



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

May 12, 2016

Ms. Pam Able
Superintendent
Modesto City Elementary School District
426 Locust Street
Modesto, California 95351

(In reply, please refer to # 09-15-1212.)

Dear Superintendent Able:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Modesto City Elementary School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated the following issues:

- (1) Whether the Student has been subjected to harassment by other students based on disability and whether the District failed to respond appropriately and effectively to notice of the harassment.
- (2) Whether the District failed to respond to the Complainant's request for a Section 504 plan for the Student.

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.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR concluded that the District violated Section 504

¹ OCR previously provided the District with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

and Title II with regard to the issues OCR investigated. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

Issue 1: Whether the Student has been subjected to harassment by other students based on disability and whether the District failed to respond appropriately and effectively to notice of the harassment.

Legal Standards

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 conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. 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 Section 504 and Title II regulations also establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. §104.8 and 28 C.F.R. §35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. §104.7(b) and 28 C.F.R. §35.107(b)). The regulations also require that recipients/public

entities designate at least one employee to coordinate compliance with the regulations (34 C.F.R. §104.7(a) and 28 C.F.R. §35.107(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, parents of elementary and secondary school 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; 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.

Factual Findings

A. Background

- The Student was in the XXXXXX grade in the 2014-2015 school year and was attending XXXXXXXX XXXXXXXX XXXXXXXXXXXX School (School). Information from the Complainant revealed that when the Student was in the XXXXXX grade she was assessed at XXXXXX XXXXXXXX and diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) with anxiety.
- At the time of the complaint, the Student did not have an Individualized Education Program (IEP) or a Section 504 plan. The Complainant requested special education services for the Student on November XX, 2014, after incident(s) where she alleged the Student was being bullied by a female student. The Complainant sent a letter dated November XX, 2014 to the District requesting a Section 504 plan.

B. District Policies and Procedures

- Board Policy (BP) and Administrative Regulation (AR) 5145.3 prohibit discrimination, including harassment, of students on various bases, including disability. BP 5145.3 states, in relevant part: "The District will act to investigate all complaints, either formal or informal, verbal or written, of harassment, bullying, intimidation, and/or discrimination and take appropriate action against any pupil, teacher, administrator or other school personnel who is found to have violated this policy. . . ."
- AR 5145.3, states in relevant part: "The result of the District's investigation of any complaint filed under these procedures will be reported in writing by the District to the complainant. . . . Complainants who disagree with the findings or action taken as a result of their complaint may appeal in writing to the Superintendent/designee."

- BP and AR 1312.3 comprise the District's Uniform Complaint Procedures (UCP). The UCP states that the District shall investigate and resolve any complaints, alleging unlawful discrimination on various bases, including mental or physical disability, in accordance with the UCP.
- Under the UCP, all complaints must be investigated and resolved within 60 calendar days of the District's receipt of the complaint unless the complainant agrees in writing to an extension. A complaint must be filed no later than six months from the date the alleged discrimination occurs, or six months from the date of the complainant first obtains knowledge of the fact of the alleged discrimination.
- The initial step in investigating the complaint involves the Compliance Officer providing the complainant and/or his/her representative an opportunity to present the complaint and any evidence or information leading to evidence to support the allegations. The UCP states that the Compliance Officer shall also collect all documents and interview all witnesses with information pertinent to the complaint.
- Within 60 calendar days of receiving the complaint, the Compliance Officer must send the complainant a written report of the District's investigation and decision. The decision will include the findings of fact based on the evidence gathered; the conclusions of law; the disposition of the complaint, including a determination for each allegation as to whether retaliation or unlawful discrimination has occurred; the rationale for such disposition; corrective actions, if any are warranted; and notice of the complainant's right to appeal to the California Department of Education.

C. Alleged Harassment

- According to the Complainant, the Student was subjected to bullying by a female student in the XXXXXX grade class because of the Student's disability.
- The Complainant stated that she informed the XXXXXX grade teacher about the Student being bullied by a female student in class. The female student would bully the Student, for example, saying to her: "You're fat. You're dumb." "No one likes you." "No one wants to be your friend." "Don't talk to me."
- The Complainant sent a letter to the District dated November XX, 2014 which, in addition to requesting a 504 plan, identified her concern about the Student being bullied by a female student in class.
- The principal at the School stated he could not recall the family raising any concern regarding bullying until the November XX, 2014 letter from the parents.

