



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

December 26, 2012

Dr. Kevin Skelly  
Superintendent  
Palo Alto Unified School District  
25 Churchill Ave.  
Palo Alto, CA 94306

(In reply, please refer to case no. 09-11-1337.)

Dear Superintendent Skelly:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Palo Alto Unified School District (District). The Complainant alleged that the Student<sup>1</sup> was subjected to harassment by other students and District employees based on her disability, and the District failed to respond appropriately and effectively to notice of the harassment.

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. Section 504 and its implementing regulation prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II and its implementing regulation prohibit discrimination on the basis of disability by public entities. The District receives Department funds, is a Public Education System, and is subject to the requirements of Section 504 and Title II, and their regulations.

OCR reviewed information provided by the Complainant and the District and conducted interviews with the Complainant, District staff and administrators, and students. With regard to the allegation of peer harassment, OCR concluded that the District did not respond appropriately and effectively to notice that the Student was harassed by her peers based on her disability. OCR did not identify any compliance concerns with respect to the allegation of disability-based harassment by District employees. The District, without admitting to any violation of the law, voluntarily signed the attached resolution agreement which will resolve the areas of noncompliance once it is fully implemented. The applicable legal standards, the facts OCR gathered and the reasons for our determination are summarized below.

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<sup>1</sup> OCR notified the District of the Student's name in a letter dated July 14, 2011. The Student's name is not used in this letter in order to protect the privacy of the Student.

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. School districts are responsible under Section 504, Title II and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Under Section 504, Title II, and the regulations, once a district has notice of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A district may violate Section 504, Title II and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the district fails to take appropriate responsive action. These steps are the district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

In addition, school districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the district is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

OCR's investigation revealed the following:

- The Student was enrolled in the XXXXX grade at XXXXXX XXXXXX School (School) during the 2010-2011 school year. She was receiving special education and related services under an individualized education program (IEP) based on a disability of Speech and Language Impairment.
- The evidence showed that the Student's disability affected her interactions with peers. The meeting notes of the Student's transition IEP meeting in June 2010 state that, "she is not reading the social cues of those around her." In describing the Student's disability, the School RSP Specialist stated that the Student's speech and language impairment affected her social skills and impeded her ability to process language quickly and receive correct messages from other students. In an amendment to the Student's IEP, dated February XX, 2011, "social skills" was addressed as an area of concern.

#### *Evidence of Peer Harassment*

- Many students stated to OCR that they consistently tried to avoid the Student. Students said that a lot of people bullied her and called her "stupid" and "slow" and "annoying."
- Students also made a game of avoiding contact with the Student. Multiple students described to OCR a phenomenon that had started in elementary school called "[The Student] touch." They would try not to get "[The Student] touch," or the "[Student B] touch." Student B was another student with disabilities. Students also told OCR that there was the thought that if "you're hanging out with [the Student], you're a loser too."
- The School Counselor's notes describe one instance when the Student hit and kicked another student after allegedly being picked on by him and two of his peers.
- Several students said that they had never said anything to School staff about the Student having been bullied. They said that they were worried about speaking up because they might be accused of being a snitch.

- Many of the students reported having attended “social kindness” or cyberbullying trainings offered by the School. None of the students reported having had any training about interacting with or relating to students with disabilities.
- While several students said that students with disabilities were treated like “normal” students, others said that students with disabilities tended to say things that were “weird.” They said that students with disabilities would talk to themselves and were perceived as disruptive in class. Others said that it was annoying when you had a group project and a student with a disability was assigned to it because they could not work on the project and didn’t contribute to the project, which meant more work for the rest of the group. Others mentioned a student at school who XXXXXXXXX. They added that people got annoyed with him when he talked in class because it took a long time for him to talk. Others in the group highlighted students with disabilities who read slowly, saying that those students were wasting class time.

*Notice to the School/District and Response*

- Several staff members at the school, including the PE Teacher, RSP Specialist, Math Teacher, Lunchtime Supervisor, and Counselor, told OCR that the Student had approached them during the school year and said that her classmates were picking on her.
- In November 2010, the Student, her family, the Counselor and the Principal met to discuss her difficulties with her peers. The Counselor’s notes state that the Student was bullied in elementary school and that the family was afraid that the bullying would recur since students from her elementary school attended the School.
- The Counselor’s notes from November XX, 2010 show that the Student identified several of the students who harassed her. The Counselor brought them in for conflict resolution on several occasions, the outcome of which was an agreement for the students to avoid each other.
- Although the Counselor’s notes included the names of the students and descriptions of the incidents, the Assistant Principal stated to OCR that the School had not received specifics from the Student and if the Student had provided names the School would have done more.
- In her interview with OCR, the Principal disputed that any harassment had occurred, saying, “It was always different kids. If it’s the same kids, then it’s harassment.” The Principal also cited the Student’s contributory role in the incidents and said that the District wanted to give her social skills training.
- On January XX, 2011, the family e-mailed the Principal, stating that the Student continued to be bullied and that a girl in her class (Student V) told her that everyone hated her, and that therefore she had to hate the Student too, and that

