



**STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PH05RE-03029**

██████████, Sr., parent/guardian on behalf of)
██████████, a minor, and ██████████, Sr., individually,)
and)
Chinh Q. Le, Director, New Jersey)
Division on Civil Rights,)
)
Complainants,)
)
v.)
)
Franklin Township Board of Education,)
)
Respondent.)
_____)

FINDING OF PROBABLE CAUSE

Consistent with a verified complaint filed on January 3, 2008, the above-named respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., and specifically within the meaning of N.J.S.A. 10:5-4 and 10:5-12(f).

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF COMPLAINT

Complainant alleged that beginning in 2005, his daughter, ██████████, was racially harassed by other students while enrolled in Respondent’s Main Road School. Among other things, Complainant alleged that ██████████ was repeatedly called offensive racial names such as “nigger,” “darky” and “chocolate” by her classmates and subjected to derogatory remarks such as “go back to niggerville.” Complainant alleged that he made numerous complaints to school administrators over the years, but that Respondent failed to take effective remedial action to end the racial harassment. Complainant alleged that the ongoing racial harassment was sufficiently severe and pervasive to render the school environment hostile and abusive and to deprive his daughter of educational opportunities. He also alleged that he personally suffered emotional distress and other harm as well, as a result of the racial harassment of his daughter.

SUMMARY OF RESPONSE

Respondent denied that it engaged in any unlawful discrimination because of race or that ██████████ was exposed to a hostile school environment or to racial harassment. Respondent asserted that to the extent

that students engaged in any inappropriate conduct or behavior toward ██████████, all such incidents, once reported, were immediately investigated by its administrators and appropriate action was taken. Respondent also asserted that it takes a proactive approach to prevent harassment, intimidation and bullying, and to educate students regarding diversity and tolerance.

BACKGROUND

Respondent is a public school district in Gloucester County, New Jersey. Respondent's Main Road School is an elementary school that serves students in the third to sixth grades. For the school years relevant to this investigation (2005-2006 through 2008-2009), Main Road School had an annual total enrollment of approximately 460 students, and the racial composition of its student body was approximately 88% white, 8% black, 3% Hispanic, and 1% Asian.

Complainant, ██████████, and his wife are the parents of a minor daughter, ██████████. Complainant, a resident of Franklinville, Gloucester County, New Jersey, brought this action on behalf of his daughter for actions he alleged took place while she was enrolled in Main Road School. Hereinafter, "██████████'s parents" or "her parents" shall refer to Complainant and his wife.

SUMMARY OF INVESTIGATION

The investigation disclosed sufficient evidence to support a reasonable suspicion that Complainant's daughter, ██████████, was subjected to severe or pervasive race-based peer harassment, that ██████████'s parents reported the racial harassment to Respondent's administration on multiple occasions, and that Respondent failed to take appropriate remedial action.

The investigation disclosed that ██████████ began attending Main Road School as a third grader in September 2005. She was eight years old at the time. Complainant advised the Division's investigator that his daughter began experiencing various forms of racial harassment in her first year at that school.¹

¹ By way of background, the investigation disclosed that before ██████████ enrolled in Main Road School, her older brother, ██████████, attended that school as well. Complainant alleged that while a student at Main Road School, ██████████ was subjected to race-based peer harassment. Respondent's records documented at least one incident, which took place in March 2005, while ██████████ was in fifth grade, in which a white student made a racially derogatory comment and assaulted ██████████. Respondent suspended the offender and notified Complainant and his wife. Complainant also advised the Division that beginning in 2003, he had reported to Respondent other incidents in which ██████████ was racially harassed by white students. Ultimately, at Complainant's request, Respondent transferred ██████████ to another school for the 2005-2006 school year, which would have been his last year at Main Road School. During the Division's investigation of the current complaint, Complainant asserted that his son was transferred because of the racial harassment, but Respondent disputed Complainant's contention that racial harassment prompted his transfer.

Complainant alleged that ██████████ did not immediately report the first incidents of racial comments to her parents or school staff. Complainant stated that on or about May 15, 2006, ██████████ informed him and his wife for the first time that two white third-grade boys had called her “chocolate” on the school bus on that day and on several prior occasions. Her parents immediately verbally reported this news to school principal Mercedes Berrios. In a follow-up letter the same day, Complainant and his wife informed Principal Berrios that ██████████ was intimidated by the boys, and that because of the harassment, ██████████ was resisting going to school. The letter identified the boys by first name (██████████ and ██████████) and asserted that they had also caused her problems earlier in the school year. The letter requested that Respondent investigate the matter, take appropriate action, and respond to Complainant and his wife in writing.

