



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

November 5, 2013

Dr. Deborah Flores
Superintendent
Gilroy Unified School District
7810 Arroyo Circle
Gilroy, California 95020

(In reply, please refer to # 09-13-1265.)

Dear Superintendant Flores:

On April 23, 2013, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against the Gilroy Unified School District (District). The Complainant alleged that her daughter (the Student) was subjected to discrimination on the basis of disability and sex.¹ Specifically, OCR investigated whether: (1) the District failed to evaluate the Student in a timely manner when it had reason to believe that the Student needed special education or related services because of a disability; (2) the District failed to respond appropriately to an internal complaint that the Student was sexually harassed by a male teacher; and (3) a male teacher disciplined the Student differently based on her sex.

OCR enforces Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex in programs and activities operated by recipients of Federal financial assistance. OCR also enforces Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 which prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance and by certain public entities respectively. The District receives funds from the Department and is subject to the above laws and regulations as enforced by OCR.

OCR gathered evidence through reviewing documents provided by the Complainant and District, and interviewing the Complainant. Under Article III, Section 302 of OCR's Case Processing Manual (CPM), a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the conclusion of OCR's investigation into the harassment allegation, the District expressed interest in resolving allegation one (1) through a voluntary agreement (Agreement). At the time the District

¹ OCR identified the name of the Student and Complainant in previous correspondence and is withholding their names in this letter to protect their privacy.

expressed interest in voluntary resolution, OCR had completed its investigation into allegations two (2) and three (3), and therefore reached a determination that the evidence did not establish a violation of Title IX as to those issues. The District agreed to voluntarily enter into an agreement with respect to issue one (1) regarding evaluation of the Student for possible disabilities. The applicable legal standards, the facts gathered during the investigation, the reasons for our determinations, and the resolution of the case are summarized below.

I. Legal Standards

The regulations implementing Title IX, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. School districts are responsible under Title IX and the regulations for providing students with a nondiscriminatory educational environment. Sexual harassment of a student can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities.

School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities either (1) conditions an educational decision or benefit on a student's submission to unwelcome sexual conduct, or (2) engages in sexual harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school district is responsible for the discriminatory conduct whether or not it has notice.

Under Title IX and the regulations, if a student is sexually harassed by an employee, the school district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The school district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

Under the Title IX regulations at 34 C.F.R. §106.31(a) and (b), a school district may not treat individuals differently on the basis of sex with regard to any aspect of services, benefits, or opportunities it provides. Section (b) (iv) states that a school district may not, on the basis of sex, subject any person to separate or different rules of behavior, sanctions, or other treatment in providing an aid, benefit, or service.

Section 504 and its implementing regulations prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990

and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

The Section 504 regulations² require school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

II. Factual Findings

- During the 2012-2013 school year, the Student was in the XXX grade at a District middle school (School). The Student's transcript indicates that she has a strong academic record, including being on her School's honor roll and scoring at the advanced level on the English Language Arts and Mathematics portions of the California Standards Test. The Student had also been experiencing emotional difficulties which the District knew about.

² 34 C.F.R. §104.35(a)

- The Complainant stated that in April 2013, the Student was in her physical education (PE) class in the School's gymnasium. The Complainant stated that the Student gave her female PE teacher a hug and then decided to hug a male coach (Coach) who was nearby instructing a separate XXX grade PE class. The Complainant describes the Student as a "hugger" and stated that the Student frequently hugs her friends and school staff. The Complainant stated that when the Student hugged the Coach, he became upset, shoved the Student away and yelled at her to do 25 jumping jacks as a punishment. The Complainant said the Student felt humiliated because this occurred in front of other students.
- The Complainant stated that she believes the Coach does not punish male students in a similar fashion. The Complainant also stated that this particular punishment constituted sexual harassment because of the way the Student's body moved during the jumping jacks.
- The District provided OCR with copies of communications from the Complainant regarding the incident and internal communication between school staff. On April XX, 2013, the Complainant emailed the Coach and copied the School Principal. The Complainant complained that the Coach screamed at the Student and humiliated her by making her do jumping jacks. The Complainant demanded the Coach publicly apologize to the Student and that he be required to complete triple the number of jumping jacks he required the Student to do.
- The Coach responded to the Complainant's email and apologized for upsetting the Student. The Coach stated that he had been instructing his class and suddenly felt someone grabbing and hugging him. The Coach stated he reacted by trying to push the person off of him but that the person held on. The Coach stated he then had to push harder to make the person let go, and saw that it was a student. The Coach stated he did not know the Student and instructed her to do jumping jacks because she had interrupted his class by hugging him and would not let go. The Coach stated that after the Student completed the jumping jacks and he finished speaking with his class, he spoke with her and explained to her that it was inappropriate to hug a teacher.
- The Coach stated that he was "very aware of appropriate boundaries between students – especially between male teachers ... and female students and especially in a physical education environment." The Complainant responded with angry comments including calling the Coach a "disgustingly abusive bully," and threatening to "drag [the Coach's] name through the streets and the courts."
- The following day, the Principal responded to the Complainant's email and requested that she meet with him to discuss the incident. The Principal explained that he advises teachers not to hug students and that the Coach was not familiar with the Student or about the emotional problems she had been experiencing. The Principal stated he would conduct an investigation into what occurred and asked for the Complainant's permission to interview the Student. The Principal also informed the Complainant that he would interview students who were present about the incident.

