

UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS THE WANAMAKER BUILDING, SUITE 515 100 PENN SQUARE EAST PHILADELPHIA, PA 19107-3323

REGION III DELAWARE KENTUCKY MARYLAND PENNSYLVANIA WEST VIRGINIA

February 9, 2016

IN RESPONSE, PLEASE REFER TO: 03151229

D. Dusty Blakey, Ed.D Superintendent Colonial School District 318 E. Basin Road New Castle, DE 19720

Dear Dr. Blakey:

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

LEGAL STANDARDS:

Disability Harassment

The regulation implementing Section 504 prohibits a recipient of Federal financial assistance from discriminating on the basis of disability. The Section 504 regulation, at 34 C.F.R. § 104.4(a), states that no qualified individual shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Title II prohibits the same form of discrimination by public entities. Therefore, OCR applies the Section 504 standard when analyzing the same claims under Title II.

When investigating an allegation of disability harassment OCR determines whether: (1) a student was subjected to harassment on the basis of disability; (2) the harassment rose to a level that denied or limited the student's ability to participate in or benefit from the educational program, service or aid; (3) the recipient had actual or constructive notice of the harassment; and (4) the recipient failed to take prompt and remedial action to end the harassment and prevent its reoccurrence.

To establish a violation under the hostile environment approach, OCR must determine whether the conduct constitutes a hostile environment from the totality of the circumstances, including a consideration of whether the disability harassment is severe, pervasive, or persistent. In making this determination, OCR examines the context, nature, scope, frequency, duration, and location of harassing incidents, as well as the identity, number, and relationships of the persons involved. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. In addition, as with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim. For example, the age and maturity of the students involved must be considered. Under OCR policy, the harassment must, in most cases, consist of more than casual or isolated incidents to constitute a hostile environment on the basis of disability. In addition, where a recipient has notice of the conduct, we determine whether it took prompt and effective action to eliminate the hostile environment and prevent is recurrence.

The extent of a recipient's responsibilities if an employee harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in disability harassment – generally this means harassment that is carried out during an employee's performance of his or her responsibilities in relation to students, including teaching, counseling, supervising, advising, and transporting students – and the harassment denies or limits a student's ability to participate in or benefit from a school program on the basis of disability, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the recipient has "notice" of the harassment. Whether or not harassment of a student occurred within the context of an employee's responsibilities for providing aid, benefits, or services is determined on a case-bycase basis, taking into account a variety of factors, including:

- The type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally;
- The degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place;

- Where and when the harassment occurred;
- The age and educational level of the student involved; and
- As applicable, whether, in light of the student's age and educational level and the way
 the school is run, it would be reasonable for the student to believe that the employee
 was in a position of responsibility over the student, even if the employee was not.

