



March 13, 2018

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Karen Hendricks  
Interim Superintendent  
Palo Alto Unified School District  
25 Churchill Road  
Palo Alto, CA 94306

Re: Report of Investigation re: [REDACTED] Report

Dear Ms. Hendricks:

Pursuant to the terms of the Palo Alto Unified School District's March 7, 2017 Resolution Agreement with the Office for Civil Rights, and at the request of former Superintendent Dr. Glenn "Max" McGee, Cozen O'Connor conducted a review of the District's response to [REDACTED] [REDACTED] report of sexual harassment and sexual assault against [REDACTED]

This review was conducted to assess the institutional response by the District under Title IX of the Education Amendments of 1972. The review did not include a de novo investigation as to whether the underlying conduct, as described by the Complainant, occurred as reported.

### Overview of Conclusions and Recommendations

We conclude that the District promptly responded to the report, reported the incident to external law enforcement, took some steps to investigate and otherwise determine what occurred, and provided adequate interim measures while the investigation was pending. We also conclude, however, that the investigation conducted by the District was inadequate, that there was no coordinated oversight by the District's Title IX Coordinator of the investigation, and that there was no written notice of outcome provided to the Complainant. Moreover, [REDACTED]

[REDACTED] there was no coordinated oversight by the District's Title IX Coordinator or [REDACTED] senior administrators to assess the appropriateness and sufficiency of [REDACTED]

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<sup>1</sup> This review was conducted under Section E.4 of the Resolution Agreement. In addition, [REDACTED] raised concerns about the manner in which the District responded to this incident.

[REDACTED]

In light of these observations, we recommend that the District ensure that future reports of sexual assault or harassment are adequately investigated by a trained and/or experienced investigator, that a determination is reached by a preponderance of the evidence, that the investigation is documented in a written investigation report, and that written notice of outcome is provide to both a Complainant and Respondent.<sup>2</sup>

We also recommend that the District ensure that all employees [REDACTED] receive training related to their responsibilities under Title IX, particularly as it relates to the provision of interim or ongoing remedial measures and the obligations to communicate and coordinate with the District's Title IX Coordinator in appropriate cases. Further, we recommend that the District take steps to ensure that the Title IX Coordinator has visibility into – and some oversight of – supports provided to Complainants or Respondents [REDACTED]

Finally, we recommend that designated site level administrators be actively engaged with the Title IX Coordinator [REDACTED].

## Background

During the fall of 2015, [REDACTED] (the Complainant) [REDACTED]

At the time, [REDACTED] (the Respondent) was a [REDACTED].

## Scope of Review

We reviewed available and relevant documents provided by the District, including notes from [REDACTED] email correspondence to and from the Complainant, email correspondence to and from the Complainant's [REDACTED] email correspondence to and from the Respondent [REDACTED] email correspondence among [REDACTED] faculty and staff, [REDACTED] and other relevant documents.

We also conducted interviews. Those interviews included [REDACTED] and those staff and administrators most directly involved in the resolution of this report and the provision of resources, including: [REDACTED]

[REDACTED] This review was also informed by our understanding of the [REDACTED]

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<sup>2</sup> It is our understanding that this has been the District's practice since June 2017, when the District brought in new personnel and adopted new procedures to address sexual harassment and assault.

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[REDACTED] and District's general working knowledge and practices around Title IX.<sup>3</sup> [REDACTED]

As part of our review under Section E.4 of the Resolution Agreement, we addressed the following questions in this matter:

1. Whether the incident was handled appropriately under Title IX;
2. Whether any remedies are needed for the Complainant;
3. Whether the steps taken for the Respondent were sufficient to address [REDACTED]; and,
4. Whether a notice of written outcome to the Complainant and/or Respondent is needed.

[REDACTED]

### Summary of Allegations

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>3</sup> It is notable that the District was in the midst of an active Title IX investigation by the Office for Civil Rights at this time, which should have led to a heightened awareness of and attention to Title IX obligations and responsibilities.

