



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

December 19, 2016

Ms. Deborah Flores
Superintendent
Gilroy Unified School District
7810 Arroyo Circle
Gilroy, California 95020-7313

(In reply, please refer to case no. 09-16-1222.)

Dear Superintendent Flores:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against Gilroy Unified School District (the District). OCR began an investigation of whether the District discriminated against the Student¹ on the basis of his disability in the following manner:

1. The District failed to provide the Student with a free, appropriate public education (FAPE) by failing to:
 - a. implement the Student's Section 504 plan; and,
 - b. follow adequate procedures for evaluation and placement of the Student.
2. The Student was subjected to harassment by a District employee based on his disability, and that the District failed to respond appropriately and effectively to notice of the harassment.

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 Student's parents, the Student's English Language Arts teacher, the School's Assistant Principal, and the District's Director of Student Services. OCR also reviewed all of the documents and other information provided by the Complainant (the Student's mother) and the District. Prior to OCR completing its investigation, the District voluntarily agreed to address certain areas of concern identified by OCR with respect to the issues being investigated.

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.

This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

Issue 1: *Whether the District failed to provide Student with a free, appropriate public education (FAPE) by failing to follow adequate procedures for evaluation and placement of the Student and by failing to implement the Student's 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.

Section 104.35(a) of the 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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. 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 104.35(c) of the regulations requires that placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Findings of Fact

- The Student was diagnosed with Generalized Anxiety Disorder in fifth grade and in 2015-16 entered sixth grade at XXXXXXXX Middle School (School). The Student

had previously been in a GATE program in a different district and had not had a 504 plan in the previous district. When the Student entered the District, he was placed in a sixth grade GATE class at the School based on his participation in the GATE program in the previous district.

- On September XX, 2015, the Student's English Language Arts and Social Studies teacher (ELA Teacher) called the Complainant to discuss the Student's progress in the GATE program. In that conversation, the Complainant told OCR that she informed the ELA Teacher that the Student had been diagnosed with Generalized Anxiety Disorder and was receiving counseling. She also informed the ELA Teacher that his anxiety was triggered by reprimands he perceives as public or angry, and asked the ELA Teacher to provide feedback quietly and in a kind tone. The ELA Teacher denied that the Complainant told her about the Student's diagnosis during this call and told OCR that she only learned about his anxiety through the Section 504 process that occurred starting in late October.
- On October XX, 2015, the Student reported to his parents that the ELA Teacher had told him, in an area where other students could hear, that his coloring on a map project was terrible that she could arrange for coloring lessons if he wanted. The Student's father called the ELA Teacher that day. In that call, the Student's father again told the ELA teacher about the Student's anxiety disorder and noted that interactions like the coloring issue exacerbated the Student's anxiety. The ELA Teacher sent a follow-up email that same day to the Principal and Assistant Principal stating that the Student's father had told her the Student had an anxiety disorder, which she said was "news to me." The ELA Teacher said that in her conversation with the Student's father, "everything seemed to center around how [the Student] 'feels' but I told him that the [Student] I see everyday is smiling and participating in class."
- After the call with the ELA Teacher, the Student's parents received a phone call from the School's Counselor requesting to set up a Student Study Team (SST) meeting. The School's Assistant Principal told OCR that SST meetings are used as an intervention strategy and are sometimes also a precursor to a 504 evaluation.
- On October XX, 2015, the SST meeting was held. As a result of the SST meeting, the District agreed to begin the process to evaluate the Student for eligibility under Section 504.
- On November X, 2015, the Assistant Principal sent the Student's parents a one-page document describing a list of steps to be taken by the School while a Section 504 evaluation was being conducted. That memorandum stated that homework for English Language Arts should be limited to 90 minutes, that the Student's teachers would be sensitive with feedback, that teachers would allow homework to be typed, and that the Student could be assigned to XXXX XXX (a lunch program in the School library where students can work on homework) as long as it did not increase

his anxiety. The ELA Teacher told OCR that she had no recollection of this memorandum being provided to her or any plan for interim accommodations.

- On November X, 2015, the Complainant emailed the Assistant Principal and the District's Director of Student Services to voice her frustration over the memorandum sent to her on November X, 2015. The Complainant noted that the memo contained absolutely no accommodations, and that "each item listed as an 'accommodation' is nothing more than a good teaching practice."
- On Monday, November XX, 2015, the Complainant emailed the Assistant Principal because the Student had spent five hours on his homework over the preceding weekend but had been told on Monday at school by the ELA Teacher that he had not completed enough homework and was assigned to XXXX XXX. The Complainant reported that the Student was suffering from increased anxiety, which was manifesting itself in him being unable to sleep, suffering nightmares, and suffering from increased phobias.
- On November XX, 2015, the District's Director of Special Services notified the Complainant that she had spoken with the School Psychologist about conducting a Section 504 eligibility evaluation and that she would follow up with the School Psychologist about the plan for evaluation. The District's Section 504/ADA Handbook cites case law stating that 60 days is a reasonable period to conduct a Section 504 evaluation and that 90 days is not a reasonable timeline, and concludes that "adhering to a 60 day timeline is wise." The Handbook states that the evaluation timeline starts when the parent signs the consent and notice of rights forms.
- The District's 504/ADA Handbook provides that "[i]f the District or the school site's Section 504 Service Plan team determines an evaluation under Section 504 is appropriate, the team will forward a letter and/or an assessment plan requesting consent for evaluation of the student to the parent/guardian." It also includes a flow chart that indicates that parental consent is required for all Section 504 evaluations. However, the District's parental notice of rights document says that "[t]he District may administer and use formal and informal measures as deemed necessary. If the team is going to conduct formal assessment and/or observations in order to determine eligibility, then the team must obtain informed and written consent from the parent/guardian before the student is evaluated."
- On November XX, 2015, the School Psychologist met with the Student for an interview as part of his Section 504 evaluation. (Though the Complainant knew that the District was planning to conduct an evaluation, the parents had not been asked for or provided written consent for the Student to be evaluated.)
- On December X, 2015, the School Psychologist informed the Complainant that he had received a letter from the Student's therapist, which was sufficient to start a

Section 504 plan, and that he was working on finding a date for a Section 504 team meeting.

- In early December 2015, District staff and the Complainant exchanged emails about scheduling a Section 504 meeting, which included comments from District staff reflecting that the District wanted to wait to schedule the Section 504 meeting until some training on Section 504 was provided for the Student's teachers.
- On December XX, 2015, the School Psychologist emailed the Complainant to say that he had mailed her a "copy of your rights" that day. No School or District staff were aware of the notice of procedural safeguards being provided before that date. The District's 504/ADA Handbook provides that "a copy of the District's notice of parent/guardian rights and procedural safeguards under Section 504" should be sent to the parent as soon as the District determines whether to conduct an evaluation under Section 504 or to deny a request to conduct an evaluation. OCR asked the Complainant whether the failure to provide the notice of rights sooner caused any harm, and the Complainant was not able to articulate any harm.
- The District convened a Section 504 Meeting on December XX, 2015. At the meeting, the District asked the Complainant to sign a consent form for the evaluation of the Student. The Complainant refused to sign the form because it was being completed after the evaluation had already been conducted.
- On December XX, 2015, the District emailed the Complainant a copy of a draft Section 504 plan and the District's Section 504 "Parent Rights" document, the same document that the School Psychologist had stated he was mailing on December XX, 2015.
- After a draft Section 504 plan was provided to the Student's parents, the Complainant and Student's father requested a meeting with the District Director of Student Services to discuss their concerns with the draft Section 504 plan, a meeting which occurred during the week of January XX, 2016. On January XX, 2016, the District provided the Complainant with a revised draft Section 504 plan.
- The Complainant and the Student's parents requested a meeting with the Superintendent to discuss their continued concerns with the draft Section 504 plan. On February X, 2016, the Student's parents met with the Superintendent and the Director of Student Services.
- On March XX, 2016, after further revisions, the Complainant signed the final Section 504 plan. Most of the accommodations in the final Section 504 plan were not included in the previous SST memorandum, including allowing the Student to take tests in a different location, allowing him to take a break to use the restroom as requested, allowing for modification or extension of assignments without grade penalty, meeting with the ELA teacher daily to check in and to review assignments, allowing the Student to make up tests or assignments in math, providing after-school

tutoring, and a requirement to provide critical feedback privately. The homework limitation that was contained in the Section 504 plans (60 minutes for English Language Arts and Social Studies) was also different than the homework limitation in the SST memorandum (90 minutes for English Language Arts).²

Analysis & Conclusions of Law

Issue 1(a): Adequate Procedures for Evaluation and Placement

The regulations implementing Section 504 at Section 104.36 provide that districts “shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.”

Compliance with Section 104.36 requires notice to parents explaining any evaluation and placement procedures affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing. To implement this requirement, the District's 504/ADA Handbook provides that “a copy of the District's notice of parent/guardian rights and procedural safeguards under Section 504” should be sent to the parent as soon as the District determines whether to conduct an evaluation under Section 504 or to deny a request to conduct an evaluation.

Here, the evaluation process under Section 504 began directly after the SST meeting on October XX, 2015, but the Complainant was not provided with notice of her rights under that process until sometime in mid-December 2015, around the time of the Section 504 meeting. In interviews with OCR, School and District staff suggested they may have provided the notice at some point before the 504 meeting, but the District presented no evidence of providing the document sooner and no District staff involved in the 504 process had any specific memory of who provided the Complainant with the notice or when that occurred. OCR found that this oversight constituted a violation of the Section 504 requirements, though OCR also found that, in this circumstance, the violation was remedied when the District provided the Complainant with the notice in mid-December. Further, OCR found no evidence of a harm caused by the District's failure to provide the notice in a timely manner.

Compliance with Section 504 also requires that districts obtain parental permission for initial evaluations. To implement this requirement, The District's 504/ADA Handbook provides that “[i]f the District or the school site's Section 504 Service Plan team determines an evaluation under Section 504 is appropriate, the team will forward a letter

² The Complainant signed the 504 plan but continued to object to the District's refusal to include a provision related to the use of technology in the classroom. That dispute was resolved through a due process hearing and is not addressed by OCR as part of this complaint.

and/or an assessment plan requesting consent for evaluation of the student to the parent/guardian.” Though the Section 504 regulations do not specifically require that the parental consent for an evaluation be written, OCR has interpreted Section 504 to require parental consent for initial evaluations.³ Obtaining written consent provides a mechanism through which the parties can be clear regarding what evaluation procedures the parents are agreeing to. Though the parties agreed at the SST meeting to have the Student evaluated, the District did not obtain the parents’ written consent for the evaluation process at that time. Instead, the District asked the Complainant to sign a written consent form at the Section 504 meeting on December XX, 2015, which was after the evaluation had already been conducted. Neither the Student’s parents nor the District provided OCR with a copy of the consent form that was presented to the Student’s parents at the December XX, 2015 meeting. OCR found that the Student’s parents did know after the SST meeting that the school was moving forward with an evaluation under Section 504, but did not receive anything in writing or an assessment plan.

OCR therefore had concerns about whether the District obtained effective consent for the evaluation of the Student that was conducted, given that the written record does not identify whether the parents agreed to the scope and nature of the evaluation to be conducted. In order to complete the investigation, OCR would need to interview each of the remaining people involved in the Section 504 evaluation process (including the school psychologist, the counselor, and other school administrators) to definitively determine whether the Student’s parents provided appropriate consent to the evaluation that was conducted. Prior to the conclusion of OCR’s investigation into this allegation, however, the District expressed an interest in resolving this allegation and OCR agreed that such a resolution was appropriate.

OCR also had concerns about whether the District evaluated the Student in a timely manner. In determining whether a district or school has timely conducted an evaluation of a student, OCR takes into consideration the timeframes provided by the IDEA regulations and the district or school’s own procedures. The requirement in the IDEA regulations that a district hold an IEP meeting within 60 calendar days after receipt of a signed assessment plan serves as such a guideline. Here, the District’s Section 504/ADA Handbook also cites case law finding that 60 days was a reasonable period to conduct an evaluation and that 90 days was not a reasonable timeline, and concluded that “adhering to a 60 day timeline is wise.”

OCR finds that the Complainant notified the School regarding Student’s anxiety issues and need for accommodations in a phone call with the ELA Teacher on September XX, 2015. The ELA Teacher denied to OCR that the Student’s parents ever told her about the Student’s anxiety, and said she only learned about his anxiety through the Section 504 process. The Complainant, however, described in detail to OCR a conversation about anxiety issues that she had with the teacher on September XX, 2015. Furthermore, when the Student’s father sent an email to the ELA Teacher on October XX, 2015 after their initial discussion, he noted that both he and his wife had previously

³ See e.g., <http://www2.ed.gov/about/offices/list/ocr/504faq.html>

discussed the Student's anxiety issues with the ELA Teacher. After that call, the Teacher sent an email to other School staff that acknowledges her discussion of the Student's anxiety with the Student's father. Both the Father's email and the ELA Teacher's email are inconsistent with the ELA Teacher's assertion that she never heard about the Student's anxiety from the Student's parents. OCR therefore finds the Complainant's statement that she shared the student's anxiety disorder with the ELA Teacher on September XX, 2015 more credible than the ELA Teacher's statement that she did not know about the Student's anxiety until the Section 504 process started.

After the notification on September XX, 2015, eighty days passed before the Section 504 team meeting on December XX, 2015.⁴ During that time period, the District did conduct an SST meeting to try to put some interim steps in place for the Student. However, most of the accommodations in the final Section 504 plan are not included in the SST memorandum. OCR also notes that the guidelines that were put in place as interim steps after the SST meeting to reduce the Student's anxiety were not functioning as intended to reduce the Student's anxiety. For example, the Complainant emailed the Assistant Principal on Monday November XX, 2015 because the Student had spent five hours on his homework over the weekend but was told on that Monday at school that he did not do enough work over the weekend and was assigned XXXX XXX. The ELA Teacher in fact reported to OCR that she had no recollection of that memorandum or any plan for interim steps.

Thus, the SST memorandum did not obviate the need for the District to complete the Section 504 process in a timely manner. Furthermore, even after the SST meeting, more than seven weeks elapsed before the 504 meeting was held. During this period, the only evaluation done by the District was one meeting with the Student, some communications with the Student's teachers, and a review of two documents provided by the Complainant documenting the Student's anxiety disorder. Email correspondence produced by the District suggests that the 52 day period between the SST meeting and the Section 504 meeting was primarily caused by a delay by District staff at the beginning of the process in starting the evaluation process, and another delay at the end of the process where the District was attempting to provide individualized training on Section 504 for the Student's teachers.

OCR therefore had concerns about whether the evaluation was completed in a timely manner as required under Section 504. In order to complete the investigation, OCR would need to interview each of the remaining people involved in the Section 504 evaluation process (including the school psychologist, the counselor, and other school administrators) to definitively determine the reasons for the delay and to understand the scope of the evaluation. Prior to the conclusion of OCR's investigation into this allegation, however, the District expressed an interest in resolving this allegation and OCR agreed that such a resolution was appropriate. Pursuant to the resolution agreement, the District will reimburse the Complainant for costs incurred for co-

⁴ The District's 504/ADA Handbook states that the evaluation timeline starts when the parent signs the consent and notice of rights forms. However, as described above, the parent was not provided with those forms before the evaluation was conducted.

payments for the Student’s counseling sessions and provide written guidance and training to School staff regarding their obligations under Section 504.

Issue 1(b): Implementation of the 504 plan

Once a 504 plan is created, Section 504 requires that teachers must implement the provisions of Section 504 plans when those plans govern the teachers' treatment of students for whom they are responsible. If teachers fail to implement the plans, such failure can cause the school district to be in noncompliance with Section 504.

This complaint, which was filed with OCR on February X, 2016, contains allegations that the Student’s teachers failed to follow the guidelines set out in a memo drafted by the Assistant Principal after the SST meeting on October XX, 2015, which included a limit on the amount of homework and a provision that teachers should be “sensitive” with feedback.

The Student’s Section 504 plan was finalized and signed by Complainant on March XX, 2016. The brief memorandum issued by the School on October XX, 2015 was not a plan established pursuant to the Section 504 process. The memorandum was issued before the School had conducted an evaluation to definitively determine if the Student had a disability needing accommodation. The Assistant Principal told OCR that the purpose of the SST meeting was to determine how to assist the Student and determine whether a Section 504 evaluation was necessary, and that the purpose of the memorandum was to put in place temporary measures to support the Student while the Section 504 evaluation was taking place.

The memorandum generally describes good teaching practices rather than accommodations for Student’s disability, such as the provisions that “[t]eachers will grade students on standards” and “[t]eachers will be sensitive with feedback.” The Complainant acknowledged this in an email to the Assistant Principal on November X, 2015, where she noted her concern that the memo contained “absolutely no accommodations.”