- The District's data response included several internal emails dated November XX, 2015 regarding the Complainant's telephone call to them about the persistent bullying of the Student at school. The emails also indicated that the Complainant had spoken to the teacher and the principal about the bullying.
- A SST meeting for the Student was held on November XX, 2014. The participants in the meeting were the parents of the Student, principal, XXXXXX grade teacher, resource specialist, school psychologist, and speech therapist.
- According to the principal, he investigated the parents' complaint of harassment by a female student against the Student. He explained that his investigation revealed that the two students were using their friendship against one another when they became angry, and that this was not harassment. According to the District, the principal informed the Student's parents verbally of the results of his investigation at the SST meeting. The District has acknowledged to OCR that there are no written records of the investigation and that no written response to the allegations of harassment was ever provided to the parents.
- The SST recommended the help of the Student Assistant Specialist to work with both students on appropriate boundaries and social skills. The team also encouraged the Student that if she ever felt bullied to report to the principal, her teacher, and/or the Student Assistant Specialist on campus.
- The District data showed that from February XX to March X, 2015, the Student's father went to see the school principal on multiple occasions regarding alleged continued bullying of the Student by the female student. According to the District, at each of these meetings, the principal informed the father that he found no bullying had occurred.
- In March 2015, the Student's father also talked to the XXXXXX grade teacher about the continued bullying of the Student by the female student. The parents felt that the XXXXXX grade teacher was not addressing their concerns. As a result, the parents requested that the Student be able to transfer to another school in the District.
- On March X, 2015, the Complainant filled out an Intradistrict transfer request to XXXX XXXXXXXXXXXX School, which was granted and signed by the Student's school of residence. In April 2015, the Student enrolled at XXXX XXXXXXXXXXXX School.

Analysis

The District has acknowledged that on multiple occasions after the Complainant's November XX, 2014 letter wherein the Complainant notified the District that the Student was being harassed by another student, the Student's father complained to the principal that the Student was continuing to be bullied by the same student. Although it appears that the District did

promptly conduct some form of investigation, and held a meeting with the parents on November XX, 2014 and subsequent meetings with the Student's father where it discussed the issue, OCR found that the District's response was not adequate or effective.

The District has adopted grievance procedures with its Nondiscrimination policy (BP and AR 5145.3) and its UCP process for resolving such complaints (BP and AR 1312.3). However, the District failed to follow those grievance procedures. The Nondiscrimination policy and UCP require that the complainant be provided with a written report of the District's investigation and decision, whether the complaint is investigated at the school site or otherwise. Under the District's policies, the written decision should have included: findings of fact; conclusions of law; disposition of the complaint and rationale; corrective action, if warranted; and notice of the complainant's right to appeal. The District concedes that no written decision or notice of appeal rights was provided to the Complainant or the Student's father despite their repeated written and verbal allegations. The parents' concerns about ongoing harassment and bullying on the basis of disability and the District's lack of adequate response ultimately led to the parents transferring the Student to another school. As such, OCR found that the District's failure to follow its own grievance procedures and provide a notice of outcome, in the face of multiple complaints over several months, is sufficient evidence to establish non-compliance with Section 504 and Title II.

In reviewing the District's grievance procedures, OCR also found that several revisions were required for compliance. Among other things, although BP 5145.3 says all complaints (informal, formal, oral or written) will be investigated, AR 5145.3, the nondiscrimination policy, inconsistently says that use of formal reporting forms is mandatory for filing complaints. There are also conflicting statements about the individual assigned as the Title IX Coordinator/Compliance Officer. *Compare* AR 1312.3 and AR 5145.3.

Issue 2: Whether the District failed to respond to the Complainant's request for a Section 504 plan for the Student.

Legal Standards

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.

Section 104.35(a) regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Factual Findings

A. District's Section 504 Policy and Procedures

- The District's Board Policy (BP) and Administrative Regulation (AR) 6164.6, address identification, evaluation and education of qualified disabled students under section 504. In its definitions section, BP 6164.6 specifically states: "Attention deficit disorder and attention deficit hyperactivity disorder have been identified by the Office for Civil Rights as potential disabling conditions under Section 504."
- AR 6164.6, states, in relevant part:

B. Referral, Identification and Evaluation Procedures:

1. Any student may be referred by a parent/guardian . . .for consideration of eligibility as a disabled student under Section 504. This referral should be made to the designated school site 504 Coordinator. The 504 Team will include persons knowledgeable about the Section 504 standards, the student's individual needs and school history, the meaning of the evaluation data, and placement options.
2. The Coordinator will notify the parent of the referral and the scheduled meeting of the team and invite the parent to attend.

3. The Student Success/504 Team shall promptly consider the referral and determine whether an evaluation under these procedures is appropriate. This determination shall be based on a review of the student's school records and the student's needs. The evaluation may include, but not limited to, classroom and playground observations, performance-based testing, academic assessment information, and data offered by the parent/guardian. Students requiring assessment must be evaluated in all suspected areas of disability to determine if the student is a student with a disability under Section 504. Students requiring evaluation shall be referred to appropriate evaluation specialists. Parents must consent to the assessment plan in writing.
4. Assessments will be conducted in the same manner as if the student had been referred under Individuals with Disabilities Education Act (IDEA).
5. ... Whenever there is a reason to believe that because of a disability, a student needs regular special education and/or related aids and services (and the student has not been found eligible under IDEA) that student will be evaluated under this policy's administrative regulation. If the District does not assess a student after a parent has requested an assessment, the District shall provide notice of the parent's/guardian's procedural safeguards.
6. If a request for evaluation is denied, the school site committee shall inform the parent/guardians of this decision and of their procedural rights as described below. . . .

C. 504 Education Plan

9. The parent/guardian shall be notified in writing of the final decision concerning services to be provided, if any and of the Section 504 procedural safeguards, including the right to an impartial hearing to challenge the decision.

