



First Class Mail and Email: kennysouthwick@USD 512.org

December 4, 2017

Dr. Kenneth Southwick, Interim Superintendent
Shawnee Mission Public Schools
Center for Academic Achievement
8200 W. 71st Street
Shawnee Mission, Kansas 66204

Re: Racial Harassment Complaints at Shawnee Mission South High School

Dear Dr. Southwick,

We write on behalf of [REDACTED] the mother of former Shawnee Mission South High School (SMS) student [REDACTED] is the fourth parent of a minority student-athlete to raise a complaint of racial harassment against Coach Brett McFall, and she has asked the American Civil Liberties Union Foundation of Kansas to help ensure that USD 512 takes appropriate corrective action in response to these allegations.

As you are aware, on August 28, 2017, former SMS basketball players [REDACTED] and [REDACTED] submitted written complaints to the school district alleging that Coach McFall routinely made disparaging remarks about their race and ethnicity. [REDACTED] and [REDACTED] both complained that McFall frequently mentioned a minority player's race when he reprimanded them. According to [REDACTED] McFall asked him "do you not pay attention because you're black?" and "what is it with you black kids?" [REDACTED] described an incident where McFall asked [REDACTED] "why are you always talking back? Is it because you're African American?" The complaints also alleged that McFall consistently stereotyped minority players, commenting on their food choices, hair, and the way they smelled. For instance [REDACTED] remembers McFall saying "I know you black folks love this here fried chicken" when the team was eating at a buffet after an away game. He also cited a second incident where McFall offered several black players Cheeto's saying "hey you black fellas want some Cheetos, I know you guys love eating them and licking them off your fingers."

McFall did not limit his offensive comments to the black players. [REDACTED] complained that McFall would joke about the types of food his family ate. Coach McFall also insisted on ascribing Mexican stereotypes to [REDACTED] even though his family is Colombian. [REDACTED] also recalls an incident where McFall asked a Hispanic player "why do you Mexicans smell like that?" and "are all Mexicans' hair greasy?" Moreover [REDACTED] alleged that McFall would make

racialized statements seemingly out of nowhere. [REDACTED] described an incident where McFall asked for two “white players” to join a drill and clarified he wanted Caucasian players when [REDACTED] and [REDACTED], who were wearing white jerseys, stepped on the court.

USD 512 selected SMS Principal Dr. Todd Dain to investigate the complaints. It is my understanding that Dr. Dain purported to interview all students and staff who would have been present to witness the alleged statements and conduct. Dr. Dain concluded his investigation on September 13th and found that “discriminatory actions did not occur.” Specifically, Dr. Dain’s report stated that the information he gathered throughout the investigation demonstrated that Coach McFall “did not use racially charged language” and “did not make statements that were racially charged.” Dr. Dain reached these conclusions without interviewing [REDACTED] who corroborated one of the incidents in [REDACTED] complaint and provided additional, specific examples of McFall’s harassing behavior. Dr. Dain also did not interview [REDACTED] who was named as a witness and the target of McFall’s discriminatory behavior in [REDACTED] complaint.

On or about November 2, 2017, [REDACTED] contacted Dr. Dain to inquire why he had not interviewed her son about the allegations against McFall. Dr. Dain responded that [REDACTED] was “not part of the investigation.” When [REDACTED] pointed out that [REDACTED] had named [REDACTED] in his complaint, Dr. Dain responded that the issue had been resolved. [REDACTED] urged Dr. Dain to continue the investigation, explaining that her son was also a victim of McFall’s harassment and could corroborate his teammates’ complaints. Dr. Dain declined to interview [REDACTED].

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in public educational institutions, including in extracurricular activities. 42 U.S.C. § 2000d; 65 Fed. Reg. 39775 (2000). Under Title VI, schools are prohibited from creating or tolerating a racially hostile environment. *See Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 933 (10th Cir. 2003) (finding a violation of Title VI where school administrators “facilitated the hostile environment or, in the least, permitted it to continue.”); *L.L. v. Evesham Twp. Bd. of Educ.*, 2017 U.S. App. LEXIS 18635 (finding prima facie case of racial harassment where teachers and administrators tacitly accepted use of racial epithets). While a school is not required to seek out and discover discriminatory conduct, deliberate indifference to known incidents of harassment will trigger liability. *Bryant*, 334 F.3d at 933.

School administrators have a duty to adequately respond to complaints of discrimination. *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 670 (2d Cir. 2012) (“a finding of deliberate indifference depends on the adequacy of a school district’s response to the harassment”); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (“where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior.”). While the adequacy of a school district’s response varies depending on the circumstances, administrators, at a minimum, have an obligation to investigate a complaint. *See*

Eg. Zeno, 702 F.3d at 671(finding the school equity officer's refusal to investigate complaints of racial harassment supported finding of deliberate indifference); *Murrell v. School Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999)("complete refusal to investigate known claims, if true, amounts to deliberate indifference.").¹ In particular, an adequate investigation entails interviewing victims and witnesses to the alleged harassment. *See* 59 Fed. Reg. 11448, 11454 (1994), *citing* California State University, Chico, Case No. 09-89-2106 (finding inadequate investigation into racial harassment where university failed to interview most of the individuals involved); *Doe v. Forest Hill School District*, 2015 U.S. Dist. LEXIS 17532 at 34 (W.D. Mich. 2013)(holding school's response may have been inadequate and deliberately indifferent where the investigator failed to interview students who had knowledge of the alleged harassment); *Landon ex rel. Municip. Oswego Unit. Sch. Dist. #308*, 2001 U.S. Dist. LEXIS 7793 at 13-14(N.D. Ill. 2001) (failure to interview the victim of harassment created a material question of fact on the adequacy of the school's response to complaint).

USD 512's decision to forgo interviewing [REDACTED] and [REDACTED] raises grave concerns about the adequacy of the district's investigation into complaints against Coach McFall. By omitting interviews with two key witnesses, the district has fallen far short of its threshold fact finding obligations under Title VI. Thus, Dr. Dain's investigation is at best incomplete. USD 512 should reopen the investigation and undertake reasonable efforts to interview [REDACTED] and any other witness Dr. Dain overlooked. The district is on notice that minority students at SMS have been subjected to pervasive racial harassment by Coach McFall. If the district fails to conduct a more thorough review into these complaints, it is choosing to facilitate a hostile educational environment.

Further, we urge USD 512 to appoint an independent investigator to look into the allegations against Coach McFall. It is a well-established best practice in harassment investigations to appoint a fact finder with no ties to any of the parties.² Dr. Dain is McFall's direct supervisor and their relationship may compromise his ability to assess the complaints in an unbiased manner. Thus, USD 512 should select an investigator outside of SMS to continue the investigation.

Please contact me about this matter at your very earliest convenience so that we can discuss the facts, the district's response to this situation, and possible remedies.

¹ While *Murrell* analyzes a claim for a hostile educational environment under Title IX, the Tenth Circuit has held "the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa)." *See Bryant*, 334 F.3d at 934 (10th Cir. 2003).

² *See Eg. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (No. 915.002)(stating, "anti-harassment policy and complaint procedure should contain, at a minimum, the following elements... a complaint process that provides a prompt, thorough, and impartial investigation."). Available at: <https://www.eeoc.gov/policy/docs/harassment.html>

Dr. Kenneth Southwick, Interim Superintendent
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Sincerely,

A handwritten signature in black ink, appearing to read 'Lauren Bonds', with a long, sweeping horizontal line extending to the right.

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A handwritten signature in black ink, appearing to read 'Doug Bonney', with a long, sweeping horizontal line extending to the right.

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