The District’s obligation to implement the Section 504 plan relates to the plan developed through the Section 504 process, meaning a plan developed after an evaluation of the Student, and one that is based on his individualized needs. In this case, that Section 504 plan was not finalized until March XX, 2016. The proposed measures suggested after the SST meeting were not a Section 504 plan based on an evaluation of the Student. Based on the totality of the circumstances, OCR therefore cannot find that the District violated Section 504 by failing to implement the measures described in the SST memorandum.

Issue 2: *Whether the Student was subjected to harassment by a District employee based on his disability, and whether the District failed to respond appropriately and effectively to notice of the harassment.*

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 and Title II 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.

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.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. 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 circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the 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

- The Student told OCR that he believed that the ELA teacher targeted him and other students in the class who were not her "favorites." The Student told OCR that he felt like he was not one of the teacher's favorites because her ideal version of a GATE student is a student that is "book smart" and gets things done fast, and he did not fit that mold because he did not work fast and thought "outside the box." He also reported to OCR that the ELA teacher repeatedly made students re-do assignments if they contained mistakes, which caused him anxiety because he struggled to complete assignments without mistakes.

- The Student reported that the ELA teacher targeted him by being sarcastic and condescending towards him. The Student described a number of incidents in which the ELA Teacher made condescending or sarcastic comments towards him and criticized him in ways that made him feel bad about himself. As a result of this, the Student felt embarrassed and told OCR he would “curl up in a hole.” Because of how he felt in this class, the Student cried regularly at home and at school, could not sleep, and had nightmares. The Student and the Complainant reported several specific incidents where the teacher embarrassed him or treated him inappropriately, which included the following:
 - In October 2015, after the Student turned in a project that involved coloring and labeling a map, the ELA Teacher pulled him to the side of the class by the file cabinets to give him feedback. The Student reported that the ELA Teacher told him his map was terrible and asked him whether another student in the class needed to provide him with coloring lessons. The ELA Teacher told the Student he would need to redo the map. The ELA teacher told OCR that she provided feedback to the Student because he did not follow the directions for the assignment, but the teacher could not describe what directions he had failed to follow. The teacher also told OCR that she separately provided feedback to several other students who had not completed the project correctly.
 - On other occasions at the beginning of the school year, the Student reported that the ELA Teacher would call him up to her desk and criticize his work, which other students could hear. The Student reported that he would regularly cry during class in response to criticism that he perceived as public. The Student told OCR that as the year progressed, the ELA Teacher started talking more quietly to him when providing feedback and then started pulling him off to the side of the class to provide feedback, which he also felt embarrassed by. The Complainant told OCR that the ELA Teacher had said that she was unable to effectively provide feedback because of the Complainant’s requests to not provide feedback publicly.
 - On another occasion, the Student reported that he had an anxiety attack and asked to go to the office to finish taking a test. The Student reported to OCR that the ELA Teacher initially encouraged him to “face his fears” and stay in the classroom, but then eventually allowed him to take the test in an administrator’s office.
 - The Student reported that the ELA Teacher regularly talked about stress and told the class that anxiety was “a choice.” The Student told OCR that the ELA Teacher made these comments to the entire class, but that the Student felt as though they were directed at him. The ELA Teacher told OCR that she and other teachers at the school use a program called MindUp from the Hawthorn Foundation that addresses how the brain works and how to deal with stress, and that it was in that context that she discussed anxiety.

- On March XX, 2016, the Student missed school for a short period of time due to an incident where he hit his head. When he returned to class on March XX, 2016, the class was grading a quiz that he had not yet taken. After the class finished grading the quiz, the Student notified the ELA Teacher that he had not yet taken the quiz. The ELA Teacher gave him only half credit on the quiz. After the Student's parents complained, the ELA Teacher thereafter agreed to remove the grade entirely.
- The Student told OCR that on March XX, 2016, the ELA Teacher approached the Student and asked him if he wanted to stay in the back of the class where she would not bother him, or whether he wanted to sit somewhere further up where she would keep pushing him; the Teacher stated that she had no recollection of this event. That day, the Complainant moved the Student out of the GATE program. The Student told OCR that he immediately felt more comfortable in his new classes and felt happy for the first time that school year.
- The Student reported that the ELA teacher also sometimes targeted other students in the class and identified those students to OCR. OCR obtained the Section 504 and IEP plans for all students in the Student's class and determined that none of the students he had identified as being targeted had Section 504 plans or IEPs.