Principal Berrios responded to ██████████’s parents in writing on the same day, May 15, 2006. The letter stated that Principal Berrios spoke to both N. and S., and that both children denied making any racial remarks or even speaking to ██████████ on the bus. Nonetheless, Principal Berrios said she warned them that if they were calling ██████████ or anyone else anything other than his or her proper name, they should cease immediately. Her letter also confirmed that she had notified the bus driver of the incident, and had spoken to the superintendent of schools, who would be assigning a bus aide to ██████████’s bus. Her letter asked them to encourage ██████████ to promptly report any incidents to the bus driver, a teacher or her parents.

██████████’s parents believed that Respondent’s action were insufficient in light of the gravity of the conduct they alleged, and as a result, they kept ██████████ home from school a total of approximately 15 days that month (including absences that may have taken place prior to the reporting of the incident in question). During this period, they arranged for ██████████’s classwork and assignments to be sent home for her.

The investigation revealed that ██████████’s parents met again with Principal Berrios on May 25, 2006, and that Principal Berrios memorialized their conversation by letter that same day. In the letter, Principal Berrios acknowledged that Complainant and his wife expressed dissatisfaction with Respondent’s actions to date, but stated that she could not further discipline ██████████ or ██████████ because her investigation was unable to substantiate ██████████’s allegations of name-calling. The letter concluded with an expression of concern that ██████████ was falling behind in her studies because of her absences, and it encouraged Complainant and his wife to return ██████████ to school.

During the Division’s investigation, Complainant asserted that because of the racial harassment and her related absences, ██████████ required remedial tutoring during the summer of 2006 before she could be promoted to the fourth grade. The investigation disclosed that in June 2006, due to the racial harassment, Complainant asked Respondent to transfer his daughter to another school district for the upcoming school year. In a response dated June 22, 2006, Respondent’s Superintendent, John Scavelli, advised Complainant that Respondent’s Curriculum Committee had considered and denied the transfer request.²

² During the Division’s investigation, Complainant asserted that he did not request a transfer to any particular school or district; his only goal was to get ██████████ out of Main Road School because of the racial harassment. He stated that he informally renewed that request when further incidents of racial harassment occurred, including in a November 19, 2007 letter to the school principal and an April 1, 2008 letter to the superintendent. Complainant advised the Division that his requests were never granted and he was never given any reasons.

On or about September 7, 2006, ██████████'s parents sent a letter to Superintendent Scavelli in which they claimed that one of the boys involved in the May 15, 2006 incident, S., "apologized to [██████████] for calling her racial names . . . and gave [her] a music CD as a gift." In the letter, ██████████'s parents expressed the belief that this admission contradicted the findings of Principal Berrios' earlier investigation into the incident that the student never even talked to ██████████ on that occasion. They asked Superintendent Scavelli to "take the appropriate disciplinary action" in light of these new facts. Superintendent Scavelli responded by letter dated September 13, 2006. In the letter, he suggested that ██████████'s parents "allow [their] daughter to accept the alleged apology so that the children can move forward and learn from this experience." The Division obtained no evidence that Respondent took any further action.³

The investigation revealed that racial harassment recurred in the next school year, and that ██████████'s parents again notified school officials requesting assistance and intervention. By letter dated January 29, 2007, ██████████'s parents informed Superintendent Scavelli of an incident that occurred on the bus earlier that day. According to the letter, two white fourth-grade female students, ██████████ and ██████████, teased ██████████ by calling her "ugly," "retarded" and "nigger," and one of them added, "yeah, she's a nigger."⁴ The letter also stated that ██████████ "gets very sad when she is called these names [and] her grades are slowly dropping." Complainant and his wife also sent a similar letter describing these same facts to Principal Rich Dantine, Jr., who had taken over at Main Road School from Principal Berrios earlier that year.

Principal Dantine responded to ██████████'s parents by letter dated February 6, 2007. In the letter, he stated his investigation confirmed that ██████████ "was verbally teased" on the bus on January 29, 2007. He also reported that the two students involved in the incident "are no longer sitting by [██████████] on the bus" and that he spoke to the perpetrators' parents to express his concern over their "inappropriate" language. Finally, he stated that the students "served suspensions" and "viewed several videos regarding discrimination and equal rights," including ones related to Rosa Parks and Martin Luther King, Jr.

In an interview with the Division's investigator, Complainant said that on the last day of school in the spring of 2007, the same two girls, ██████████ and ██████████, called ██████████ a "nigger" as she was leaving school grounds. Complainant's son and ██████████ told him about the incident that evening, but he said he did not report it to school administrators because ██████████ was becoming reluctant to tell him what was happening,

³ The Division concludes that if Respondent's handling of the May 15, 2006 incident and its initial denial of Complainant's subsequent transfer request were the sole bases for the complaint, the investigation would not necessarily sustain a probable cause finding that Respondent failed to take appropriate actions in light of the circumstances. The Division does conclude, however, that the May 15, 2006 incident is relevant to the investigation and to Respondent's handling of subsequent allegations, in that — together with prior reports of ██████████'s harassment — it provided clear notice of a potential concern about racial hostility in the school culture and environment, which was heightened by later reports of a continuing pattern of harassment and bullying endured by ██████████

⁴ Complainant advised the Division that when ██████████ returned to school for the 2006-2007 school year, no bus aide was assigned to her school bus, as Respondent had promised.

and he wanted to avoid putting pressure on her.⁵

The investigation revealed that the racial harassment continued in ██████████'s fifth-grade year as well, and that students' taunting and name-calling grew even more aggressive. In early November 2007, ██████████'s parents reported to Principal Dantine that on November 2, 2007, two white male students, ██████████ and ██████████ verbally harassed ██████████, allegedly referring to her as a "nigger," and telling her to "go back to niggerville" and to "go back to the 'hood."

By letter dated November 15, 2007, Principal Dantine informed ██████████'s parents that he had investigated the matter. According to the letter, both students acknowledged involvement in the teasing, although only one "confessed to calling [██████████] a 'nigger'." Principal Dantine stated that he moved the student who admitted making the racist comment to the front seat of the bus, away from ██████████. In addition, he counseled the students together and individually, spoke to their parents regarding "the severity of using racial remarks," and reported the incident to Respondent's Interim Superintendent, Barbara Morella. Finally, Principal Dantine stated that he was in the process of composing a letter for distribution to all Main Road School students that would "remind students of our longstanding policy prohibiting any form of inappropriate conduct verbal or otherwise which may be hurtful to other students."

During the Division's investigation, Respondent was unable to produce a copy of the letter Principal Dantine described. It did provide, however, a document with his recollection of its contents. According to the document, Principal Dantine sent a letter on November 16, 2007 to all parents that included notice of "upcoming parent conferences . . . and . . . school closings, and information about the Golden Rule, . . . highlight[ing] policies in general terms and remind[ing] the children to be mindful of inappropriate comments and conduct, verbal or otherwise which would be hurtful to other students." The letter appears neither to have discussed any of the recent incidents of bias-based bullying nor to have made specific mention of the harms resulting from peer racial harassment.

The investigation disclosed that ██████████'s parents were dissatisfied with Respondent's response to the November 2, 2007 incident; they also felt that additional affirmative efforts were warranted in light of the severity of the comments made and multiple incidents they had previously reported. They expressed their dissatisfaction in a November 19, 2007 letter to Principal Dantine. The letter stated their concern about the number of incidents ██████████ had endured since first arriving at the school as a third-grader. It expressed the view that the latest incident was more even more verbally aggressive and intimidating to ██████████ than the earlier ones for which students received suspensions and were required to watch films about discrimination. ██████████'s parents noted that she was experiencing emotional stress, pain and suffering, and they renewed their request to transfer her to another school.

It appears from the Division's investigation that Respondent took little or no further action with regard to ██████████'s situation until ██████████'s parents spoke with Principal Dantine on March 28, 2008. ██████████'s parents described this conversation in a letter to Superintendent Michael G. Kozak, dated April 1, 2008.

⁵ Complainant added that ██████████ also received some racially derogatory email messages around his time, but that he did not report them to anyone because he was unable to identify the senders. The Division was unable to obtain copies of these alleged email messages.

In that letter, they stated that Principal Dantine telephoned them to discuss their disagreement with his response to the November 2, 2007 incident. According to the letter, Principal Dantine said during the course of the conversation that “Main Road School can not stop children from calling out racial names . . . at the school,” and that he had previously said, in ██████████’s presence after the November 2, 2007 incident, that “he does not know how to stop the racial problems in the school and just does not know what to do.” ██████████’s parents added that, since meeting with Principal Dantine, ██████████ has felt there is no benefit to reporting the racial harassment. They renewed their request for a transfer to another school.

The assertion by ██████████’s parents that Principal Dantine had said he did not know how to stop the racial harassment was corroborated by contemporaneous writings of ██████████ herself. Complainant provided the Division with a copy of an undated, handwritten letter authored by ██████████ from approximately that same time, when she was ten years old. Addressed to “Mr. President, of the USA,” it stated, in part:

After I told the principal what happen[ed] when the boys [██████████ and ██████████] called me the N word and told me to go back to the hood, and go back to N....ville . . . [t]he principal said I don’t know how to stop this racist problem[] at the school, and he said I don’t know what to do . . .

Please help
Sincerely,

██████████

Below her name, ██████████ drew three human figures. One appears to be a girl with a frown, and the other two boys with open mouths.

The investigation revealed that the racial harassment ██████████ endured was even more frequent and severe during her sixth-grade year. ██████████’s parents wrote to Superintendent Kozak on September 26, 2008, reporting that ██████████, who was one of the boys involved in the November 2, 2007 racial harassment incident, said loudly on the school bus, “Obama better not be the president, he is a Black man.” ██████████’s parents asked Superintendent Kozak to contact them about the incident and requested a written reply “after you investigate and take appropriate action.” According to Complainant, they received no written reply to this letter.

██████████’s parents followed up with another letter to Superintendent Kozak on October 14, 2008, and requested a written response. According to Complainant, they again received no written reply.

In a December 8, 2008 letter to Superintendent Kozak, ██████████’s parents reported that while ██████████ was on the school bus heading home on December 5, 2008, two students yelled out “what time is it?” and a third student, ██████████, responded very loudly, “it’s nigger time.” The letter again requested that Superintendent Kozak “contact us in writing . . . after you investigate and take appropriate action.”

By letter dated February 26, 2009, ██████████’s parents reported to Superintendent Kozak that on the bus ride home that day, a male student, ██████████, told ██████████, “I’m not letting a nigger sit back here, you nigger,” called her a bitch, used the word “nigger” several more times. ██████████ also allegedly made an obscene gesture at her using his middle finger. Their letter indicated that they had received no response to their December 8, 2008 letter.

██████████'s parents acknowledged receiving a written response from Superintendent Kozak in the form of a letter dated March 25, 2009. This letter appears to be Respondent's first written response to the three allegations discussed above. In the letter, Superintendent Kozak explained that Respondent's investigation of the February 26, 2009 incident had been delayed "[d]ue to the illness of several of the children involved," but that it did confirm one student called ██████████ "nigger" on that date. Superintendent Kozak informed ██████████'s parents that Principal Dantine met with the student and his parents, assigned him after-school detention, and required him to view and report on a video about Rosa Parks. Superintendent Kozak also noted in the letter that he had offered counseling for ██████████, but that Respondent had not received consent to participate from her parents to date.

In the same letter, Superintendent Kozak indicated that he had spoken to them by telephone in December 2008 and January 2009 about the December 5, 2008 racial harassment incident to inform them that the student who used the racial slur in December 2008 received "disciplinary action" and was required to watch a video called "The Children's March." He also offered Complainant and his wife the opportunity to view and provide feedback on the school's diversity materials. Finally, Superintendent Kozak conveyed in the letter that Respondent was "trying to raise awareness of racial slurs and the importance of respect for diversity" and listed several programs it held to that end "during the last month."

During the investigation, the Division asked Respondent to provide more information about the specific programs it had presented to address ██████████'s repeated reports of racial harassment. Respondent provided a letter from Principal Dantine listing a number of videos from the "Teaching Tolerance" series presented to all students, as well as assignments and videos relating to black history, Martin Luther King, Jr., and civil rights. He noted that although those activities were offered during Black History Month and in observance of Martin Luther King, Jr.'s birthday each year, they were not necessarily limited to those times. The letter also noted that Respondent had presented two specific school-wide cultural diversity programs on January 26, 2009 and February 26, 2009, dates that also correspond closely with Martin Luther King Jr.'s birthday and Black History Month. Thus, the Division's investigation is unable to conclude that they were specifically designed or scheduled to address ██████████'s reports of racial harassment.⁶

The investigation disclosed that ██████████ graduated from Respondent's Main Road School in June 2009. Complainant advised the Division's investigator that, to date, ██████████ has not experienced any racial harassment while enrolled in her current school.

ANALYSIS

At the conclusion of the investigation, the Division is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported

⁶ Indeed, the incident in which ██████████ allegedly said, among other things, "I'm not letting a nigger sit back here, you nigger," took place on the bus after school on February 26, 2009 — the same day Respondent reported it held one of its two cultural diversity programs — drawing into question the effectiveness of the program in addressing the real racial hostility being expressed by at least some students.

by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S. Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an “initial culling-out process” whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

