



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

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February 28, 2019

Timothy Hearney, Ed.D.
Superintendent
Bayport-Blue Point Union Free School District
189 Academy Street
Bayport, New York 11705

Re: Case No. 02-18-1402
Bayport Blue Point School District

Dear Dr. Hearney:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Bayport Blue Point School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by failing to respond appropriately to her complaints about incidents of disability-related harassment that allegedly occurred in October 2017; November 2017; December 2017; and, January 2018 (Allegation 1).¹ The complainant further alleged that the District retaliated against the Student for her disability-related advocacy, by having the Student XXXX X XXXX XX XXXXXX XX XXX XXXXXX, on or about January 10, 2018 (Allegation 2).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the

¹ In her initial report to OCR, the complainant approximated that the alleged incidents of disability-related harassment occurred in October 2017; December 2017; and, throughout school year 2017-2018. During the course of the investigation, OCR determined that the alleged incidents of which the complainant complained occurred in October and December 2017; and January 2018.

Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

Harassment based on disability that creates a hostile environment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations, at 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, respectively. Harassment based on disability can include verbal, written, graphic, physical, or other conduct by an employee, a student, or a third party. Harassment can create a hostile environment if it is sufficiently serious to limit an individual's ability to participate in, or receive benefits, services, or opportunities in the recipient's program. If OCR determines that harassing conduct occurred, OCR will examine additional factors to make a determination as to whether a hostile environment existed and whether the recipient took prompt and effective action to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

In its investigation, OCR reviewed documents and information that the complainant and the District submitted to OCR. OCR also interviewed the complainant² and the principal of the District's XXXXX XXXXXX XXXXXX School (the School). OCR made the following determinations.

During school year 2017-2018, the Student was enrolled in the X^{xx} grade at the School. The District identified the Student as a qualified individual with a disability, and determined that the Student should receive related aids and services pursuant to an individualized education program (IEP) during school year 2017-2018.³ The Student's IEP stated that the Student should be placed in XX XXXXXXXXXXXX XXXXXXXXXXXX classroom for his XXXXXX XXXXXXXX and XXXXXXXX classes, and XXXX classes for the rest of his subjects.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to respond appropriately to her complaints about incidents of disability-related harassment that allegedly occurred in October 2017 (Incident 1); December 2017 (Incidents 2 and 3); and January 2018 (Incidents 4 and 5).

With respect to Incident 1, the complainant alleged that in an electronic mail message (email) dated October 31, 2017, she complained to the principal that the Student's XXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX (teacher 1) had announced, in front of the entire class, that

² OCR attempted, without success, to reach the complainant via telephone, on December 3 and December 4, 2018, to clarify some of the information OCR obtained.

³ The Student's IEP classified the Student as having a learning disability.

the Student's quiz XXXX XXXXX XXXX XXXXXXXXXXX XXXX XXXXX XXXXXXXXXXXX XXXXXXX because the Student's quiz "XXXXX XXXXXXXXXXXXXXX." The complainant alleged that the Student was mortified that teacher 1 had treated him differently because of his learning disability and had revealed confidential information to the class.

The principal informed OCR that on November 1, 2017, one day after he received the complainant's email, he spoke with teacher 1. The principal stated that teacher 1 explained to him that on October 31, 2017, she had taken three students, including the Student, to a separate room to administer their testing modifications; and, acknowledged that within earshot of the other two students, she informed the Student that his quiz would be XXXXXXXXXXX XXXX XXXX XX XXX XXXXX XXXXXXXXXXX. The principal stated that all three students' students' IEPs required that XXXXX XX XXXX XX XXXX.

With respect to Incident 2, the complainant stated that during a telephone call in December 2017, she complained to the principal that a student (student A) had subjected the Student to disability-related harassment and bullying at the School. The complainant stated that there was no indication that the principal had investigated her concerns regarding disability harassment. Specifically, the complainant stated that in December 2017, she informed the principal that during the Student's gym class, student A, who was aware of the Student's placement in a XXXX classroom for some of his subjects, told the Student, "You're so stupid, you're going to fail XXX too."

The principal stated that, in response, he spoke to the Student and student A, and directed them to keep away from each other. The principal stated that he also complied with the complainant's request to change the Student's gym class. The principal stated that, thereafter, he notified the complainant of his response to Incident 2.

With respect to Incident 3, the complainant stated that in December 2017, while she was speaking with the principal in his office, the principal was called to intervene in a physical altercation between the Student and another student (Student B) during their lunch period. The principal acknowledged that he was called away to intervene in the confrontation; and, stated that on the following day, he informed the complainant that the assistant principal had investigated Incident 3; and, he had disciplined the Student with detention and Student B with suspension for their respective roles in the altercation. The complainant stated that she later reported to the principal that Student B had referred to the Student as "stupid" because he has classes in the XXXX setting, which resulted in a shoving match. The complaint further stated that the principal did not address her concerns regarding this alleged disability harassment. The principal stated that he did not recall the complainant's complaining about alleged disability-related harassment regarding Incident 3.

With respect to Incident 4, the complainant stated that in January 2018, she complained to the principal that the special education teacher in the Student's skills class (teacher 2) subjected him to disability-related harassment. OCR determined that in an email to the principal dated January 17, 2018, the complainant complained that teacher 2 told the Student that he would "not be successful." The principal acknowledged receiving the complainant's email; and, stated that on January 18, 2018, he spoke with teacher 2. The principal stated that teacher 2 acknowledged

making the statement, but informed the principal that she believed that the Student needed motivation and made the statement in order to encourage the Student to increase his participation in class and classwork output. The principal stated that, thereafter, he communicated teacher 2’s response to the complainant.

With respect to Incident 5, the complainant stated that in January 2018, she complained to the principal that the Student’s aide had subjected the Student to disability-related harassment. OCR determined that in an email to the principal dated January 31, 2018, the complainant complained that during a science examination, the Student asked the aide to re-read the exam questions because he had had some difficulty and had “got[ten] stuck” on a few questions. The complainant stated in the email that the aide responded to the Student, stating, “XXX XX XXX XXXX XXXXX XX XXXX XXXX XXXXXXXX XX XX XXX XXXX”; and, then turned to teacher 1, stating, “XXXX XX XXXXXXXX XXX XXXXXXXX XXXX XXXXXXX XXXXX XXXX XXXX.”

The principal acknowledged receiving the complainant’s email; and, stated that, in response, he interviewed the aide. The principal stated that the aide acknowledged that she made the statements to the Student; however, she explained that she was trying to encourage the Student, and this was her way of making the Student realize that he knew the material. The principal stated that on February 2, 2018, he communicated the aide’s explanation to the complainant. The principal stated that, thereafter, the complainant requested that the Student’s Committee on Special Education (CSE) remove the one-to-one aide as a related service on the Student’s IEP because the Student considered the aide’s presence stigmatizing. The principal stated that he recommended removal of the aide provision from the Student’s IEP; and, the CSE agreed with his recommendation, and removed the one-to-one aide from the Student’s IEP.

With respect to Allegation 2, the complainant alleged that the District retaliated against the Student for her disability-related advocacy, by having the Student XXXX X XXXX XX XXXXX XX XXX XXXXX, on or about January 10, 2018.

In analyzing whether retaliation occurred, OCR must first determine whether the three *prima facie* elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a *prima facie* case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

OCR determined that the complainant engaged in protected activities by complaining to the District: that the Student had been subjected to disability-related harassment during school year 2017-2018; and that teacher 1 had failed to appropriately implement the Student’s IEP with respect to an in-class assignment in January 2018. OCR determined that the District was aware of the complainant’s protected activities.

The complainant stated that the principal determined that teacher 1 had inappropriately deducted two credit points from the Student’s grade on an in-class assignment, contrary to his IEP, on about January 9, 2018.⁴ The complainant alleged that on the following day, January 10, 2018, during the Student’s XXXXXX class, teacher 1 retaliated by forcing the Student to XXXX XXXXX from XXXX XX XXXXX XXXX, XX XXXXX XX XXX XXXXXXXXXXXX, the following disability-related instructions: “[The Student’s] checklist, I will take out my planner; I will write my homework; and I will show the homework written down in my planner.”

The principal stated that the Student used XXXXX XXXXX that included directives, such as, “write down your homework,” as a strategy to prompt the Student to participate in the XXXXXX class and take the steps required for engagement in classroom activities. The principal stated that teacher 1 denied that she had the Student XXXX XXXXX XXXX XX XXXXX XXXX XX XXXXX XX XXX XX XXX XXXXXXXXXXXX; rather, teacher 1 stated that, while standing next to the Student, she checked with the Student regarding his understanding of the class material and reminded the Student to look at his XXXXX XXXX and read what he was supposed to do next.

On February 20, 2019, the District signed the enclosed resolution agreement (Agreement) to voluntarily resolve the complainant’s allegations without further investigation, pursuant to Section 302 of OCR’s *Case Processing Manual*. OCR will monitor the implementation of the Agreement.

This letter should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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 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 individual may file a complaint alleging such treatment.

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

If you have any questions, please contact Genara Necos, Compliance Team Attorney, at (646) 428-3828 or genara.necos@ed.gov; Grace D. Kim, Compliance Team Attorney, at (646) 428-

⁴ The District asserted that the complainant complained about the Student’s grade in an email dated January 16, 2018, not on or about January 9, 2018, as she alleged. The District further stated that teacher 1’s deduction of points on the in-class assignment was appropriate; but, stated that the principal, nonetheless, intervened and advocated for the Student to receive full credit for the assignment, as a way of resolving the complaint.

3977 or grace.d.kim@ed.gov; or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or nadja.r.allen.gill@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Encl.

cc: Fahad Qamer, Esq.