



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

January 13, 2017

Mr. Kent Kern
Superintendent
San Juan Unified School District
3738 Walnut Avenue
Carmichael, California 95608

(In reply, please refer to case no. 09-15-1523.)

Dear Superintendent Kern:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against San Juan Unified School District (the District). OCR investigated whether the District discriminated against the Student¹ on the basis of his disability by failing to provide him a free appropriate public education (FAPE); by treating him differently than other students based on his disability; by harassing him because he is a student with a disability; by retaliating against him because the Student's mother (the Complainant) advocated on his behalf to the District; and by failing to respond to the Complainant's April XX, 2015 complaint.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), 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 (Title II), 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 education system, and is subject to the requirements of Section 504, Title II, and the regulations.

To investigate this complaint, OCR interviewed the Student, the Complainant, the Student's XXXXXXXX teacher, the District's Program Manager for Family and Community Engagement, and the District's General Counsel. OCR also reviewed all of the documents and other information provided by the Complainant and the District. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and OCR's findings.

As described below, the Complainant first submitted these allegations in a complaint directly to the District on April XX, 2015. Where allegations filed with OCR have been investigated through a recipient's internal grievance procedures, OCR first thoroughly

¹ OCR previously notified the District of the Student's name and is not including it in this letter to protect the student's privacy.

reviews all documentation of the recipient's investigation and resolution of the complaint to determine whether the recipient provided a resolution and remedy using legal standards that meet the requirements of Section 504 and Title II, and a comparable process that meets OCR's requirements. If OCR finds that that the recipient has met these requirements, OCR generally will not conduct its own independent investigation. Here, because the District's resolution of the Complainant's grievance did not meet the requirements of Section 504 and Title II, OCR conducted its own investigation of the Complainant's allegations.

Issue 1: *Whether the District failed to provide a Free Appropriate Public Education (FAPE) to the Student by failing to implement the Student's Section 504 plan.*

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.

Findings of Fact

- The Student was a senior at a high school in the District (the School) in the 2014-15 school year. When the Student was seven years old, the Student was diagnosed with Kawasaki Syndrome, which, among other symptoms, causes him to get sick more often and for longer periods of time and to be absent from school regularly. For example, during his senior year, the Student missed XXXXXXXX class approximately 30 times.
- The District found that the Student was eligible for services under Section 504 at least as early as 2008. At the beginning of the Student's senior year, his Section 504 plan was dated September 2013. That plan included a number of accommodations, including that exams would be delayed if the Student was absent for an extended period of time and that if the Student was absent, he would have up to double the amount of time of his absence to turn in assignments.
- The Student began taking XXXXXXXX in seventh grade, and had that same XXXXXXXX teacher (the Teacher) from seventh grade through twelfth grade.

The Student participated in the International Baccalaureate (IB) diploma program at the School, through which students who are successful over a range of IB courses and exams (including a foreign language) receive an IB diploma to signify their achievement. Students in IB classes are not required to take the IB exam, and not all students in the Student's IB XXXXXXXX class chose to take the exam.

- In January 2015, the Complainant contacted the Teacher regarding her concerns that the Student was struggling in her class. The Complainant noted that XXXXXXXX was challenging for him in part because of his many absences over the previous few years.
- In response, the District decided to convene a Section 504 team meeting on February X, 2015 to determine if the Section 504 plan in place needed to be updated. The Complainant told school officials that she did not understand why a Section 504 meeting was needed, but she agreed to come to the meeting. School officials also wanted the Student to attend the Section 504 meeting, but the Student did not attend because the Complainant felt that the meeting would cause him stress and exacerbate his condition. The meeting was attended by the Principal, Vice Principal, IB Coordinator, Counselor and several of the Student's teachers, including the XXXXXXXX teacher.
- The Complainant's notes from the February X, 2015 Section 504 meeting that she provided to OCR indicate that the Student "should be able to get an extension granted probably to at least April 1st for any IB related assignments in XXXXXXXX." The Complainant's notes also state that the Teacher said "she'll pair [the Student] up" with another student in the class so that he could catch up on any missed instruction.
- On February X, 2015, the District's Section 504 Coordinator sent out an email to school and district staff noting that she appreciated that over the course of the two-hour meeting the previous day, "the 504 plan was updated, procedures were followed, and everyone signed as present." On that same day, the District's Program Manager from the Family and Community Engagement Department emailed the Complainant to say that the District would pay for up to 10 hours of tutoring for the Student "as well as [for] other students in the class that are struggling."
- After the meeting, a District staff member sent the Complainant a revised Section 504 plan. That plan was virtually unchanged from the September 2013 Section 504 plan. The date on the top of the plan was updated to "2-2-15" but none of the accommodations were changed, nor were the student's age, grade (listed as 11th even though he was in 12th grade), or the date of the next meeting (listed as September 2014) updated. There appeared to be one minor change in the "Eligibility Evaluation Data" section of the plan, which was reworded slightly between the 2013 and 2015 versions.

