incidents that the Complainant reported included the following: (Incident 1) on XXXXX, 2018, Student A XXXXX XXXXX XXXXX, and then ran out of the restroom, all of which the Student allegedly reported to Teacher 1; and (Incident 2) on XXXXX, 2018, Student A was laughing at the Student and telling her that she was XXXXX XXXXX.

The Division asserted to OCR that even though the Complainant “amended” her description of some of the incidents that allegedly occurred between XXXX and XXXX, 2018, it had already conducted a full investigation of those incidents as reported by the Student at the time, such that it did not substantiate that the incidents even occurred as alleged.

Regarding the two additional incidents, Incidents 1 and 2, that allegedly occurred on XXXXX, 2018, the Division asserted that it did not conduct any further investigation. However, it stated that staff would have conducted a further investigation, by first meeting with Student to discuss what had happened, and then by speaking with any identified student witnesses and/or perpetrators. However, because the Student opted to pursue home instruction after her second suspension, it did not conduct any further investigation.

Legal Standards

A recipient’s failure to respond promptly and effectively to sex-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Title IX. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; 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. When such harassment is based on sex, it violates Title IX.

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.

When responding to harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other

⁹ See Footnotes 5 and 6.

factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a recipient 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.

Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>, and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

Analysis

The Complainant alleged that the School failed to respond promptly and equitably to incidents of sex-based harassment and bullying of the Student by other students that created a hostile environment, from approximately XXXX, 2018 through XXXX, 2018, as described above.

As discussed above, OCR determined that there were discrepancies between what the Student initially reported to the Division, what the Complainant later reported to the Division through the Notices on XXXXX, 2018, and what the Complainant alleged to OCR. OCR determined that for the incidents that the Student initially reported to the Division, the Division promptly and equitably investigated the Student's reports, and it took prompt and effective steps reasonably calculated to end the alleged harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring, and it notified the Complainant and Student A's guardian of the outcome of the investigation. Through its investigation, the Division did not substantiate the Student's reports.

Specifically, on XXXXX, 2018, when School staff first learned about the Student's allegation that Student A was spreading rumors about the Student XXXXX, the AP immediately created a plan with the Student to have a meeting with Student A the following morning to discuss the alleged comments. Further, the AP offered an interim measure, to report to the AP's office in the morning (rather than the auditorium), aimed at avoiding further negative interactions between the Student and Student A, which the Student declined. The following day, after the Student reported that Student A said that she XXXXX, and despite interviewing witnesses identified by the Student, including XXXXX [Student C], the AP was unable to confirm that Student A made any of the alleged comments. Thus, by the end of the day on XXXXX, 2018, the AP completed her investigation and was unable to conclude that Student A made the remarks. Nevertheless, the AP advised the Complainant and Student A's guardian that the Student's complaints had not been substantiated, and she informed them about the need to monitor social media.

Moreover, OCR determined that the AP also investigated incidents wherein the Student alleged that unidentified students bumped her in the hallway and another student had written a threatening message XXXXX. However, through investigation, including a review of video footage, the AP determined that there was no evidence to indicate that the Student was bumped by another student in the hallway; and that the Student had written the threatening message herself, such that she made a false report.

OCR further determined that even though the Complainant provided additional information or “amended” the Student’s reports regarding these incidents through the Notices of harassment/sexual harassment that the Complainant delivered to the Division on XXXX, 2018, OCR found no evidence to indicate that any further investigation on behalf of the Division would have altered its determination, as it had not substantiated that the incidents had, in fact, occurred as alleged.

In addition, OCR considered the Division’s response to the additional Incidents 1 and 2 that the Complainant reported through the Notices, and were alleged to have occurred on XXXXX, 2018, including whether it assessed if such incidents could constitute sex-based harassment and bullying, which may have warranted further investigation. However, before completing our investigation with respect to Incidents 1 and 2, including interviewing Division and School staff and before making a compliance determination, the Division requested to resolve the complaint pursuant to Section 302 of OCR’s *Case Processing Manual*.

Conclusion

Pursuant to Section 302 of OCR’s *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on September 21, 2018, which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information 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 has fulfilled the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening the complaint.

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 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.

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 Dwayne J. Bensing, the OCR attorney assigned to this complaint, at 202-453-6910 or Dwayne.Bensing@ed.gov.

Sincerely,

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

Enclosure

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