



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

REGION XV
MICHIGAN
OHIO

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

August 10, 2018

Mr. Marshall Grate, Esq.
Clark Hill PLC
200 Ottawa NW, Suite 500
Grand Rapids, MI 49503

RE: OCR Docket #15-15-1267

Dear Mr. Grate:

On April 29, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint filed against Kalamazoo Public Schools (the District). The complaint alleged that the District discriminated based on sex by failing to promptly and equitably respond to complaints of sexual battery against a student (Student A) occurring on XXXXXXXX XX, XXXX, and XXXXXXXX XX, XXXX, and, as a result, Student A was subjected to a sexually hostile environment.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance from the Department. As a recipient of such financial assistance, the District is subject to Title IX.

During its investigation, OCR reviewed documents provided by the District, observed the District's surveillance video footage of the XXXXXXXX XX, XXXX, incident, and interviewed Student A, Student A's mother, and relevant District staff. After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Title IX. On August 6, 2018, the District signed the attached resolution agreement that, once implemented, will address the compliance concerns OCR identified. A summary of OCR's investigation, and the basis for OCR's findings, are presented below.

Background

The complaint was filed on behalf of Student A, who during the XXXX-XXXX school year, attended one of the District's high schools. Included with the complaint was a detailed written narrative that the attorney for Student A (the attorney) submitted, as well as two handwritten statements from Student A concerning the two alleged incidents. Both of Student A's statements were dated XXXXXXXX XX, XXXX. The attorney alleged that in the fall of 2014, when Student A was XX XXXX XX and in the XXXXX XXXXX, she was sexually assaulted twice at school. Student A had also been identified as a student with a disability and had been receiving services under an individualized education program (IEP).

According to the attorney, as explained in more detail below, Student A was also subjected to teasing, threats, and humiliation by additional students at school, related to the two incidents. Student A and her mother complained about the incidents to the District and then later to the Kalamazoo Township Police Department, but the District failed to adequately respond to the complaints.

The District acknowledged that two incidents occurred on the dates alleged but asserted that it appropriately and adequately addressed each of the incidents.

Alleged Sexual Harassment

X---forty one paragraphs redacted---X

The District's Title IX Grievance Procedures

The District provided OCR with copies of its harassment policy and procedures for reporting incidents of sexual harassment in place during the 2014-2015 school year and its Student Code of Conduct for the 2016-2017 school year. In addition, OCR obtained a copy of the District's sexual harassment policy and procedures posted on the District website as of October 2017, which was still the version posted to the District's website as of March 23, 2018.

The District policies in place during the 2014-2015 school year included board policy 3.7 entitled "Harassment" and a corresponding procedure 3.7 entitled "Reporting Incidents of Sexual Harassment." The policy prohibited harassment based on sex and provided a comprehensive definition that defined sexual harassment, in part, as: "unwelcome sexual advances, requests for sexual favors, and other conduct or communication of a sexual nature." The board policy stated that the District would promptly investigate all allegations reported and take appropriate action. The brief "Reporting Incidents of Sexual Harassment" procedure stated that students and staff should report allegations of sexual harassment "directly to the principal/administrator" and that any allegation brought to the principal's attention had to be reported to the assistant superintendent of human resources. The procedure stated that the school district would investigate all allegations and take appropriate remedial action. These documents provided no additional direction regarding how sexual harassment investigations were to be conducted or documented. These procedures were not included in the 2014-2015 Student Code of Conduct.

The District's Title IX policy and procedures were included in the 2016-2017 Student Code of Conduct, under the subsection "Title IX Non-Discrimination," which was posted on the District's website.

The 2016-2017 Student Code of Conduct states that students, employees, and candidates for admission to any educational program and/or employment and all other persons are protected against all forms of sex discrimination and sexual harassment, including based on gender identity or stereotypical notions of gender identity. It includes the names and contact information for the District's two Title IX coordinators, one for complaints involving staff members and one for complaints involving students. It provides an explanation for how students and all other adults

can report complaints of discrimination based on sex, who to report to, and what information to include. Students are instructed to report complaints of sex discrimination first to a teacher and, if not satisfied, to an assistant principal or principal. The Student Code of Conduct states that “[c]omplaints of any violation of the District’s nondiscrimination policy will be promptly investigated and appropriate actions taken based on the results of the investigation. Individuals who report violations of the District’s nondiscrimination policy will be granted confidentiality to the extent reasonably practicable.” The School’s Student Handbook has the same information and the District’s sexual harassment procedure (3.7) states essentially the same thing.

In addition, the Student Code of Conduct also includes a list of disciplinary offenses, including harassment and criminal sexual conduct (as defined by Michigan State law), and the range of possible consequences for these offenses.

The District’s website also includes a “Non-Discrimination and Accessibility Policy,” last accessed by OCR on March 23, 2018, which states the same two Title IX coordinators as the Code of Conduct and describes the same information about complaints.

The District administrators involved in processing Student A’s complaints of sexual harassment did not seem to recognize Student B’s behavior as being of a sexual nature. Although they did recognize the sexual nature of Student C’s behavior, they did not appear to report that incident to the designated Title IX coordinator.

Legal Standard, Analysis and Conclusions

- **Legal Standards**

The Title IX implementing regulation, 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 academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Hostile environment sexual harassment is unwelcome conduct of a sexual nature that is sufficiently serious that it denies or limits a student’s ability to participate in or receive the benefits, services, or opportunities of a school’s program. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. In addition, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment.

OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex. OCR considers the conduct from both a subjective and objective perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., “the constellation of surrounding circumstances, expectations, and relationships.” Schools should also use these factors to evaluate conduct in order to draw

commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level. Relevant factors include the following: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; 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 or subjects of the harassment¹; the size of the school, location of the incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment.

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

When responding to reported sexual harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. If there is a dispute about whether harassment occurred, determinations should be made based on the totality of the circumstances such as: statements made by any witnesses to the alleged incident; evidence about the relative credibility of the alleged harassed student and the alleged harasser (e.g., the level of detail and consistency of each person's account should be compared to one another and to the existence or lack of corroborative evidence); evidence that the alleged harasser has been found to have harassed others; evidence that the allegedly harassed student has made false allegations against other individuals; evidence of the allegedly harassed student's reaction or behavior after the incident such as witness accounts from individuals who saw the student immediately after the incident or evidence of significant changes in the student's behavior in the weeks after the incident; evidence about whether the allegedly harassed student filed a complaint or took other action to protest the conduct after it had occurred; and any other contemporaneous evidence.

It may be appropriate for a school to take interim measures prior to and/or during the investigation of a complaint. Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct. Interim measures include counseling, extensions of time or other course-related adjustments, modifications of class schedules, restrictions on contact between the parties, increased security and monitoring of certain areas of campus, and other similar accommodations. The measures needed by each student may change over time, and the Title IX coordinator should

¹ For example, in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.

communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs.

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. In some cases, it may be appropriate to further separate the harassed student and the harasser. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed.

Steps should also be taken to eliminate any hostile environment that has been created. For example, if a student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct. In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student.

Finally, a school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses. At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation.

Pursuant to the Title IX regulation at 34 C.F.R. § 106.8(b), recipient schools must adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of discrimination on the basis of sex in violation of the Title IX. Factors OCR considers in determining whether a grievance procedure is prompt and equitable include: whether there is notice of the procedure, including where complaints may be filed; whether the procedures apply to complaints alleging discrimination carried out by employees, other students, or third parties; whether the procedures provide for adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; whether the procedures provide designated and reasonably prompt timeframes for the major stages of the complaint process; whether the procedures provide notice to the parties of the outcome of the complaint; and whether the procedures provide an assurance that the school will take steps to prevent

recurrence of any harassment and to correct its discriminatory effects on the complainant and others if appropriate.

A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students, parents, and employees know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated. Distributing the procedures to administrators, or including them in the school's administrative or policy manual, may not by itself be an effective way of providing notice, as these publications are usually not widely circulated to and understood by all members of the school community. The school must also make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates.

Title IX grievance procedures may include informal mechanisms for resolving complaints to be used if the parties agree to do so. However, it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor or trained mediator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.

- **Analysis and Conclusions**

X---five paragraphs redacted---X

Moreover, by the time the District offered to take more substantial measures to prevent ongoing sexual harassment of Student A and address the impact it was having on her, such as an escort and a change of schedule, Student A had already been assaulted a second time. The evidence supports that this incident was a result of the District's failure to promptly and effectively address the first incident.

Although the District handled the incident with Student C differently and expeditiously, again there is little evidence to suggest that it investigated the incident as a Title IX sexual harassment issue. It is unclear whether Student C's immediate removal was the result of his conduct towards Student A or due to his XXXXXXXX XX XXXXXXXX. Therefore, the District's response to this incident does not support or suggest that its handling of the first incident was an anomaly.

At no time did the District take steps to ensure that Student A was not experiencing retaliatory harassment or to address any teasing or similar conduct by other students against Student A. Ultimately, Student A left the District.

For the reasons stated above, OCR concludes that the evidence is sufficient to find that the District failed to take prompt, effective action upon notice of the first assault against Student A, the District's inaction permitted Student A to be subjected to a hostile environment that denied or limited her ability to participate in or benefit from the District's program on the basis of sex, and the District did not take sufficient corrective actions to stop the harassment, prevent its

recurrence, and remedy the effects on Student A, including to address any ongoing harassment from other students. The District therefore violated the Title IX implementing regulation at 34 C.F.R. § 106.31. The District also failed to provide a prompt and equitable response to Student A’s Title IX grievance, in violation of 34 C.F.R. § 106.8(b).

