



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

January 21, 2016

Dr. Russell W. Booker, Superintendent
Spartanburg School District Seven
610 Dupre Drive
Spartanburg, South Carolina 29307

Re: OCR Complaint No. 11-15-1155
Letter of Findings

Dear Dr. Booker:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on March 6, 2015, against Spartanburg School District Seven (the District). The Complainant alleged that the District discriminated against her child (the Student) on the basis of sex when it failed to promptly and effectively respond to a February 2015 internal complaint of peer-based sexual harassment.

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 education program or activity receiving Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

In reaching a determination, OCR reviewed information provided by the Complainant and the District. After carefully considering all of the information obtained during the investigation, OCR identified compliance concerns. The District agreed to resolve the concerns through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

Background

During the 2014-15 school year, the Student was in the XXXX grade at the School. The School is the only high school in the District.

On Friday, February 6, 2015, the Complainant received a call from a male student's parent informing her that the male student was involved in an altercation at school with another male student over a video of the Student. After talking with the Student and the male student, the Complainant learned that the video was sexually explicit of the Student and the male student and that the male student showed the video to other students at the School. On Monday, February 9, the Complainant verbally reported to School personnel that she believed the Student was subjected to peer sexual harassment when the male student showed the video to others at school.

The Complainant met with the guidance counselor and the assistant principal. The guidance counselor advised the Complainant to call the police, but the assistant principal wanted to investigate first to determine if the video was shown on a school-issued laptop. Because she was concerned about the effect of the sexual harassment on the Student if she returned to the School, the Complainant informed the School personnel that she wanted to withdraw the Student and have her transfer to a school in another state near her grandmother's house.

When the Complainant did not hear back anything from the assistant principal in two days, she reported the incident to District administration. The assistant principal then called the Complainant to report that she had investigated and found that the video was not shown on the school-issued laptop, and that although several students admitted to viewing the video at school, she did not believe the Student was in any danger, only humiliated. The assistant principal could not tell the Complainant what disciplinary action was taken against the male student who showed the video. The Complainant talked with another District administrator about the situation on February 12. The Complainant subsequently filed a police report about the incident, as well as this complaint with OCR.

Legal Standards

The regulation implementing Title IX, 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 education program or activity operated by a recipient. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the recipient's program.

In determining whether this denial or limitation has occurred, OCR examines all of the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the school district; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. For example, a single instance of rape is sufficiently severe to create a hostile environment. Title IX also protects all students at recipient institutions from sex harassment, including male and female students.

If a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. 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. These duties are a recipient's responsibility regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. A recipient has notice of peer

sexual or third party harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject students to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial sexual harassment and the effects of the recipient's failure to respond promptly and appropriately. A recipient's obligation to respond appropriately to sexual harassment complaints is the same regardless of the sex or sexes of the parties involved.

Even if the sexual harassment did not occur in the context of an education program or activity, a recipient must consider the effects of the off-campus sexual harassment when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual harassment while at school or in an off-campus education program or activity.

A recipient should notify a complainant of the right to file a criminal complaint, and should not dissuade a complainant from doing so. Recipients should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the complainant in the educational setting. A law enforcement investigation does not relieve the recipient of its independent Title IX obligation to investigate the conduct.

Sexual harassment of a student by a teacher or other school employee also violates Title IX. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out the employee's day-to-day responsibilities (such as teaching, counselling, supervising and advising) engages in sexual harassment, the recipient is responsible for remedying any effects of the harassment on the complainant, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has notice of the harassment.

The Title IX regulation, at 34 C.F.R. § 106.8(b), requires recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title IX, including sex discrimination, sexual harassment, and sexual assault/violence. Title IX does not require a school district to provide separate grievance procedures for sexual harassment complaints, including sexual assault/violence complaints.

A district may use student disciplinary or other separate procedures for these complaints; however, a district's grievance procedures for handling discrimination complaints must comply with the prompt and equitable requirements of Title IX. In evaluating whether a recipient's grievance procedures are prompt and equitable, OCR reviews all aspects of a recipient's policies and practices, including the following elements that are critical to achieve compliance with Title IX:

1. notice to students and employees of the procedures, including where complaints may be filed;
2. application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties;
3. provision for adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence;

4. designated and reasonably prompt timeframes for major stages of the complaint process;
5. written notice to parties of the outcome of the complaint and any appeal; and
6. an assurance that the institution will take steps to prevent recurrence of any sex discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate.

To ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the recipient processes complaints, the recipient's Title IX grievance procedures should also include the following in writing:

1. a statement of the recipient's jurisdiction over Title IX complaints;
2. adequate definitions of sexual harassment (which includes sexual assault) and an explanation as to when such conduct creates a hostile environment;
3. reporting policies and protocols, including provisions for confidential reporting;
4. identification of the employee or employees responsible for evaluating requests for confidentiality;
5. notice that Title IX prohibits retaliation;
6. notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
7. notice of available interim measures that may be taken to protect the student in the educational setting;
8. the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint;
9. notice of potential remedies for students;
10. notice of potential sanctions against perpetrators; and
11. sources of counseling, advocacy and support.

The procedures for addressing and resolving complaints of sexual harassment should be written in language that is easily understood, should be easily located, and should be widely distributed. For Title IX purposes, a recipient must inform the complainant as to whether or not it found that the alleged conduct occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the recipient has taken to eliminate the hostile environment, if the recipient finds one to exist, and prevent recurrence. Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to other classes or another school. Additional steps the recipient may take to remedy the effects of the hostile environment include counseling and academic support services for the complainant and other affected students.

To ensure individuals can invoke these grievance procedures without fear of reprisal, Title IX also prohibits the school district and other actors, including students, from retaliating against any individual "for the purpose of interfering with any right or privilege secured by [Title IX]," or because that individual "has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title IX. Prohibited retaliatory acts include

intimidation, threats, coercion, or discrimination against any such individual. Districts therefore must take steps to prevent any retaliation against a student who makes a complaint or any student who provides information regarding the complaint and take strong responsive action if retaliation occurs. At a minimum, under Title IX, the school district must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems; and should follow up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

Pending the outcome of an investigation, Title IX requires a recipient to take steps to ensure equal access to its education programs and activities and to protect the complainant from further harassment as necessary, including taking interim steps before the final outcome of the investigation. The recipient should undertake these steps promptly once it has notice of a sexual harassment allegation and should provide the complainant with periodic updates on the status of the investigation. It should notify the complainant of his or her options to avoid contact with the alleged perpetrator, and allow students to change academic or living, transportation, dining and working situations as appropriate. For instance, the recipient may prohibit the alleged perpetrator from having contact with the complainant pending the results of the investigation. The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. When taking steps to separate the complainant and the alleged perpetrator, a recipient should minimize the burden on the complainant and thus should not, as a matter of course, remove the complainant from classes while allowing the alleged perpetrator to remain. If an accused student is found responsible and a recipient determines that he/she must be separated from the complainant, it must do so in a manner that minimizes the burden on the complainant. Recipients should also check with complainants to ensure that the interim measures are effective and, if ineffective, identify alternatives. In addition, recipients should ensure that complainants or their parents/guardians are aware of their Title IX rights and any available resources, such as advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to the school resource officer (SRO) or local law enforcement.

If the complainant requests confidentiality or asks that the complaint not be pursued, a district should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If the complainant or, if the complainant is a student, his/her parent/guardian, insists that the student's name or other identifiable information not be disclosed to the alleged perpetrator, the recipient should inform the student and his or her parent/guardian that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the accused. The recipient should notify students, including the students' legal guardians, of the information that will be disclosed, to whom it will be disclosed, and why. The recipient should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. If the student still requests that his or her name not be disclosed to the accused or that the recipient not investigate or seek action against the accused, the recipient will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the harassment.

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints; however, it is improper for a complainant to

be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the recipient (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a faculty member or administrator). 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. Moreover, in cases involving allegations of sexual assault/violence, mediation is not appropriate even on a voluntary basis.

Throughout the recipient's investigation and in any hearing, both parties must have equal opportunity to present relevant witnesses and other evidence and to otherwise participate in the process. Also, in order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence. If a recipient provides for appeal of the findings or remedy, it must do so for both parties. The recipient must maintain documentation of all proceedings.

In addition, a district must ensure that responsible employees with the authority to address sexual assault/violence know how to respond appropriately to reports of sexual assault/violence; that other responsible employees know that they are obligated to report sexual assault/violence to appropriate school officials; and that all other employees understand how to respond to reports of sexual assault/violence. A district should provide training to all employees likely to witness or receive reports of sexual assault/violence, including teachers, district law enforcement unit employees, district and school administrators, school counselors, general counsel, athletic coaches, and health personnel. Training for employees should include practical information about how to prevent and identify sexual assault/violence, including same-sex sexual assault/violence; the behaviors that may lead to and result in sexual assault/violence; the attitudes of bystanders that may allow conduct to continue; the potential for re-victimization by responders and its effect on students; appropriate methods for responding to a student who may have experienced sexual assault/violence, including the use of nonjudgmental language; the impact of trauma on victims; and, as applicable, the person(s) to whom such misconduct must be reported. The training also should explain responsible employees' reporting obligation, including what should be included in a report and any consequences for the failure to report and the procedure for responding to students' requests for confidentiality, as well as provide the contact information for the District's Title IX coordinator. A district also should train responsible employees to inform students and their parents/guardians of: the reporting obligations of responsible employees; the option to request confidentiality, available confidential advocacy, counseling, or other support services; and students' rights to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

