



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

June 14, 2012

Ref: 06111487

Dr. Keith Boles
Superintendent
Henderson Independent School District
200 N. High Street
Henderson, TX 75652

Dear Dr. Boles:

The United States Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint that was received in OCR on August 26, 2011, filed against the Henderson Independent School District (HISD), Henderson, Texas. The complainant alleged that the HISD discriminated against a student (Student) on the basis of sex. The complainant also alleged retaliation. In our evaluation letter dated October 12, 2011, OCR informed both the complainant and the HISD that we were investigating the following issues:

1. Whether the HISD discriminated against Student on the basis of sex by failing to take prompt and effective action to address sexually harassing conduct (sexual assault and subsequent harassing conduct), which was sufficient to constitute a hostile environment, of which it had or should have had notice from XXXX through XXXX, in violation of Title IX and its implementing regulation at 34 C.F.R. § 106.31; and
2. Whether the HISD retaliated against Student based on sex when, after Student reported that she was sexually assaulted on XXXX, the HISD removed her from XXXX and placed her in XXXX with XXXX, in violation of Title IX and its implementing regulation at 34 C.F.R. § 106.71.

This agency is responsible for determining whether entities that receive or benefit from federal financial assistance from the Department, or an agency that has delegated investigative authority to this Department, are in compliance with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation at 34 C.F.R. Part 106 (2011), which prohibit discrimination on the basis of sex. The Title IX implementing regulation at 34 C.F.R. § 106.71 incorporates by reference the provision against retaliation under Title VI of the Civil Rights Act of 1964 (Title VI) 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. § 100.7. The HISD is a recipient of federal financial assistance from the Department. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Title IX.

As a preliminary matter, please note that a finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). In other words, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion. 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.

In reaching a determination in this case, OCR conducted interviews with the complainant, Student, Student's mother, administration and staff at the HISD, and reviewed documentation provided by complainant and the HISD. Based on a review of this information, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with regard to issues investigated. The bases for the determinations are set forth below.

Issue 1

Legal Standards

Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

When investigating complaints of discrimination based on sex, including sexual harassment, OCR will consider the following: whether the recipient has disseminated policy(ies) prohibiting sex discrimination under Title IX and effective grievance procedures; whether the recipient appropriately investigated or otherwise responded to allegations of sexual harassment; and whether the recipient has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and as appropriate, remedy its effects. What constitutes a reasonable response to information about possible sexual harassment will differ depending on the circumstances.

Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the Title IX requirements, including affording a complainant a "prompt and equitable" resolution. In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct (e.g., sexual assault). Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the recipient of its duty under Title IX to resolve complaints promptly and equitably. A

school may not absolve itself of its Title IX obligation to investigate and resolve complaints of sexual harassment or violence by delegating responsibility to administer school discipline to school resource officers or “contract” law enforcement officers.

Findings of Fact

OCR reviewed the HISD grievance procedures regarding sexual harassment (Policy). The Policy is online and is referred to in the HISD Student Handbook under “sexual harassment.” The Policy provides the name and contact information for the HISD’s Title IX Coordinator. It provides that, upon notice of a report of sexual harassment, “the District official [defined under the policy as the Title IX Coordinator, ADA/Section 504 Coordinator and Superintendent] shall determine whether the allegations, if proven, would constitute prohibited conduct as defined by this policy. If so, the District official shall immediately authorize or undertake an investigation, regardless of whether a criminal or regulatory investigation regarding the same . . . allegations is pending. The investigation may be conducted by the District official or a designee, such as the campus principal, or by a third party designated by the District. . .” Investigations are generally to be completed within 10 business days from the date of the report, and the investigator must prepare a written report of the investigation. Furthermore, OCR’s review indicated that a student dissatisfied with the outcome of the investigation may appeal through FNG (Local), beginning at the appropriate level.

OCR’s review of the HISD Student Handbook policy under “Sexual Harassment” states the following: “a complaint alleging sexual harassment by another student . . . may be presented by a student and/or parent in a conference with the principal or designee or with the Title IX coordinator. . . . The principal or Title IX coordinator will coordinate an appropriate investigation, which ordinarily will be completed within 10 days.” The policy also states “if the resolution of the complaint is not satisfactory to the student or parent, the student or parent within 10 days may request a conference with the Superintendent or designee by following the procedure set out in Board policy FNCJ (Local).”

OCR’s review of documentation and interviews with the complainant, Student, Student’s parent, HISD administrators and staff revealed the following with regard to the incident of alleged sexual assault. The complainant alleged that Student was sexually assaulted (the incident) by a XXXX student (Student 2) in the XXXX on XXXX. Student informed XXXX (XXXX 1) about the incident immediately after it occurred. However, the XXXX 1 did not take any action regarding the incident and failed to report it to XXXX. Student was absent from school the following day, and upon her return to school on XXXX she told a XXXX (XXXX 2) about the incident, who immediately took her to the XXXX office. The XXXX subsequently called the XXXX for an interview regarding the incident. The XXXX also contacted Student’s mother, and informed her about the incident when she arrived at XXXX. Officer 1, who XXXX, contacted his supervisor at the XXXX to inform him about the incident. A police officer from the XXXX (Officer 2) arrived at XXXX. After Student, her mother, and Officer 2 went to the XXXX, the XXXX contacted the HISD’s XXXX (Coordinator) and told her of the incident. The Coordinator responded by asking if the police had been called. Interviews with Student’s mother and officials with XXXX reveal that the XXXX notified Student’s mother on XXXX, that the XXXX’s investigation regarding Student had concluded XXXX. Student’s parent met with the XXXX

(Principal) on XXXX and was notified that Student would be XXXX. Student and Student 2 were administered the XXXX.

Student was XXXX on XXXX, in a XXXX from Student 2. Student stated that she saw Student 2 several times a day, XXXX. Student also said that other students in XXXX would make comments to her about the XXXX. Specifically, she told OCR that one student asked her XXXX and stated XXXX. OCR sought to interview the students identified by Student as those who overheard the above-referenced comment made to Student, however, OCR did not receive parental consent to interview any of the identified students. OCR interviewed XXXX who was assigned to accompany Student during the first half of XXXX, who stated that Student would see Student 2 every day while waiting to enter the building; however, XXXX stated that Student did not have to walk through Student 2's classroom, see him when going to the bathroom or to XXXX. XXXX also said Student did not have to XXXX Student 2 when transitioning to her class. OCR also interviewed XXXX at XXXX. The XXXX reported that she always went to Student's classroom to walk her to the XXXX for any visits. The XXXX informed OCR that they did not have to walk through Student 2's classroom and that Student's classroom did not require walking through another classroom to get to the bathroom or main office. The XXXX reported to OCR that the Student's XXXX once complained about XXXX. The XXXX interviewed XXXX who worked with Student during the school day and could not confirm that the comments were made. The XXXX also reported that she asked Student's XXXX for the names of the students who made the alleged comments, but the XXXX did not provide any student names.

Legal Analysis

Applying the legal standards to the findings of fact, OCR found that the recipient disseminated policy (ies) prohibiting sex discrimination under Title IX and effective grievance procedures. However, in determining whether the recipient appropriately investigated or otherwise responded to allegation of sexual harassment, OCR found sufficient evidence to show that HISD failed to appropriately investigate or otherwise respond to the allegation of sexual harassment.

First, the XX-paragraph redacted-XX.

As discussed above, Student alleged XXXX. While police investigations or reports may be useful in terms of fact gathering, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve HISD of its duty to respond promptly and effectively. In this case, there is sufficient evidence that HISD failed to take immediate and effective corrective action responsive to the harassment. HISD failed to conduct an independent investigation of Student's allegation of harassment. As noted above, XXXX. The HISD improperly XXXX, and failed to conduct an independent investigation using a preponderance of the evidence standard as required under Title IX. Therefore, OCR has determined that there is sufficient evidence to support a conclusion of noncompliance with Title IX and its implementing regulation at 34 C.F.R. § 106.31.

Issue 2

Legal Standards

In order for an allegation of retaliation to be sustained, OCR must determine that: (1) the complainant engaged in a protected activity; (2) the recipient had notice of the complainant's protected activity; (3) the recipient took an adverse action contemporaneously with or subsequent to the protected activity; and (4) there was a causal connection between the protected activity and the adverse action. If any one of the foregoing cannot be established, then OCR finds insufficient evidence of a violation. However, if all of these elements are established, OCR then considers whether the recipient can establish a legitimate, nondiscriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for discrimination.

Findings of Fact

As discussed above, Student informed HISD staff on XXXX, of an alleged sexual assault occurring on the same day. On XXXX, Student's XXXX was notified by the XXXX that Student would be XXXX on the HPD's determination. Student and Student 2 were XXXX.

Legal Analysis

OCR's investigation demonstrated that Student participated in a protected activity under Title IX, and provided the HISD with notice of the same, when she notified XXXX1 on XXXX that she had been sexually assaulted. OCR determines that an adverse action occurred when Student was XXXX. OCR also finds that there was a causal connection between Student's protected activity and the adverse action, in that the proximity of time between the protected activity, XXXX, was close to the time of the adverse action: XXXX. Thus, OCR determined that a *prima facie*¹ case of retaliation has been established and investigated further to determine whether HISD had a legitimate, non-discriminatory reason for placing Student XXXX.

The XXXX reported to OCR that with regard to the assignment XXXX, Student was assigned XXXX under the school code. However, there is no evidence to show that any HISD officials investigated the Student's complaint of alleged sexually harassing conduct; rather, the evidence shows that the HISD relied on the XXXX. As discussed in issue 1, HISD failed under the obligations of Title IX to conduct an independent investigation of the alleged harassing conduct that gave rise to the disciplinary action taken against the Student. Thus, the Student's own self-reporting of XXXX to the HISD resulted in disciplinary action against her without any investigation by HISD of the alleged conduct. As such, OCR determined that the HISD failed to provide a legitimate, non-discriminatory reason for XXXX. Therefore, there is sufficient evidence to support a conclusion of noncompliance with Title IX and its implementing regulation regarding Issue 2.

Conclusion

The HISD, in the enclosed Resolution Agreement (RA) dated June 14, 2012, has agreed to address the above identified compliance issues. We have determined that proper implementation

¹ Middle English, from Latin. "At first view" or "on the first appearance." In a legal sense, meaning legally sufficient to establish a fact or a case unless disproved.

of the RA will resolve the issues in this complaint. OCR will monitor the implementation of the RA. Please be advised that if the HISD fails to adhere to the actions outlined in this RA, OCR will immediately resume its compliance efforts.

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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under OCR procedures, we are obligated to advise the complainant and the institution against whom a complaint is filed that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceedings or hearing held in connection with a complaint.

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, it 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.

If you have any questions about this letter, you may contact Timothy D. Caum, General Attorney, at 214-661-9648, or Adriane P. Martin, Team Leader, at 214-661-9600.

Sincerely,

Taylor D. August
Regional Director
Dallas Office

Enclosure
CC: John C. Hardy, Esq.