



U.S. Department of Justice  
*Civil Rights Division*



U.S. Department of Education  
*Office for Civil Rights*

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June 30, 2011

Richard L. Swanson, Ph.D.  
Superintendent  
Tehachapi Unified School District  
400 South Snyder Avenue  
Tehachapi, California 93561

(In reply, please refer to OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38)

Dear Dr. Swanson:

On October 28, 2010, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against the Tehachapi Unified School District (District). The Complainant filed the complaint following the September 2010 suicide of her 13-year-old son (Student). The Complainant alleged that, prior to his death, the Student was subject to chronic sex-based harassment by his peers at Jacobsen Middle School (School) and that, despite having notice of the harassment, the District failed to respond to it appropriately. The Student was in the eighth grade at the time of his death.

The issues OCR investigated were whether the Student was subject to sexual and gender-based harassment, including harassment based on his nonconformity with gender stereotypes, and whether the District failed to provide a prompt and equitable response to the harassment as required by law. Following OCR's investigation, the U.S. Department of Justice, Civil Rights Division (DOJ) joined OCR in the resolution of the complaint.

Based on the evidence gathered, OCR and DOJ (collectively, the "United States") concluded that the District violated Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations and Title IV of the Civil Rights Act of 1964 (Title IV). Specifically, the United States found that the Student suffered sexual and gender-based harassment by his peers, including harassment based on his nonconformity with gender stereotypes; that the harassment was sufficiently severe, pervasive, and persistent to interfere with his educational opportunities; and that despite having notice of the harassment, the District did not adequately investigate or otherwise respond to it.<sup>1</sup> The legal standards applicable in this case, the facts gathered during OCR's investigation, and the basis for the United States' legal conclusions are explained below.

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<sup>1</sup> DOJ further finds that the District's failure to adequately investigate or otherwise respond to the harassment constitutes deliberate indifference.

## Legal Standards

OCR investigated this case under its Title IX authority. DOJ and OCR share responsibility for enforcing Title IX. Title IX and its implementing regulations, 34 C.F.R. § 106.31, prohibit discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. DOJ enforces Title IV, which prohibits discrimination in public schools against students based on sex, race, color, religion, and national origin. The District is a public school district that receives federal funds, and therefore is subject to the requirements of both Title IX and Title IV. In the context of OCR-initiated administrative enforcement actions and DOJ-initiated court actions for injunctive relief, OCR and DOJ interpret Title IX and Title IV as applying the same standard to allegations of sex-based harassment. Thus, in the context of this investigation, the United States applied the same legal standards under Title IX and Title IV to conduct its legal analysis and reach its findings.

Under Title IX and Title IV, school districts are responsible for providing students with a nondiscriminatory educational environment. Harassment of a student on the basis of sex can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. Title IX and Title IV prohibit both sexual harassment and gender-based harassment. Sexual harassment is unwelcome conduct of a sexual nature and can include verbal, nonverbal, or physical conduct. Gender-based harassment may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex stereotypes. Thus, sex-based discrimination includes harassment of a student either for exhibiting what is perceived as a stereotypical characteristic of the student's sex, or for not conforming to stereotypical notions of masculinity and femininity. Title IX and Title IV prohibit sexual and gender-based harassment of all students, regardless of the actual or perceived sex, sexual orientation, or gender identity of the harasser or victim.

In determining whether a hostile environment based on sex has been created, the United States evaluates whether the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's education program. The United States examines all the relevant circumstances, 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; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors.

Under Title IX and its regulations, as well as under Title IV, once a school district has actual or constructive notice of possible sexual or gender-based harassment among students, it is responsible for determining what occurred and for responding appropriately. When a district fails to take adequate steps to address harassment, it is held liable under Title IX and Title IV for its own conduct. A school district may violate Title IX and Title IV if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the

district fails to take appropriate responsive action. A district must take these steps regardless of whether the student who was harassed makes a complaint or otherwise asks the district to take action.

The United States 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 the circumstances. However, in all cases, the district must conduct a prompt, thorough, and impartial inquiry designed to reliably determine what occurred. If harassment is found, the district should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may also be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any reports of harassment by students, parents, employees, or others. The district also should take steps to prevent any retaliation against the student who made the complaint or any student who provided information regarding the complaint.

In addition, the Title IX regulations establish procedural requirements that are important for the prevention and correction of sex-based discrimination, including harassment. These requirements include issuance of a policy against sex discrimination (34 C.F.R. § 106.9) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination (34 C.F.R. § 106.8[b]). The regulations also require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 106.8[a]).

## **Factual Findings**

To investigate this case, OCR conducted extensive witness interviews, including of the Complainant and other members of the Student's family, individuals identified as friends of the Student, parents of students who attend the School, and School site personnel, including administrators, counselors, school psychologists, security personnel, law enforcement officers, each of the Student's seventh and eighth grade teachers, and other relevant staff. Also at the School site, OCR interviewed approximately 75 of the Student's classmates. In addition, OCR reviewed extensive written documentation, including documentation provided by the Complainant and the District, reports of the Tehachapi Police Department and information included in the media coverage of the Student's death. OCR's investigation revealed the following findings.