[REDACTED]

[REDACTED]

### **Overview Chronology of the Incident**

This report is accompanied by a detailed chronology of the documentary information considered in this review. The following is a high level overview of the chronology to provide context and background for the analysis and recommendations that follow:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

**Analysis**

Pursuant to Section E.4 of OCR’s Resolution Agreement, we evaluated the following aspects of the school’s response to this incident:

1. Whether the incident was handled appropriately under Title IX;
2. Whether any remedies are needed for the Complainant;
3. Whether the steps taken for the Respondent were sufficient to address [REDACTED]; and,

4. Whether a notice of written outcome to the Complainant and/or Respondent is needed.

In evaluating these questions, we considered the following key tenets of Title IX law and guidance:

Title IX prohibits discrimination on the basis of sex in all of an institution's programs and activities, including an institution's education programs and activities and in employment.<sup>13</sup> Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence.<sup>14</sup> Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that create or contribute to a hostile environment.<sup>15</sup>

When an educational institution knows or reasonably should know about sexual harassment that creates a hostile educational or working environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred; if an investigation reveals the existence of a hostile educational or employment environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile educational and employment environment, prevent its recurrence and address its effects.<sup>16</sup>

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<sup>13</sup> See generally 20 U.S.C. § 1681 *et seq.*; 34 C.F.R. Part 106. As set forth in greater detail in the Appendix, Title IX is accompanied by implementing regulations that have the force and effect of law. 34 C.F.R. § 106. In addition to the implementing regulations, the U.S. Department of Education's Office for Civil Rights (OCR) has issued guidance documents that provide policy guidance to assist educational institutions in meeting their Title IX obligations. Early guidance documents include the 1997 *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997 Guidance) and the 2001 *Revised Sexual Harassment Guidance* (2001 Guidance). The 2001 Guidance replaced the 1997 Guidance, which was published in the Federal Register at 62 Fed. Reg. 12,034 (Mar. 13, 1997); it was also reissued in a Dear Colleague Letter issued on January 25, 2006 (2006 DCL). In April 2011, OCR designated its April 4, 2011 Dear Colleague Letter (2011 DCL) as a significant guidance document. In response to questions about implementation of the 2011 DCL, on April 29, 2014, OCR released its Questions and Answers on Title IX and Sexual Violence (2014 Q&A), also designated as a significant guidance document. While these guidance documents did not purport to create or add legally binding requirements to applicable law, enforcement efforts by OCR between 2011 and 2017 held institutions accountable for the tenets set forth in these guidance documents.

On September 22, 2017, OCR issued a Dear Colleague Letter (2017 DCL) rescinding the 2011 DCL and the 2014 Q&A and expressing its intent to implement a policy, through a rulemaking process, that considers public comment. OCR concurrently issued interim guidance, Questions & Answers on Campus Sexual Misconduct (2017 Q&A), which outlines how OCR intends to review a school's compliance with Title IX and makes clear that it will continue to rely on its 2001 Guidance. The 2017 Q&A includes concepts that have not yet been subject to rulemaking and is silent on many of the concepts set forth in the 2011 DCL and 2014 Q&A, leaving many unanswered questions about the current state of Title IX guidance as it relates to critical concepts. This report, in some instances, cites to the rescinded 2011 DCL and 2014 Q&A, as those documents set forth OCR's expectations at the time of the incidents under review in this report.

<sup>14</sup> April 4, 2011 DCL at 1. In 2011, OCR defined sexual violence as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol." 2011 DCL at 1. As noted above, the 2011 DCL was rescinded on September 22, 2017 and replaced with the 2017 Q&A which addresses an educational institution's responsibilities when addressing sexual misconduct, including peer-on-peer sexual harassment and sexual violence. In the 2017 Q&A, OCR does not define the terms "sexual misconduct" or "sexual violence."

<sup>15</sup> 2001 Guidance at 2-3 ("Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."). OCR reiterated this concept in the 2017 Q&A, stating that, "Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities." 2017 Q&A at 1, fn 3.

<sup>16</sup> *Id.* at 4; 1997 Guidance; 2001 Guidance at 15; 2014 Q&A at 2-3. Note that in the 2017 Q&A, citing section VII of the 2001 Guidance, OCR states that the school's obligation is to "take steps to understand what occurred and to respond appropriately." 2017 Q&A at 1. This is arguably a broader and less specific requirement than "investigate or otherwise determine what occurred."

An institution violates Title IX if it has “notice” of a sexually hostile educational or employment environment and fails to take immediate and corrective action. In addition, an institution’s delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.<sup>17</sup>

Title IX’s implementing regulations require that educational institutions publish a non-discrimination statement;<sup>18</sup> appoint a Title IX Coordinator;<sup>19</sup> and adopt grievance procedures that are prompt and equitable.<sup>20</sup> OCR has addressed the role of the Title IX Coordinator in multiple guidance documents, including one devoted solely to that topic, issued in 2015.<sup>21</sup> OCR guidance calls for the Title IX Coordinator to oversee the centralized review, investigation, and resolution of reports of sexual and gender-based harassment and violence under the institution’s complaint processes, and to identify and address any patterns or systemic problems that arise during the review of such complaints.<sup>22</sup>

The educational institution must have grievance procedures that include provisions for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate.<sup>23</sup>

Once an institution has notice of an allegation of sexual or gender-based harassment or violence, it must promptly take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures while the investigation is pending.<sup>24</sup> Prior guidance stated that the institution should notify the complainant of reasonably available measures and any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance.<sup>25</sup>

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<sup>17</sup> 2001 Guidance at 12; 2014 Q&A at 4.

<sup>18</sup> 34 C.F.R. § 106.9.

<sup>19</sup> 34 C.F.R. § 106.8(a).

<sup>20</sup> 34 C.F.R. § 106.8(b).

<sup>21</sup> Office for Civil Rights, U.S. Dept. of Education, *Dear Colleague Letter on Title IX Coordinators* (April 24, 2015) (“2015 Title IX Coordinator DCL”). This document has not been rescinded by OCR.

<sup>22</sup> 2015 Title IX Coordinator DCL at 3 (“The Title IX coordinator is responsible for coordinating the recipient’s responses to all complaints involving possible sex discrimination. This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate.”). *See also* 2001 Guidance at 21 (“While a school may choose to have a number of employees responsible for Title IX matters, it is also advisable to give one official responsibility for overall coordination and oversight of all sexual harassment complaints to ensure consistent practices and standards in handling complaints.”).

<sup>23</sup> *Id.*

<sup>24</sup> 2014 Q&A at 32-33; 2017 Q&A at 3.

<sup>25</sup> 2014 Q&A at 32-33. In the 2017 Q&A, OCR did not include victim advocacy in its list of recommended interim measures: “counseling, extensions of time or other course related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.” 2017 Q&A at 2.

OCR previously directed institutions to consider a range of factors when determining the appropriate interim measures: the facts and circumstances of the particular case; the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the alleged harassment; any continuing effects on the complainant; any intersections between the complainant and respondent (shared residence hall, dining hall, class, transportation, or job location); and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).<sup>26</sup>

In prior guidance, OCR stated that when taking interim measures, an institution should minimize the burden on the complainant and carefully consider the facts of the case when determining whom to remove from a shared class or residence hall.<sup>27</sup> In the 2017 Q&A, OCR stated that “a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”<sup>28</sup> That guidance also states that the Title IX Coordinator should make every effort to avoid depriving any student of their education in considering interim measures.<sup>29</sup> Furthermore, interim measures should be individualized and appropriate based on the information gathered by the school, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective as students’ needs may evolve over time.<sup>30</sup>

### **1. Whether the Incidents Were Handled Appropriately under Title IX**

We conclude that the District promptly responded to the report, reported the incident to external law enforcement, took some steps to investigate and otherwise determine what occurred, and provided adequate interim measures while the investigation was pending. We also conclude, however, that the investigation conducted by the District was inadequate, that there was no coordinated oversight by the District’s Title IX Coordinator of the investigation, and that there was no written notice of outcome provided to the Complainant. [REDACTED]

[REDACTED] provided extensive care and support for the Complainant, there was no coordinated oversight by the District’s Title IX Coordinator or [REDACTED] senior administrators to assess the appropriateness and sufficiency of interim or ongoing remedial measures for the Complainant. While administrators were involved in supporting the Complainant, the efforts were ad hoc, rather than coordinated or tied to a demonstrated understanding of Title IX obligations.

In support of these findings, we make the following observations:

- a. The school took timely action in response to the Complainant’s report to investigate or otherwise determine what happened:
  - i. The Complainant’s disclosure to [REDACTED] was promptly reported to [REDACTED].
  - ii. [REDACTED] immediately notified the SRO and the incident was reported to external law enforcement.
- b. The school communicated with both the Complainant and the Respondent’s parents in a timely manner.

