



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SEATTLE, WA 98174-1099

August 6, 2014

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Dr. Kenneth W. Cox
Superintendent
Minidoka County Joint School District 331
633 Fremont Avenue
Rupert, Idaho 83350

Re: Minidoka County Joint School District 331
OCR Reference No. 10121025

Dear Superintendent Cox:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the referenced complaint against Minidoka County Joint School District 331. The complaint alleged that, during the 2011-2012 school year, the district discriminated against a student at XXXXXXXX XXXXXXXX School, by:

1. failing to take appropriate action to address student-on-student disability-based harassment of the student; and
2. failing to implement the provision in the student's individualized education program (IEP) which requires teachers to utilize an FM system to assist the student with hearing instruction.

OCR enforces section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act of 1990, and their implementing regulations at 34 CFR Part 104 and 28 CFR Part 35, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance from the U.S. Department of Education. The district is a recipient of federal financial assistance from this Department and is subject to these regulations.

OCR investigated the following issues:

1. Whether the student was subjected to a hostile environment because of harassment on the basis of disability and, if so, whether the district knew about the disability harassment and failed to promptly and effectively address it.

2. Whether the district discriminated against the student, on the basis of disability, by failing to implement the provision in the student's IEP which requires teachers to utilize an FM system to assist the student with hearing instruction, in violation of 34 CFR 104.33 and 28 CFR 35.130(a).

With regard to the issue of whether the student was subjected to disability-based harassment, OCR concluded that the district failed to comply with Section 504 and Title II because school officials failed to take prompt and effective steps to stop harassment of which school officials knew or should have known. After notifying the district of the identified compliance concerns, OCR entered into discussions with the district regarding a Settlement Agreement that would serve to voluntarily resolve those concerns. The district has made a commitment in the agreement to undertake action that, when completed, will fully address the compliance concerns identified by OCR.

With regard to the issue of whether the district failed to implement the student's IEP, OCR determined that the evidence did not support a conclusion that the district failed to comply with Section 504 and Title II in this regard.

OCR's findings of fact and conclusions set forth below, in which the subject student is referred to below as "student A," are based up information and documents provided by the student's parent and district staff.

Findings of Fact - Issue No. 1

1. Student A was enrolled in the XXth grade at XXXXXX XXXXXX School for the 2011-2012 school year, and received disability-related educational services through an IEP for XXXXXX XXXXXX XXXXXXXXX.
2. It is the position of student A's parent that on numerous occasions during the first semester of the 2011-2012 school year, student A was subjected to disability-related harassment by several students. Specifically, the parent asserted that student A was called "retarded," "dumb," and "idiot," and was physically assaulted by another student on at least one occasion in September 2011. It is the parent's position that several teachers either witnessed or were informed of these incidents by student A and the parent but that these incidents continued to occur.
3. The district's Policy No. 502.00 prohibits bullying, coercion, cyber-bullying, discrimination, gang activity, harassment, hazing, and intimidation on the bases of race, color, creed, national origin, religion, age, disability, and gender/sex. The policy defines bullying, harassment, and/or intimidation as misconduct by a student which is characterized by aggressive or intentionally harmful behavior carried out repeatedly over time. Any student or parent who

believes the student is being harassed, hazed, intimidated, coerced, bullied, or discriminated against should immediately report the situation to school personnel. The policy also states that any district employee who receives a report of harassment from a student, becomes aware that a student is being subjected to harassment, or in good faith believes that a student is being subjected to harassment is required to report the matter to the building principal immediately. Any district employee who witnesses harassment of a student should take immediate appropriate action to intervene to stop the harassment.

4. With respect to investigating allegations of harassment and bullying, Policy No. 502.00 states that the school administrator or designee will investigate any allegations of misconduct that are reasonably characterized as bullying, coercion, cyber-bullying, discrimination, gang activity, harassment, hazing, or intimidation. When a report of harassment is received by the principal or the superintendent, the policy requires that a written statement will be obtained from the complainant and the accused regarding the allegations. If, after the initial statements are reviewed, the principal reasonably believes that an incident of prohibited behavior has occurred, the principal will obtain written statements from witnesses and prepare a written report detailing the investigation. The policy states that students whose behavior is found to be in violation of this policy will be subject to discipline, up to and including expulsion.
5. The XXXXXXXX XXXXXXXX School Student Handbook, which is available only in electronic format, includes a reference to the district's Policy No. 502.00 under the heading "Prohibition of Gangs and Hate Groups" which states the following:

"Gangs, hate groups, and similar organizations or groups which advocate hatred or discrimination on the basis of race, color, religion, sex, ancestry, national origin or handicap are inconsistent with the fundamental values of the educational environment and that such groups and their members are prohibited on school property and at all school sponsored functions...Bullying, coercion, cyberbullying, discrimination, gang activity, harassment, hazing and/or intimidation of students and/or employees is prohibited and will not be tolerated."
6. The Student Handbook states that anyone who believes they are a victim of bullying, fighting, gang activity, or harassment should immediately report the alleged acts to a teacher, counselor, supervisor, principal, or the superintendent and that complaints will be investigated following the

procedures of Policy No. 502. Other than the section titled “Prohibition of Gangs and Hate Groups,” the Student Handbook does not contain any other reference to the prohibition of bullying or harassment.

7. XXXXXXXX XXXXXXXX School utilizes PowerSchool, a computer-based program, to record individual student activity, including attendance, grades, and discipline. It is the district’s position that PowerSchool is the only method utilized by the district for recording and tracking disciplinary incidents.
8. The PowerSchool entry for student A included an entry on September 21, 2011, which stated that students A and B were hitting and kicking each other, that both were instructed to stay away from each other, and that if this occurs again, it may lead to discipline action and court. No other disciplinary entries were noted in the PowerSchool involving student A during the 2011-2012 school year.
9. The incident on September 21, 2011, was also reported to the School Resource Officer (SRO). The SRO’s incident report reflected that student A’s mother contacted the principal and assistant principal with concerns that student B was harassing and bullying student A. The report stated that student A told the SRO that student B would hit, kick, and tease her. Student A indicated that she would hit or kick student B when he teased her and that she also tried to get student B to stop teasing her. The SRO spoke with student B and explained that if the behavior continued he could be charged with battery or bullying. Student B told the SRO that he would bother the student because she was hitting and kicking him. There was no reference to the student’s disability in this report or to any of the teasing being disability-related.
10. OCR interviewed several of student A’s teachers and administrators at XXXXXXXX XXXXXXXX School regarding whether they either witnessed or received reports that student A was being harassed by other students during the 2011-2012 school year. It is the position of one teacher (teacher A) that sometime between September and October 2011, student A told her that another student, student C, called her a name but was not specific as to what name she was allegedly called. The teacher stated when she questioned student C, he denied calling the student any name. The teacher stated that she did not take any further action because there was no specific information to report. The teacher stated that another student, student B, was removed from her advisory during the first trimester of the class because of some concerns regarding student B’s interactions with student A but that the teacher was not aware of the specific reasons.

11. Another teacher (teacher B) stated that she never personally witnessed any situations in which student A was called derogatory names or bullied in a manner related to her disability. However, teacher B informed OCR that in early fall 2011, she was directed by the principal or counselor to allow student A to come into the classroom before class started and to leave early so that she was not in the hallways with student B because student B, who was in a neighboring classroom, had been bothering student A.
12. It is the position of student A's counselor during the 2011-2012 school year that she never received any reports from student A or the parent about alleged name calling or any other incidents. The counselor stated that she was aware of one incident that involved students A and B on or about September 21, 2011, that involved a physical altercation, but she did not view the incident as disability-related harassment.
13. It is the position of the former principal that he was aware that student A was having some issues with a few other students but he could not recall any specifics as to those incidents. The principal recalled one occasion on or about September 21, 2011, between students A and B in which the SRO was called and that this incident was logged into PowerSchool. The principal stated that both students reported hitting each other. The former principal stated that as a result of this incident, student A was given a buddy to walk with between classes, and was permitted to enter and leave classrooms early so that she would not have to walk through the hallways with student B.
14. It is the position of the assistant principal that he was aware of the situation involving students A and B when student A's parent called and stated that the students were hitting each other. The vice principal did not recall whether the student's disability was raised as an issue. The assistant principal recalled that the SRO interviewed both students and told them to stay away from each other for the rest of the year. No further actions were taken regarding this situation.
15. On October 20, 2011, student A's parent sent an e-mail to the school psychologist informing her that student A was being "picked on" by other students in teacher C's class and that the student wants to know why students hate her. The psychologist responded that she spoke with teacher C to make sure the class was safe and that she believed teacher C would handle the situation.
16. Teacher C told OCR that he was informed by the former principal at the beginning of the 2011-2012 school year that student B, who was in his class, was bumping and hitting student A on the arm in between classes. Teacher C told the former principal that he would take care of the situation as best as he