OCR also finds that the District’s Title IX grievance procedure as written did not include specific provisions that would ensure an adequate, reliable, and impartial investigation of complaints as Title IX requires. The procedure did not make clear that it applied to discrimination carried out by third parties. Although it stated that complaints will be “promptly investigated” it did not include any timeframes for any of the stages of an investigation. Further, the procedure did not provide the parties the right to present evidence and witnesses. It did not require that the parties be notified of the outcome of an investigation. Although it stated that the District would take actions appropriate to the outcome of the investigation, it did not provide an assurance that the District would take steps to prevent the recurrence of any discrimination and to correct the discriminatory effects on the complainant and others, if appropriate.

Moreover, although the procedure did not specifically describe an informal resolution procedure, interviews with various District administrators indicate that the District utilized an outside mediation service, including potentially for sexual harassment complaints. The complaint asserted that District administrators said, after the second incident, that Student A should “sit down with” Students B and C to “talk about it.”

In addition, with respect to the reporting procedures for Title IX complaints, the written procedures broadly directed students to report complaints to teachers, then to an assistant principal or principal if not satisfied, and then to a Student Services administrator if not satisfied at the building level. Students were not directed to report incidents directly to the District Title IX coordinator responsible for handling Title IX complaints, nor did the procedures require District staff to immediately notify the Title IX coordinator of incidents reported to them. Thus, it is unclear how the Title IX coordinator would have had notice of complaints when they were initially reported or would have overseen the complaint process. When OCR interviewed the Title IX coordinator for students during the time period in question, she stated that the complaint involving Student A was the only Title IX complaint she was directly involved in during the prior three years.

For these reasons, OCR finds that during the time period relevant to this complaint, the District failed to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of discrimination on the basis of sex, as required by Title IX’s implementing regulation at 34 C.F.R. §106.8. It also failed to provide adequate notice of the grievance procedures or training on what constitutes sexual harassment.

OCR notes that the District received technical assistance from OCR regarding its Title IX procedures, and has since revised the procedures.

Additional Compliance Concern

As noted above, Student A has a disability and was on an IEP. Although this issue was not raised in the complaint, the evidence obtained to date raises a compliance concern as to whether the District convened Student A's IEP team to determine whether, as a result of the effects of the sexual harassment, Student A's needs had changed such that the IEP was no longer designed to provide a meaningful educational benefit and/or whether Student A was being denied a free appropriate public education (FAPE), as required by the Section 504 regulation at 34 C.F.R. §§ 104.33 and 104.35. In addition, the mention by one School administrator of placing Student A in an "alternate location," without apparent consideration to the required IEP process for a change in placement raises concerns as to whether the District was providing Student A FAPE services in an educational setting with persons without disabilities to the maximum extent appropriate to her needs as required by 34 C.F.R. § 104.34.

Resolution

On August 6, 2018, the District signed the attached resolution agreement (the Agreement) to resolve this complaint. The Agreement requires the District to adopt and publish its revised Title IX complaint procedures and other related procedures and to train its staff on the revised procedures and on the requirements of Title IX. It also requires the District to provide training to staff involved in Title IX investigations on how to properly conduct and document future Title IX investigations. It further requires the District to maintain documentation regarding the processing of each report of sex discrimination, including sexual harassment and sexual assault.

The Agreement also requires the District to provide annual, age-appropriate training to its middle and high school students regarding the role and duties of the District's Title IX coordinators; what constitutes sex discrimination, sexual harassment and sexual assault and how to report such incidents; the District's prohibition against sexual harassment; the District's revised Title IX policies and procedures; consequences for violating the District's Title IX policies; and remedies available to students.

The Agreement also requires the District to develop a monitoring program to assess the effectiveness of the District's overall anti-harassment efforts at the School.

Finally, the Agreement requires the District to offer, in writing, to have its Title IX coordinators meet with Student A and Student A's parent regarding the District's handling of the alleged sexual assaults. The District must also provide them with written notice of the outcome of the District's investigation into Student A's complaint and notify them of the changes to the District's Title IX policies and procedures.

OCR will monitor the District's compliance with the Agreement.

This concludes OCR's investigation of the complaint and 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, OCR will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR looks forward to receiving the District's first monitoring report, which is due by **September 1, 2018**. If you have any questions, about this letter or the monitoring of the Agreement, please contact Ms. Ann Millette, the OCR attorney assigned to monitor the District's compliance with the Agreement. Ms. Millette can be reached by telephone at (216) 522-2679, or by e-mail at Ann.Millette@ed.gov.

Sincerely,

/s/

Meena Morey Chandra
Regional Director

Enclosure