- The District provided OCR with the Principal's notes of his investigation. The Principal randomly selected six XXXXXX grade students from the PE class to interview and six XXXXXX grade students from the other class. The notes indicate that the Principal gave a general description of the kind of situation he was investigating and asked students if they observed anything similar, but did not identify the Student. He asked what the students observed.
- The students interviewed identified the Student as the individual involved in the situation. Those who saw her actions described the Coach as being startled and upset. They recalled him telling the Student that he didn't hug and asking her to do 25 jumping jacks. Some of the students stated that the Student appeared shocked by the Coach's reaction but did not appear upset afterwards. One student, who was the Student's friend, stated that she believed the Student was upset. Students also reported that the Coach told the Student he was sorry if he upset her but that it was not appropriate for her to give him a hug.
- The Principal interviewed the Student. The notes state that the Student explained that she thought the Coach looked sad and gave him a hug because she had just given a hug to her PE teacher. The notes state that the Principal explained that it was not appropriate for a male teacher to give students hugs and that the Student indicated she understood. The notes also indicate the Principal talked to the Student about whether she had been bullied and that he was aware of emotional problems she had been having.
- The notes state that the Principal determined the Coach had not done anything wrong and that his actions were consistent with the School's policy of instructing students to respect others space by keeping their hands, feet and objects to themselves.
- The next day, on April XX, 2013, the Complainant emailed the Principal and complained that other students were approaching the Student and asking her if she hugged the Coach. The Complainant accused the Principal of not being tactful in his interviews with students and stated "[t]his is yet continuing bullying against my daughter. I'm more than a little disappointed by your lack of action on this matter and the lack of care you have utilized in your so called investigation." The Complainant stated that she had been informed that a male teacher using jumping jacks as a form of punishment for a female student is sexual harassment and that the Coach had "crossed the line to be sexually abusive towards my daughter."
- The Principal stated that after receiving the Complainant's email, he contacted the District Superintendent and requested a third party be present for his meeting with the Complainant. Email correspondence between the Principal and the Complainant indicates that the Principal informed the Complainant he needed to postpone their meeting so that a District representative could attend.
- On April XX, 2013, the Principal, Associate Superintendent and the District's counsel met with the Complainant and the Student's father. The District provided OCR with notes of the meeting, which state that the Student's parents expressed concerns about the manner in

which the Principal interviewed the other students and their belief that the Principal drew additional negative attention to the Student. The notes state that the Principal explained he did not use the Student's name but that other students identified her.

- The notes also state that the Complainant said she had read on a website that requiring female students to do jumping jacks was sexual harassment. The notes state that the Principal told the Student's parents that he would speak with the School's PE teachers about the practice of using of exercise as punishment. The District provided OCR with subsequent communication from the District reminding teachers of the District's policy not to use physical activity, such as running laps or doing push-ups, as a punishment.

District Policies and Procedures

- The District has a Nondiscrimination in District Programs and Activities Policy (BP 1040) which prohibits discrimination on the basis of several categories, including sex and gender. The District also has a Sexual Harassment Policy (BP 5145.7) which prohibits sexual harassment of students at school and school-sponsored activities. The District has an administrative regulation which governs sexual harassment complaints (AR 5145.7).
- AR 5145.7 details the notice and receipt of sexual harassment complaints, required investigative steps and timeline, consideration of interim measures, optional mediation, and the factors to be considered in reaching a determination. It states that at the conclusion of an investigation, the Nondiscrimination Coordinator/Principal will prepare a report of his/her findings, including the decision, reason for the decision and a summary of the steps taken in the investigation. Where a finding is made that harassment occurs, AR 5145.7 states that the report will also include any corrective actions taken. AR 5145.7 does not explicitly require that this report is provided to the complainant.

III. Analysis

District Response to Complaint

As described above, under Title IX and the regulations, if a student is sexually harassed by an employee, the school district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The school district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In this case, the Complainant initially complained to the Coach and the School about the Coach's conduct, calling it bullying and saying it humiliated the Student. The Complainant did not refer

to sexual harassment. The Coach, who did not know the Student or know about any problems she was experiencing, immediately apologized for upsetting the Student and explained the reason for his action. The Coach also explained that he spoke with the Student during the class regarding why he believed her behavior was inappropriate. The Principal also responded to the Complainant's email within hours of receiving it and requested that the Complainant meet with him to discuss the incident. That same day, the Principal launched an investigation which included interviewing the Student, 12 additional students, the Coach and another teacher who had observed the incident. The day after the investigation the Complainant emailed the Principal again, referring to the Coach's conduct for the first time as sexual harassment and abuse.

The District determined that the Coach was acting in response to the School's general policy that students should keep their hands to themselves. The Principal, a District administrator and the District's counsel met with the Complainant and the Student's father to discuss their concerns and explain the District's response. The Principal subsequently instructed P.E. teachers that they should not use physical activity as a form of punishment if they believed a student had misbehaved. The District agreed to the Complainant's request that the Coach not have contact with the Student.

After the Complainant referred to sexual harassment, the District did not conduct any additional investigation under its sexual harassment complaint procedure or make an explicit finding that the Coach did not sexually harass the Student. Under the circumstances of this case, OCR concludes that the District's actions did not violate Title IX. The Complainant did not mention sexual harassment when she initially complained of the Coach's conduct. The Coach's actions were not on their face conduct of a sexual nature, and the Principal's investigation did not indicate that any sexual conduct had occurred. Under these circumstances, OCR concludes that the District did not violate Title IX or the regulations. Based on the information summarized above, OCR finds that a preponderance of the evidence does not establish that the District failed to respond appropriately to the Complainant's internal sexual harassment complaint in violation of Title IX. As a matter of technical assistance, OCR recommends that, if a parent or student makes an allegation of sexual harassment, if the District determines there is an insufficient basis for pursuing the complaint under its sexual harassment policies and procedures, it should notify the complainant in writing of the reasons for this decision.

Different Treatment

In addition to the sexual harassment complaint, the Complainant alleged to OCR that the Coach treated the Student differently with respect to the jumping jacks punishment than male students. As described above, to determine whether a student has been discriminated against on the basis of sex under Title IX, OCR looks at whether there is evidence that the student was treated differently than students of the other sex under similar circumstances, and whether the treatment has resulted in

the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the student's sex.

The Complainant did not provide OCR with any information to support her allegation that the Coach's response to the Student was based on her sex. The evidence indicates that the Coach applied a "no hugging" rule to both male and female students to prevent potential or perceived inappropriate contact between students and staff. As indicated above, OCR expresses no opinion on whether the Coach's response was prudent or educationally sound. However, based on the information summarized above, a preponderance of the evidence does not establish that the Coach treated the Student differently based on the sex in violation of Title IX.

IV. Conclusion

As discussed above, OCR determined the evidence did not establish the District violated Title IX as to allegations one and two. OCR discussed with the District concerns about information indicated that the Student had exhibited signs of emotional difficulties and the possibility that a disability could underlie the problems. The enclosed Agreement resolves the Complainant's allegation that the District failed evaluate the Student in a timely manner for special education or related services. The Agreement requires the District (1) conduct a psycho-educational assessment, (2) hold an IEP or Section 504 meeting within a specified period of time and consider certain services and (3) issue guidance to relevant administrators and staff regarding the District's responsibilities under Section 504 and its special education assessment referral guidelines.

Based on the foregoing, OCR is closing this complaint as of the date of this letter and concurrently notifying the Complainant. 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.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and other participants who feel that such actions have occurred may file a separate complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the

extent provided by law, personal information which, if released, would reasonably be expected to constitute an unwarranted invasion of privacy.

OCR wishes to thank the District for its assistance and cooperation in resolving of this complaint. If you have any questions please contact OCR attorneys Yohance Edwards, at 415-486-5585 or Kendra Fox-Davis, at (415) 486-5418.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure