



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

September 9, 2014

Dr. Arturo Delgado
Superintendent
Los Angeles County
Office of Education
9300 Imperial Highway
Downey, CA 90242

(In reply, please refer to case no. 09-13-1033.)

Dear Superintendent Delgado:

This letter is to advise you of our findings in the above-referenced case which was opened on October 5, 2012, in response to a complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), against the Los Angeles County Office of Education (LACOE). The Complainant¹ alleged that LACOE discriminated against her daughter (Student) on the basis of sex and disability. The issues OCR investigated were:

1. Whether LACOE denied the Student a free appropriate public education (FAPE) by failing to have a staff member accompany her to the restroom.
2. Whether LACOE failed to respond appropriately and effectively when the Complainant notified the school of an alleged sexual assault of the Student in the restroom.

OCR investigated the complaint under the authority of Title IX of the Education Amendments of 1972 (Title IX), Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulations. Title IX prohibits discrimination on the basis of sex in education programs and activities operated by recipients of Federal financial assistance. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. LACOE receives Department funds, is a public education system, and is subject to the requirements of Title IX, Section 504, Title II and their regulations.

OCR gathered evidence through interviews with the Complainant and LACOE employees, and by reviewing documents submitted by the parties. After reviewing all of the evidence, OCR

¹ OCR notified the District of the identity the Complainant and the Student when the investigation began. OCR is withholding their names from this letter to protect their privacy.

concluded that LACOE was in compliance with Section 504 and Title II with respect to the alleged denial of FAPE. OCR also concluded that the preponderance of the evidence established that LACOE did not comply with Title IX and the implementing regulation with respect to its response to notice of a sexual assault on the Student, the implementation of a prompt and equitable procedure for the resolution of complaints alleging sex discrimination, and the appointment of a Title IX Coordinator.

On August 27, 2014, without admitting to any violation of law, LACOE submitted a signed agreement (attached to this letter) which, when fully implemented, will resolve the findings in this case. The applicable legal standards, the facts gathered during the investigation, and the reasons for OCR's determinations are summarized below.

Allegation 1: Whether LACOE denied the Student a FAPE by failing to implement her IEP.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a 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 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.

Our investigation showed the following:

- During the 2011-12 school year, pursuant to her IEP, the Student was placed in an XXXXX XXXXXXXXXXXX XXXXXXXX XXX XXXXX XXXXX program operated by LACOE. The program was designed X---paragraph redacted---X.
- On XXXXX X, 2012, an IEP meeting for the Student was held which was attended by the Complainant, Principal, Teacher, Regional Center Service Coordinator², and the School Nurse. According to Complainant, the IEP team verbally agreed that an aide would accompany the Student to the bathroom to assist her. The Complainant told OCR that she signed her consent to the IEP because she did not realize that the provision concerning the aide had not been included in the written document.
- The Complainant alleged to OCR that, on XXXXX XX, 2012, the Student went to the bathroom without an aide and was sexually assaulted by a male classmate. The Complainant asserts that the Student would not have been sexually assaulted if an aide had

² The Regional Center is a California state agency that provides case management and other services to persons with developmental disabilities.

accompanied her as agreed to by the IEP team. (The issue of the sexual assault is discussed more fully under allegation 2.)

- The Principal told OCR that he does not recall having a discussion about a bathroom aide for the Student during the XXXXX X, 2012 IEP meeting. The Principal also told OCR that the Student is capable of using the bathroom on her own and there would have been no reason for the team to discuss a bathroom aide. The Principal also stated that students in XXX XXXXX XXXXXXXXXXXX XXXXXXXX are encouraged to be independent and do things on their own; therefore, if a student can go to the bathroom or leave the classroom on their own, the staff gives that student the independence to do so.
- The Regional Center Service Coordinator initially told OCR that she could not recall if the IEP team had discussed a need for a bathroom aide during the XXXXX X, 2012 IEP meeting. In a subsequent interview, the Coordinator told OCR that she did remember the Complainant requesting a bathroom aide for the Student but she could not remember the date of the IEP meeting at which the request was made.
- OCR reviewed the IEP prepared at the XXXXX X, 2012 meeting, as well as the Student's prior IEP from 2011 and found that neither made any reference to toileting issues or required a bathroom aide to assist the Student.
- On XXXXX XX, 2012, another IEP meeting was held for the Student after the Complainant notified the program about the alleged sexual assault. The Complainant, Principal, Teacher, Regional Center Coordinator, and School Nurse attended the meeting. According to the Principal, the Complainant stated that, on XXXXX XX, a male student (Student 2) had sexually assaulted the Student in the bathroom. The Student had not returned to school since that date. The Complainant requested that an aide monitor the Student when she returned to school. The IEP team agreed that the Student should have an aide when she returned, but the Student did not return to the program. The Complainant told OCR that the Student refused to go back to the school after the assault.
- LACOE provided OCR with an e-mail that LACOE's Regional Director sent to the Principal on XXXXX XX, 2012. The e-mail states in part: "Also please insure that the [classroom aides] are able to carry out their responsibility of following students who may have exited the class for any reason to insure they are supervised. It is my understanding the [aide] that is full time in this class didn't follow the female student to the restroom as needed to be done in this situation. It is my understanding that she understood she was to be accompanying the female student to the restroom as parent had previously requested this." The LACOE Regional Director told OCR that what he wrote in the e-mail was based on information he received from staff when he went to the school on XXXXX XXXX for the purpose of beginning an investigation into the Complainant's allegation that the Student had been sexually assaulted.

- On XXX X, 2012, a new IEP was written placing the Student X---paragraph redacted---X.

As previously stated, implementation of an IEP developed in accordance with the IDEA is one means of meeting the Section 504 requirement for the provision of FAPE. The failure to implement a disabled student's IEP, the program of services that has been determined to be appropriate for the student, can constitute a denial of FAPE under Section 504/Title II and the regulations at 34 C.F.R. §104.33. The Complainant believed that the Student needed an aide to accompany her to the bathroom and that this had been agreed to at a XXXXX X, 2012 IEP meeting. Administrators who attended the XXXXX X, 2012 meeting did not recall such a discussion. The Regional Director's e-mail to the Principal written on XXXXX XXXX indicates that the Regional Director believed it was a regular practice at the school for an aide to accompany students who left the classroom, and that this should have occurred in the Student's situation. However, the Student's then-current and prior IEP did not include a provision requiring a bathroom aide to assist her or any notation indicating the IEP team agreed to such a service. Therefore, OCR concluded that the preponderance of the evidence did not establish that LACOE failed to implement the Student's IEP with respect to this issue. OCR found that LACOE did not violate Section 504/Title II or the regulations with respect to allegation 1.

Allegation 2: Whether LACOE failed to respond appropriately and effectively when the Complainant notified the school of the alleged sexual assault.

Title IX and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment is unwelcome conduct of a sexual nature and is a form of sex discrimination prohibited by Title IX. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, including acts of sexual violence.³ Sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.

³ OCR's standards for analyzing sexual harassment issues under Title IX in the elementary and secondary school context are more fully discussed in OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (January 19, 2001). The applicable legal standards described herein are more fully discussed in OCR's 2011 Dear Colleague letter on Sexual Violence, which is available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (April 4, 2011); for further clarification on this topic, see "Questions and Answers on Title IX and Sexual Violence," at <http://www2.ed.gov/about/offices/list/ocr/docs/ga-201404-title-ix.pdf> (April 29, 2014). See also OCR's 2010 Dear Colleague letter on Harassment and Bullying, which is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (October 26, 2010), and OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html> (January 19, 2001).

Sexual harassment of a student can result in the denial or limitation, on the basis of sex, of the student's ability to participate in or receive education benefits, services, or opportunities. When a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.

Under Title IX and the regulations, once a school district has notice of possible sexual harassment between students, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of the harassing student, but rather for its own discrimination in failing to respond adequately. A school district may violate Title IX 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 school 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 district 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 conduct a prompt, thorough, reliable and impartial inquiry. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed 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. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may be necessary to address sexual harassment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In addition, the Title IX regulations establish procedural requirements that are important for the prevention and correction of sex discrimination, including sexual harassment. These requirements include issuance of a policy against sex discrimination (34 C.F.R. § 106.9) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination (34 C.F.R. § 106.8[b]). The regulations also require that recipients designate at least one employee to coordinate compliance with the

regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 106.8[a]).

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging harassment 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 major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects.

Our investigation showed the following⁴:

- The Complainant told OCR that, on XXXXX XX, 2012, the Student told the Complainant that she was upset by an incident that took place earlier in the day when she went to the bathroom at school. The Complainant stated that the Student described Student 2 X---paragraph redacted---X.
- The Complainant told OCR that she spoke to the Assistant Principal the next morning, XXXXX XX, 2012, and reported the alleged sexual assault. She also reported the incident to the Los Angeles County Sheriff's Office. A female detective interviewed the Student on two occasions and referred the case to District Attorney's Office.⁵
- Student 2 had XXXXX XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXX. His records indicated that that he required supervision because he sometimes wandered away from class and also engaged in inappropriate behaviors, including some impulsive behaviors that created a risk of possible injury to himself or others. X---paragraph redacted---X.
- The Principal was not at the school the morning of XXXXX XX, 2012, when the Complainant reported the alleged sexual assault. The LACOE Regional Director went to the school to learn what had occurred. The Regional Director told OCR that he interviewed the students' Teacher but could not remember whether he interviewed the two classroom aides. Once the Principal returned to the school on the afternoon of XXXXX XX, the Regional Director turned the investigation over to the Principal and was no longer involved in the investigative process.

