

DATE

Dr. Devon Horton
Superintendent
Evanston/Skokie School District 65
1500 McDaniel Avenue
Evanston, IL 60201

Via electronic mail only: superintendent@district65.net

Re: OCR #05-19-1395

Dear Dr. Horton:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Evanston/Skokie School District 65 (the District) by a District teacher on June 27, 2019. The Complainant alleged the following:

- 1) Beginning in the 2017-2018 school year, and continuing through the 2020-2021 school year, the District implemented certain policies and programs that discriminate against staff, students, and job applicants on the basis of race (white), including separating staff and students into affinity groups based on race.
- 2) During the 2018-2019 school year, the District subjected her to discrimination based on race with respect to its failure to appropriately discipline students whom she stated physically assaulted her at Dr. King Jr. Literary and Fine Arts School Arts Elementary School (King Arts).
- 3) During the 2018-2019 school year, the District retaliated against her for having complained about her safety following those incidents, when it cancelled portions of a second-grade musical she co-directed, and later, in August 2019, failed to offer her a position equivalent to her .80 full-time equivalent (FTE) for the following school year.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d – 2000d-7, and its implementing regulations, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance from the Department. Title VI also prohibits retaliation. As a recipient of Federal financial assistance from the Department, the District is subject to these regulations.

Summary of Findings

Based on its findings below, OCR determined that the District violated Title VI regulations at 34 C.F.R. §§ 100.3(a), 100.3(b)(1)(ii), and 100.3(b)(1)(iii), by:

- separating administrators in a professional development training in August 2019 into two groups on the basis of race—white and non-white—and held one cabinet meeting that similarly separated participants on the basis of race in approximately March 2019;
- offering various racially exclusive affinity groups that separated students, parents, and community members by race;
- implementing a Discipline Policy that includes an explicit direction to staff to consider a student's race when evaluating a behavioral/disciplinary situation; and
- carrying out a “Colorism Privilege walk activity” with students during a “racial equity summit” at King Arts, in March 2019, that treated students differently and separated students solely based on their race and color.

OCR also has Title VI concerns that the District conducted other “privilege” activities during District staff training and student activities throughout the 2018-2019 and 2019-2020 school years that may have adversely affected a reasonable person's ability to participate in or benefit from the District's programs and activities by attributing characteristics, conduct, and attitudes to staff and students solely based on their race. In addition, OCR notes its concern that there are certain items in the District's 2019-2020 Black Lives Matter week and 2019-2020 and 2020-2021 N-Word materials that, if implemented as written, requires teachers to treat students differently based on their race.

In addition, OCR determined that the District instructed principals during the 2019-2020 school year to consider the race of staff applicants when selecting building-level, paid facilitators in violation of the Title VI regulation at 34 C.F.R. § 100.3(b)(1)(v). OCR also has Title VI concerns that during 2018-2019 and subsequent school years the District may have improperly considered race in its hiring decisions.

Separately, OCR determined that the evidence is insufficient to establish a violation of Title VI with regard to the Complainant's allegation of retaliation when it cancelled the musical, and when it reduced her full-time equivalent (FTE) level from .8 to .5 for the following school year.

During the course of OCR's investigation, the Complainant clarified her allegation regarding the District's failure to discipline students, stating that in her view, poor administration explained the District's failure to discipline the students, not her race. Accordingly, OCR determined that this allegation did not state a violation under Title VI, and is now dismissing allegation #3 pursuant to Section 108(a) of *OCR's Case Processing Manual* (CPM). The Complainant also alleged that certain other District programs and activities during the 2019-2020 and 2020-2021 school years discriminated on the basis of race. Based on all of the information provided by the Complainant regarding these allegations and publicly available information, OCR cannot reasonably conclude that the recipient has violated a law that OCR enforces, and is dismissing these allegations pursuant to CPM Section 108(c). Pursuant to CPM Section 108(d), OCR also determined that the

Complainant's allegations regarding events that occurred prior to December 29, 2018, were not timely filed with OCR.

On [date], the District voluntarily entered into a resolution agreement (Agreement), which commits the District to take specific steps to address the identified Title VI violations and areas of concern.

This letter presents the applicable legal standards, the information gathered during the investigation, the reasons for OCR's determinations, and the steps the District has agreed to take to resolve the violations and compliance concerns.

Background

The District, which is located in Cook County, serves approximately 8,000 students in kindergarten through eighth grade. It has ten elementary schools, three middle schools, two kindergarten-through-eighth grade magnet schools, and three early childhood/special/other educational services schools.¹

During the 2018-2019 school year, the Complainant taught drama at King Arts Elementary School (King Arts), and Nichols Elementary School (Nichols). During the 2019-2020 and the 2020-21 school years, she taught drama only at Nichols.

Findings of Facts

Racially Exclusive Affinity Groups

From the 2018-2019 through the 2019-20 school years, the District used racially exclusive affinity groups or spaces for staff and students.