- On February XX, 2015, the Complainant emailed the Vice Principal and the School's Counselor to express her concern that the Section 504 plan was not accurate. The Complainant did not say which accommodations were not included in the plan that she believed were agreed to at the meeting. The District responded that if any changes were requested, another Section 504 meeting would be required. The Complainant objected to having another Section 504 meeting, and requested that the Section 504 plan instead just be updated to reflect what was agreed to at the meeting, though she did again not specify what had been agreed to. The District proposed some dates for a follow-up Section 504 meeting, but the Complainant was not available on those dates and asked that the District respond in writing as to how the Section 504 plan was created. The Vice Principal responded by noting that "the plan as written is also my recollection of the team decision" and that "all members of the team signed it, including you." The Vice Principal again told the Complainant that they would need to discuss her requests at a new Section 504 meeting, but neither the Complainant nor the District followed up and no further meeting was ever conducted.
- On March X, 2015, the District's Section 504 coordinator emailed the Complainant to refer her to the District's "Notice of Parent and Student Rights" if she wanted to challenge the actions of the Section 504 team. The Complainant responded by asking if the Coordinator had reviewed the Section 504 plan that had been distributed. After having reviewed it, the Section 504 Coordinator emailed the Complainant to say that "I can understand why you need a clean copy," but no revised copy was ever provided to the Complainant.²
- On February XX, 2015, the Complainant also emailed the Teacher asking why the Student was being required to take the oral portion of the XXXXXXXX IB test the following day (February XX, 2015), given that she believed that the Section 504 team had agreed at the recent meeting to postpone the exam for at least a month, ideally until early April. The Teacher responded to the Complainant saying that at the Section 504 meeting they had only discussed postponing the deadline for the IB written assignment, not the IB oral presentation. OCR confirmed that the Principal immediately emailed the Teacher to say that the IB oral presentation would also need to be postponed.
- After further emails about the date, the Teacher agreed to give the Student an approximately three-week extension until March XX, 2015 to take the individual oral portion of the XXXXXXXX IB exam. The District provided documentation to OCR showing that the IB deadline for this requirement was

² The Coordinator had retired, so OCR was unable to interview her to determine what she meant by "clean copy," but the context within which the comment was made suggests that she understood that the Section 504 plan contained inaccurate or dated information, because the Section 504 plan included the age and grade of the student from the prior year and included a date in the past for the date of the next meeting.

April XX, 2015, and that the Teacher wanted to have the exam conducted sooner in order to give her time to grade the exam before that date, which included a week of spring break.

- In the February XX, 2015 email, the Complainant also asked the Teacher to “follow through on your commitment to pair [the Student] up with one of the advanced students in the class as you said you were going to do in the 504 meeting.” The Teacher did not respond to that request via email. In an interview with OCR, the Teacher denied that the Complainant had ever asked her at the 504 meeting about pairing the Student up with a more advanced student. The Teacher told OCR, however, that she recalled saying that she encouraged all students in her class to get a “study buddy” and that she did sometimes have student tutoring in her room.

Analysis

Once a Section 504 plan is created, Section 504 and its implementing regulations require that the District and its employees implement the plan to ensure the provision of FAPE.

Here, OCR confirmed that the District immediately convened a Section 504 meeting once the Complainant conveyed concerns that the Student’s performance in one class was related to his disabling condition. OCR further confirmed that the District convened a meeting of considerable length (two hours) that was attended by a group of persons knowledgeable about the Student’s performance in the class, including the Teacher. The Complainant alleged that the Teacher failed to follow through on two commitments she believed were made, and agreed to, during the Section 504 meeting. First, the Complainant requested that the Teacher delay the oral portion of the IB exam until early April. Instead, the Student had to take the exam on March XX, 2015. The Complainant also understood that the Student would be paired up with an advanced student to provide academic support, based on an offer made by the Teacher at the meeting.

Neither of the requests made by the Complainant were in the Student’s written Section 504 plan. The Student’s written Section 504 plan did say that “exams will be delayed for [the Student] when he has been absent for an extended period of time prior to the day of the exam,” but did not specify a required length of delay for any particular exam. The Complainant’s written notes from the meeting also indicate that the 504 team did not definitively agree that a particular length of extension was required as an accommodation under Section 504. Her notes instead stated that the Student “*should be able to get an extension granted probably to at least April 1st.*” (emphasis added). To the extent that the delay of the oral IB exam was required as an accommodation, the evidence shows that the School did delay the Student’s oral IB exam for approximately three weeks consistent with the general accommodation in the Section 504 plan. While it is possible that the District could have agreed to a longer postponement, OCR did not find that the decision to postpone for only the three weeks resulted in a failure to implement an accommodation in his Section 504 plan.

OCR also did not find sufficient evidence that the Section 504 team determined that the Student's disability required that the Student be paired up with another student in Chinese class. The written Section 504 plan did not include this accommodation, and the Vice Principal reported in an email after the meeting that the Section 504 plan as written was consistent with her recollection of what was agreed to. As discussed further below, OCR also confirmed that the District had offered the Student up to 10 hours of tutoring the day after the Section 504 meeting. If the Complainant had a dispute about whether the offer of peer tutoring (or other accommodations) should have been included in the Section 504 plan, she had the opportunity to reconvene the Section 504 team (based on the District's offer) to discuss whether additional accommodations needed to be added to the plan, or she also could have utilized the District's procedural safeguards, which included impartial hearing procedures. In the latter regard, the District appropriately provided the Complainant with a copy of its procedural safeguards. As such, OCR did not find sufficient evidence to conclude that the Teacher's failure to pair up the Student with another student was a violation of Section 504.

However, as a matter of technical assistance, OCR recommends that the District conduct training with School staff about drafting and revising Section 504 plans. The Section 504 plan provided to the Complainant after the February X, 2015 meeting did not reflect updated information about the Student's age, and grade, or any of the concerns discussed at the meeting, including preparation for an IB exam. It also listed a date in the past for the date of the next meeting. The District's response to the Complainant's concerns about the failure to update the plan also raised concerns. The Vice Principal responded by reminding the Complainant that she had signed the Section 504 plan. The Complainant's signature in Section 3 of the Section 504 Plan, however, reflected only that she attended the meeting, not that she agreed with the accommodations. OCR notes that by signing as "present," parents do not give up their rights to challenge the provisions of a Section 504 plan.

Issue 2: *Whether the Student was treated differently or subjected to harassment by a District employee based on his disability.*

Legal Standards

Under the Section 504 regulations at 34 C.F.R. § 104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives 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. Under 34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1) a public entity may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, provide different or separate aids, benefits, or services unless necessary to provide qualified disabled individuals with aids, benefits, or services that are as effective as those provided to others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

Harassment of a student based on disability can also result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. 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.

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

Findings of Fact

- In the summer of 2014, the Teacher sent an email to the students in her class that were taking the IB exam to help them get started on the written assignment they would need to complete for the IB exam. The Teacher did not send the email to the Student. The Student told OCR that he was not sure whether the Teacher did not send it to him because she did not know he was taking the IB exam or for some other reason. The Teacher told OCR that she did not send the email to the Student because the Student had not told her he was taking the IB exam.
- The Student told OCR that he did not have a workbook for "a couple of months" in the fall of 2014, and so he had to share a workbook with other students in class. He said he was absent when the workbooks were distributed. The Teacher told OCR that she took the full class to the School's textbook room to check out workbooks at the beginning of the year, and that they may have run out of workbooks. She also told OCR that she told the Student to check back

with the textbook room to see if they had other copies, but never heard anything further from the Student about whether he had done so.

- The Student told OCR that other students told him that the Teacher would make comments about his absence when he was not there, even suggesting on one occasion that he should drop XXXXXXX. The Teacher denied that she ever said the Student should drop the class, and said that the only time she discussed the Student's absences was to ask other students to pass along work to him. The Student also told OCR that the Teacher expressed shock in front of the whole class when he said that he was planning to take the IB exam. He also told OCR that shortly after he told the Teacher that he was taking the IB exam, the Teacher told the whole class that this might be the first year that not everyone passes the exam. The Teacher told OCR that she was surprised when she learned that he was planning to take the test, because he had not mentioned it before, but said that she simply told the Student she would talk to him about it later. The Teacher also said that she tells students every year that if they do not work hard they may not pass, and denied that the comment about everyone not passing was directed at the Student.
- The Complainant alleged that, on February X, 2015, the Teacher inaccurately told the participants in the Section 504 meeting that the Student was doing no work in her class. This statement was consistent with the Teacher's statement to OCR (and with the Teacher's grading records) that the Student regularly did not turn in assignments even with additional time, and that other students who missed class would eventually turn in assignments, but that the Student often did not.
- The District's Program Manager for Family and Community Engagement emailed the Complainant on February X, 2015 to say that two other students could join the first session of tutoring. The Student told OCR that other students came to the tutoring once or twice, before it was moved to the District office. The Teacher told OCR that, for the first tutoring session, she sent about 5 students who were allowed to rotate in with the Student one at a time in order to give the Student different partners to practice speaking with. However, after that session, the District agreed to move the tutoring to the District office and other students did not attend. The Student told OCR that he received ten hours of tutoring paid for by the District throughout February, and then received additional tutoring from the tutor at the Student's family's expense in March.
- The Complainant alleged that the Student's tutor told her that the Teacher was trying to convince the tutor not to work with the Student, and that the tutor even said that the Teacher offered to pay her not to tutor the Student. The Teacher denied these allegations to OCR and said that she told the tutor to do whatever she could to help the Student, except that the tutor could not help him with the written assignment that had to be turned in for the IB exam, pursuant to the IB

rules. Both the District and OCR attempted to contact the tutor regarding these allegations, but the tutor did not cooperate in the investigation.

- The Student's name was initially on a March X, 2015 list of students to attend the state conference of the Future Business Leaders of America (FBLA), for which the Teacher served as an advisor. However, a revised version of the list was later sent out that did not include the Student and several other students; the Student considered this omission as adverse. The Teacher told OCR that only students who attended the regional conference were allowed to attend the state conference. The Student acknowledged that he had not attended the regional conference and that he did not know of any other students who attended the state conference who did not attend the regional conference.
- On March X, 2015, the Student was scheduled to complete his oral group IB presentation with two other students. However, on the day of the presentation, the Teacher told him he could not complete the presentation and that he should go speak to the School's IB Coordinator about it. The Student told OCR that he did not know why he was prevented from completing the group oral presentation. The Teacher told OCR that she did not let him complete the group oral presentation that day because she knew, as described above, that the Complainant had wanted more time before he did the individual oral presentation, so she was not sure whether the Complainant also wanted the Student to have more time before completing his group oral presentation.
- On March XX, 2015, the Student told OCR that the Teacher moved him to the back row of the class. The Student also told OCR that other students were moved to new seats at the same time.
- The Student received an "F" in XXXXXXX for the second semester, after receiving a D minus in XXXXXXX for the previous semester. The Complainant provided OCR with a list of seven assignments where she said that the Student was absent when the assignments were given. The Complainant did not allege that the Student ever completed those assignments. The complaint to OCR also listed two additional assignments where the Complainant alleged that the Student turned in the assignment but the Teacher did not give him credit for the assignment. OCR reviewed the Student's "Student Progress Report" for the second semester, which showed that he received a failing grade in the class. The Report showed that, as of the end of the semester, he had not completed 27 assignments, and so received zero points for those assignments. The Teacher told OCR that her general policy was that if students were absent, they would have up to five days to make up the work or quiz, but that, because of his Section 504 plan, the Student could turn in assignments at any time. On one occasion, the Teacher informed the Complainant by email that the Student could turn in assignments up to a month late. The Teacher said that the Student's failing grade was not due to the Student turning in assignments late, but was due to him not turning in assignments at all, or turning in assignments that were incomplete

or incorrect. The Student told OCR that the grade did not affect the college admissions process.

- The Student told OCR that he felt that the Teacher treated students well if they were doing well in the class, but that other students who were struggling also thought that she was difficult. He told OCR that he thought that he was treated worse than other students because he was struggling in the class.