could. Teacher C says that he told student B to, “Knock it off. You can’t be doing this.” Teacher C did not personally view any of the alleged incidents and had no knowledge regarding whether any incidents occurred after he spoke with student B.

17. On November 9, 2011, student A’s parent wrote an e-mail to the school’s psychologist stating, “Bullying and violence is a serious issue and my daughter has lived through it. I would like an inclusion made to address this issue within her IEP.” An IEP was subsequently set up for November 18, 2011. No other action was taken by the district as a result of this e-mail.
18. On November 13, 2011, the district’s superintendent received an e-mail from a state senator regarding correspondence that student A’s parent had shared with the senator about physical abuse the student experienced at the school. The e-mail noted that the student had XXXXXXXX, but did not make any other reference to disability or disability-based harassment. The superintendent forwarded the e-mail to the director of special services and suggested a team meeting with student A’s parent. On November 14, 2011, the director of special services forwarded the e-mail to the special education teacher, school psychologist, and principal and recommended an IEP team meeting. Other than commencing an IEP meeting, no further action was taken regarding this e-mail.
19. On November 14, 2011, student A’s parent wrote an e-mail to the student’s special education teacher that said, “I know [the student] informed you that [student C] from [teacher A’s] class has been calling [the student], ‘retarded/retard.’ I asked [the student] to inform you of this issue and I would like to know what will be done about this incident.” It is the position of the special education teacher that student A had not previously informed her about the alleged name-calling. The special education teacher stated that she contacted the former principal about the e-mail and was informed that administration “would take care of it.”
20. It is the position of the former principal that the only incident of alleged harassment that was reported to him was the incident on September 21, 2011, involving students A and B. It is the former principal’s position that both students were involved in the altercation and that the SRO was called. The former principal had no other recollection of the incident other than what was reflected in the SRO’s report. The former principal did not recall any reported incidents of student A being called disability-related names.
21. On November 18, 2011, an IEP team meeting convened and the following provisions were added to student A’s IEP: “student has been the victim of

bullying. If you see this type of behavior or it is reported to you, you must contact the principal or vice principal immediately. The student may leave class five minutes early to get to other classes to avoid bullying.”

22. It is the position of teacher A that during a January 11, 2012, student-led conference, student A mentioned that she was verbally bullied in a XXXXXX class on January 4, 2012. Student A reported that she was teased by other students because she liked “anime,” a Japanese art form, and that derogatory remarks were made about her and Japanese people. Student A told teacher A that she did not tell anyone about the incident because she was concerned about what the other students would do. Teacher A told student A to inform teachers as soon as a situation occurs and that she would write up the conversation and pass it along to the student’s counselor. Teacher A told OCR that she then submitted her notes to the student’s counselor. The counselor told OCR that she recalled receiving a report about the incident in XXXXXX class, but does not recall the source of the report. The counselor informed OCR that she then visited with the XXXXXX class teacher who responded that she would be vigilant in reporting any further incidents.
23. It is the position of the student’s parent that no further incidents of bullying occurred for the remainder of the 2011-2012 school year. In addition, the student A’s annual IEP meeting notes dated October 25, 2012, reflected that no bullying incidents were reporting during the school year. The student in this case is no longer attending school in the district.
24. OCR asked the vice principal what actions are usually taken when a student reports harassment by another student. The vice principal stated that he talks to the alleged victim about what happened and may also talk with the SRO and counselor depending on the situation. When asked if a report is filed, the vice principal stated that the incident is logged into PowerSchool under the names of all students involved. The vice principal stated that no other records are maintained by the school, but the SRO may also retain records if that office is involved in the incident.
25. OCR asked the former principal how staff are informed of the district’s harassment policy. The former principal stated that at the beginning of each school year, staff are informed that they must immediately report to the principal any actions that might be considered harassment under the policy. The former principal stated that it is up to the teacher’s discretion to determine whether an action rises to the level of harassment under the policy.