During the 2018-2019 school year, affinity groups were conducted at the District's main office, and typically began with a joint session that included all participants, later transitioning into break-out sessions—one for non-white staff and another for white staff. A total of seven sessions were held, and attendance ranged from seven to fifteen staff members.² Throughout the 2018-2019 school year, the District also offered its staff "Beyond Diversity 2" training, which included the use of race-based affinity groups.³ In addition, the Assistant Superintendent for Curriculum & Instruction (AS C&I) stated that the Cabinet broke into racially exclusive affinity groups for white members and non-white members while reading the book *White Fragility* during the 2018-2019 school year.

¹ According to publicly available data, approximately 42.5% of the District's students are white, 22.6% are black, 20.8% are Hispanic, and 14.2% of students are other races. Of the District's teaching staff, approximately 69.8% are white, 13% are black, 9% are Hispanic, and 7.8% of teaching staff are other races.
<https://www.illinoisreportcard.com/district.aspx?districtid=05016065004&source=studentcharacteristics&source2=studentdemographics> (last viewed December 4, 2020).

² OCR notes that two of the sessions occurred during the period prior the Complainant's timely allegations.

³ In 2017-2018 the District offered Beyond Diversity training, which included the use of race-based affinity groups, to its senior administrators. Starting with the 2018-2019 school year, Beyond Diversity no longer included race-based affinity groups. The District required all staff to complete Beyond Diversity training by 2019.

Starting in February 2019, the District also offered racially exclusive affinity groups for kindergarten through eighth grade students, but only for those students who “identif[ied] as black.” These racially exclusive student affinity groups met after school at a community center to which the District offered transportation for participants. The District provided a registration form for parents to complete, which stated “this opportunity is entirely voluntary and open to all K-8 District 65 students who identify as black.”

In August 2019, the District also used racially exclusive affinity groups as part of professional development training at the District’s main office for Cabinet members, senior administrators, principals, assistant principals, “restorative practice” coaches, and instructional coaches. Participants were asked to identify either as white or as a “person of color,” and were separated by the District into racially exclusive affinity groups on that basis for the entire training, which was facilitated by the District’s Equity Consultant, the Director of Equity for the Evanston School District (the Director of Equity), and two additional consultants.

During the 2019-2020 school year, the District also offered racially exclusive affinity groups at Orrington Elementary School (Orrington) “for students who identif[ied] as Black or as White.” The groups met twice per month during lunch/recess, and were facilitated by Orrington staff. A total of four black students and eight white students participated in these groups.

During Spring 2020, the Director of Equity forwarded staff emails about several virtual affinity groups offered by the Pacific Educational Group (PEG). PEG provided the District its Beyond Diversity 2 training, as explained below. The emails invited their recipients to two PEG-offered-affinity groups, one for “Indigenous and Black” individuals and another for “Asian and Latinx” individuals. The Director of Equity explained that PEG offered these affinity groups to individuals who completed its Beyond Diversity program.

In the 2020-2021 school year, the Willard Elementary School Volunteering and Parent Teacher Association (PTA) page on the District’s website stated, “[t]wo groups will be held as affinity groups based on self-identified racial groups, the 3rd group is open to all” during the 2020-2021 school year.⁴

According to the Director of Equity, the racially exclusive affinity groups were a part of the District’s larger racial equity efforts, because, they stated, “you can’t get to reconciliation without truth,” and affinity groups purportedly allowed participants to be “truthful and honest,” both of which the District thought necessary to promote self-reflection and “achievement.” The AS C&I stated that the groups offered a space for “same race peers” to “think through [the District’s] policies, procedures, and actions,” while also “challeng[ing] white persons” to “increase [their] racial literacy” for themselves. According to the District, the black student affinity group created “a safe space” for students “to share, process and discuss their experience at Orrington through their lived experience” and the white student affinity group served as a “safe space” for students to “learn more about white privilege, internalized dominance, microaggressions and how to act as an ally for students of color.”

⁴ <https://www.district65.net/Page/1603> (last viewed November 1, 2020).

“Privilege” Activities

Beyond Diversity

As discussed above, the District required Beyond Diversity training for its administrators, and made that training mandatory for all licensed staff in the 2018-2019 school year. During the 2019-2020 school year, the District made that Beyond Diversity training a requirement for all non-licensed staff as well. OCR reviewed the Beyond Diversity training materials for the two-day sessions offered at various times throughout the school year. The “Courageous Conversation: Beyond Diversity” materials include a “White Privilege Exercise” that has participants answer and score a series of questions such as, “Because of my race and/or color... If I should need to move, I can be pretty sure of hassle-free renting or purchasing in an area in which I would want to live,” or “I can be sure that my children will be given curricular materials that testify to the contributions of their race.” Another exercise asks participants to consider “what is whiteness,” and invites them to write down “some defining aspects of white culture.” The materials then go on to explain, on a slide titled “what does it mean to be white?” that “most whites live, grow, play, learn, love, work and die primarily in racial segregation,” that “[w]hites are taught to see themselves as individuals, rather than as part of a racial group,” that “common white reasoning in crossracial conflicts is that as long as we are good people and don’t intend to perpetuate racism, then our actions don’t count as racism,” and that “we [whites] haven’t had to develop the skills, perspectives or humility that would help us engage constructively.”⁵