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<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>2017 Q&A at 3.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

- c. The school determined that the Respondent's conduct [REDACTED].
- d. The investigation, while timely, was flawed in several aspects:
  - i. The investigation was not documented;
  - ii. The investigation does not appear to have considered or made findings [REDACTED] reported by the Complainant;
  - iii. There was no written investigation report;
  - iv. It was not clear who made the determination of responsibility;
  - v. There is no indication that the school applied the preponderance of evidence standard of proof;
  - vi. The investigation did not determine whether a hostile environment had been created for the Complainant; and,
  - vii. There is no indication that the school effectively coordinated with external law enforcement after the initial interview of the Complainant to understand whether additional information had been gathered or whether criminal charges would be filed.
- e. The school followed its procedures for disciplinary action under the Education Code:
  - i. [REDACTED]
  - ii. [REDACTED]
- f. Interim measures were implemented to:
  - i. [REDACTED]
  - ii. [REDACTED]
  - iii. [REDACTED]
  - iv. [REDACTED]
  - v. [REDACTED]
- g. The Complainant communicated with and received communication [REDACTED]
- h. [REDACTED]

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<sup>31</sup> [REDACTED] In this case, a written investigation report articulating a clear description of the circumstances and context of the Respondent's conduct may have provided the decision-makers with information critically relevant to the issue of [REDACTED]. Without such a written report, it is difficult to ensure that the context of the conduct or the requirements of Title IX (eliminate, prevent and address) are fully considered. In addition, a more active role by the Title IX Coordinator in the [REDACTED] may provide an alternative mechanism for incorporating critical information in the final determination as to the outcome of this matter given the Title IX Coordinator's obligation to oversee the appropriateness of [REDACTED] and assess whether the steps taken by the institution [REDACTED] are sufficient to meet the institution's Title IX obligations.

- i. There is no indication, however, that additional [REDACTED] measures were considered in response to the [REDACTED];
- j. There was no coordinated oversight by the District's Title IX Coordinator or [REDACTED] senior administrators to assess the appropriateness and sufficiency of interim or ongoing remedial measures for the Complainant;
- k. Despite repeated outreach by [REDACTED] the school did not take sufficient action to redress the potential hostile environment identified by the Complainant and [REDACTED];
- l. The school did not notify the [REDACTED] of the right to pursue a complaint under the Uniform Complaint Procedures;
- m. The school provided a written notice of outcome to the Respondent;
- n. The school did not provide a written notice of outcome to the Complainant.

**2. Whether any Remedies are Needed for the Complainant**

We find that the school provided significant [REDACTED] remedial measures to the Complainant, but that there was no coordinated oversight by the District's Title IX Coordinator or [REDACTED] senior administrators to assess the appropriateness and sufficiency of remedial measures for the Complainant.

[REDACTED]

In support of these findings, we make the following observations:

- a. [REDACTED]

[REDACTED]

**3. Whether the Steps Taken for the Respondent Were Sufficient to Address**

[REDACTED]

[REDACTED]

As such, the steps taken appear to have been sufficient to address [REDACTED].

In support of these findings, we make the following observations:

[REDACTED]

[REDACTED]

**4. Whether a notice of written outcome to the Complainant and/or Respondent is needed.**

The District must provide a written notice of outcome to the Complainant informing [REDACTED] of the determination of responsibility. [REDACTED]

In support of these findings, we make the following observations:

- a. Written outcome was provided to the Respondent;
- b. No written outcome was provided to the Complainant.

**Recommendations**

In light of these observations, we recommend that the District ensure that future reports of sexual assault or harassment are adequately investigated by a trained and/or experienced investigator, that a determination is reached by a preponderance of the evidence, that the investigation is documented in a written investigation report, and that written notice of outcome is provided to both a Complainant and Respondent.<sup>33</sup>

[REDACTED]

Finally, we recommend that designated site level administrators be actively engaged with the Title IX Coordinator and [REDACTED] for Complainants or Respondents [REDACTED]

**Conclusion**

In sum, we recognize that the resolution of the Complainant's report presented unique challenges to the school. [REDACTED]

While the [REDACTED] should have been coordinated with the Title IX Coordinator and senior administrators at the school in order to effectively assess reasonable and available steps necessary to eliminate a potential hostile environment, prevent its recurrence and address its effects.

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<sup>33</sup> It is our understanding that since June 2017, this has been the District's practice under then-Interim Title IX Coordinator John DiPaolo and current Title IX Coordinator Megan Farrell.

Submitted,

A handwritten signature in black ink that reads "Gina Maisto Smith". The script is fluid and cursive, with the first letters of each name being capitalized and prominent.

Gina Maisto Smith

A handwritten signature in black ink that reads "Leslie Manigomez". The script is fluid and cursive, with the first letters of each name being capitalized and prominent.

Leslie M. Gomez