*Harassment of the Student; District Conduct.* As described by family members, friends, and acquaintances alike, the Student was a kind-hearted, social boy with a gentle disposition; witnesses portrayed him as a friendly, intrinsically happy person who was caring and treated others with compassion. Many witnesses characterized him as somewhat effeminate, with occasionally exaggerated mannerisms and speech. He had a strong sense of style, and dressed in stereotypically female clothing and shoes, such as skinny jeans, pedal pushers, scarves, and fitted v-neck t-shirts; carried backpacks with designs not typically favored by middle school boys, such as Hello Kitty; and frequently changed the color and style of his hair. Throughout elementary and middle school, most of his friends were girls. Some of the witnesses interviewed by OCR stated that, beginning in sixth grade, the Student informed them that he was gay.

Among his peers, the Student's personality, disposition, and physical presentation were concurrently admired and ridiculed. As described by one of the Student's teachers, his attributes made him both an outcast and a leader. During the Student's time in the District's schools, he both made friends and had tormentors, and the harassment against him dated back to elementary school. According to the Complainant, when the Student was in fifth grade she first complained to the Student's principal and teacher about his peers' treatment of him, including calling him "gay," "queer," and "girl" as pejorative terms. The Student's brother, who attended the Student's elementary school that year, said that students teased the Student because his friends were girls and by saying that he acted like a girl.

The Student began attending the School in 2008-2009, when he entered the sixth grade. According to the Complainant, harassment of the Student intensified that year. As the Complainant described, the Student's peers routinely called him names like those identified above, pushed him into lockers, and mocked him because his friends were predominantly girls.

The District's Sexual Harassment Policy (BP 5145.7) and Regulation (AR 5145.7) were previously approved by OCR in connection with OCR's resolution of a separate complaint against the District.<sup>2</sup> The Regulation specifies that, upon receiving notice of possible sexual harassment, the designated administrator is to explain the Regulation to the Complainant, obtain all relevant information from the Complainant and investigate the allegations by, among other steps, interviewing the complaining student, the person accused, anyone who witnessed the harassment, and anyone mentioned as having relevant information. The administrator is then to determine whether harassment has occurred, create a written report of findings, take corrective action, inform the Complainant and student of how to report subsequent problems, and make follow-up inquiries to determine whether there have been new incidents or retaliation. Any employee who receives a report of or observes sexual harassment of a student is to report it to the designated administrator.

At the School, the Principal and Vice Principal are the individuals designated to investigate complaints of sexual, gender-based, and other types of harassment. The

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<sup>2</sup> Complaint resolved June 30, 2009.

Vice Principal<sup>3</sup> told OCR that when the Student was in sixth grade, either the Student or one of his classmates reported to the Vice Principal that the Student was being harassed by his peers. The Vice Principal stated that when he asked the Student about the reported problems, the Student said that he did not want the Vice Principal to take any action because he was afraid of students retaliating against him. The Vice Principal did not take any further action.

At the end of the Student's sixth grade year, the Complainant met with the Vice Principal to express concern about harassment she anticipated the next year, particularly in the physical education (P.E.) locker rooms. According to the Complainant, the Vice Principal indicated that he was aware of the problems the Student was experiencing and advised her to bring her concerns to him the next school year, but did not otherwise take any action. The Vice Principal told OCR that he remembered the Complainant expressing concerns about harassment in the locker room, but said he did not remember specifically what they discussed. He did recall that, around the same time, the Complainant conveyed that students needed to be more accepting of the Student. The Vice Principal responded to the Complainant that, in a perfect world, the Student would be treated equally, but that the students were at a difficult age and he could not change attitudes originating in the students' homes.

The Complainant told OCR that the harassment the Student was experiencing became unbearable for him beginning in seventh grade. As described by the Student's friends and classmates, throughout his attendance at the School, but particularly in seventh grade, his peers routinely called him hostile and demeaning names related to his nonconformity with gender stereotypes and sexual orientation, including "sissy," "girl," and vulgar references to female anatomy; insults meant to question his masculinity, including mocking his clothing as "girly," asking him, "do you sit down" to use the restroom, suggesting he should "get surgery" to become a female, and referring to him as the "girlfriend" of other male students; and anti-gay slurs and epithets.

Students also relayed language of a hostile and demeaning sexual nature, including derogatory remarks related to sex between men and crude questions about sexual acts and behavior in which they suggested the Student had engaged. The Student also was reportedly teased for being attracted to another boy at school. One student recalled a male classmate asking the Student out on a date as a joke. Others said that students spread hostile and patently false sexual rumors about the Student.

Many students also described physical harassment of the Student. This included bumping the Student out of the way as he walked by; hitting items such as food out of his hands; obstructing his path as he tried to walk by; throwing food, water bottles, pencils, and erasers at him; shoving him; and subjecting him to unwanted physical conduct of a sexual nature. This physical conduct was often accompanied by verbal comments such as those cited above. For example, witnesses described students grabbing the Student from behind while suggesting that he would be sexually gratified

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<sup>3</sup> The United States understands that a different person now holds the position of Vice Principal at the School, and that the former Vice Principal now holds another administrative position in the District.

by the contact. On one occasion, a student attempted to shove a pencil up the seat of the Student's pants.

As described by his friends, the Student suffered this conduct on school grounds on a daily basis, typically during lunch period, breaks, passing periods, P.E. class, and after school. Multiple students said that harassment often occurred in an area behind the snack bar in the School's cafeteria. Friends described the Student's avoidance of certain areas of campus where harassment tended to occur, and one friend said that she and the Student would frequently roam the empty hallways during breaks, a time when other students were socializing, and take other measures to avoid harassment. Another friend said that the Student often went to the library during breaks for the same purpose. Students indicated that harassment of the Student was widespread and perpetrated by dozens of individuals, and that students belonging to certain campus cliques were particularly likely to engage in the conduct.

Students told OCR that the Student was also often demeaned and mocked by his peers even when he was not present. One student, as an example, said that a common way to describe something undesirable was, "that's gay, but not as gay as [the Student]." One friend said that students sometimes approached her and mocked the Student by affecting exaggerated effeminate mannerisms and voices. Students expressed that the negative manner in which the Student was discussed and referred to by others, even when he was not present, had an adverse impact on his environment because it affected the way students treated him when he was present. Some witnesses described students not wanting to sit or be near the Student, and said that, although the Student had many friends, he was also shunned by many people. Two students described instances of former friends ceasing to associate with them because they were friends with the Student. Another student said that she was told not to communicate with the Student because he was "evil."

Some of the most personally demeaning and hostile incidents, including incidents of physical harassment and assault, regularly occurred in the P.E. locker room. Students interviewed by OCR reported that when the Student was in the seventh and eighth grades, students often shouted insulting words about him in the locker room, including anti-gay slurs and comments suggesting that, because the Student was gay, he would try to engage in inappropriate sexual conduct with them. Students sometimes yelled out derogatory comments about the Student to the P.E. teacher. Members of the Student's family reported similar conduct, as described to them by the Student. In addition, one family member said that a male peer had threatened to rape the Student. Witnesses also reported that classmates pulled down the Student's pants in the locker room. Witnesses stated that, as a result, the Student would change his clothes in a corner, and sometimes in a bathroom stall, and at one point ceased to change into clothes for P.E. at all. During P.E. class, according to witnesses, male students did not want to partner with the Student. One female friend said that when she partnered with the Student, many classmates would call out insults to both of them.

The Complainant told OCR that toward the beginning of the Student's seventh grade year, she called the Principal, who was new to the School that year, and threatened to press criminal charges against the students involved if the harassment did not stop. The Student's grandmother, who was then a school board member, told OCR that the first time she met the Principal she mentioned that the Student was being harassed. The Principal did not have records of either of these conversations, and did not remember them.

Beginning the first week of November 2009, at the Complainant's request, the Student was placed on independent study; according to the Complainant, this was in direct response to the harassment. The Student's friends also told OCR that the independent study placement was meant for the Student to escape the harassment. The Principal told OCR that she did not recall the reason for the Student's change in placement. The Vice Principal, however, stated that the Complainant told him that it was because of peer harassment. He stated that he asked her at that time whether she wanted to make a report and provide him with names of students involved, but she declined.

According to the Complainant, while she was on campus with the Student to pick up his belongings after he entered the independent study program, she heard another student yell "queer" at the Student from inside a classroom. She personally escorted the student to the office and reported the incident. According to the Vice Principal, he gave the offending student lunch detention. The Vice Principal stated that, during his conversation with the Complainant about this incident, the Complainant suggested that the Vice Principal take steps to increase tolerance among the students. In response, the Vice Principal wrote an article that was included in the School's November 19, 2009 parent newsletter. The article reads, in part:

The student body is not only diversified by gender, race, and ethnicity, but also by dress style, hair style, likes, dislikes, maturity, and ambition. Some are tolerant of this diversity, others are not...A few make life miserable for those that appear different than "normal" even though these students don't bother them. The only thing they've done is wear their bleached hair in a style covering half their face with black fingernail polish on, along with clothes that don't match and shoes that should've been discarded long ago. Please discuss with your child that while they may find some students different and "odd", everyone deserves the right to receive an education without being harassed or bullied because of their hairstyle or fashion sense or their mannerisms or their weight or their...you get the picture. While we aren't going to hold hands in a giant circle and sing "Kumbaya" we do need to respect each other and even celebrate our uniqueness.

On January 27, 2010, after several weeks of independent study, the Student returned to the School. The Complainant and the Student's friends told OCR that he returned because he was lonely and missed socializing with peers. The following day, the Complainant called the Principal to report problems the Student was experiencing with

other students. The Principal's handwritten notes from her conversation with the Complainant read, "[Student] is homosexual – mom took out of school – is being harassed daily." Following this call, the Principal immediately met with the Student in her office. Her notes from this conversation indicate that students had made harassing comments toward the student that included both an anti-gay slur and sexually suggestive language. In response to this information, the Principal took written statements from a witness identified by the Student and from the accused student, both of whom confirmed the incident. According to the offending student's discipline record, he was advised that his behavior was a "very serious hate crime [that] will not be tolerated" and was suspended for three days. The offending student's written statement indicates that he made the comment to the Student at the urging of another student. His discipline record indicates that he made the comment in front of several students. The Principal told OCR that she did not speak to the other student who was implicated or the students who heard the comment. The Vice Principal explained that there was no reason to do so because they had already confirmed the statement. Neither administrator took any further steps regarding this incident.

The Principal's notes from her meeting with the Student also indicate the Student told her, "[a] lot of 8th grade boys" were involved in the harassment, and that she "[g]ave [the Student] the picture book to ID students." Two student names are written beneath this entry. The entry indicates the Student stated, "A lot of them shout at me when I walk by but I can't identify them. One kid with curly hair that pushed me." The Principal stated that she spoke to the two specific students identified by the Student, but that those students denied the conduct. She also asked the Student to identify his harassers by pictures in the School yearbook, but the Student was unable to do so. Because the Student could not identify any of the other students involved or name any other witnesses, she did not take any further action in response to the Student's report. The Principal also told OCR that unless a student reports back to her that a problem is ongoing, she assumes it has been resolved, and that the Student did not indicate to her that the problems had continued.

