



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

May 2, 2016

Cary Matsuoka
Superintendent
Milpitas Unified School District
1331 East Calaveras Boulevard
Milpitas, California 95035

(In reply, please refer to case no. 09-16-1195.)

Dear Superintendent Matsuoka:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Milpitas Unified School District. The complainant¹ alleged that the District discriminated against her son (the Student) on the basis of disability. OCR began an investigation of the following issues:

1. Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to fully implement his individualized education program (IEP);
2. Whether the District retaliated against the complainant and her husband for her complaints about the implementation of the Student's IEP by informing her that she could not communicate directly with her son's teacher;
3. Whether the Student was subjected to harassment by other students based on disability and the District failed to respond appropriately and effectively;
4. Whether the Student was subjected to harassment by a District employee based on his disability.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public

¹ OCR previously informed the District of the identity of the complainant and Student. We are withholding their names in this letter to protect their privacy.

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education system, and is subject to the requirements of Section 504, Title II, and the regulations.

OCR gathered preliminary evidence through an interview with the complainant and a review of documents and records submitted by the District and the complainant. Prior to the conclusion of OCR's investigation, and without admitting to any violation of law, the District expressed an interest in voluntarily resolving this case. On April 28, 2016, the District submitted a Resolution Agreement to OCR that commits the District to specific actions to address the concerns raised by the complainant. OCR determined that this agreement, when implemented, will resolve the issues raised in this complaint. OCR therefore did not complete its investigation, and reached no findings as to the District's compliance with Section 504 or Title II.

This letter summarizes the applicable legal standards, the information gathered during the investigation and how the complaint was resolved.

Issue 1: *Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to fully implement his IEP*

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. 34 C.F.R. §104.33(b)(2). 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.

In the context of providing a FAPE under Section 504, the regulations, at 34 C.F.R. §104.3(j), define an individual with a disability as any person who has a physical or mental impairment which substantially limits a major life activity. Under 34 C.F.R. §104.3(j)(2)(ii), major life activities include learning. The definition of disability under the Title II regulations, at 28 C.F.R. §35.104, is substantially the same. It is important to note that a student may have a physical or mental disorder that qualifies the student as disabled individual requiring services under Section 504 and Title II even though the disorder does not meet the eligibility criteria for services under the IDEA. The IDEA applies only to students who have specifically identified conditions. Section 504 and Title II apply to any student who has a physical or mental impairment that substantially limits a major life activity.

OCR's partial investigation showed the following:

- The Student is enrolled in second grade at a District elementary school. The District has identified him as a student with a speech and language disability.
- The Student's most recent IEP, dated October XX, 2015, and amended on December XX, 2015, provides for speech therapy services, monthly consultations between the speech therapist and the Student's regular education teacher, and the Student and/or the school staff concerning the Student's handwriting, and "differentiated instruction" in the general education classroom. The IEP does not define how instruction is to be differentiated.
- The complainant alleged that the required consultation between the speech therapist and the teacher has not occurred, and that the teacher has not provided the required differentiation to address his needs in the classroom.
- The District informed OCR that the speech/language therapist consults monthly with the Student's classroom teacher and that the teacher differentiates instruction for the Student by providing extra individual and small group instruction to him.

Pursuant to the regulations implementing Section 504, at 34 CFR §§ 104.33 and 104.35, the District is responsible for evaluating students with disabilities and for identifying and providing them with the regular or special education services that meet their needs as adequately as the needs of students without disabilities are met. This requirement may be fulfilled by developing and implementing an IEP consistent with the requirements of the IDEA.

In this case, it is undisputed that an IEP was developed for the Student, and that he received the speech therapy services set forth in the IEP. Because the District expressed an interest in resolving the complaint, OCR did not complete its investigation to determine whether the classroom teacher consulted on a regular basis with the speech therapist, whether the manner in which instruction should be differentiated was described in the IEP with sufficient detail to enable the teacher to provide the modifications to classroom instruction, and whether, based on the requirement in the existing IEP, she provided differentiated instruction to the Student.

In the Resolution Agreement (RA), the District agreed to conduct a complete evaluation of the Student and to develop an IEP that describes any specific strategies, modifications and accommodations to be provided in the Student's regular education classroom. OCR concluded that this commitment, when fully implemented, will resolve the issues raised with respect to this allegation.

Issue 2: *Whether the District retaliated against the complainant and her husband for her complaints about the implementation of the Student's IEP by informing her that she could not communicate directly with her son's teacher.*

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

OCR's partial investigation showed the following:

- During the 2014-15 and 2015-16 school year, the complainant and her husband sent a number of emails to the Student's teachers, the principal of the school where he was enrolled, and various District administrators, alleging that the Student was being treated unfairly, and that his rights as a student with a disability were being violated. The District considered some of these emails to be abusive and disrespectful. OCR reviewed several of the emails and noted that some of the comments made by the parents could be considered inflammatory.
- By letter dated December XX, 2015, the District deputy superintendent informed the complainant that, because of the tone of her communications with school and District staff, her email access would be blocked to all District staff except for the school principal and vice principal; the superintendent, deputy superintendent, and assistant superintendent; and members of the Board of Education. The letter stated that the District would forward communications to other staff on request.
- The complainant informed OCR that, because of the limitations on her communications with her son's teacher, she was not able to determine the specific instructional services being provided to her or the extent to which his IEP was being implemented.