Here, the investigation supports a reasonable suspicion that ██████████ was subjected to bias-based peer harassment that was sufficiently severe or pervasive to create a racially hostile school environment. Conduct is severe or pervasive when “a reasonable student of the same age, maturity level, and protected characteristic would consider the harassment to be sufficiently offensive to create an intimidating, hostile, or offensive school environment.” L.W., ex rel. L.G. v. Toms River Regional Schools Bd. of Educ., 189 N.J. 381, 402-03 (2007). The Division’s investigation revealed that beginning in the third grade and continuing through the sixth grade, ██████████ was repeatedly subjected to racial slurs by her classmates, and in some of the incidents she was told in vulgar racial terms that she was not welcome on the school bus and in the community. The harassment came from a number of different students, some of whom repeated their acts of racial harassment on more than one occasion. In these circumstances, for an eight- to twelve-year old black student attending a school in which she is substantially in the minority, there is sufficient grounds to believe that the nature and frequency of the conduct she endured over the course of her four years at Main Road School constitutes severe and pervasive bias-based harassment.

The New Jersey Supreme Court has acknowledged that a school district may be liable for its failure to adequately respond to severe or pervasive bias-based bullying on a school bus, as well on school grounds, and has established the following standard:

When assessing a school district's liability, the factfinder must determine whether the district, with actual or constructive knowledge of the maltreatment, took actions reasonably calculated to end the harassment.

L.W. v. Toms River Regional Schools Bd. of Educ., supra, 189 N.J. at 411-412.

In this case, the investigation disclosed that Respondent had actual notice of many of the incidents of racial harassment during ██████████’s four years at Main Road School. The harassment was reported to no fewer than two principals and two superintendents throughout that period, and the frequency of the reports increased over time. In addition, when it received the first report, Respondent’s administration was already on notice of a potential racial problem at the school, based on at least one earlier sustained incident in which her older brother had been racially harassed.

The Division’s investigation also supports a reasonable suspicion that Respondent failed to take sufficient action that was reasonably calculated to stop the racial harassment. Although Respondent was aware that incidents recurred in each of ██████████’s four years at the school, intensified in the sixth grade, and involved multiple students and repeat offenders, the investigation disclosed insufficient evidence that Respondent took appropriate action specifically and reasonably calculated to address the systemic aspect of the problem.

While after-the-fact discipline and remedial education for individual offenders, tailored to the specific offending conduct, may be a necessary part of a remedial scheme, it is not necessarily sufficient. Even with regard to the actions that Respondent took against individual students, it is not entirely clear the discipline imposed (which typically involved requiring students to watch and report on civil rights videos) was effective. In any event, the evidence in this case supports the conclusion that as the racial harassment continued and intensified, Respondent should have known that its remedies directed at individual offenders were insufficient to rid the school environment of racial hostility, and that additional remedies were needed.

Although Respondent provided documentation that it instituted programs related to Black History Month or Martin Luther King Day, the investigation failed to show that Respondent took sufficient broader affirmative steps to address racial hostility in the school culture, or that it took sufficient action to explicitly put the entire student population or their parents on notice that racial harassment was taking place and would not be tolerated. Especially since most, if not all, of the racial harassment took place on the school bus, targeting the students on ██████████'s bus route for remedial education might have been a manageable start as a systemic remedy. Instead of acknowledging and confronting the racial nature of the problem, however, much of Respondent's correspondence evaded the issue by referring to racial harassment as "verbal teasing," and making vague references to inappropriate conduct and "the Golden Rule." To the extent that racial tolerance and appreciation were addressed at all, it was done so in what appear to be relatively superficial ways, such as viewing videos about civil rights history or prominent black leaders.

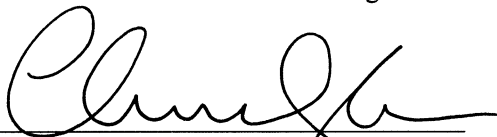
The school principal's statement, in ██████████'s presence, that he was unable to stop the harassment and did not know what to do about it, is additional evidence that Respondent could no longer reasonably rely on individual discipline to eliminate the racially hostile school environment. The evidence that this led ██████████ to feel that it was fruitless to continue reporting the harassment further supports the conclusion that Respondent's remedial actions were insufficient.

It is true that Respondent maintains a policy "Prohibiting Harassment, Intimidation, and Bullying," but the existence of such a policy alone cannot shield it from potential liability. Moreover, although the policy provides Respondent would "set the range of responses [to every incident of harassment, intimidation, or bullying], including individual, classroom, school or district level responses, as appropriate," there is insufficient evidence to show that Respondent meaningfully and fully explored the entire range of possible responses, given the significant duration and type of harassment alleged here.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that probable cause exists to credit the allegations of the complaint.

04/12/2011
Date


Chinh Q. Le, Director, Director
New Jersey Division on Civil Rights
Office of the Attorney General
Department of Law & Public Safety