26. It is the position of the former principal that harassment investigations are typically investigated within the school and that reports of harassment may be made verbally or in writing. The former principal stated that the district has a grievance procedure but that this procedure applies to staff harassment complaints rather than student harassment complaints. The former principal explained that after a report of harassment is received, an investigation is then conducted within the school and all statements are in writing. All information is logged into PowerSchool under both the violator and the reporting student's names. The SRO may also be involved depending on the circumstances.
27. OCR interviewed several staff members at XXXX XXXXXXXXXXXX School regarding their knowledge and awareness about the district's harassment/bullying policy and reporting procedures. The staff members did not have a consistent understanding of any established reporting procedures. One teacher stated that, if a student reported being harassed, the teacher would make a verbal report to a counselor. This teacher stated that, if a parent expressed concern about harassment, the teacher would refer the parent to the administrator. When the teacher was asked if a student had ever reported being harassed, she stated that students report conflict with other students, such as calling each other names, but she doesn't believe it would be defined as harassment. A counselor informed OCR that if a student reports harassment, the counselor would report the incident to the vice principal.
28. OCR requested that the district provide any documents or summaries reflecting student training, assemblies, staff training, or other proactive steps the school or district has taken to prevent disability-based discrimination and harassment or to address school climate issues or concerns. The district provided OCR with a list of PowerSchool entries of all students in the district from 2004 through 2013, which showed the specific disciplinary actions and the actions taken. No other information was provided regarding staff or student training on harassment and bullying.

Analysis and Conclusion - Issue No. 1

The issue investigated was whether student was subjected to a hostile environment because of harassment on the basis of disability and, if so, whether the district knew about the disability harassment and failed to promptly and effectively address it.

The regulations implementing Section 504 at 34 CFR 104.4(b)(1)(ii) and (iii) state that in providing any aid, benefit, or service, a recipient of federal financial assistance may not, on the basis of disability, afford a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that

afforded to others; or provide a qualified disabled person with an aid, benefit, or service that is not as effective as that provided to others.

The regulations implementing Title II at 28 CFR 35.130(b)(1)(ii) and (iii) contain similar prohibitions applicable to public entities. Because the district receives federal financial assistance from the U.S. Department of Education and is a public entity, it is required to comply with the regulations that implement both Section 504 and Title II.

OCR's Dear Colleague Letter on prohibited disability harassment, dated July 25, 2000, defines disability harassment under Section 504 and Title II as "intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program." The letter states that harassing conduct may include verbal acts and name-calling, as well as non-verbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations.

When a school district knew or should have known about disability harassment of a student by other students, and the harassment limits or denies a student's ability to participate in, or benefit from, the district's programs or activities, the district must respond effectively, by investigating the incident(s) promptly and responding appropriately. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed.

The notice in the Student Handbook regarding harassment is limited to a discussion of prohibition of gangs and hate groups. In addition, the evidence did not establish that school staff were provided effective training or guidance regarding what constitutes harassment or how disability-related harassment and bullying should be handled when staff witness such incidents or receive reports from students and parents regarding alleged incidents.

The evidence established that between September 2011 and January 2012, staff and administrators received reports that other students were "bullying" or "picking-on" student A. The evidence establishes that at least one report specifically referenced the student's disability and another report identified derogatory disability-based name-calling being directed at student A. OCR's investigation indicated that district staff did not follow their established procedures for responding to claims of harassment and bullying, and did not investigate instances that were called to the

school's attention. OCR found that at least one alleged harasser, student B, was verbally warned to stop bothering student A, but was not disciplined regarding the alleged behavior. When student A's parent requested addressing "bullying and violence" in the student's IEP, this request also did not trigger an investigation of disability-based harassment under the district's procedures.

OCR found that the alleged discriminatory incidents occurred for several months until the student A's IEP included a provision designed to limit student A's contact with the offending students.

Because the preponderance of the evidence established that student A was subjected to a hostile environment, and because the school did not take prompt and effective action to respond to reports of disability-related bullying and harassment of student A, OCR concludes that the district did not comply with the requirements of Section 504 or Title II.