According to the District, the Beyond Diversity seminar is “designed to help teachers, students, parents, administrators, and school support professionals understand the impact of race on student learning and investigate the role in which racism plays in institutional academic achievement disparities.”

SEED

In the 2019-2020 and 2020-2021 school years, the District has offered year-long courses in Seeking Educational Equity and Diversity (SEED) to staff.⁶ According to the District’s written materials, SEED is a seminar in which participants “explore and build capacity to promote institutional change by examining their own education and privilege in relation to race,” as well as other aspects of their identity, “and how these factors impact their school classrooms, community, or workplace.”⁷ The AS C&I told OCR that the SEED training she attended included an exercise resembling a “privilege walk,” during which participants lined up and then identified themselves by stepping forward in response to statements such as “you’re male,” or “you’re white.”

⁵ OCR inquired whether the District had determined that it would no longer use the “Courageous Conversation: Beyond Diversity” materials. The District responded that it did not plan to use materials with any staff during the 2020-2021 school year.

⁶ Beyond Diversity 2 is a professional development program delivered by PEG. District administrators have attended Beyond Diversity 2 with attendance and costs paid by the District.

King Arts' Student Equity Summit

According to the District, an optional privilege walk was also part of its programming for the Student Equity Summit held at King Arts, on March 16, 2019. During that summit, King Arts had participants from its seventh and eighth grade classrooms break out into groups, in order to enact a "Colorism Privilege Walk." That activity, as explained in the facilitators' handout, had students "[b]egin in [the] center of [the] room on [a] diagonal & hold hands IF comfortable." From there, "[i]n silence," and with "eyes lowered," the students would then "[t]ake small steps" in answer to prompts from the activity's facilitator. Those prompts began with the following: "If you are white, take two steps forward. If you are a person of color with light skin, take one step back. If you are a person of color with dark skin, take one step back. If you're Black, take two steps back."

Black Lives Matter Week Materials

In February 2019 and 2020, the District conducted exercises with students in conjunction with Black Lives Matter (BLM) Week and Black History Month. The February 2020 BLM lesson plans for third through fifth grade included the following statements:

- Because of the overt and subliminal messages about Black people being bad, ugly, and inferior to White people, Black people feel pressure to assimilate, or throw away their culture in order to become more like White people in the hopes to be more accepted by society.
 - . . . [W]e live in a society that is patriarchal, that means our systems and government are controlled by men. In the same way that the systems and the government are controlled by White people and racism being a result of it, so is it with men controlling systems and government and messages about women being dumb, weak, and inferior being a result. Because Black women cannot separate being Black from being a woman or their intersectionality, they experience something like a double oppression. The guiding principle of Black Women encourages the building of women-centered spaces where women, especially Black women, can have freedom from messages that they are dumb, weak, and inferior.
 - Prompt students with the following:
 - Without sharing out loud, please think to yourself about the messages you've received about Black men and boys in the media, your community, your home, or your school. How do those messages make you feel?
- **During this part of the lesson, the teacher/students are not to share out the messages they've received. This is a point of reflection. Sharing out the messages will trigger students, more specifically Black students, because it reinforces systemic oppression and will bring up memories of experienced trauma.**

- *Pay attention to students who disengage and consider the reasons. For Black children, especially those who identify as girls, this can be triggering. This can also be a trigger for students who are used to being the centered voice and will disengage believing this does not apply to them.
- How do you think the lyrics, “Your skin is not only dark, it shines and it tells your story—Keep dancin’, they can’t control you” ties into what you already understand about being Unapologetically Black, being a woman, or the intersectionality of being a Black woman? (bold in original).
- Read aloud *Not My Idea: A Book about Whiteness*. Ask students: What does the author mean “You can be white without signing on to whiteness?” Ask why the girl in the story was mad when she found out the history of racism in our country.
- In the United States, a lot of us believe that children, especially White children, are racial innocents — completely naive, curiously fragile with respect to the realities of race, or both. The truth is that well before their teen years, the vast majority of children are well aware of prevailing biases, and most kids, of all racial stripes, have taken on a bunch of their own.⁸

The President of District 65 Educators’ Council (DEC) informed OCR that the BLM unit of study was a teacher-led initiative that grew out of a desire by the District’s educators to support the national BLM week of action. DEC members drew on resources developed by the national BLM curriculum to develop the unit of study during the 2018-2019 school year, which was approved by the Board. The AS C&I told OCR that the BLM materials are designed in developmentally appropriate grade bands, which allows teachers to present the curriculum for their grade level and class.