Analysis

The Complainant raised a number of allegations about ways in which the Teacher treated the Student poorly or treated him differently than other students. OCR did not find sufficient evidence to conclude that the Teacher discriminated against or harassed the Student on the basis of his disability.

For example, the Complainant alleged that the Teacher excluded him from various activities, including not sending the Student an email in the summer of 2014, not providing him a workbook in the fall of 2014, and not including him in the FBLA state conference. OCR did not find any evidence, however, that the Teacher singled him out based on his disability in any of these instances. Rather, the reasons for his exclusion for each of these incidents were explained by other factors, and OCR found no evidence that these factors were a pretext for disability discrimination.

The Complainant also alleged that the Teacher disrupted the tutoring offered by the District by including other students and by trying to convince the tutor not to work with the Student. OCR found that the Teacher's actions in including other students were consistent with the District's communications to the Complainant. The Teacher also denied the accusation that she discouraged the tutor from helping the Student, and OCR did not find evidence to support this allegation. Furthermore, regardless of what the Teacher said to the tutor, the tutor continued to assist the Student for the ten hours paid for by the District and for additional hours paid for by the family. As such, OCR found that any statements that may have been made by the Teacher did not limit the Student's access to the District's educational benefits, services or opportunities.

The Complainant also alleged that the Teacher made inappropriate comments to the class and at the Student's Section 504 meeting. The Teacher denied making some of these comments, such as that he should drop XXXXXXX. She also explained the context for other comments, such as her remark about students possibly not passing the IB test, which she explained she said every year to impress upon students the importance of working hard, not as a way to embarrass anyone. The Teacher's alleged statement at the Section 504 meeting about the Student doing no work in class may have overstated matters, but was also consistent with the fact that the Student did not complete a large number of assignments because he was struggling in the course.

OCR also found that other actions by the Teacher were reasonable under the circumstances. For example, the Student was removed from the IB group oral

presentation only a week after the Complainant had insisted that the date of the IB individual oral presentation be pushed back. Given that, OCR found that it was reasonable for the Teacher to also delay the group oral presentation to clarify whether the Complainant was comfortable with it going forward. OCR also did not find evidence that the Student's failing grade for the spring semester was due to disability discrimination. The Complainant provided OCR with a list of seven assignments where the Student was absent when assignments were given, and contended that those assignments should not have been included in his grade. The Student's Section 504 plan allowed the Student additional time to complete the assignments, but the Teacher was not required to give him credit for assignments he did not complete.³ Therefore, OCR found insufficient evidence that the student was treated adversely based on his disability.

In sum, the Student described an environment in which he was struggling in XXXXXXXX, his most difficult class, and in which the Teacher was very demanding. The Student told OCR that the Teacher was also hard on other students who were not doing well in the class. OCR found instances in which the Teacher was not as sympathetic as she could have been about why the Student needed additional support (for instance, regarding his request to delay the individual oral IB exam). However, OCR found insufficient evidence that the Student was subjected to the adverse actions as described, or that the Teacher's actions were pretext for disability discrimination. OCR also did not find sufficient evidence to conclude that the Teacher's actions were severe, persistent, or pervasive harassment based on the Student's disability in a way that limited the Student's ability to participate in or benefit from the District's program. As noted above, OCR was not able to find sufficient evidence to verify that the Teacher made the alleged comments to the tutor to dissuade him from tutoring the Student, and OCR did find that the tutor did, in fact, provide all required (and additional not required) tutoring to the Student. As to other comments made by the Teacher, the Teacher may have inaccurately described the Student's work at the Section 504 meeting and may have inappropriately expressed her concerns to the class about the Student missing class. OCR concluded, however, that even if true, those comments were not sufficient to create a hostile environment on the basis of disability.

Issue 3: *Whether the District retaliated against the Student after the Student's mother complained to District staff about the Student's XXXXXXXX teacher.*

³ The Complainant also cited two assignments where she believed the Student turned in the assignment but the Teacher did not give him credit for the assignment. OCR did not reach a finding as to whether those two assignments were turned in. However, given that those two assignments would not have changed the Student's grade given his overall average and that he would have needed a 60% to avoid a failing grade, OCR found that they were not sufficient to form the basis of a claim of discrimination or harassment.

Legal Standards

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.