Findings of Fact - Issue No. 2

1. The student A's IEP dated October 26, 2011, includes a provision regarding an FM unit for use in the classroom to address minimal hearing loss in her left ear. The provision states that, "As needed per the student, an FM System will be used by teachers to help her hear instructions better." The start date for this provision was October 27, 2011.
2. It is the position of the speech pathologist who wrote the provision that it was the understanding of the IEP team that student A was to request the use of the FM unit at her discretion. The speech pathologist stated that she provided training to student A and the teachers about the use of the FM unit shortly after the provision was added to the student's IEP and that the student was aware that the FM unit would only be used if she requested it. The speech pathologist stated the use of the FM unit is generally dependent on the particular circumstances of each class.
3. It is the position of the student A's parent that the FM unit should have been used at all times by all of the student's teachers and that the teachers told the student that they would not use it when the student requested it. Efforts to interview student A in this case were not successful.
4. It is the position of student A's teachers that they received training in the use of the FM unit in early November 2011 and that the expectation was that the student would indicate to them whether she wanted the teacher to use the FM unit during a particular class. All teachers interviewed by OCR specifically denied that they refused to use the FM unit if the student requested it.

5. In a November 4, 2011, e-mail to the former principal and various school staff, student A's parent expressed concerns that the student's teachers were not using the FM unit. She indicated that teachers have told the student, "not today," in regards to using the FM unit. It is the position of the former principal that he talked to all of the student's teachers and that they told him that the FM unit was being used whenever the student felt she needed it.
6. Teacher A stated that it was her understanding that the use of the FM unit was necessary only if requested by student A and that she used the device whenever the student requested.
7. It is the position of teacher B that student A was responsible for informing the teacher if she needed to use the FM unit. The teacher stated she asked the student on occasion if she had trouble hearing her. The student responded that she could hear if the teacher stood near her during class. It is the teacher's position that she then asked the student to set up her FM system on several occasions but the student refused. The teacher remained in close proximity to the student during the class on those occasions and the student did not express any difficulties in hearing the instruction during the remainder of the first trimester.
8. It is the position of teacher C that student A was responsible for informing him if the student needed to use the FM unit. Teacher C stated that he asked the student if she needed to use the FM unit and the student told him that she could hear him without the FM unit. Teacher C said that he never used the FM unit in his class.

Analysis and Conclusion - Issue No. 2

The issue investigated was whether the district discriminated against the student, on the basis of disability, by failing to implement the provision in the student's IEP regarding the use of an FM unit.

The regulation implementing Section 504 at 34 CFR 104.33(a) requires a school district that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified student with a disability within its jurisdiction. An appropriate education is defined as the provision of regular or special education and related aids and services that (1) are designed to meet the individual educational needs of disabled students as adequately as the needs of nondisabled students are met, and (2) which are based upon an adherence to Section 504 procedures. Implementation of an IEP is one means of meeting this standard. The applicable Title II regulatory provision is set forth at 28 CFR 35.130 and is interpreted consistent with the provisions of Section 504 mentioned above.

OCR found that student A's IEP during the 2011-2012 school year included a provision for an FM unit as needed "per the student" to help her hear instructions. The student's parent alleged that teachers were not consistently using the FM unit in the classroom. However, the evidence did not establish that the student made specific requests to use the unit in the classroom that were not honored by the student's teachers. The teachers reported that they used the FM unit to various degrees based on the student's requests. Because the evidence was insufficient to establish that the student was denied the use of an FM unit as described in her IEP, OCR concludes that the district is in compliance with Section 504 and Title II with respect to this issue.

With respect to issue No. 1, the district has agreed to take the actions set forth in the enclosed Settlement Agreement which, when fully implemented, will resolve the identified compliance concern. OCR will monitor the implementation of the agreement and will close the complaint when OCR determines that the terms of the agreement have been satisfied. The first report under the agreement is due by October 15, 2014.

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the district's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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 district may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, 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.

Thank you and your staff for your cooperation during the investigation of this complaint. If you have any questions, please contact Samantha Wilson, equal opportunity specialist, by telephone at (206) 607-1671 or by e-mail at samantha.wilson@ed.gov.

Sincerely,

/ s /

Sukien Luu
Supervisory Attorney

Enclosure: Settlement Agreement

cc: Tom Luna, Superintendent of Public Instruction
Robinson, Anthon & Tribe, Attorneys at Law