N-Word Materials

The District’s “N-Word” exercises are available to teachers to use when there is an instance of the “N-Word” being used by students in the building. The “N-Word” exercises were developed in August 2019 by external education and curriculum consultants. The District’s teachers received training on the exercises, and were provided the relevant teaching materials and resources to use on an as-needed basis. The District materials state:

Explain that we are now going to watch a short video of author Ta-Nehisi Coates speaking at ETHS. Ask students to pay attention to any new perspectives they hear that they may not have thought about before:

Ta-Nehisi Coates Explains Why White People Shouldn't Use the N-Word (4:58).

⁸ Excerpt from Andrew Grant-Thomas’ “Your 5 year old is already racially biased.”

During the video, which is entitled “When Not Every Word Belongs to Everyone,” Ta-Nehisi Coates states:

- The question one must ask is why so many white people have difficulty extending things that are basic laws, you know, of how human beings interact to black people.
- When you’re white in this country, you’re taught that everything belongs to you. You think you have a right to everything. ... You’re conditioned this way. It’s not, you know, because your hair is a texture or your skin is light. It’s the fact that the laws and the culture tell you this. You have a right to go where you want to go, do what you want to do, be however — and people just got to accommodate themselves to you.
- So here comes this word that, you know, you feel like you invented. And now somebody will tell you how to use the word that you invented. You know? ‘Why can’t I use it? Everyone else gets to use it. You know what? That’s racism that I don’t get to use it. You know, that’s racist against me. You know, I have to inconvenience myself and hear this song and I can’t sing along. How come I can’t sing along?’
- For white people, the experience of being a hip-hop fan and not being able to use the [N-Word] is actually very, very insightful. It will give you just a little peek into the world of what it means to be black. Because to be black is to walk through the world and watch people doing things that you cannot do, that you can’t join in and do. You know? So I think there’s actually a lot to be learned from refraining.⁹

According to the District, the exercises are developed in grade bands, including pre-k through 2nd grade, 3rd grade through 5th grade, and 6th grade through 8th grade.

Hiring

Goals

The Assistant Superintendent Human Resources (AS HR), in a December 13, 2018 memorandum to the Board of Education, wrote that because the District’s “percentages of teachers of color ... do not yet mirror our student demographics,” the District’s goal was to “increase the number of teachers of color hired for the 2019-2020 school year by 5%.” The AS HR informed OCR that she set the goal to increase teachers of color “by 5%,” “in a somewhat random way” and she may have “looked at what happened the last few years.” According to the AS HR, the District aims to have staff be “reflective” of its student population, but does not and cannot make hiring decisions based on race. The AS HR also told OCR that the District only analyzes the diversity demographics of hired applicants. The memorandum lists nine short-term and long-term strategies to increase the applicant pool in order to reach the goal to increase

⁹ The video clip the District included in its N-Word curriculum is an excerpt from a Q & A segment with Ta-Nehisi Coates during his 2017 book tour for *We Were Eight Years In Power*. The full video is available at <https://www.youtube.com/watch?v=deMx1b701Y0>. The District materials also identify “In Defense of the N-Word” by Ta-Nehisi Coates, available at <https://www.nytimes.com/2013/11/24/opinion/sunday/coates-in-defense-of-a-loaded-word.html>, as a teacher resource.

teachers of color by 5%, such as hosting a job fair for colleges and universities with high populations of students of color, recruiting applicants from Historically Black Colleges and Universities, and developing marketing strategies to target and recruit educators of color.

Stipend Opportunities

During the 2019-2020 school year, the District provided all educators a copy of the book *White Fragility: Why It's So Hard for White People to Talk About Racism*, but did not require them to read the book. In a September 9, 2019 e-mail to principals and staff, the Director of Equity stated:

There is one \$450 stipend available per building, to be paid by the Equity Department. There can either be one facilitator OR facilitation (and the stipend) can be split with another person for dual facilitation. Two things [sic] to consider when choosing the facilitator, preferably, at least one facilitator who identifies as White as we are centering White Racial Literacy Development.

Discipline Policy

OCR noted that the District's Discipline Policy states that "[e]ffective discipline balances consistency with regard for the unique circumstances of the individual, including but not limited to[:] race, cultural background, disability, and traumatic life experiences."¹⁰ The District acknowledged that the Discipline Policy directed staff to consider "all matters of the student's unique circumstances, including racial/ethnic/cultural backgrounds . . . when evaluating a behavioral/disciplinary situation." However, the District denied that the Policy was "a directive that discipline should be based upon broad racial classifications, or that one race should be treated differently than any other."