To constitute protected activity, OCR must find that: 1) an individual communicated, formally or informally, a belief that a recipient's act or policy is discriminatory on the basis of disability; 2) the manner of the opposition is reasonable; and 3) the complainant has a good faith and objectively reasonable, though perhaps mistaken, belief that he or she was opposing unlawful discrimination. It is irrelevant whether the individual in fact erred, as a matter of fact or a matter of law, in his or her belief that illegal discrimination occurred.

For an action to be considered adverse, OCR generally determines whether the action significantly disadvantaged the complainant as to his or her role as a parent or as to his or her ability to participate in district programs, or whether the action could well dissuade a reasonable person from exercising his or her civil rights, including her right to advocate for students. Whether an action is adverse is judged from the perspective of a reasonable person in the complainant's position.

If OCR finds that the action was adverse, OCR next asks whether the district offered legitimate, non-retaliatory reasons for the alleged adverse actions, and whether the reasons offered were the real reasons or rather pretext for what was in fact a retaliatory motive. Pretext can be established in several ways, directly by establishing that an impermissible reason more likely motivated the school district; or indirectly, by, for example establishing that the stated reason has no basis in fact, was not the true reason, or was insufficient to explain the action, or where the complainant was treated differently from how he or she was treated prior to the activity.

Findings of Fact

- In January 2015, the Complainant contacted the District's Family and Community Engagement Department to complain that, given the Student's disability, the

Teacher was not appropriately supporting the Student to be successful in XXXXXXXX class. The Complainant continued to raise those concerns both directly with the Teacher and with other School and District staff throughout the remainder of the spring semester, including complaining to School and District staff that the 504 plan was not adequate, as described above.

- On March XX, 2015, the Teacher moved the Student to a different seat in the back of the classroom. The Student told OCR that the Teacher also moved other students to different seats at the same time and that he was not sure if it was just a coincidence that this happened during the same time period as his mother was advocating on his behalf. The Student's Section 504 plan did not provide for any special or preferential seat assignments for the Student.
- As described in more detail above, the Complainant also alleged that the Teacher tried to convince the tutor not to work with the Student, which the Teacher denied to OCR.

Analysis

The Complainant alleged that the Teacher retaliated against the Student after the Complainant had complained to the District about the Teacher's actions. The Complainant alleged, specifically, that, in early March 2015, the Teacher moved the Student to the back of the classroom and tried to convince the tutor not to work with the Student.

OCR found that the Complainant's communications to the District Family and Community Engagement Department in January 2015 that the Teacher was treating the Student differently or more harshly based on his disability, and the complaints to School and District staff about the adequacy of the Section 504 plan constituted "protected activity" for the purposes of a retaliation claim. However, OCR found that the District's actions that the Complainant cited did not constitute adverse actions and thus did not constitute retaliation.

With respect to the seat assignment change, nothing in the Student's Section 504 plan required that he be seated in the front of the classroom; the Student himself also stated that his seat change was one of many that was occurring in the classroom. The Student also did not provide any evidence that he was harmed by the move. As such, OCR did not find that the seat change was an action that could dissuade a reasonable person from making a charge of discrimination. OCR also did not find any evidence that the Teacher's decision to move the Student had a retaliatory motive or that the decision to move a number of other students around was pretext.

Similarly, OCR found that there was not sufficient evidence to conclude that any comments the Teacher made to the tutor were adverse actions that constituted retaliation. As noted above, OCR did not find sufficient evidence to conclude that the Teacher made any comments to discourage the tutor from working with the Student.

Furthermore, even assuming any comments were made, the tutor continued to work with the Student both when she was paid by the District and beyond that time, such that there was no evidence of significant harm to the Student. OCR thus did not have sufficient evidence to conclude that the Teacher made any comments to the tutor that constituted retaliatory adverse actions.

In summary, OCR found insufficient evidence of retaliation under Section 504 and Title II and their implementing regulations.

Issue 4: *Whether the District responded appropriately to the internal complaint submitted by the Complainant's attorney on April XX, 2015 stating that the Student had been discriminated against on the basis of his disability.*

Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.7(b), 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. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

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, 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 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.

OCR evaluates the appropriateness of a District's responsive action to alleged discrimination on the basis of disability by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to discrimination 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 discrimination and remedy the effects of the discrimination on the student who was discriminated against. The district must also take steps reasonably calculated to prevent the discrimination from recurring.