Section 504 Grievance Procedures

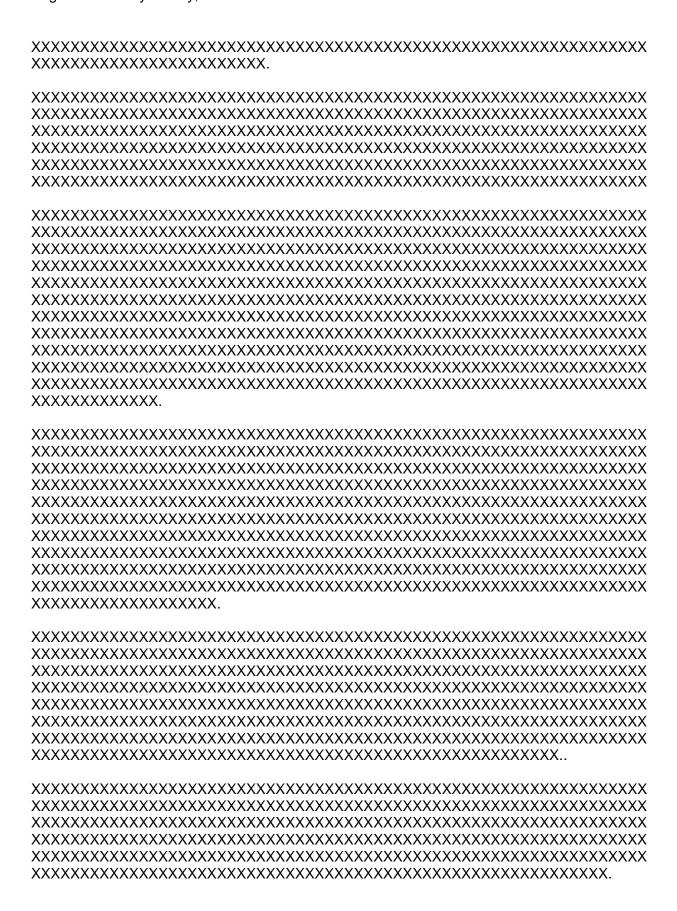
The Section 504 regulation, at 34 C.F.R. § 104.8, requires recipients to notify participants, beneficiaries, applicants, and others that the recipient does not discriminate on the basis of disability in violation of Section 504. If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, it shall include in those materials or publications a statement of the nondiscrimination policy.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires recipients that employ fifteen or more persons to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging action prohibited by Section 504, including disability harassment. OCR has identified a number of elements in evaluating whether a recipient's grievance procedures provide for the prompt and equitable resolution of complaints of discrimination and harassment. These include:

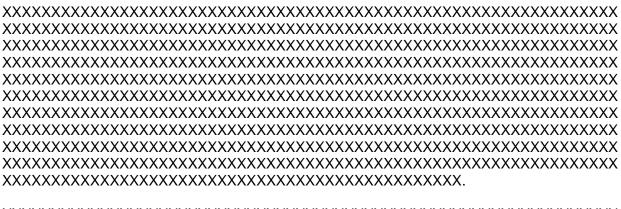
- Notice of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designated and reasonably prompt timeframes for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint; and
- An assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

FACTUAL FINDINGS

X)	X)	X)	X)	$\langle \rangle$	()	$\langle \rangle$	(X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	()	$\langle \rangle$	$\langle \rangle$	()	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	(X	(X	X	X	X	X.	X_{λ}	X)	X)	$\langle \rangle$	()	(X	X	X	X					
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	()	$\langle \rangle$	$\langle \rangle$	X)	X.	X	X	X	X	X	X	X	X	(X	(X	(X	(X	$\langle \rangle$	$\langle \rangle$	$\langle \rangle$	$\langle \rangle$	()	()	(X	(X	X	X	X	X	X	X.	X)	X)	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	X	Χ	X	X	X	X	X	X	X	X	X	X	(X)	()	$\langle \rangle$	X)	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X.	X)	()	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	$\langle \rangle$	(X	ĺΧ	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	()	$\langle \rangle$	$\langle \rangle$	()	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	X	X	X	X	X	X.	X)	X)	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	Χ	Χ	X	X	X	X	X	X	X	X	X	X	(X)	()	$\langle \rangle$	X)	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X.	X)	()	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	Χ	Χ	X	X	Χ	X	X	X	X	X	Χ	Χ	()	$\langle \rangle$	$\langle \rangle$	X)	X.	X	Χ	Χ	Χ	Χ	X	Χ	χ	ĺΧ	ĺΧ	ĺΧ	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X	X)	X)	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	Χ	Χ	X	X	Χ	X	X	X	X	X	Χ	Χ	()	$\langle \rangle$	$\langle \rangle$	X)	X.	X	Χ	Χ	Χ	Χ	X	Χ	χ	ĺΧ	ĺΧ	ĺΧ	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X.	X)	X)	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	Χ	Χ	X	X	X	X	X	X	X	X	X	X	(X)	()	$\langle \rangle$	X)	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X.	X)	()	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	X	Χ	X	X	X	X	X	X	X	X	X	X	(X)	()	$\langle \rangle$	X)	X.	X	X	X	X	X	X	X	X	X	(X	X	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X.	X)	()	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	ĺΧ	X	X	X	Χ	Χ	X	X	Χ	X	X	X	X	X	Χ	Χ	()	$\langle \rangle$	$\langle \rangle$	X)	X.	X	Χ	Χ	Χ	Χ	X	Χ	χ	ĺΧ	ĺΧ	ĺΧ	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	Χ	Χ	X	X	X	X	X)	X)	<>	(X	(X	X	Χ
X	X)	X)	X)	X)	()	()	(X	X	X	X	X	X	X	Χ	Χ	X	X	X	X	X	X	X	Χ	()	$\langle \rangle$	$\langle \rangle$	X)	X	X	X	X	X	X	Χ	X	χ	χ	ĺΧ	ĺΧ	(X	$\langle \rangle$	()	()	()	()	()	(X	(X	X	X	X	X	X^{\prime}	X	X)	()	<>	(X	(X	X	Χ