Retaliation

King Arts' Second-Grade Musical

In January 2019, the King Arts music teacher selected *Giants in the Sky* as the second-grade musical to be performed on March 14, 2019. The Complainant assigned the students' speaking parts and informed students, parents, and second-grade teachers of the students' assignments via email during the last week of January 2019.

Two second grade teachers (Teacher A and Teacher B) informed OCR that in the days leading up to the performance of the musical, they expressed concerns that the Complainant unfairly assigned the roles by giving only nine out of the sixty students in the grade the majority of speaking lines, and assigning only white students to the lead roles. The Principal reported to OCR that after the teachers brought their concerns to him, he reviewed the script—something that he did not usually do—and "wasn't too happy." The Principal further stated that he objected to some of the character names, noting that "one or two of the names were offensive," and he

¹⁰ The District's Discipline Policy was adopted on March 19, 2018.
https://www.boardpolicyonline.com/?b=evanston/skokie_65 (last viewed November 1, 2020).

“didn’t think it was appropriate for second-grade.” He also “tried to get an idea about the diversity piece,” and noted, after “look[ing] at the cast,” that the “[l]eading parts in *Giants* all went to white students, rather than capitalizing on other students, their backgrounds and abilities.” According to the Principal, however, he was concerned “most” about “character names” rather than “diversity in leading roles.” Some of the scripted names, he stated to OCR, were “street level” and “not appropriate,” and he “knew he would get negative feedback (calls and emails) from parents complaining about *Giants*” if King Arts put on “the musical as scripted.” And he felt that he “would [have] take[n] a hit when parents [or other members of the] community complained.”

Although it is undisputed that the Principal and the Complainant spoke about the musical on March 13, 2019, they recall the conversation differently. The Principal told OCR that he shared his concerns with the Complainant, including whether she fairly assigned parts to students resulting in a small number of students, all of whom (according to the Principal) were white, receiving the majority of the speaking parts. The Complainant stated that she explained to the Principal that she had randomly assigned the parts by going down the class roster. The Complainant told OCR that she informed the Principal that she did not believe the musical was unfairly cast, and identified a black student, several Hispanic students, a Native American-Alaskan student, and a multi-racial student who were all assigned several of the larger speaking roles.

The Principal sent an email at 2:20 pm on March 13, 2019, to all families, informing them that the second-grade musical “will go on in a modified version ... [t]he students will only be sharing the music tomorrow and not the scripted words.” The e-mail further stated that the Principal felt “the distribution of the assigned parts [was] not equitable to all students,” and that there was “a concern with the language [not] being second grade appropriate.”

The Complainant alleged that the Principal’s reasons for modifying the performance were pretextual, and in fact that the modification was retaliation for her having complained on March 13, 2019, that she felt unsafe in her classroom due to several student incidents involving alleged assault, discussed below. As additional evidence of retaliation, the Complainant also argued to OCR that the other King Arts drama teacher, Teacher C (who is white), directed a musical production in April 2019, called *Stories Alive*, with her 7th grade drama ensemble that featured a total of 15 students, of whom 11 were white, one was black, one was Hispanic, and two were multi-racial. The Complainant explained that the King Arts administration did not raise any issues concerning racial diversity in the casting of Teacher C’s production. Teacher C informed OCR that, unlike the second-grade musical, the 7th grade drama ensemble is a specials class, for which students audition during the spring of sixth grade. Teacher C stated that all students who audition for the class are selected. OCR was unable to identify any instances in which the Principal treated a non-white teacher more favorably in connection with concerns about the races of students cast in a school performance, or the appropriateness of a student production; however, the drama teachers at King Arts were both white.

Complainant's FTE Status

On April 12, 2019, the Complainant submitted a voluntary transfer request form to the District, in which she asked to transfer her position to "any location other than King Arts." The HR Department informed the Complainant that her request would not be processed because she did not apply for an open position and encouraged her to email HR when she identified a posting to which she was applying.

On June 4, 2019, the Complainant emailed the AS HR, stating "I have been physically assaulted this year three times at King Arts. I do not feel safe at King Arts. I completed a request for a transfer and submitted the document to Human Resources. I was notified via email by [HR Partner] that because there are no positions open in drama, there is no place for me to transfer." On June 11, 2019, the AS HR replied to the Complainant, reminding her that she must submit a Transfer Request and identify a posted position to which she would like to transfer, and that if she were to teach only at Nichols, she would be .50 FTE.¹¹

On June 27, 2019, OCR received the Complainant's complaint against the District alleging discrimination on the basis of race with respect to the District's "'equity', 'restorative justice', and" and other allegedly "raced based policies." OCR sent the Complainant a standard letter acknowledging receipt of her complaint to her attention at Nichols after the Complainant declined to provide her home address. The Nichols Secretary informed OCR that she told the Principal that the Complainant had received a letter that "looked official and time sensitive," and the Nichols Principal directed her to leave the letter in the Complainant's mailbox. The Nichols Principal stated that he recalls the School Secretary informing him that the Complainant had received a letter that looked important over the summer and that he directed her to inform the Complainant.

