



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

March 17, 2015

Jeffrey Weinstein
Chief Administrative Officer
Southern Kern Unified School District
3082 Glendower Street
P.O. Drawer CC
Rosamond, California 93560

(In reply, please refer to OCR case no. 09-14-1187.)

Dear Mr. Weinstein:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Southern Kern Unified School District (District). The Complainant, the parent of a student with a disability, alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether the District responded adequately to notice that the Student had been harassed and discriminated against on the basis of disability.

OCR investigated this complaint pursuant to its authority under 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 therefore subject to the requirements of Section 504, Title II, and their implementing regulations.

OCR reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, we concluded that there was sufficient evidence to support a finding of noncompliance with Section 504/Title II. The District has agreed to implement the attached resolution agreement in order to resolve the issues identified by OCR. The facts gathered, the applicable legal standards, and the reasons for our determination are summarized below.

¹ OCR notified the District of the Complainant's and Student's identities at the beginning of the investigation. We omit their names in this letter to protect their privacy.

Legal Standards

The regulations implementing Section 504 prohibit discrimination based on disability by recipients of Federal financial assistance.² The Title II regulations create the same prohibition against disability-based discrimination by public entities.³ School districts are responsible under Section 504, Title II and the regulations for providing students with a nondiscriminatory educational environment.

Harassment. 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. In addition, bullying of a disabled student, even if it is not disability-based harassment, could result in the denial of a free appropriate education for the student.⁴ Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, or other conduct that may be physically threatening, harmful, or humiliating.⁵ Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. 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.

Grievance procedures. The Section 504 regulations require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination.⁶ The Title II regulations similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.⁷ OCR examines a number of factors in evaluating whether a recipient/public entity's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to parents of elementary and secondary school students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial

² 34 C.F.R. §104.4(a) and (b)

³ 28 C.F.R. §35.130(a) and (b)

⁴ OCR's Dear Colleague Letter: Bullying of Students with Disabilities (October 21, 2014), available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

⁵ OCR's Dear Colleague Letter: Student-on-student harassment (October 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> .

⁶ 34 C.F.R. §104.7(b)

⁷ 28 C.F.R. §35.107(b)

investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Factual findings

The Student was enrolled in XXXXXX grade at XXXXXX Middle School (School) in the District during the 2013-2014 school year. She has an IEP and was placed in a Special Day Class for students with mild to moderate disabilities. She has intellectual disabilities, neurological tremors, and movement disorders. According to the Complainant, the Student's tremors worsen when she is under stress. In addition, the Student is more susceptible to head injury when pushed or hit than other children because of the nature of her disabilities.

The underlying allegations giving rise to this complaint investigation involved another student at the School, "A.A."⁸ During the 2013-14 school year, A.A. was in XXXXXX grade and placed in a different classroom than the Student. A.A. has an IEP but OCR has no further knowledge of the nature of A.A.'s disability.

The alleged interactions at issue between the Student and A.A. occurred in late January and early February 2014. According to the Complainant, the alleged incidents included the following: A.A. threw an apple toward the Student while they were at lunch in the cafeteria (January XXXX); A.A. told the Student that she could not sit at A.A.'s table because the Student was "not cool" (January XXXX); A.A. shoved the Student and told her to "move it" (also January XXXX); A.A. called the Student a "whore" and "f-ing b"⁹ (unspecified dates); A.A. said things such as "you're not cool" and "you're in Special Ed" to the Student (unspecified dates); and A.A. attempted to intimidate the Student by approaching her and whispering to her (February XXX and February XXX).

The Complainant told OCR that as a result of the incidents with A.A., the Student became very fearful of A.A., her neurological tremors increased, and she had difficulty eating and sleeping. The Complainant believed that the District was failing to protect the Student and opted to keep the Student out of school February X-XX, 2014. The Complainant also obtained a restraining order against A.A. on February X, 2014.

The District was first put on notice that A.A. was allegedly harassing the Student during the last week of January, and the Complainant's concerns were communicated again on several occasions thereafter:

⁸ This student is identified by fictitious initials throughout this letter in order to protect the student's privacy. OCR notified the District of the identity of the student at the beginning of the investigation.

⁹ According to the Teacher, this is the precise language used and not a sanitized version.