Student V tried to kick her but the Student was able to get out of the way. The family also added that the Student was afraid to go back to school knowing that everyone hated her and pointed out that the family had requested an aide to support the Student. The Principal responded on the same day and informed the family that the District would “intervene immediately around any bullying” and offered to meet with them.

- On the same day, the Counselor e-mailed the RSP Specialist and the Principal to say that she knew who Student V was. The Counselor stated that she had spoken to Student V several days earlier and, according to Student V, “[the Student] follows her around even if [Student V] says to stop... [and] that [Student V] and her friends don’t really like hanging out with [the Student] because she will be rude and interrupt conversations, and bring up things that are off topic, that they don’t even understand what she is taking about.”
- The Counselor’s notes on January XX, 2011 state that she, the Principal, the Student and her guardians met because girls were bothering the Student at lunch. The Counselor and the Student subsequently met individually and then all together with Student V and other girls she had identified to do a conflict resolution.
- In an e-mail to the District Special Education Coordinator and the Principal on January XX, 2011, the RSP Specialist stated, “[The Student]’s mother has requested an aide for lunch for [the Student] at lunch due to the [the Student’s] reports of bullying.”
- On January XX, 2011, the District Office advised the RSP Specialist and the Principal via e-mail that “SPED will not furnish an aide for [the Student] because of the bullying. SPED is taking the position that bullying is each site’s responsibility. SPED wants the site to work this one out outside the IEP.”
- On February XX, 2011, an IEP meeting was held. The meeting notes indicate that the family reported that the Student “was being bullied while at school.” The family requested an aide to assist the Student with social interactions. The District stated it could not provide an aide without further assessment of the Student, which the family said it would consider. The District offered the Student counseling but the family declined because it had decided to pursue outside private counseling.
- Also on February XX, 2011, the District Superintendent e-mailed the Principal to inform her that the Complainant had brought the Student and another child to the XXXX XXXXXX XXXXX XXXXXXXX and the children XXXXX XX XXXXX XXX XXXXX XXXXX XXXXX XXXXXXXXXXXX The Superintendent stated, “I’m not sure what, if anything, we can do to relieve their concerns.” X XXXXX XX XXX XXXXXXXX XXXXXXXXXXXX XX XXX XXXXXXXX XXXX the Student told XXX XXXXX that other students bullied her a lot and said things like, “Everyone hates you because you’re different so why don’t you just go away.”

- On March X, 2011, the Complainant sent an email to the District expressing frustration with the February XX IEP meeting, including the fact that no psychologist was present. The family denied consent to further assess the Student, indicating that it wanted the School to address the bullying first; the family felt the School would use the assessment as a reason to further delay taking action to prevent the harassment and bullying.
- At the end of March 2011, the Student and another student got into an argument; the other student punched the Student in the face. The Counselor met with the two students and, according to her notes they “agreed to stay away from each other.”
- On May X, 2011, while walking with the Lunchtime Supervisor, XXX XXXXX XXXXXXXX, the Student discussed how her friends didn’t want to hang out with her. The Student also said, “I don’t know what I’ll do, I’ll just hurt myself.” When the Supervisor asked what she meant, the Student said “kill myself” XX XXXXXXXX. The Supervisor reported this to the Counselor, who asked for a written statement from the Supervisor, which she provided.
- The Counselor’s notes reflect that she e-mailed and left voicemails for the Complainant and met with the Student to make sure that she was okay. The family responded to the Counselor via e-mail the same day and copied the Principal, the Superintendent and other District staff. The family said that the Student had XXXXX XXX XXXXXXXXXXXX XXXXX XXXXXXXX XXXXXXXX XXX XXX XXXXXXXXXXXX XXXX XXX XXXX XXXXXXXX XX XXXXXXX.... [She said she just want[s] the kids to leave her [alone] and [...] that they should not make fun of her calling her: gross, stupid, retarded, cocos...”
- On May X, 2011, the family wrote to several school and District staff and administrators, including the Principal, the Superintendent, and some of the Student’s teachers, to inform them that they had decided to keep the Student home. The e-mail stated in part, “[S]he started to get depressed and anxious again, and she begged that we do not send her to school because [...] does not want the kids are going to make fun of her again and call her names.”
- The District e-mailed the family to ask for a meeting to discuss their concerns. The District stated that they wanted to discuss support for the Student if she was under a physician’s care and needed to stay at home. In a written response on May XX, 2011, the family stated that, “[The Student] does not need to stay home. The reason we are keeping her at home is because the doctor said that it does not make sense to take her to school to be bullied, so as soon as you [assign] a new school for [the Student], she will be ready to go.”
- The family had a meeting with several District staff on May XX, 2011 to discuss placement for the next school year. It was decided that the District would initiate an administrative transfer to XXXXXX XXXXXXX School. The Student