One of the Student's friends told OCR that on two occasions during the Student's seventh grade year, she escorted the Student to the main office to seek help from a counselor in dealing with the harassment. She said that the Student talked with the Vice Principal on both occasions, although she was not allowed to participate in the meetings and therefore was not sure what was discussed. The counselors told OCR that the Student never reported any problems to them. The Vice Principal also said that the Student never directly reported any incidents to him; however, he said that the Complainant called him two or three times and met with him in his office once to report incidents. These contacts occurred during the Student's seventh grade year, including while the Student was on independent study. The Vice Principal said that the Complainant expressed frustration that the Student was still being harassed by students at the School. The Vice Principal said that he was unable to respond to the Complainant's reports because she did not provide the names of the students involved and because, rather than the Student reporting incidents as they were occurring, the Complainant was complaining about them "after the fact."



The Complainant told OCR that the Student's P.E. teacher called her during his seventh grade year to report that the Student was not changing his clothes for P.E. class, and that she explained to the teacher that the Student was not changing his clothes due to harassment in the locker room. According to the P.E. teacher, the Complainant expressed frustration during this call that the School was not working with the Student. The P.E. teacher advised her co-teacher, who supervised the boys' locker room, of the conversation; she believed that he looked into the complaint, monitored the locker room, and did not find any problems. She did not take any further action. The P.E. co-teacher told OCR that he had no recollection of the reported conversation with the other P.E. teacher, was not aware of the Student having any problems in the locker room, and never inquired into the matter. Some students who witnessed harassment of the Student in the locker room speculated that the P.E. teacher did not know about the conduct because he stayed in his office with the door closed. Other student witnesses stated that the P.E. teacher alternately told the harassers to stop or simply ignored the harassment.

The School employs four security officers who are responsible for patrolling the campus, ensuring that it is secure, assisting students, and referring them to the office as necessary. The School is divided into zones, and security personnel rotate between the zones. In addition, the Principal said that she and the Vice Principal often monitor common spaces during passing periods and at lunchtime. Every three weeks, the teachers rotate onto yard/hall supervision duty; otherwise, they typically only interact with students in the classroom.<sup>4</sup> With the exception of one security officer, every School employee interviewed by OCR said that she or he had never personally seen the Student experiencing problems with peers.

Many student witnesses said that they did not think adults at the School were aware of the harassment of the Student. Other students, however, said that the conduct was so prevalent and obvious that adults must have known, and close friends of the Student said that they were certain that some adults at the School witnessed it. Several students specifically stated that the security officers heard comments and saw physical conduct directed at the Student, but ignored it. One student stated that he had seen the Vice Principal turn away without responding after hearing a student call the Student an anti-gay slur. Another student told OCR that he had seen an adult intervene when the Student and a male friend were pushed down to the floor because they were holding hands. A third student said that a teacher had given a detention for conduct aimed at the Student in sixth grade. The District did not provide records of any of these incidents. Some students speculated that adults did not intervene on the Student's behalf because they themselves disapproved of the Student and privately agreed with things that students said about him.

One security officer said that he did not patrol the area in which the Student and his friends usually congregated, but was nonetheless aware that certain students "picked on" the Student. He said that, in one instance, the Student told him about an incident and he responded by taking the student alleged to have perpetrated the incident to the

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<sup>4</sup> According to the Principal, security and monitoring was increased after the Student's death.

office for administrators to handle. He did not remember the details of the incident, and the District did not provide a record of it. The student taken to the office by the security guard was the same student who was disciplined for making a sexual comment to the Student the day he returned from independent study. The security officer also said that he could tell from the Student's body language that he was uncomfortable around certain other students.

Another security officer told OCR that she learned of negative comments made by students to and about the Student, but that when she asked the Student about it, he did not seem concerned. She said that she never personally witnessed any harassment and regularly asked the Student how he was doing. A third security officer told OCR that she was never aware of the Student having any problems and that the Student never reported any to her, yet said that she nonetheless regularly checked in with him and told him to let her know if anyone gave him a "hard time."

The Student's teachers told OCR that they were completely unaware of the harassment, and students generally indicated that the conduct did not occur in the classrooms. However, student witnesses identified three particular classes in which they believed the Student was regularly taunted by his peers; in each instance, the students said they did not know whether the classroom teacher was aware of the conduct. Witnesses said that, in one of these classes, some of the Student's classmates "despised him" and made vulgar comments to him. One student recalled a teacher giving a student lunch detention for calling the Student an anti-gay slur in the classroom; however, none of the teachers reported this to OCR.

Many students perceived that the Student was liked by his teachers. However, one of the Student's friends said that the Student had told her that he did not think he was accepted by his teachers, and that they seemed suspicious of him. She also said that one of the Student's teachers would mock him in class by, for example, pointing to a picture of something ugly and suggesting it resembled the Student. Another friend said that, although teachers did not overtly mistreat the Student, they also did not "engage" with him the way they did with other students. One student reported a conversation between a classmate and a teacher during which the teacher made fun of gay people and mentioned the Student by name. The Complainant said that the Student told her that one of his teachers made negative comments directly to him; for example, when the Student raised his hand and said he needed help, the teacher responded, "That's right, you do need help."

The Student's transcript shows that, during his sixth grade year, he passed all of his classes and achieved grades of A and B in several of them; he finished the year with a GPA of 2.95. By the end of his seventh grade year, his GPA had dropped to 1.47; in the last quarter, he received a D grade in two courses and an F grade in three. On February 5, 2010, the School sent the Complainant a notice that the Student was in danger of not being promoted to eighth grade. The harassment continued for the remainder of the Student's seventh grade year.

The Complainant told OCR that the Student was miserable during the first two weeks of his eighth grade year. On September 1, 2010, she met with the Principal to request that the Student again be placed on independent study. According to the Complainant, the Principal indicated to her that she was aware of the reason for the request. Under the "rationale for placement" section on the Student's Independent Study placement form, on file with the District, the Complainant wrote "sexual orientation ridicule." The Principal stated she did not see the Complainant's notation at the time she approved the Independent Study. However, she told OCR that she nonetheless understood peer harassment to be the reason for the placement. The Vice Principal also said that he was aware that this was the basis for the request.

According to both the Complainant and the Principal, the Principal approved the placement without suggesting any alternative means of addressing the environment for the Student at school. Neither the Principal nor the Vice Principal took any steps following the meeting to investigate or respond to the harassment. According to the Vice Principal, although the Principal told him the Student was being placed on Independent Study because the Student was being harassed, and the Vice Principal did not doubt that the harassment was happening, additional investigation was not needed because the Student was no longer attending the School.

The Student's teachers told OCR that they were not informed of the reason for the Student's placement on independent study in either the 2009-2010 school year or the 2010-2011 school year. They said that School administrators never asked them whether they had witnessed the Student having problems, nor did any administrator ever suggest that the teachers be vigilant about possible harassment or take any other measures on the Student's behalf.

Many student witnesses told OCR that they assumed the Student had left school because of the harassment. Students told OCR that the Student generally responded to harassment by trying to ignore it and pretending that it did not bother him. However, according to his friends, the conduct actually impacted him profoundly. Some students said that, despite trying to hide it, the Student seemed lonely and sad. One friend described the Student crying at and after school. Another said that, although the Student did not want people to know, the conduct, "hurt his feelings. It hurt his heart." One friend said that, during the first month of his eighth-grade year, the Student told her that he did not want to live in Tehachapi anymore because nothing ever got better. An undated note written by the Student reads, in part, "I want to live elsewhere...I feel like utter failure. School, I'm terrified to go to. I was going to leave...but I don't have money, food, or support. So, I'm staying here."

On September 19, 2010, shortly after the Student began independent study the second time, he and a female friend had an encounter at the local park with a student from the School and three students from the District's high school. According to police records from the incident, the Student was threatened, taunted, followed, and physically assaulted. That afternoon, the Student hanged himself from a tree in his backyard. He

was discovered and cut down by his mother and his younger brother. After being in a coma for over a week, the Student died on September 27, 2010.

Prior to hanging himself, the Student wrote a letter to his mother and siblings. The letter reads, in total:

I love you. Thank you for having me. It's been a pleasure. I know this will bring much pain. But I will hopefully be in a better place than this s\*\*t hole. Please, put my body in burial and visit my used body. And make sure to make the school feel like s\*\*t for bringing you this sorrow. This life was a pleasure, mostly having you guys to bring me through the pain. Hopefully I become the universe.

*District Policies and Procedures; Measures to Prevent Harassment.* The District's Sexual Harassment Policy states that the District must "ensure that all district students receive age-appropriate instruction and information on sexual harassment." The Sexual Harassment Regulation requires the District to take actions to reinforce the Policy, which may include training for students, staff, and parents about how to recognize and respond to harassment. In addition, the Regulation requires that the District provide copies of the Policy and Regulation to parents, students, and employees on an annual basis, and display them at school sites.

The District also has a Board Policy on Hate-Motivated Behavior (BP 5145.9). This Policy prohibits discriminatory behavior or statements that degrade an individual on the basis of his or her actual or perceived sex or sexual orientation, among other things. The Policy specifies that the District will "provide age-appropriate instruction to help promote an understanding of and respect for human rights, diversity and tolerance in a multicultural society and to provide strategies to manage conflicts constructively" and ensure that staff receive "training on recognizing hate-motivated behavior and on strategies to help respond appropriately to such behavior." It requires that complaints of hate-motivated behavior be handled pursuant to the procedures described in the District Sexual Harassment Regulation.

School administrators have quarterly "discipline talks" with students that touch on a variety of prohibited behaviors, including sexual harassment. Otherwise, witnesses indicated that the School has not had meaningful discussions with or provided instruction to students about sex-based harassment or hate-motivated behavior, either before or after the Student's death. School staff and administrators also told OCR that they have not received copies of or received any training on the Sexual Harassment Policy and Regulation, or training on how to recognize or respond to student sex-based harassment or hate-motivated behavior. In 2009, District administrators received sexual harassment training from the District's legal counsel as mandated by OCR in connection with the resolution of a previous complaint; however, the Principal told OCR that the training related primarily to employment. The School Handbook states that harassment is prohibited and specifically defines sexual harassment. It also indicates that "hate

violence” includes harassment of an individual based on, among other things, gender or sexual orientation.

The District has taken the following steps in response to the Student’s death. Following the Student’s suicide, the District made psychologists and mental health counselors available to students at the School. At the Principal’s request, the District permitted the Principal to attend a multi-day Olweus Bullying Prevention Program training which, according to the Principal, was general in nature and did not address sex-based harassment specifically. The Principal told OCR that she intends to implement that program at the School. Also, the School published an article about cyberbullying written by the Vice Principal in the October 2010 Parent Newsletter. It encouraged parents to contact the school if they believe their child is being bullied. In the same newsletter, the Principal recited steps the District was taking to prevent bullying. Additionally, the School posted anti-bullying posters on campus.