- Sometime during the week of January XX-XX, 2014, the Student told her classroom teacher (Teacher) that A.A. was bullying her. Within a day or so of the conversation between the Teacher and the Student, the Complainant informed the Teacher that there was a problem between the Student and A.A., and asked the Teacher to help watch out for the Student. The Teacher agreed to escort the Student to the office to meet the Complainant at the end of the day and to monitor her during passing periods.
- The following week, on February X, 2014, the Complainant and the Student met with the School Principal concerning A.A. According to the Complainant and the Principal, the Complainant told the Principal about the apple-throwing incident and that there had been “continuous” bullying by A.A. of the Student. The Principal asked that the Student write an incident report. The Complainant told the Principal that the Student would need assistance in writing an incident report, and he said that the office staff would be able to assist her.
- The next day, on February X, 2014, the Student went to the School office with a classmate and wrote an incident report with the classmate’s assistance. The incident report reads, “[A.A.] tried to say Hi to [the Student] & [another student] & [another student] was the witness.”
- On February X, 2014, the Complainant met a second time with the Principal and again asserted that the Student was being bullied and that A.A. should be expelled. The Principal informed her that he would have campus security watch the Student in order to ensure her safety, that he could not discuss A.A. due to privacy concerns, and that if the Student missed too many days of class, she could be found truant. The Complainant told OCR that she felt that the Principal was dismissive of her concerns and rude.

The District took several responsive actions to the Complainant’s concerns about harassment of the Student. The Principal initiated an informal investigation of the apple-throwing allegation on February X, 2014. His investigation involved interviewing two other students who would have been present on that date. He also spoke with A.A. According to the Principal, the students he spoke with denied seeing the Student pushed by A.A. or A.A. throwing an apple at the Student. Regarding the handwritten incident report in which the Student stated that A.A. said “hi” to her, the Principal told OCR he did not follow up with the Student further because, to his mind, the Student did not describe harassment or bullying. The Principal sent a very brief summary of his investigation to the Superintendent by email on February X, 2014. The Superintendent provided a redacted copy of the Principal’s summary to the Complainant on or sometime soon after February X, 2014. The Principal’s investigation report does not state whether or not he found that A.A. had engaged in bullying or harassment or whether any action was taken against A.A. He refused to share any further information with the Complainant.

On February XX, 2014, the Complainant spoke with the Special Education Director about her concerns. She requested counseling for the Student. The Complainant and the Special Education Director agreed to an administrative amendment to the Student’s IEP that assigned a

one-to-one aide to the Student and provided 30 minutes per week of counseling. The Complainant told OCR that she was satisfied with the Special Education Director's actions and felt that she was helpful.

The Student's annual IEP meeting was held on February XX, 2014. The Complainant's concerns regarding bullying of her daughter by A.A. were discussed. The meeting notes in regard to the bullying stated that "[Student] has been escorted to nutrition lunch and passing periods including PE by a campus security and that service will now be performed by paraeducators" and that "[Student] is receiving services by a school psychologist and these services will continue." A one-on-one aide/paraeducator remained with the Student through the end of the 2013-2014 school year. She also participated in counseling with a school psychologist through the end of the school year. Under the IEP completed on February XX, 2014, the Student continued to receive counseling with the same school psychologist until the next annual IEP.

At the same time that the Complainant was taking actions she felt were necessary to protect the Student, the Principal, the Special Education Director, and other District staff members were trying to address an escalation of aggressive behavior by A.A. toward other students. In early February 2014, there were multiple complaints regarding A.A.'s behavior toward other students. A.A.'s parent requested that A.A. be removed from the School to an alternative placement after being served with restraining orders by other parents. The District granted an alternative placement for A.A., and A.A. did not attend the School from February XXXX through the rest of the 2013-14 school year.

On February XX, 2014, the Complainant filed a complaint at the School using a form entitled "Uniform Complaint Procedure."¹⁰ The Complainant stated that she was submitting a complaint against the Principal because she had "reported several serious incidents of bullying against my disabled daughter" and the Principal provided "no solution" to the problem. On March XX, 2014, the Complainant and her sister met with the District's UCP compliance officer, the District Personnel Director. According to the Personnel Director, he informed the Complainant that she had used the wrong form to file a complaint against the administrator, and the Complainant then told him that she did not wish to pursue the UCP further. Therefore, he suspended his investigation and did not issue a decision on the complaint.