subsequently enrolled at XXXXXX in the fall of 2011. Starting in early 2012, the Student received extensive mental health treatment over the course of several months. During this time period, her school placement was changed.

- None of the teaching staff at the School could definitively recall having been asked by District or School administrators if they knew anything about the Student being bullied, or told about the bullying reports they had received from the family or from the Superintendent's Office.
- None of the staff or administrators described having received any training that addressed harassment based on disability. The Principal said that the staff was very "sophisticated" and "didn't need a disability awareness" training.

#### *Schools and District Policies*

- The School has a student handbook which is posted on its website. Under the heading "harassment policy", the handbook states that harassment or discrimination may include "slurs of any kind (racial, ethnic, religious, sexual, gender-based, physical, etc.)". Except for the word "physical," no reference is made to disability-based harassment. In addition, under the heading "complaint procedures", the handbook states, "A student, who believes that they are being harassed or discriminated against at school or at school activities because of her/his sex, race, ethnicity, or religion, should immediately bring the matter to the attention of the school staff. District complaint procedures will be followed to resolve the issue." No reference is made to disability in either the harassment policy or complaint procedures section of the handbook.
- The handbooks at the other XXX XXXXXX schools in the District, XXXXXX and XXXX XXXXXXXX XXXXXXXX, also omit reference to disability as a basis for discrimination or harassment in the section entitled "complaint procedures."

#### *Harassment by Employees*

- With respect to the allegation of harassment by School employees, the complaint did not specify which school employee(s) had harassed the Student because of her disability. OCR's investigation revealed that the Student and the family had lodged complaints about the Student's Aide. Specifically, both the Student and the Complainant informed the Principal in writing that the Aide had been mean to the Student.
- The Principal investigated the allegation by meeting with the Student and the Aide. It was discovered that the Aide had a condition which made her hands shake, which could have been perceived as anger. The Principal reported that once the Student was informed of the Aide's condition, she felt much better. The family reported no further concerns with the Aide and no complaints of harassment on the part of any other staff member.

- OCR’s investigation revealed no other instances or complaints of harassment on the part of a District employee.

### *Analysis and Case Resolution*

The evidence showed that the Student was subjected to harassment<sup>2</sup> by other students on an ongoing basis during the 2010-2011 school year. The Student has a disability which, according to School and District records including the Student’s IEP, and according to statements of School employees, caused difficulties with peer interactions such as acting inappropriately at times and misinterpreting social cues. Based on statements by the both the Student and other students, the harassment was primarily related to the Student’s disability-related characteristics, reflected in other students calling her names such as stupid, slow, annoying, gross, retarded and cocos.

District and School officials had ample notice, at least as early as November 2010, that the Student was being subjected to peer harassment and that the harassment was related to the Student’s disability. Both the Student and her family reported to School and District employees over a period of more than six months that the Student was being bullied by her peers. While the family and the Student did not explicitly use the term “discrimination based on disability,” it was clear from their communications, in the IEP setting and otherwise, that their intention was to communicate that the harassment was related to the Student’s social and communication challenges arising from her disability.

School officials showed a lack of understanding that harassment of a student based on behaviors that are the product of a disability is a matter of discrimination, and a lack of understanding of what constitutes a hostile environment. While the Principal attributed the bullying to the Student’s inappropriate social behavior and was aware that the inappropriate behavior was the product of the Student’s disability, the Principal failed to recognize that therefore, the harassment was not just a social or discipline problem but also a civil rights issue. The Assistant Principal stated incorrectly that there had to be multiple instances of harassment by one student to create a hostile environment and that separate instances of harassment by individual students were not sufficient. Both administrators stated that staff members had not received any trainings specific to the needs of students with disabilities, beyond the basic requirements of Section 504 and the IEP process, and that there had been no staff trainings on what constituted disability-based harassment.