On July 26, 2019, the AS C&I told the Complainant that she would not be teaching at King Arts during the 2019-2020 school year. Although she was not aware of any other District employee moving or "switching" to another position absent a vacancy, the Complainant told OCR that she expected the District to switch her teaching position with another drama teacher's in order to maintain or increase her FTE.

On August 2, 2019, the Complainant sent an e-mail to the AS C&I stating that she wished to maintain a .80 FTE, and asking whether there were other teaching opportunities available. The Complainant indicated that she is also licensed to teach English/Language Arts (ELA), and was interested in teaching an advisory class at Nichols. The Complainant informed OCR that, while she was aware that there was at least one vacancy for a full-time ELA position for the 2019-2020 school year, she did not apply for an ELA vacancy because she wanted to continue teaching drama in the District.

¹¹ According to the AS HR, she had previously conferred with the King Arts Principal regarding the Complainant's report that she was physically assaulted by King Arts students, and did not believe that the underlying incidents were "assaults" as characterized by the Complainant.

The Complainant responded to an e-mail sent by the Nichols Principal to all building staff, indicating there were several advisory positions available for the 2019-2020 school year. In an August 5, 2019 e-mail to the Principal, the Complainant wrote that she was “available to teach fifth period advisory” for the 2019-2020 school year. The Nichols Principal told OCR that he did not offer the Complainant a fifth period advisory class because she had no prior experience as an advisory teacher at Nichols or, in the case of the STEM-related advisory period, a background in the relevant subject-matter, and that he had more applicants than spaces to teach fifth-period advisory. Each of the three fifth-period advisory assignments were assigned to teachers either with prior advisory teaching experience or a background in the relevant subject-matter. A fourth teacher with prior advisory teaching experience was assigned to another period, and there were several other teachers who expressed interest in fifth period advisory who, like the Complainant, were not selected. The Complainant did not apply to teach a different advisory period, several of which the Principal filled with teachers who had no prior advisory experience because there were not enough experienced teachers willing to teach the later periods.

The District gave the Complainant a paid stipend position in the Drama Department during the summer of 2020. The Nichols Principal selected the Complainant to teach an advisory class during the 2020-2021 school year, for which she receives a stipend.

Applicable Regulations and Legal Standards¹²

Title VI

Segregation and Different Treatment

The regulation implementing Title VI at 34 C.F.R. § 100.3(a) states that no person shall, on the basis of race, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity that receives Federal financial assistance. The Title VI regulation at 34 C.F.R. § 100.3(b)(1)(ii) prohibits a recipient, on the basis of race, from providing any service or other benefit to a student that is different, or is provided in a different manner, from that provided to other students. The regulation implementing Title VI, at 34 C.F.R. § 100(b)(1)(iii), prohibits a recipient, on the basis of race, from subjecting an individual to segregation or separate treatment in any matter related to his/her receipt of any service, financial aid, or other benefit under the program.

Title VI requires that beneficiaries be provided equal access to a recipient’s education programs, benefits, and services without regard to race, color, or national origin. Pursuant to 34 C.F.R. § 100.3(a), no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the basis of race, color, or national origin under any program that receives federal financial assistance. Furthermore, applicable provisions of the regulation at 34 C.F.R. § 100.3(b)(1) provide that a recipient may not, directly or through contractual or other arrangement, on ground of race, color, or national origin:

¹² OCR interprets its statutes and regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. OCR will not interpret any statute or regulation to impinge upon rights protected under the First Amendment or to require recipients to encroach upon the exercise of such rights. Case Processing Manual, Section 109.

- i. Deny an individual any service, financial aid, or other benefit provided under the program;
- ii. Provide any service, financial aid, or other benefit to an individual which is different, or provided in a different manner from that provided to others under the program;
- iii. Subject an individual to segregation or separate treatment in any matter related to the individual's receipt of any service, financial aid, or other benefit under the program;
- iv. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
- v. Treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; or
- vi. Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford the individual an opportunity to do so which is different from that afforded others under the program.

A use of race or national origin that violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also violates Title VI. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). Thus, in analyzing the lawfulness of the use of race or national origin, OCR considers not only Title VI and its implementing regulation, but also case law from the United States Supreme Court interpreting the Equal Protection Clause.

Hostile Environment

Racially based conduct that consists of different treatment of students or staff by recipients' agents or employees, acting within the scope of their official duties, also violates Title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated, or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI. Racial harassment creates a hostile environment if the conduct is sufficiently severe, pervasive or persistent that it interferes with or limits an individual's ability to participate in or benefit from the services, activities or privileges provided by a recipient.

To determine whether a racially hostile environment exists, OCR must determine whether the racial harassment is severe, pervasive, or persistent. OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, relationships, and the number of the persons involved. The harassment must in general consist of more than casual or isolated racial incidents to establish a Title VI violation.

As with other forms of harassment, OCR will take into account the relevant particularized characteristics and circumstances of the victim, especially a victim's race and age, when evaluating the severity of racial incidents at an educational institution. If OCR determines that

the harassment was sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances, OCR will find that a hostile environment existed. The reasonable person standard as applied to a child must incorporate the age, intelligence and experience of a person under like circumstances to take into account the developmental differences in maturity and perception due to age.¹³

Retaliation

34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, further provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The following three elements must be satisfied to establish a *prima facie* case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a *prima facie* case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Analysis

Racially Exclusive Affinity Groups, Privilege Activities, and BLM Week and N-Word Materials

The District acknowledged coordinating and conducting racially exclusive affinity groups in programs for students and staff that separated participants on the basis of race. Specifically, the District separated senior administrators and building administrators in a professional development training in August 2019 into two groups on the basis of race—a group for self-identified “white” staff, and another for self-identified “persons of color.” The District also subsidized some staff's participation in Beyond Diversity 2 trainings, which included the use of race-based affinity groups. In addition, the District held one cabinet meeting that similarly separated participants on the basis of race, in approximately March 2019. Further, the District offered various affinity groups that separated students by race. Some were open to students, parents, and community members who were separated during the program on the basis of race, and others were open only to black student participants.

Based on the above, OCR concludes that the District engaged in intentional race discrimination by coordinating and conducting racially exclusive affinity groups, which resulted in the separation of participants in District programs based on race in violation of the Title VI

¹³ *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed Reg 11448, 11449 (Mar. 10, 1994).

regulation at 34 C.F.R. §§ 100.3(a), 100.3(b)(1)(iii).¹⁴ Further, to the extent that some affinity groups were offered only to black participants, these programs excluded participants based on race and treated District students and staff differently on the basis of race, in violation of the Title VI regulation at 34 C.F.R. §§ 100.3(a), 100.3(b)(1)(ii).¹⁵ OCR has also determined that the “privilege walk” used by the District during the 2019 Student Equity Summit at King Arts—which explicitly instructed students to take steps based on race, e.g., two steps forward if they were white and two steps back if they were black—singled out and separated students solely based on their race and color in violation of 34 C.F.R. §§ 100.3(a), 100.3(b)(1)(ii).

OCR has serious concerns that items in the District’s BLM week, N-word materials, and SEED trainings from the 2019-2020 school year, if followed as described, would have effectively required District personnel to treat students or other individuals differently based on race.¹⁶ By instructing teachers to ask their students what it means “to be white without signing on to whiteness,” or using materials that strongly suggest that individuals of different races have the right to use different words and language, or directing individuals—during a “privilege walk”—either to take steps or refrain from taking steps based on invidious stereotypes about their race, the District appears to have deliberately singled out students and other individuals by their race, in order to reduce them to a set of racial stereotypes. Title VI bars such discriminatory conduct.

OCR also has serious concerns that the other “privilege” activities the District carried out as part of its trainings with staff and students during the 2018-2019 and 2019-2020 school years may have created a racially hostile environment. As noted above, OCR is bound to adhere to the First Amendment’s free speech protections when considering allegations falling under Title VI. However, OCR notes with particular concern the “What is Whiteness?” exercise used in the District’s Beyond Diversity trainings, among other lessons that advocated assigning students and individuals characteristics based solely on their race. OCR has significant concerns about the likely hostile effects of those activities, which would no doubt have adversely affected a reasonable person’s ability to participate in or benefit from the District’s programs and activities. More troublingly, these materials, if used as directed, would have led students to be treated differently based on their race, depriving them of the benefit of a classroom free from racial recrimination and hostility. Such treatment has no place in federally funded programs or activities.¹⁷ Nor is it protected by the First Amendment.

¹⁴ Cf. *Oak Park and River Forest (IL) High Sch. Dist. 200*, Case No. 05-15-1180 (OCR Sept. 29, 2015) (finding that a racially exclusive Black Lives Matter assembly violated Title VI).

¹⁵ The District produced no evidence that it ever assessed whether its use of race with respect to affinity groups, training exercises, its hiring goal, and discipline policy served a compelling interest or that its use of race was narrowly tailored to meet a compelling interest, as required by Title VI.

¹⁶ OCR’s concerns are stated here with respect to the probable use of the materials as written, since OCR did not obtain a recording of any instruction or investigate whether each part of the materials was followed strictly when used.

¹⁷ See 34 C.F.R. § 100.3(b)(1)(iv) (prohibiting a recipient from “restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under [its] program” on the basis of race).