The Title IX implementing regulation, at 34 C.F.R. § 106.8(a), requires that a recipient designate at least one employee to coordinate its responsibilities to comply with and carry out its responsibilities under that law. The recipient is further required, by the Title IX implementing regulation at 34 C.F.R. § 106.8(a), to notify all students and employees of the name (or title), office address, and telephone number of the designated employee(s). In addition, OCR's 2011 Dear Colleague Letter on Sexual Violence states that recipients should notify all students and employees of the electronic mail (email) address of the Title IX Coordinator. The coordinator's responsibilities include overseeing the recipient's response to Title IX reports and complaints of sexual harassment, including sexual assault/violence, and identifying and addressing any patterns or systemic problems revealed by such

reports and complaints. The coordinator or designee should be available to meet with students, as needed. The Title IX coordinator should not have other job responsibilities that may create a conflict of interest. Also, as noted above, recipients must ensure that employees designated to serve as Title IX coordinators have training or experience in handling sexual harassment, including sexual assault/violence complaints, and in the operation of the recipient’s grievance procedures.

The regulation implementing Title IX, at 34 C.F.R. § 106.9, requires that recipients notify applicants for employment, students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in its education programs or activities, and that it is required by Title IX not to discriminate in such a manner. The notice must also state that questions regarding Title IX may be referred to the recipient’s Title IX coordinator or to OCR.

Analysis

Grievance Procedures

The District has several policies and procedures that appear to cover Title IX student situations:

- Policy AC—Nondiscrimination/Equal Opportunity (11/2005);
- Policy JI + Administrative Regulation JI-R—Student Rights And Responsibilities (2/2012) + JI-E “Sexual Harassment Formal Complaint Form”;
- Policy JII—Student Concerns, Complaints And Grievances (2/2012); and
- Policy JICFAA—Harassment, Intimidation Or Bullying (2/2012).

After review of the District’s grievance procedures, OCR has determined that there are a number of defects that result in an overall finding that the procedures do not comply with Title IX. First, OCR found that the District does not provide notice to students and employees of the procedures, including where complaints may be filed, that is easily understood. Rather, the District offers more than one grievance process. The processes are different from each other in critical respects, including that the procedures identify different staff persons who should receive the complaint and only one of the procedures requires written notice of the outcome of the complaint. The District does not provide students and employees adequate guidance on the differences between the processes or when one is more appropriate than the other. This lack of clarity and potential for confusion limits the effectiveness of both the notice requirement and meaningful access to the District’s Title IX investigative process.

Second, as stated above, OCR generally requires that grievance procedures have designated and reasonably prompt timeframes for each major stage of the complaint resolution process. Only one of the District’s processes (Administrative Regulation JI-R—Student Rights And Responsibilities) designates any timeframe, merely stating that an investigation will be initiated within three days of receiving a report of discrimination. It does not, for example, identify how long an investigation will take.

Further, the procedures also fail to include provisions specifying that: there will be an adequate, reliable, and impartial investigation; written notice will be provided to the parties of the outcome of the complaint (including the one procedure that specifies written notice because it only requires that

such notice go to the complainant and the personnel director); the District and/or the individual school will take steps to prevent the recurrence of harassment and to correct its discriminatory effects on the complainant and others, if appropriate; complainants may proceed with a criminal investigation and a Title IX complaint simultaneously; and that, if needed, the District and/or school must take immediate steps to protect the student in the educational setting.

Taken together, OCR finds that the District's grievance procedures are in violation of Title IX. This compliance concern will be resolved by the District's compliance with the attached agreement. Under the agreement, the District will revise its grievance procedures, subject to OCR's review and approval, to ensure that they comply with Title IX.

The Student's Peer Sexual Harassment

The District claimed that it did not receive any complaints, reports or grievances about peer sexual harassment or a hostile environment at the School within the past two years. However, it also does not appear that either the School or the District processed the Complainant's report about the video under any applicable Title IX grievance procedure. The District asserted that neither the Complainant nor the Student submitted a complaint in accordance with applicable policies and procedures, and it believes that it did not have notice of the possible sexual harassment until after the Student withdrew from the District when it received OCR's April 2, 2015 complaint notification letter.