The School did not respond appropriately to reports of the harassment. The School offered the Student social skills counseling, and the Student and her peers were typically brought in to meet with the Counselor and participate in conflict resolution, the outcome of which was normally an agreement that the students should avoid each other or leave each other alone. This approach was not effective in stopping the harassment. In part, school administrators indicated that they could not take more action because the Student did not identify the other students responsible. However,

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<sup>2</sup> The terms “harassment” and “bullying” do not have separate meanings in the context of disability, race, or sex discrimination. Both refer to harassing conduct based on a protected status.



there were e-mails from the family identifying several other students, and the Counselor's notes contained many names of students with whom the Student had had difficulties, along with summaries of the incidents.

The District also did not conduct any organized inquiry into the reports of harassment. Each staff member (e.g., the RSP Specialist, Counselor, and Lunchtime Supervisor) was left to her own devices as to how best to respond to the information each received. There was no single staff member or administrator designated to investigate and gather information. No structured approach was taken to interviewing students. Records were not kept of interviews with the Student or the other students accused of harassment. The School did not interview any other students who were witnesses of the harassment or compile the information about the reports of harassment over the period of several months. It made no analysis as to whether the harassment was or was not based on disability and whether a hostile environment had been created.

As mentioned, the School cited the Student's own behavior as the cause of the harassment. However, while the District correctly offered to conduct additional assessment of the Student, it did not do so until four months after the harassment was first reported. Instead, it offered the Student social skills training and offered to have a Lunchtime Supervisor shadow the Student without determining, based on pertinent evaluation data, whether these services were appropriate to address the behavioral issues.

After the School did offer assessment, it is true that the family did not give consent. The family also rejected the District's offer of counseling for the Student. While these matters may have affected the District's FAPE responsibilities, they did not relieve the District from taking other available steps to stop the harassment by other students and prevent it from recurring. As stated above, the District did not conduct a thorough and impartial investigation of the incidents. It did not take any disciplinary action toward students who engaged in the harassment or steps to develop an appropriate training or education program for students to reinforce the policy against discrimination and raise their awareness of the issue of disability-based harassment. Notably, none of the middle school handbooks, including the one used by the School, mentions disability-based harassment as a prohibited type of harassment or a basis on which a discrimination complaint can be made.

In summary, the evidence showed that the District failed to respond promptly and effectively to notice that the Student was being subjected to peer harassment based on disability. The response was not reasonably calculated to end the harassment, prevent it from recurring or eliminate the effects of the hostile environment on the Student. Based on the foregoing, OCR concluded there was sufficient evidence to support a finding of noncompliance with Section 504 and Title II with respect to the allegations of peer harassment.

As to the specific question of whether the teachers were harassing the Student based on disability, OCR found no evidence to support the allegation. OCR learned that a concern the family had about the Student's aide was resolved. OCR concludes that there was no violation of Section 504/Title II as to this allegation.

To address OCR's compliance concerns, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegation and the information obtained by OCR during its investigation. Under the agreement, the District will (1) hold an IEP meeting for the student to make sure that her disabilities have been fully and correctly identified and that the services she is receiving are adequate to meet her needs; (2) issue a memorandum and provide training to District administrators and a notice to staff, parents and students regarding the District's obligation to provide a nondiscriminatory environment for students with disabilities; (3) revise its middle school handbooks to include disability as a basis that may give rise to a discrimination complaint; and (4) provide age-appropriate training for students regarding disability-based harassment. OCR will monitor the implementation of the agreement, and is informing the Complainant of its decision by concurrent letter.

OCR appreciates the steps taken by the District to resolve this matter in a constructive manner. We are hopeful that the difficulties between the Student's family and the District, as articulated by both parties to OCR, will not impede their efforts to achieve successful outcomes for the Student and consider her health and well-being. We encourage the District to work in partnership with students with disabilities and their families around issues related to their educational programs to create a climate in which all parties feel comfortable sharing and exchanging their observations and recommendations.

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.

OCR wishes to thank the District and in particular the District's Counsel, XXXXXX XXXXXXXX, for their cooperation and courtesy during this investigation. If you have any questions about this letter, please contact Shilpa Ram at [shilpa.ram@ed.gov](mailto:shilpa.ram@ed.gov) or (415) 486-5565.

Sincerely,

/s/

James M. Wood  
Team Leader

Enclosure  
cc: XXXXXX XXXXXXXX, Esq.