The District also posted a statement on its website in response to the Student’s death. The statement was incorrect in certain respects. Specifically, it incorrectly suggested that the Student only briefly attended the School during his seventh-grade year; that the Student had an erratic pattern of transferring in and out of the School; that, as a result of this purportedly erratic attendance, School staff did not know the Student well; and that School personnel were unaware of the harassment. The statement failed to acknowledge that the main reason the Student was placed on independent study was to avoid the harassment he was experiencing at school.

Students told OCR that since the Student’s death, there has been less bullying generally on campus and increased awareness among students of the impact of such conduct; they attributed this increased awareness among students to the Student’s death and to students’ fear of consequences from law enforcement. Many students said that they did not believe the steps taken by the School were effective, that they did not feel comfortable reporting any form of bullying or harassment to the School’s administrators, and that they believed other students would retaliate against them if they did so. Some students also told OCR that they were aware that the Complainant had complained to administrators about harassment of the Student, but were not aware of any responsive action taken by the District.

A review of incident statements from the 2009-2010 school year shows that taunting of students based on gender stereotypes is common, and that much of the taunting involves the use of anti-gay slurs.

## **Analysis**

*Hostile Environment.* A hostile environment based on sex exists when a student is subject to sex-based harassment that is sufficiently serious to deny or limit the student’s ability to participate in or benefit from his or her educational program. In determining whether a hostile environment exists, the United States examines all relevant circumstances and factors, including the type, frequency, and severity of the harassing

conduct; the age, sex, and relationship of the parties; the setting and context in which the harassment occurred; and whether other incidents have occurred at the school.

The Student's peers—including his friends, acquaintances, and other students with whom he had no personal relationship—described continuous and severe verbal and physical harassment perpetrated against the Student by a large number of his peers on a daily basis, over a period of years. The harassment suffered by the Student occurred throughout the school day in numerous, unavoidable locations, and was both threatening and publicly humiliating. The physical harassment included students pushing the Student, knocking objects out of the Student's hands, throwing objects at the Student, and engaging in more explicitly physically threatening sexual conduct. The physical harassment was typically accompanied by verbal harassment.

The content of the verbal harassment that the Student suffered suggests that it stemmed, in part, from the perception among his peers that he was gay. Title IX and Title IV do not specifically prohibit discrimination based on sexual orientation. However, lesbian, gay, bisexual, and transgender (LGBT) students, and other students who are subjected to harassment on the basis of their actual or perceived sexual orientation or gender identity, may also be subjected to sex discrimination prohibited by Title IX and Title IV, including sexual and gender-based harassment. Moreover, regardless of a victim's actual or perceived sexual orientation, any student who is subjected to harassment that is sexual and physical in nature is protected when that harassment is based on the student's gender. Thus, the fact that harassment of the Student was partly based on his sexual orientation does not relieve the District of its obligation under Title IX and Title IV to investigate and remedy overlapping sexual and gender-based harassment. On the contrary, even where harassment of which a district has or should have notice appears, at first blush, to be based on sexual orientation (including, for example, the use of anti-gay slurs and epithets), the district is not relieved of its obligation to inquire further to determine whether the conduct at issue includes sex-based harassment arising from, among other things, the student's nonconformity with gender stereotypes.

In this case, much of the verbal harassment suffered by the Student was sexual in nature. It included comments and questions to the Student suggesting that he was engaging in sex and disparaging the manner in which he was presumed to do so; insinuations that the Student was a sexual threat to other students in the locker room; mocking invitations to the Student to engage in sexual acts or go out on dates; suggestions that the Student would be sexually gratified by accompanying physical sexual harassment that was occurring; the spreading of sexual rumors about the Student; and name-calling of a sexual nature.

Most of the other verbal harassment was gender-based, motivated by the Student's failure to act as some of his peers believed a boy should act, including his style of dress, mannerisms, voice, and manner of speech; lack of interest in activities that are stereotypically male; prevalence of female friends; and gentle manner. The ridicule included suggestions, intended as insults, that the Student was or wanted to be a girl,

and that he dressed as and had the mannerisms of a girl; mockery because most of his friends were female; insinuations that the Student was the “girlfriend” of other male students; mimicking the Student in a manner suggesting he was effeminate; and prevalent name-calling using words that connote female gender.

The harassment also included the use of anti-gay slurs and other homophobic language. Such language is commonly used in our culture as a means of general derision. It is also often used more pointedly to disparage others specifically for their actual or perceived sexual orientation. Although such conduct is not, by itself, sufficient to establish prohibited harassment under Title IX or Title IV,<sup>5</sup> the evidence in this case indicated that the use of such language stemmed, to a substantial degree, from gender-based animus related to the Student’s nonconformity with gender stereotypes. Specifically, students at the School routinely use homophobic epithets and related insinuations to ridicule those who do not conform to common gender expectations; incident reports show that male students in particular are called anti-gay slurs for conduct such as styling their hair a certain way, wearing makeup, and crying in public. Further, the Student’s peers began using anti-gay slurs to refer to him when he was quite young, before he openly self-identified as gay or they otherwise had a factual basis to know he was gay. This evidence establishes that the use of homophobic epithets in many instances stemmed from commonly held attitudes and perceptions about gender and masculinity from which also flowed the sexual and other gender-based conduct described above. To the extent that it did, such adverse conduct is within the scope of Title IX and Title IV.

These sexual and gender-based acts of verbal and physical aggression, intimidation, and hostility directed toward the Student—particularly in light of their cruel, relentless, and inescapable nature, in conjunction with the Student’s young and vulnerable age—were clearly sufficient to create a hostile environment that limited the Student’s ability to participate in and benefit from the school’s education program. Harassment fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning. This undermines the ability of students to participate in or benefit from their educational program.

In this case, the impact of the harassment significantly limited the Student’s educational opportunities. The Student took extensive steps while at school to try to avoid the harassment, including often spending breaks in isolated areas, such as the library and the hallways, rather than congregating with other students in social areas where the conduct was more likely to occur. The Student also reduced his participation in P.E. to avoid harassment in the locker room, even though his failure to participate could have impacted his grade and resulted in discipline. The Student’s grades deteriorated

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<sup>5</sup> Although such conduct is not covered by Title IX or Title IV, California state law specifically prohibits discrimination and harassment based on both gender and sexual orientation, as well as other categories. See Cal. Ed. Code §§ 200-234.3. While OCR and the DOJ do not enforce state laws, the District is obligated to comply with both federal and state laws.

significantly during the time he attended the School, and the Complainant attributed this decline to the harassment the Student experienced.

Most significantly, the Student was compelled to withdraw from School for a period of several weeks in seventh grade, opting instead for an independent study program. These measures denied the Student important opportunities and occasions to benefit from the educational opportunities afforded to his classmates, socialize with his peers, develop relationships with his teachers, and engage in the types of activities and interactions that are age-appropriate and healthy. The Student faced immediate harassment and ridicule upon his return to the School in eighth grade, such that he again chose this route rather than endure the torment of his peers at school, despite the loneliness and isolation that he experienced on independent study the previous school year. Although the Student is not alive to describe for himself his feelings about school, his written statement that he was terrified to attend the School, and the blame he cast on the School in his suicide note, are indicative of the impact of the harassment he experienced.

*Notice of Harassment.* Under Title IX and Title IV, districts must respond promptly and equitably to actual or constructive notice of sexual or gender-based harassment. In the context of OCR administrative enforcement actions and suits by the DOJ for injunctive relief under Title IX and Title IV, a school has notice if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. A “responsible employee” includes any individual who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or who a student could reasonably believe has this authority or responsibility.

In this case, school administrators and employees generally claimed to be unaware of the harassment the Student experienced. However, as repeatedly described by students, the harassment was in plain sight, occurring in hallways and other common areas, P.E. classes, and during breaks, and was widespread and well-known to students and at least some staff. As stated above, a school has notice of, and thus a duty to respond to, harassment about which it reasonably should have known; that is, harassment about which it would have learned if it had exercised reasonable care or made a reasonably diligent inquiry. In the Student’s situation, the obvious nature of the harassment was sufficient to put School officials on notice that it was occurring.

In addition, even had the harassment not been open and obvious, School officials, including the two administrators specifically designated to respond to sexual and gender-based harassment complaints, received actual notice of the conduct via multiple reports made by the Complainant and the Student. These included reports to the Vice Principal by both the Complainant and the Student during the Student’s sixth-grade year and at various points during his seventh-grade year; reports to the Principal by the Complainant and the Student’s grandmother at the beginning of his seventh-grade year; reports to both the Principal and Vice Principal made at the time of, and stated as the basis for, the Student’s placement on independent study in both seventh and eighth



grade, as well as upon his return from independent study in seventh grade; visits by the Student to the main office on at least two occasions during his seventh-grade year, as reported by one of his classmates; the Complainant's report to the P.E. teacher; and the direct observations of and discipline referral by a security officer. The District has a record of or acknowledges most, though not all, of these reports.

*Response.* Upon receiving notice of possible harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a school 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.

In light of the information provided to administrators by the Complainant and the Student and the information the School should have known had it exercised reasonable diligence, the School had a duty to investigate and respond to the harassment to which the Student was subjected. As required by law, the District has a sexual harassment complaint procedure that provides District schools with a mechanism for discovering harassment as early as possible and effectively correcting problems, and details the investigative and remedial steps administrators should take upon receiving notice of possible harassment. In 2009, pursuant to a previous finding by OCR that the District was not in compliance with Title IX, the District issued guidance to its school sites on how to implement the Sexual Harassment Regulation. Additionally, School administrators received training on the Sexual Harassment Policy and Regulation in August 2009, at the beginning of the Student's seventh-grade year, and applied the Regulation to reports of harassment by female students during the 2009-2010 school year. Yet administrators did not utilize the Regulation to investigate and resolve the Student's complaints, nor explain the Regulation and their rights under it to the Complainant and Student. Although the District was required to report to OCR all complaints of sexual harassment made during the 2009-2010 school year, it did not report any of the complaints made by the Complainant or Student. Most School employees interviewed by OCR seemed unaware of the Regulation's existence.

While the School responded on two occasions to reports of harassment by the Complainant and Student by taking disciplinary action against the harassing students, those actions were inadequate to fulfill the School's legal obligations. In response to the November 2009 incident, in which a student shouted a slur at the Student as he and the Complainant walked by a classroom, the Vice Principal gave the offending student a lunch detention and took no further action. When the Student complained of harassment immediately following his return to school from the first independent study placement, the Principal confirmed one of the incidents alleged by the Student and then suspended the offending student. The Student identified two other students who were harassing him but reported that many other students were involved whom he did not

know. When the two identified students denied the harassment, the School took no further action to resolve the Student's complaint. In addition, the School did not attempt to locate the students the Student could not readily identify. After the Complainant's report that she was withdrawing the Student a second time, the School did not investigate whether the harassment had in fact continued. The Vice Principal stated that while he knew the Student withdrew because of continued harassment, he did not conduct an investigation because the Student was no longer at the School.