B. Complainant's Request for a Section 504 Plan for Student

- In the 2014-2015 school year, the Complainant requested a Section 504 plan for the Student. The Complainant told OCR that she initially requested a Section 504 plan orally on approximately November XX, 2014 and was told to put the request in writing. She subsequently requested a 504 plan in writing via a November XX, 2014 letter that she sent to the school administrators and also provided to the Student's teacher.

- The November XX letter stated that the Student has been diagnosed with ADHD, as well as Adjustment Disorder with Anxiety, and that her disabilities were impacting her educational performance and needs. Further the letter states: “Though the school and teachers have attempted to address some areas of concern, [Student] continues to have difficulties, as the interventions have been unsuccessful. [Student] is making limited progress and as a result is experiencing increased anxiety and distractibility.” The letter also made specific requests for accommodations, such as alternative seating and a behavior intervention plan.
- At the November XX, 2014 SST meeting, the team discussed the accommodations requested by the Complainant in her November XX, 2014 letter. The Student Study Team Notes and Action Plan developed at the meeting included the following action plan: “Student Assistant Specialist (SAS) – individually, classroom, possible social skills group; Alternative seating in classroom/XXXXXXXX XXXX & home strategies – positive reinforcement; Daily routine (Classroom Dojo[]?) in order to track progress; Motivation charts; check back in to monitor above strategies in order to determine future action (504[]?).”
- According to the principal, the SST was to implement the agreed upon accommodations and schedule a follow up meeting to determine how the Student responded. He stated that the SST Action Plan addressed the Complainant’s concerns and that the Complainant was in agreement with the plan and signed it.
- The District acknowledged to OCR that it did not follow its policy of providing Section 504 procedural safeguards to the parent after the SST meeting and that it did not obtain a written withdrawal of the 504 request from the Complainant. The District contends that the parent agreed orally to withdraw the request for a 504 plan, but provided no written record of such agreement. The Complainant denies withdrawing her request for a 504 plan.
- No follow-up 504 meeting was conducted for the Student before she transferred in April 2015. In its April XX, 2015 response to OCR’s data request for a copy of the Student’s IEP or 504 Plan in effect during the current school year, the District responded: “[The Student] is not currently eligible under the IDEA or Section 504.”
- A 504 Plan was developed for the Student at an April XX, 2015 meeting after she transferred.

Analysis

The Student’s parents made a clear and unequivocal request for a Section 504 Plan for the Student in their November XX, 2014 letter to the District, in which they stated that the Student had been diagnosed with ADHD and Adjustment Disorder with Anxiety. The District’s own

Board Policy on identification, evaluation, and education of students for Section 504 acknowledges that ADHD may be a disabling condition requiring a Section 504 Plan. BP 6164.6(A)(3). Nevertheless, the District did not evaluate the Student and provide her with a Section 504 Plan in response to the request. Instead, the District held a SST meeting which provided some accommodations – but not the specific list of accommodations that the Student’s parents had requested in their letter. Nor did the District evaluate the Student or provide the parents a written explanation of why the Student was not eligible for a 504 Plan.

The District told OCR that it determined that the Student was not eligible for a 504 plan in the fall of 2014. However, the SST Notes and Action Plan developed on November XX, 2014 says: “[c]heck back in to monitor above strategies in order to determine future action (504 ?).” The District explained to OCR that this note was intended to convey that the District would later come back and determine whether the SST interventions worked and whether the Student should receive a 504 plan.

Despite its determination that the Student was not eligible for a 504 Plan in the fall of 2014, the District never provided the Student’s parents with written notice that the Student was denied a Section 504 Plan or their procedural safeguards. The District has acknowledged to OCR that under its own policies, the proper procedure would be for the parents to receive written notification, a copy of procedural safeguards, and grievance procedures when a Section 504 plan is denied. *See* AR 6164.6 (d) (“The parent/guardian shall be notified in writing of the final decision concerning services to be provided, if any, and of the Section 504 procedural safeguards, including the right to an impartial hearing to challenge the decision.”). The District’s contention that the Student’s parents agreed orally to not move forward with a Section 504 Plan is not supported by the evidence. There is no record of the parents withdrawing their request for a Section 504 Plan, the parents deny that they withdrew their request, and the District’s SST meeting documentation states that they would check back in to determine if a Section 504 plan was necessary. A day after the District’s Data Response to OCR, the Student was provided a Section 504 Plan at her new school, also support a determination that the parents continued to seek a Section 504 Plan for the Student.

For these reasons, OCR found that the District was not in compliance with Section 504 and Title II and its regulations for the failure to timely evaluate the student and provide a written explanation and procedural safeguards when denying the Complainant’s Section 504 evaluation and eligibility.

Conclusion

This concludes the investigation of this complaint. To address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegations and the findings and information obtained by OCR during its investigation.

Based on the commitments made in the enclosed resolution agreement, 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 the agreement until the District is in compliance with the statute(s) and regulations at issue in the case.

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

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 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact OCR Attorney Yohance Edwards at (415) 486-5585 or yohance.edwards@ed.gov.

Sincerely,

/s/
Zachary Pelchat
Team Leader

Enclosure