Analysis & Conclusions of Law

As noted above, in order to find that harassment occurred under Section 504 and Title II, OCR must find that the Student was subjected to sufficiently severe conduct based on his disability. Here, OCR did not find sufficient evidence to show that the ELA Teacher's conduct towards the Student was based on his disability.

The Student described a number of incidents in which the ELA Teacher made condescending or sarcastic comments towards him and criticized him in ways that made him feel bad about himself. As a result, the Student cried regularly at home and at school, could not sleep, and had nightmares. The ELA Teacher was the source of much of his anxiety. The ELA Teacher generally downplayed the Student's anxiety to OCR and told OCR that the Student "never had breakdowns or was hyperventilating or turning red," but the information gathered from the parent and Student reflected that the Student had significant anxiety problems that were being exacerbated by being in the ELA Teacher's class.

However, OCR did not find sufficient evidence that the ELA Teacher's treatment of the Student was harassment on the basis of disability. The Student reported that he felt uncomfortable and less supported in the class because he did not fit the mold of a typical GATE student. OCR examined whether there was evidence that the ELA Teacher's conduct was related to the Student's anxiety or whether the ELA Teacher singled the Student out while not treating non-disabled students in a similar manner.

With respect to the specific incidents described by the Complainant and the Student, OCR did not find sufficient evidence that the ELA Teacher's negative treatment of the Student was based on his disability. For example, with regard to the feedback the ELA Teacher gave to the Student about his map, while the Teacher's tone may have been harsh, as described by the Student, OCR found no evidence that the Teacher's behavior toward the Student was intended to cause him anxiety, or that she singled him out for poor treatment because of his anxiety. OCR also notes that the ELA Teacher reported that she provided feedback through a similar method to several other students about the same project.

Also, OCR did not find evidence that the Student's anxiety disorder was the cause of him being a target of the ELA Teacher. The Student reported that other students in the class were at times also "targeted" by the ELA Teacher. OCR found no evidence that those students were students with disabilities, as they did not have Section 504 Plans or Individualized Education Programs. This is consistent with the conclusion that the ELA Teacher's actions were not targeted towards students with disabilities.

The Student and Complainant also described concerns with feedback being provided in a way that other students could hear. OCR, however, found no evidence that the Teacher provided feedback in ways that were more public to the Student than for other students. The Student also reported to OCR that the Teacher's feedback mechanisms did change over the course of the school year to become less public, after the discussions about Student's anxiety. The Complainant reported that she was concerned that the ELA Teacher said she was unable to effectively provide feedback to the Student because of the request to not provide feedback in front of other students. OCR did not find the ELA Teacher's comments to constitute harassment, but rather reflected a legitimate acknowledgment of the fact that not providing critical feedback in real time in the classroom would have an impact on how the ELA Teacher was able to assist the Student. To the extent that the ELA Teacher did provide feedback in ways that the Student found embarrassing, OCR did not find that these instances constituted harassment on the basis of disability. However, this may reflect a need for additional training for the ELA Teacher about working with students with anxiety disorders.

Both the Student and the Complainant also identified that the ELA Teacher discussed anxiety and stress to the class. The ELA Teacher's discussion of anxiety was part of the MindUp program. OCR found no evidence that the use of this program was focused on the Student in particular. However, OCR recommends as a matter of technical assistance that the School evaluate the program to determine whether this program is appropriate for use with students with Generalized Anxiety Disorder, or to determine how it might be best presented to students with such disabilities. OCR, however, does not find that the ELA Teacher's comments constituted harassment based on disability that denied or limited the student's ability to participate in or receive education benefits, services, or opportunities.

For the foregoing reasons, OCR found insufficient evidence of non-compliance with regard to this issue. As a matter of technical assistance, however, OCR notes that the

ELA Teacher's interactions with the Student appeared to significantly exacerbate the Student's anxiety, and OCR recommends that the District continue to offer training to its GATE staff about how to accommodate students with anxiety in the GATE program.

Conclusion

Based on the commitments made in the enclosed Agreement to address OCR's concerns with respect to the first allegation, 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 the statute(s) and regulations at issue in the 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: XXXX XXXXX (by email only)