⁴ OCR did not make an independent determination as to whether the alleged assault occurred. OCR's determination was limited to whether LACOE's response to notice of the alleged assault was sufficient to comply with its responsibilities under Title IX.

⁵ X---paragraph redacted---X.

- The Principal reviewed the Assistant Principal’s notes, and obtained handwritten statements from the Teacher and the two classroom aides and had them prepare timeline charts describing what occurred on the morning of XXXXX XX. He interviewed the Teacher but did not interview either of the aides. The Principal told OCR that he believed the Assistant Principal interviewed the aides. However, the Assistant’s Principal’s notes did not make any reference to such interviews. While the Assistant Principal spoke briefly to the School Psychologist, the Principal did not conduct an interview of the School Psychologist. The Principal did not interview the Student or Student 2 because their parents did not consent to interviews.
- The Principal completed an Investigative Report dated XXXX XX, 2012. The Principal told OCR that it took him three months to complete the report because he was waiting for the results from the Sheriff’s Office investigation and to see what action the District Attorney’s Office would take. He did not inform the Complainant of his findings and said this was because the Student XXX XXXXXXXXXXXX XXXX XXXXX by the time he finalized his report.
- The Principal’s report had 11 attachments including the handwritten statements from the teacher and the two classroom aides, the timeline charts, the Assistant Principal’s notes, and an email from the Regional Director. The report itself consisted of a summary of each attachment and a conclusion.
- The information gathered by the Principal established that, sometime around XXXX XX XXXXX XX, both the Student and Student 2 had left the classroom and gone to the hallway bathroom, and that the Teacher went to look for Student 2. As described further below, however, the staff statements and timelines were not consistent as to the remaining details and timing what occurred.
- The Principal concluded that no sexual assault occurred. The Principal’s report states that X--paragraph redacted---X
- The Principal told OCR that he considered the written statements provided by the classroom staff and the timelines they created in determining what the Student and Student 2 did on XXXXX XXXX and to make his findings. OCR reviewed all the attachments to the report and identified a number of ways in which the statements were inconsistent with other statements and/or with the Principal’s conclusion, including the following:
 - X---paragraph redacted---X.
 - X---paragraph redacted---X.
 - X---paragraph redacted---X.
 - X---paragraph redacted---X.

- The Principal told OCR that he concluded that it was highly improbable that the Student and Student A could have engaged in the alleged sexual act at all because their developmental levels would preclude them from understanding what they were doing. The Principal also told OCR that both students have difficulty with higher reasoning, are unable to follow complex directions, and are unable to clearly communicate their feelings.
- LACOE’s Board Policy (BP) 5145.7 (Sexual Harassment) prohibits sexual harassment against students. The corresponding Administrative Regulation (AR) provides a procedure for investigating student sexual harassment complaints. BP 5145.3 (Nondiscrimination/Harassment) contains a broad prohibition of discrimination against students based on race, color, national origin, sex, disability, and other categories protected under state law. The related AR 5145.3 contains a procedure for investigating complaints of discrimination that is different than the procedure described in AR 5145.7. Since both AR 5145.7 and AR 5145.3 describe procedures that are potentially applicable to resolving sexual harassment and assault complaints, it is unclear which procedure should be followed in what circumstances. Further, AR 5145.7 and AR 5143.5 contain different and/or contradictory provisions about key areas of the complaint investigation and resolution process. For example, the two documents contain different definitions of harassment, as well as different descriptions of the following procedural steps: the process for reporting sexual harassment; information on how LACOE will treat requests not to release a complainant’s name; the relationship between the procedure and any parallel criminal procedure, and the factors LACOE will use in reaching a determination. In addition, AR 5145.3 contains a 180 day filing deadline for complaints while AR 5145.7 does not. AR 5145.3 lists remedies and possible consequences for the respondent; AR 5145.7 does not. However, AR 5145.7 provides for interim remedies for a complainant while AR 5143.5 does not.
- Summaries of the policies and procedures are contained in the LACOE annual notification to parents. Neither AR 5145.3 and AR 5145.7 or any other documents provided by LACOE identify an individual designated to coordinate LACOE’s responsibilities for complying with Title IX or provide notice to students, parents and guardians of the identity of a Title IX Coordinator.
- LACOE provides two hour sexual harassment training to its staff every two years. According to the Principal, the sexual harassment training covered some investigative techniques but it did not cover investigating cases involving students with cognitive impairments.