Hiring and Staffing

OCR determined that in December 2019, the District troublingly stated in a memorandum to staff and principals that District principals should affirmatively consider the race of the staff applicants when selecting paid facilitators for its staff discussions of *White Fragility*. The evidence clearly establishes the District instructed principals to treat white staff differently from staff of other races when determining whether the staff member should be selected as a paid facilitator, in clear violation of the Title VI regulation at 34 C.F.R. § 100.3(b)(1)(vi).

In addition, in this context, OCR finds exceedingly troubling the AS HR's December 2018 memorandum to the school board, in which she noted that because the District's "percentages of teachers of color ... do not yet mirror our student demographics," the District's goal was to "increase the number of teachers of color hired for the 2019-2020 school year by 5%." The AS HR conceded that the goals were created "somewhat randomly" in order to attain staffing "reflective" of student racial demographics. Although the strategies the AS HR sets out in her memorandum to attain this goal focus on increasing the diversity of the applicant pool, OCR has Title VI concerns that given the District's clear violations of Title VI in other respects, the District might have considered race as part of its hiring decisions.¹⁸

Discipline

The evidence clearly establishes that the District's Discipline Policy incorporates into its definition of "effective discipline" the explicit consideration of the student's race. The Discipline Policy directs staff to consider the student's race when evaluating a behavioral/disciplinary situation. Accordingly, OCR found that the District's Discipline Policy violates the Title VI regulation at 34 C.F.R. § 100.3(b)(1)(ii) because as written it illegally directs staff to consider a student's race when "evaluating a behavioral/disciplinary situation."¹⁹ The District's Policy to apparently impose racial discrimination in discipline has no part in federally funded education programs or activities.

Retaliation

Second Grade Musical

Although the Complainant alleged that the modification of the school musical was done in retaliation for her earlier report of physical assault, OCR has determined that the Complainant's March 13, 2019 report to the Principal at King Arts regarding repeated assaults by students concerned issues of workplace safety, and not discrimination prohibited by Title VI. In this case, therefore, it was not a protected activity under Title VI. Additionally, the evidence indicates that the Principal had already made his decision to modify the school musical at the time that the Complainant reported the physical assaults, as evidenced by the fact that he had already sent out the email announcing the modification. OCR has therefore determined that there is insufficient

¹⁸ See *supra* note 15.

¹⁹ See *supra* note 15.

evidence to conclude that the Complainant was retaliated against with respect to the Principal's decision to cancel the speaking portions of the second-grade musical.

Complainant's FTE Status

With respect to the Complainant's allegation that the District retaliated against her when it did not find another drama position for her to teach after she asked to leave King Arts, it is undisputed that the Complainant did not identify, and OCR's investigation did not reveal, any instance in which a teacher transferred to a new position absent a vacancy. Moreover, the Complainant, who was certified to teach ELA, acknowledges that she did not apply at any time for any of the several open, full-time ELA positions to which she could have applied. Furthermore, the Complainant applied to and was hired to serve on a curriculum committee comprised of members of the Drama Department during the summer of 2020. For all of these reasons, OCR determined that the District had a legitimate, non-retaliatory justification for assigning the Complainant to a .50 FTE for the 2019-2020 school year, because she asked to stop teaching at King Arts and there was not an available drama position at a different District school at that time.

With respect to the Complainant's request to teach an advisory class, OCR determined that the Nichols Principal had more individuals interested in the fifth period advisory than available slots, and not enough experienced teachers to fill ninth and tenth period advisory classes. OCR further determined that the Complainant applied for only one of the three available advisory periods (fifth period), which received the most interest from teachers, and which was filled exclusively by teachers who had either prior advisory teaching experience or a relevant subject-matter background, because more teachers applied for the position than there were available vacancies. The Complainant did not apply for the additional advisory vacancies in the 2019-2020 school year, and she did not apply for any other vacant teaching positions in the District for which she was qualified, such as the ELA positions. For these reasons, OCR determined that the District's denial of the Complainant's request to teach fifth period advisory was based on the Principal's legitimate, non-retaliatory preference to fill fifth period advisory positions with relevantly experienced teachers.

Based on the foregoing, OCR finds insufficient evidence that the District retaliated against the Complainant as alleged.

Conclusion

The attached Resolution Agreement is aligned with the complaint allegations and, when fully implemented, will resolve the Title VI violations described above.

OCR will monitor the District's implementation of the Agreement until the District is in compliance with all of its terms. We look forward to receiving the District's next monitoring report.

This concludes OCR's investigation of this complaint, and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in individual OCR cases. 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 file a private suit in federal court, whether or not OCR finds a violation.

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

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

OCR thanks the District, especially for its responsiveness and cooperation throughout the investigation of this complaint and during the negotiations of the Agreement. If you have any questions regarding this letter, please contact me at (202) 453-6790 or carol.ashley@ed.gov.

Sincerely,

Carol Ashley
Enforcement Director

Enclosure

cc: James Petrunaro, Esq.