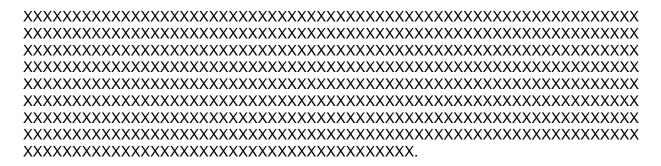
Page 5 - D. Dusty Blakey, Ed.D.



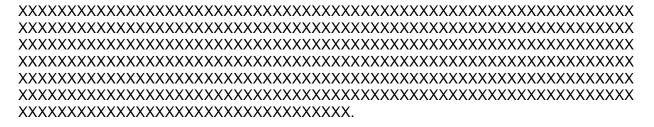
The District provided OCR with a copy of its Section 504 procedures, which assures students, parents, applicants for employment, and employees that the District will not discriminate against any individual with disabilities. The procedures also state that: "All grievances will be received and investigated in a fair and expeditious manner."

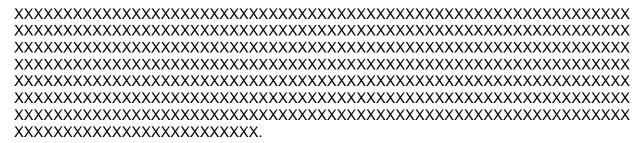
LEGAL ANALYSIS

Disability Harassment



Page 6 - D. Dusty Blakey, Ed.D.





Grievance Procedures

Based upon our review, we have determined that the District's grievance procedures fail to comply with the requirements of Section 504 and Title II because they do not include the following provisions:

- notice to students, parents, and employees of the procedure, including how and where to file a complaint;
- application of the procedure to complaints alleging disability discrimination carried out by students, employees, or third parties;
- adequate, reliable, and impartial investigation, including the opportunity to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the major stages of the complaint process;
- notice to the parties of the outcome of the complaint, and the basis for the decision; and
- an assurance that the District will take steps to prevent the recurrence of any prohibited actions and to correct its discriminatory effects on the complainant and others, if appropriate.

On February 8, 2016, the District signed an Agreement to address these compliance concerns. When fully implemented, the Agreement will address all of OCR's compliance concerns. Consistent with our procedures, OCR will monitor the implementation of the agreement until the District is in compliance with the regulation implementing Section 504, at 34 C.F.R. § 104.7(b), and the regulation implementing Title II, at 28 C.F.R. § 35.107(b), which were at issue in the case.

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 an individual OCR case. 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 have the right to file a private suit in federal court whether or not OCR finds a violation.

Page 7 - D. Dusty Blakey, Ed.D.

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 Complainant 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 is committed to a high-quality resolution of every case. If you have questions or concerns regarding OCR's finding, you may contact Mr. Robert Ford at 215-656-8537 or by email at Robert Ford @ed.gov.

Sincerely,

/s/

Beth Gellman-Beer Team Leader Philadelphia Office

Enclosure

cc: Elizabeth P. Fleetwood