OCR finds that the District knew or reasonably should have known of possible sexual harassment when the Complainant reported to two School administrators and other District personnel that the video was shown to other students in February. Title IX prohibits a hostile environment on the basis of sex. The Complainant informed the School in February of the conduct at issue. The unauthorized sharing of a sexually explicit video may create a hostile environment on school grounds when such sharing either occurs on campus or the targeted student becomes subject to related comments or conduct. The spreading of sexual rumors may have the effect of limiting a student's access to the District's program. When such complaints involving peer-to-peer conduct are made to the District, it has an obligation to determine what occurred and if that conduct was sex-based harassment. Based on the information available to the School in February, the District should have recognized that the complaint was an allegation of sexual harassment and the District therefore was obligated to take immediate and appropriate action to investigate or otherwise determine what occurred.

When the Complainant reported the video incident to the School in February, the School took some actions to look into whether the male student had the video on his school-issued computer and whether other students saw the video. However, after the Complainant withdrew the Student from the District to go to a school in another state immediately after reporting the incident, the District did not identify any further actions to follow up on the situation. The District claimed that after receiving OCR's April 2015 notification letter, it investigated its handling of the situation and concluded that its response to the situation was not "clearly unreasonable". In any case, the District failed to promptly investigate the Complainant's report under Title IX, as the District acknowledged that it did not consider the Complainant's report to raise a Title IX concern until it received notice of the OCR complaint, 52 days after the initial report. The School's response was focused on whether the video was on a school-issued device and whether the sexual activity occurred on school property,

not on whether the male student showing the video to other students created a sexually hostile environment for the Student and/or for other students at the School. The District acknowledged that at least one other student (a female student) said that the male student showed her the video on his cellphone while at school. The Complainant said that she told School and District personnel that she thought the Student had been subjected to sexual harassment and bullying, but the only response she received was that the Student was not in danger. The School was unable to provide OCR any records of its interviews with the male students and other witnesses; thus, the evidence does not establish that School personnel asked any Title IX-related questions during its investigation of the incident. The District was likewise unable to provide any evidence that School personnel reached a conclusion as to whether the alleged conduct created a hostile environment for the Student or other students. Moreover, to date, neither the School nor the District has notified the Complainant about any findings under Title IX.

The evidence also does not establish that the District's response to the Complainant's report was equitable in that there was no record that the District offered the Student any interim measures, such as counseling services, assistance with avoiding contact with the alleged perpetrator or any other students, and/or educational services, that might have enabled her to remain in the School. The only information the District provided the Complainant was on the withdrawal process, with no mention of options to address the situation under Title IX grievance procedures.

The District also did not effectively notify the Complainant of her right to file a criminal complaint and a Title IX complaint simultaneously. While the guidance counselor initially suggested that the Complainant call the police, the assistant principal immediately countered that she wanted to investigate first, and neither staff person advised the Complainant that she had the right to file a criminal report or directed her to the District's grievance procedures that cover Title IX.

As explained above, if a recipient knows or reasonably should have known about sexual harassment that creates a hostile environment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. OCR concluded that the District: failed to appropriately respond to the Complainant's report in that it discouraged her from contacting law enforcement by stating that the School wanted to investigate first; failed to promptly determine whether a hostile environment had been created for the Student or other affected students; and failed to provide the Complainant with notice (written or otherwise) of the outcome of the complaint. In addition, there was no evidence that the District offered interim measures to the Student and assessed whether there was a need to remedy the effects of a hostile environment and to implement remedies for students, including the broader school community, in violation of 34 C.F.R. § 106.31. These compliance concerns will be resolved by the District's implementation of the attached resolution agreement. OCR will review the District's corrective actions—including training, climate assessment, and remedies for students¹—to ensure they comply with Title IX.

Conclusion

To resolve the compliance concerns identified above, the District entered into the attached

¹ OCR notes that during the investigation, the Student returned to the District for the 2015-16 school year but did not want to return to the School; in response, the District facilitated the Student's inter-district transfer to another high school in time for the first day of school in August 2015.

Resolution Agreement, signed on December 18, 2015. Once the Resolution Agreement is fully implemented, the District will be in compliance with Title IX with respect to the issues addressed in this letter. OCR will monitor the District's implementation of the Resolution Agreement until the District is in compliance with the statute and regulations at issue in the case.

This concludes OCR's investigation of the complaint. This letter 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. 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 District 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, or participates in an OCR proceeding. 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 District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Sebastian Amar or Kristi Bleyer, the OCR attorneys assigned to this complaint, at 202-453-6023 or Sebastian.amar@ed.gov or 202-453-5901 or Kristi.bleyer@ed.gov.

Sincerely,

/S/

Michael Hing
Supervisory Attorney, Team I
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Ken Darr, Esquire (via email)