When OCR asked the Complainant about the March XXXX meeting with the Personnel Director, she strongly disagreed with his characterization of the meeting. The Complainant stated that she had never agreed to drop the UCP complaint. She said that the Personnel Director told them that he would respond to the UCP complaint within the allotted time, and did not tell her she had used the wrong form. If he had, she said, she would have resubmitted the complaint on the correct form.

¹⁰ OCR noted that the form used did not match the UCP form accompanying the District's UCP procedure, AR 1312.3. As a matter of technical assistance, OCR recommends that the District ensure all copies of the UCP form are the same.

District's policy regarding internal complaints. Board Policy 1312.3 (BP 1312.3) states that the District's Uniform Complaint Procedure (UCP) may be used to file complaints of disability discrimination. Administrative Regulation 1312.3 (AR 1312.3) sets out the process for filing and investigating a complaint under the UCP. The UCP is also the applicable procedure for complaints alleging other forms of bullying (Board Policy 5131.2) and complaints regarding other types of discrimination. (Board Policy 5145.3). AR 1312.3 states that complaints will be investigated and resolved by the compliance officer within 60 days of receipt. All parties involved are to be notified when a complaint is filed, when a complaint meeting or hearing is scheduled, and when a decision or ruling is made. Within 10 days of receiving the complaint, the compliance officer must meet with the complainant. At the conclusion of the investigation, the compliance officer prepares a written report of the District's investigation and decision which includes: (1) the findings of fact based on the evidence gathered; (2) the conclusions of law; (3) disposition of the complaint; (4) rationale for such disposition; (5) corrective actions, if any are warranted; and (6) notice of the complainant's right to appeal to the California Department of Education within 15 days of the District's decision. The policy also describes how a complainant may appeal the District's decision to the Board.

Analysis

As stated above, under Section 504/Title II, if a school district has notice of disability based peer harassment, it has a duty to respond promptly and appropriately to determine what occurred and take actions reasonably calculated to stop the harassment and prevent it from recurring. The district has this obligation whether or not the harassed student or his/her parent files a formal complaint. Where the harassed student has an IEP or Section 504 plan, the district must examine whether additional or different services are needed to provide the student a free appropriate public education (FAPE).¹¹

In this case, in late January and early February 2014, the Complainant told the School about alleged incidents of harassment of the Student by another. Receiving general information that a student with disabilities has been harassed by peers does not, in and of itself, raise a duty to respond to discrimination under Section 504/Title II. A school district must also be on notice that there is a connection between the student's disabilities and the harassment. Notice of discriminatory harassment may be provided if the student or parent explains to district personnel that they believe the harassment is connected to the student's disability. However, parents and students are not required to specifically make reference to disability, or use the

¹¹ The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

word 'discrimination' or any other particular terms. Notice may be also be provided by the nature of the other students' actions, the context of the harassment, or other factors suggesting that the harassing conduct is motivated by a student's disability-related characteristics, behavior or appearance.

Information from the Complainant and School staff demonstrated that the District was first put on notice that the Student was allegedly being bullied by A.A. when the Student spoke with her Teacher during the last week of January, 2014. The District was provided with additional notice when the Complainant spoke with the Teacher several days later and asked him to escort the Student to and from the classroom because of A.A.'s taunting. Thereafter, in the first half of February, the Complainant spoke with the Principal at least twice and the Special Education Director at least once regarding the alleged bullying.

The Complainant and Student did not tell the School that they believed A.A.'s actions were based on the Student's disabilities. In addition, A.A. is disabled and has a history of aggressive behavior toward other students generally. It was not apparent from the circumstances that A.A.'s conduct was directly related to the Student's disabilities. Nevertheless, the Principal and the Special Education Director assigned security to monitor A.A., assigned a paraeducator to accompany the Student throughout the school day, and started providing weekly counseling to the Student. Providing an escort for the Student happened within a day or two of the complainant's initial meeting with the Principal. The other steps were in place in eight calendar days after meeting with the Principal, after the Student returned to School. Under these circumstances, the evidence is not sufficient for OCR to conclude that the District violated Section 504/Title II when it did not treat the January-February 2014 reports as a complaint of disability-based discrimination. Nevertheless, as a matter of technical assistance, OCR notes several concerns the District should be aware of if it is responding to reports of discriminatory harassment in the future.