OCR investigates allegations of retaliation by first determining whether a district took adverse action against an individual after s/he engaged in activities that are protected under Section 504 or Title II, under circumstances that suggest a connection between the protected activity

and the adverse action. An action is considered materially adverse to the complainant if it could dissuade a reasonable person from making or supporting a charge of discrimination. Whether an action is materially adverse is judged from the perspective of a reasonable person in the complainant's position.

OCR reviewed the December letter to the complainant and determined that, on its face, it was not adverse to the complainant, since it provides for the complainant's communications to be forwarded to the recipients she designates and also encourages her to schedule an in person meeting with the school administrators and teacher. Because the District proposed entering into a resolution agreement, OCR did not complete its investigation by interviewing the principal and the teacher to determine whether the implementation of the policy described in the letter interferes with the complainant's ability to communicate with the teacher sufficiently to constitute a materially adverse action.

In the RA, the District agreed to engage in an Alternative Dispute Resolution process with the complainant and her husband, facilitated by an employee of the Consortium for Special Education Local Planning Area (the SELPA) who is not employed by the District. This process will enable the District and the parents to reach a written agreement concerning all aspects of communication among the District, school, teacher and parents. OCR concluded that this agreement, when implemented, will resolve the issues raised with respect to this allegation.

Issue 3: *Whether the Student was subjected to harassment by other students based on disability, and the District failed to respond appropriately and effectively.*

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 school 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 school 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.

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 partial investigation showed the following:

- The complainant informed OCR that, in March 2015, the Student was subjected to harassment because of his disability by another student. She stated that, on one occasion during the 2015-16 school year, the Student was sent to the office for hitting a student when that student refused to stop cheating during a classroom game, and claimed he couldn't understand the Student.
- The District informed OCR that a counselor assigned to the Student's school will work with his class on bullying.

The regulations governing OCR's investigations (see 34 CFR § 100.7(b), incorporated by reference into the Section 504 regulations at 34 CFR § 104.61) provide that OCR will investigate complaints of discrimination only if they are filed within 180 days of an alleged act of discrimination. Because this complaint was filed more than 180 days after the March 2015 incident on January 26, 2016, and does not appear to be part of a pattern of harassment against the Student, OCR considers it untimely.

OCR reviewed the complainant's account of the incident that occurred during the current school year and determined that it did not state a claim of discrimination on the basis of disability. OCR notes, however, that, by assigning a counselor to work with the second grade class on bullying, the District has proposed steps that should limit the creation of a hostile environment on the basis of disability.

Issue 4: *Whether the Student was subjected to harassment by a District employee based on his disability.*

As noted above, harassment of a student on the basis of disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in harassing conduct (physical, verbal, graphic, or written) on the basis of race, color or national origin 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.

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 school district is responsible for the discriminatory conduct whether or not it has notice.

OCR's partial investigation showed the following:

- The complainant alleged that the Student's teacher subjected him to harassment on the basis of disability by making remarks to him that led him to think that she did not think he was "smart enough." She was unable to provide specific examples of these remarks.
- The complainant alleged that, on two occasions, the teacher did not let him access completed homework that he had left in his backpack, which, because of a rule imposed by the teacher, was not in his classroom. She alleged that the teacher "humiliated" the Student by claiming that he had not completed his homework when he had completed it. She also alleged that the teacher had deprived the Student of afternoon recess during one week because he was unable to complete his assignments. She stated that his inability to complete the assignments resulted from the teacher's refusal to explain to the parents what needed to be completed.
- The District stated that the Student was kept in the classroom during the week in question for a small portion of several recess periods in order to receive individual assistance from the teacher.
- On October XX, 2015, after an IEP meeting, a District administrator and the school principal met with the complainant and her husband to discuss their concerns about the Student's education and actions of the teacher, including her refusal to allow him access to his backpack. According to the complainant, the parties agreed that the Student would be allowed to access his backpack as necessary, and that the teacher would include clear explanations for work that needed to be completed, rather than writing "fix this." The complainant stated that neither of these agreements were implemented.

Because the District agreed to enter into a Resolution Agreement with OCR, OCR did not complete its investigation of this allegation by interviewing the teacher, and did not reach a conclusion as to whether the Student was subjected to a hostile environment in his classroom, either because of his disability or in retaliation for his parents' complaints of discrimination. OCR concluded that the development of an updated and more specific IEP, and the creation of a mediated agreement regarding communications between the parents and the school, and about other concerns raised by the parents, will resolve this allegation.

This concludes OCR's investigation of the 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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently.

When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with Section 504, Title II, and their implementing regulations that were at issue in this case.

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.

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 individual 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 greatly appreciates the cooperation received from the District during the resolution of this case. If you have any questions, please contact Katherine Riggs, Attorney, at (415) 486-5544.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure