



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 11, 2017

Parvin Ahmadi
Superintendent
Castro Valley Unified School District
4400 Alma Avenue
Castro Valley, California 94546

(In reply, please refer to case no. 09-16-1552)

Dear Superintendent Ahmadi:

On July 8, 2016, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against Castro Valley Unified School District (Recipient). The Complainant¹ alleged discrimination on the basis of disability. OCR opened the following allegations for investigation:

1. The Recipient failed to provide the Student with a free, appropriate public education (FAPE) by:
 - a. Failing to evaluate the Student in a timely manner under the Individuals with Disabilities in Education Act (IDEA) even though it had reason to believe that the Student needed special education or related services because of a disability.
 - b. Failing to implement the Student's Section 504 plan during the 2015-2016 school year.
2. The Student was subjected to harassment by a Recipient employee based on her disability, and that the Recipient failed to respond appropriately and effectively to notice of the harassment.
3. The Recipient retaliated against the Student after the Complainant advocated on her behalf when her math teacher accused her of cheating on a final exam.

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

¹ OCR informed the District of the identities of the Complainant and Student in our letter notifying it of the complaint. We are withholding them here to protect their privacy.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

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.² 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.

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

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.

² For further explanation, please see the Dear Colleague Letter entitled "English Learner Students and Limited English Parents" (jointly issued by OCR & the U.S. Department of Justice) (January 17, 2015).

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.

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 materially adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

OCR's preliminary investigation showed the following:

- On April XX, 2011, the Student was first found eligible for a 504 Plan, when she was in the fifth grade.
- During the 2015-2016 school year, the Student was in the tenth grade and her Section 504 Plan had not been updated since 2011.
- The Student's 504 Plan identified the Student's disability as Attention Deficit Disorder/Oppositional Defiance Disorder, which resulted in the Student having difficulty staying on task, maintaining focus in class, interactions and getting along with peers, and impulse control. The 504 Plan included the following accommodation plan:

- Seat [Student] near good role model or near teacher
 - Increase distance between desks
 - Allow extra time to complete assigned work and on tests
 - Pair written instructions with oral instructions
 - Cue to stay on task (i.e. private signal)
 - Set up clear, concise rules of behavior and consequences for breaking them – established with [Student], parent, and teacher
 - Increase immediacy of rewards and consequences
 - Utilize positive reinforcement
 - Remind child to check over work product if performance is rushed and careless
 - Look for opportunities for child to display leadership role
 - Assist child to use calming strategies
 - Supervise writing down of homework assignments
 - Send daily/weekly progress reports between home and school as needed
 - Increase tolerance for minor misbehavior
 - Supervise closely during transition times
 - Minimize distractions in the study environment
- In October 2015, the Complainant received a call from the Student's Chemistry Teacher with concerns that the Student had not completed all her assignments for a notebook check. The Complainant told the Chemistry Teacher that, as a result of the Student's disability, she was extremely disorganized and would have trouble locating her work, even after completing it. According to the Complainant, the Chemistry Teacher responded that the Student had admitted to lying about completing her work, but that the Student could have her notebook rechecked.
 - Thereafter, the Complainant made a written complaint to the Student's counselor, alleging that the Chemistry Teacher harassed the Student by making her stay after class, shouting at her to admit that she was lying about completing her work, and would not let her leave class until she admitted to lying. The complaint also included an allegation that the Chemistry Teacher had not followed the Student's 504 Plan because progress reports had not been sent home and the Student was not reminded to check her assignments by the Chemistry Teacher when there were issues with the notebook.
 - On November X, 2015, after an investigation, the District's Student Services Director emailed the Complainant regarding the allegation that the Student's 504 Plan had not been followed, finding that the Chemistry Teacher encouraged all students, including the Student, not to turn in sloppy or disorganized work and that the Complainant could check the parent portal for detailed daily checks on the Student's progress. In order to resolve the complaint, the Chemistry Teacher offered to remove that notebook check from the Student's final grade. The email did not address the Complainant's harassment allegation.

- On November XX, 2015, the District agreed to change the Student to another chemistry class.
- On January XX, 2016, the Complainant made a written request that the Student be assessed for eligibility of an IEP under the IDEA.
- On February X, 2016, the District sent a written response to the Complainant which stated that an IDEA assessment was not necessary because the Student had a 504 Plan which could address the Student's needs. The letter recommended a 504 Plan meeting to discuss the Student's needs, and included a copy of Procedural Safeguards.
- On February XX, 2016, the Complainant again requested in writing that the Student be assessed for eligibility of an IEP during the Student's 504 Meeting. The information provided indicates that the District agreed to assess the Student and the Complainant signed the District's assessment plan on March XX, 2016.
- An initial IEP meeting was held on May XX, 2016 and continued on June X, 2016. The IEP team determined that the Student was eligible for an IEP under the categories of Autism and Other Health Impairment (OHI) – Attention Deficit Hyperactivity Disorder.
- On June XX, 2016, the Student took her final exam in math. The District provided information stating that after reviewing all the tests, the Math Teacher suspected the Student had cheated on the exam.
- On June XX, 2016, the Student's Math Teacher met with the Student and Complainant to go over one of the Student's math tests and also brought up his concern that the Student cheated during the final exam. The Complainant complained to School administrators that the cheating allegation was in retaliation for her advocacy that teachers were not following the Student's 504 Plan.
- The District had begun an investigation into this allegation but stopped because the Complainant had submitted her OCR complaint.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. The Recipient in this case expressed an interest in resolving the complaint to resolve OCR's concerns regarding the implementation of the Student's 504 Plan, the delay in reevaluating the Student's 504 Plan, and the need for a thorough investigation of the Complainant's harassment and retaliation allegations. In order to complete the investigation, it would be necessary to interview members of the Student's 504 Team, for clarification about the Student's 504 Plan accommodations and how they were implemented, as well interviews with the Student, the Chemistry Teacher, and the Math Teacher.

On January 9, 2017, the Recipient signed an agreement with OCR. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. Because the Recipient voluntarily resolved this complaint, OCR did not complete its investigation or reach conclusions as to whether the Recipient failed to comply with Section 504 or Title II. OCR will monitor the Recipient's implementation of the agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Recipient's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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.

Please be advised that the Recipient may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

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

If you have any questions please contact Alvaro Soria at (415) 486-5580 or alvaro.soria@ed.gov.

Sincerely,

/s/

Kendra Fox-Davis
Team Leader

Enclosures

Cc: District Student Services Director (by e-mail only)