The School's response to these incidents did not appropriately identify the scope of the harassment or effectively remedy it. An adequate investigation into any of the Complainant's and Student's numerous complaints would have revealed the hostile environment to which the Student was subject. Although discipline was a necessary step in the instances described above, it was not a sufficient response in light of the reported nature and pervasiveness of the conduct. Additional steps to eliminate the hostile environment and to prevent further harassment in this instance would have included, for example, counseling the students who witnessed and reportedly instigated and encouraged the incidents to ensure that those students understood that the conduct was not acceptable and would not be tolerated, providing instruction to the classroom where the comments were made, and contacting the parents of the students to communicate the same message. It is notable that when the Complainant independently contacted the parents of one of the students involved, that student apologized to the Student and ceased the behavior, suggesting that such interventions by the School would indeed have been effective.

On each occasion that the Complainant spoke to administrators about placing the Student on independent study, the administrators merely agreed to the placement without taking steps to investigate whether harassment was occurring, to understand the extent of it, or to determine the toll that it was taking on the Student. Had they done so, they would have been in a position to understand what steps were needed to stop the harassment and repair the educational environment so that the Student could continue to attend school with his peers.

The District should also have taken steps to try to ensure that when the Student returned from independent study, he was not subjected to continued harassment. For example, the School could have used the Vice Principal's letter in the parent newsletter to explain the types of conduct that constitute harassment, and strongly state that such conduct was unacceptable and would result in discipline. Instead, the letter, although intended to promote tolerance, likely identified the Student to the reader through specific and disparaging descriptors; contained elements that validated some students' perceptions that the Student and other students like him were "odd" and not "normal," and made light of the harassment the Student was experiencing. The statements in the newsletter were not only inappropriate, but may have emboldened students to persist in harassing and ostracizing students, such as the Student, who did not conform to gender stereotypes.

While the administrators' ability to respond to the Student's complaints may have been hampered by his inability to name all of the witnesses and alleged harassers, the School could have taken other steps to identify the parties involved. For example, administrators could have interviewed other students in the vicinity, security officers, and other potential witnesses, reviewed the School's security cameras, or spoken to the Student's friends and classmates to confirm the harassment the Student was experiencing. Administrators could also have alerted the Student's teachers, the security staff, and other employees of the alleged harassment, so that they could keep a closer watch on the Student, more aggressively patrol areas where the harassment typically occurred, and respond to incidents. The School could also have conducted follow-up inquiries to see if the Student had experienced any new incidents of harassment or any instances of retaliation, responded promptly and appropriately to address any new problems, and made sure that the Student and the Complainant knew how to report subsequent problems. Steps such as these are required not only under the law, but also by the District's own Sexual Harassment Regulation.

Other more comprehensive steps by the District were also necessary, given that the harassment was widespread and perpetrated by such a large number of students. Steps could have included providing instruction to the entire School community, including students, on civil rights and expectations of tolerance, specifically as they apply to sexual and gender-based harassment, and steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct. Instead, many students interviewed by OCR believed that School officials knowingly allowed the conduct to occur, and perceived this to mean that they did not object to the conduct and, in some students' eyes, condoned it. When administrators should have been actively communicating to students the importance of treating the Student with respect and of intervening on his behalf when others did not do so, they instead engaged in passive, incomplete action or inaction, creating for some students the perception that the harassment was acceptable.

Finally, although the School environment clearly took a tremendous toll on the Student's mental health and academic performance, the District did not take any steps to address the impact of the harassment on him, such as providing counseling or academic support services.

## **Conclusion**

Based on the above facts and analysis, the United States concludes that the Student was subject to persistent, pervasive, and often severe sex-based harassment that resulted in a hostile educational environment of which the District had notice, and that the District failed to take steps to sufficient to stop the harassment, to prevent its recurrence, or to eliminate the hostile environment. Although the District's Sexual Harassment Policy and Regulation are consistent with the law with respect to sexual harassment, the District did not adhere to its own policy in addressing the multiple forms of notice it received with regard to the treatment of the Student.

In order to resolve the District's identified noncompliance with Title IX and Title IV, the District voluntarily entered into the attached Resolution Agreement. The United States has determined that, when implemented, the Resolution Agreement will resolve the issues in this complaint. Therefore, the United States is closing this complaint as of the date of this letter. The United States will monitor the implementation of the enclosed Resolution Agreement and may reopen the investigation if the District does not comply with the Agreement. The United States is notifying the Complainant of the closure of this complaint concurrently.

This letter is a letter of findings issued by OCR to address an individual case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

Under the Freedom of Information Act, this document and related records may be released upon request or made public by OCR and/or DOJ. In the event that OCR and/or DOJ receives such a request or intends to make these documents public, the respective agency will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

The United States thanks you and your staff for your cooperation during this investigation. If you have any questions regarding this letter, please contact OCR staff attorneys Suzanne Taylor or Kendra Fox-Davis at (415) 486-5555 or DOJ trial attorneys Whitney M. Pellegrino or Joseph J. Wardenski at (202) 514-4092.

Sincerely,



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