While the Principal's informal investigation was initiated promptly after he met with the Complainant and the Student, he limited his investigation to the alleged apple-throwing incident and the Student allegedly being pushed by A.A., and did not consider whether there was other harassing conduct by A.A. directed toward the Student. In investigating reports of discrimination, if a parent or student describes a larger pattern of harassment, administrators should speak with other staff who work with the targeted student and with other students to find out whether other incidents occurred. In investigating a report of possible discriminatory harassment, it is important to look broadly at both the reported incident(s) and whether or not there have been other incidents that cumulatively could create a hostile environment on the basis of disability (or other protected basis). In addition, given that the targeted student was asked to complete an incident report, OCR would expect an administrator to follow up in person with the Student. If a targeted student has intellectual or communication challenges, the best practice would be to have a qualified staff member who works with the student follow up to find out what s/he is trying to express rather than putting the report aside because it is vague.

Therefore, the District's responsive actions were appropriate and prompt.

OCR finds that the District took sufficient action to comply with its responsibility to determine how the harassment affected the provision of a FAPE to the Student. Pending the Student's next IEP meeting, the Special Education Director responded to the Complainant's concerns by immediately assigned a one-to-one aide for the Student and providing counseling services. At the IEP meeting two weeks later, the team continued an escort for the Student during lunch and passing periods, services by a school psychologist, and the one-on-one aide

With respect to the District's response to the Complainant's UCP complaint, the District failed to follow its own procedures for investigating and responding to a complaint alleging discrimination. Specifically, it did not conduct or complete an investigation after the Complainant filed the complaint, and did not provide the Complainant with a written explanation of the reasons for its action. The Personnel Director's¹² explanation to OCR of the reason for this was not credible. Among other discrepancies, the District stated that the complainant did not want to pursue her complaint, but the Complainant denied this. Even if OCR found the District's explanation credible, the District should have provided the Complainant with written notice that it was not pursuing the complaint any further and reasons for its actions. The preponderance of the evidence established that the District failed to respond promptly and appropriately to the complaint of disability-based discrimination submitted by the Complainant. OCR therefore concluded that there was sufficient evidence to support a finding of noncompliance in the District's response to the Complainant's formal complaint.

Conclusion

For the reasons discussed above, OCR identified issues of noncompliance with Section 504, Title II, and their implementing regulations. On March 11, 2015, the District agreed to implement the attached Resolution Agreement. Pursuant to the agreement, the District will: (a) hold an IEP meeting to discuss the impacts of the early spring 2014 incidents on the Student's ability to access a free appropriate public education, and also discuss whether the Student would benefit from social skills or other advocacy skill training as part of her IEP; (b) at each annual IEP for the Student, the IEP team will specifically discuss whether the Student has experienced negative interactions with peers, and whether changes to her IEP are needed to ensure that she continues to receive a free appropriate public education; (c) the District will develop guidance for its school and district staff on disability harassment and how to appropriately respond, and upon OCR's review and approval, will distribute it to those staff; (d) the District will draft a notice for parents explaining the options for making a complaint of disability discrimination or harassment, and upon OCR's review and approval, will distribute the notice to parents; and (e) the District will develop investigation training for administrators, and upon OCR's review and approval, will train its administrators in summer 2015 according to the approved training. OCR

¹² The District has advised OCR that the former Personnel Director is no longer employed by the District.

will monitor the implementation of the agreement. The Complainant is being notified of the resolution of this case by concurrent letter.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provisions or to address any issues other than those addressed in the letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and they 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.

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 the law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. In particular, we appreciate the assistance of the District's legal counsel, Stacy Inman. If you have any questions regarding this letter, please contact OCR attorney Laura Welp at 415-486-5577 or laura.welp@ed.gov.

Sincerely,

/s/

Anamaria Loya
Team Leader

cc: Stacy Inman, Attorney
School Legal Services
(By email only)