Other actions may be necessary to repair the educational environment. 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 discrimination and will be responsive to any student reports

of discrimination. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Findings of Fact

- On April XX, 2015, the Complainant's attorney sent the District an eleven page complaint that included all of the same allegations that were later included in the complaint to OCR, discussed above.
- On May XX, 2015, the District's General Counsel responded by email to the Complainant's attorney stating that "I have not had much time to look into your concerns" but that what "little I have been able to find out about this matter" indicated that there was a thorough Section 504 meeting which resulted in the appropriate accommodations and that "your requests would provide [the Student] with an unfair advantage over non-disabled peers." That same day, the Complainant's attorney responded to the General Counsel to emphasize that the complaints were much broader than the Section 504 plan.
- Two days later, on May XX, 2015, the District's General Counsel again emailed the Complainant's attorney. The General Counsel again noted that "the little I have discovered about the situation" was that she had "yet to be able to corroborate your allegations" and that she had "heard that [the Teacher] has worked hard with [the Student] to help him succeed." The General Counsel reported that she had "been told he has not turned in a majority of his homework" but noted that he could still receive his IB diploma regardless of what happened in XXXXXXXX class. The Complainant's attorney responded that day again asking that the District investigate the allegations, including by speaking with the student, parent, and the tutor. No further response from the District was provided.
- On May XX, 2015, the Complainant's attorney again contacted the General Counsel asking whether the Student could drop his XXXXXXXX class, and also asking the General Counsel "are you looking into the teacher and her conduct?" The General Counsel responded with an answer about dropping the class but did not respond to the question as to whether she was investigating the Complainant's allegations.
- The District's Uniform Complaint Procedures (AR 1312.3) define a complaint as any written and signed statement "alleging a violation of federal or state laws or regulations, including an allegation of unlawful discrimination, harassment, intimidation, and/or bullying." For complaints filed under that procedure, the District's procedures require, among other things, a final written decision providing "findings of fact based on the evidence gathered," "conclusions of law," and notice to the Complainant about how to appeal the decision to the District's Board of Education or to the California Department of Education.

Analysis

When a complaint of discrimination on the basis of disability is filed, OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. At minimum, the District must conduct a prompt and impartial inquiry to reliably determine what happened. Here, OCR found that the District did not do a thorough and effective investigation that was sufficient to determine what happened.

The District's responses to the Complainant did helpfully address the Complainant's most immediate concerns that the Student would not be able to earn his IB diploma. However, the District's responses acknowledged twice that the General Counsel had not had much time to look into the issues raised in the letter. The Complainant's attorney specifically asked that the District interview the Complainant and the Student and the tutor, but the District did not take those steps. As noted above, what constitutes a reasonable response to a complaint of discrimination will differ depending upon the circumstances. The fact that the District ensured that the Student would be able to graduate is a factor that OCR considered in assessing what constituted a reasonable response under the circumstances. However, it does not justify the District's failure to do a complete investigation that addressed all of the issues that were raised in the complaint.

OCR reviewed the submission by the Complainant's attorney and found that it was clearly a formal complaint of discrimination that required a response consistent with the District's discrimination complaint procedures. However, the District's response in this matter was not prompt, thorough, or effective in that the issues raised in the complaint were not thoroughly investigated, including conducting interviews with relevant individuals, and therefore was not consistent with the requirements of Section 504 and Title II and their implementing regulations.

Conclusion

The District has entered into the enclosed Resolution Agreement, which is aligned with the finding with respect to the last allegation. As part of the Resolution Agreement, the District has agreed to train all staff responsible for responding to complaints of discrimination, harassment, intimidation or bullying on the basis of disability. The District also agreed to provide OCR with a copy of all complaints of unlawful discrimination, harassment, intimidation or bullying that it receives for the calendar year of 2017, along with copies of District's responses for review to ensure that the District has provided prompt and equitable responses to complaints.

Based on the commitments made in the enclosed 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 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 Title II, Section 504, and their implementing regulations, which 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank you and your staff for your courtesy and cooperation in resolving this case. If you have any questions, please contact Blake Thompson, Civil Rights Attorney, at (415) 486-5630.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Encl: Resolution Agreement
Cc: XXXXX XXXXXXXX (by email only)