On XXXXX XX, 2012, the Complainant notified LACOE that the Student reported being sexually assaulted by Student 2 in the hallway bathroom the previous day. The Principal conducted an investigation. The investigative report was completed on XXXX XX, 2012; found that it was “highly improbable” that the alleged sexual activity between Student and Student 2 took place. After a careful review of the facts gathered about the LACOE investigation, OCR concluded that LACOE failed to respond promptly and adequately to notice of alleged sexual assault.

First, OCR determined that the response was not prompt. Although the investigative steps took only several days, the report and conclusions were not issued for three months. This exceeded the timeline of 30 days contained in both AR 5145.3 and AR 5145.7. The primary reason for the delay appears to be the Principal's decision to wait until the Sheriff's Office investigation was completed and a decision was made by the District Attorney concerning whether to prosecute. This is a misunderstanding of LACOE's responsibilities under Title IX. A school district has an independent responsibility under Title IX to investigate and address sexual violence, apart from any separate criminal investigation by local police. While a district may need to delay temporarily the fact-finding portion of a Title IX investigation while police are gathering evidence, it must promptly resume and complete its fact-finding for the Title IX investigation once it learns that the police department has completed its evidence gathering stage of the criminal investigation. The school should not delay its investigation until the ultimate outcome of the criminal investigation or the filing of any charges. The school should also continue to update the parties on the status of the investigation, which was not done in this case.

Further, LACOE did not carry out an investigative process that was thorough or sufficient to reliably determine whether or not the assault occurred. The final decision was based on information that was incomplete and that included contradictory facts on significant issues. The Principal did not interview two key staff members who were with the students around the time the alleged incident occurred; although LACOE told OCR that the Assistant Principal interviewed the two aides, there were no notes to document the interviews. There was no record that the Principal consulted the school psychologist or other staff member with appropriate expertise concerning the effect of the students' developmental levels on their ability to engage in sexual activity. OCR also found that the investigation was not properly documented. In addition, LACOE did not inform the Complainant of the outcome of the investigation either orally or in writing. For these reasons, OCR concluded that LACOE did not comply with its responsibility under Title IX and 34 C.F.R §§ 106.8 and 106.31 to respond promptly and effectively to notice of sexual assault of a student.

Additionally, OCR concluded that LACOE's procedures for the resolution of complaints do not comply with Title IX requirements. Because there are two separate procedures which potentially apply to complaints of sexual harassment, and which, as described above, contain different provisions governing key elements of the complaint process, LACOE does not provide notice to students, parents and employees of the procedures that is easily understood. Further, LACOE does not provide an adequate definition of sexual harassment, adequate information about interim and final remedies, or adequate notice of the outcome of the processes because the explanation of these and related issues are confusing. Also, LACOE has not designated or adequately trained an individual responsible for coordinating its efforts to comply with Title IX and has not provided notice to students, parents, and guardians of the identify of a Title IX Coordinator. OCR therefore determined that LACOE did not comply with the requirements of the Title IX regulations at 34 C.F.R. §§ 106.8 and 106.31.

In order to resolve the areas of noncompliance, LACOE signed the attached Resolution Agreement which will address the areas of noncompliance once the Agreement is fully

implemented. As part of the Agreement, LACOE agreed to: 1) make specific revisions to its sexual harassment complaint procedures and related procedures to comply with Title IX requirements; 2) provide notice of the revised procedures and its Title IX Coordinator to parents/guardians, students and employees; 3) hire a consultant with expertise in investigating cases of sexual assault and sexual harassment involving persons with cognitive disabilities to develop and present training for LACOE's Division of Special Education (DSE); 4) have the consultant work with LACOE to develop a training module that will be used on an annual basis to train LACOE's XXXXX XXXXXXXXXXXX program site staff on how to respond to reports of sexual assault or harassment; and 6) provide information specifically designed XXX XXXXX students with cognitive disabilities in the XXX XXXXX XXXXXXXXXXXX programs to raise understanding and awareness of sexual harassment issues.

OCR will monitor the implementation of the Agreement, and is informing the Complainant of its decision by concurrent letter. This concludes OCR's investigation of the complaint and should not be interpreted to address LACOE's compliance with any other regulatory provision or to address any issues other than those address in this letter.

This letter sets forth OCR's determination in an individual 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 LACOE 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.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR thanks XXXXXXXX XXXXX for her continued assistance during the resolution of this case. If you have any questions about this letter, please contact Minako Sakurai at (415) 486-5552 or me at (415) 486-5566.

Sincerely,

/s/

James Wood
Team Leader

Enclosure