

January 30, 2015

Ms. Martha L. Peek
Superintendent
Mobile County Public Schools
1 Magnum Pass
Mobile, Alabama 36618

Re: Complaint #04-13-1549

Dear Ms. Peek:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has concluded its investigation of the above-referenced complaint, which was filed on July 31, 2013, against the Mobile County School District (District). The Complainant alleged that an aide (Aide 1) harassed her son (Student) on the basis of disability (psychotic and behavior disorders and Attention Deficit Hyperactivity Disorder) in that the Student was subjected to negative disability-related conduct and comments when Aide 1 used her cell phone to videotape the Student, stated that she would show the video to the Complainant, and threw the Student's book bag across the classroom. The Complainant believes that as a result, the Student became upset and slammed his head into the classroom wall.

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, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance (FFA). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of FFA from the Department and a public entity, the District is subject to the provisions of Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR opened the following legal issue for investigation:

Whether the District discriminated against the Student by failing to respond promptly and appropriately to incidents of disability harassment, thereby, subjecting him to a hostile environment, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.4 and 104.7, and the Title II implementing regulation at 28 C.F.R. § 35.130.

During the investigation, OCR reviewed documentation submitted by the Complainant and the District and conducted interviews with the Complainant, the Student and District staff. OCR found noncompliance with respect to the District's written policies and procedures. Prior to

OCR's completion of the remaining aspects of the investigation the District offered to resolve the complaint. Pursuant to OCR's procedures, an issue may be resolved when, before the conclusion of an investigation, the recipient requests to resolve the issue. Based on the foregoing, OCR accepted the District's request to resolve the remaining aspects of the complaint and the District entered into the enclosed Resolution Agreement (Agreement), which when fully implemented, will resolve the area of noncompliance and the remaining aspects of the complaint.

LEGAL STANDARDS

The Section 504 implementing regulation at 34 C.F.R. § 104.4 provides that no qualified student with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

A violation of Section 504 may be found if a recipient has created or is responsible for harassment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently serious to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or opportunities offered by a school.

If a District employee who is acting (or who reasonably appears to be acting) in the context of carrying out his or her responsibilities over students (i.e., such that the employee has actual or apparent authority over the students involved) engages in harassment, then the District is responsible for the discriminatory conduct and therefore, must remedy any effects of the disability-based harassment on the victim, end the harassment and prevent its recurrence.

When a school knows or should know of harassing conduct based on disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, and the size and administrative structure of the school and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

Moreover, for the student with a disability who is receiving FAPE services, disability harassment can result in a denial of FAPE that must be remedied under Section 504. Accordingly, a school's investigation should include determining whether that student's receipt of appropriate services may have been affected by the harassment. If the school's investigation reveals that the harassment created a hostile environment and there is reason to believe that the student's FAPE services may have been affected by the harassment, the school has an obligation to remedy those effects on the student's receipt of FAPE. Even if the school finds that the harassment did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the harassment may have had some impact on the student's receipt of FAPE services.

The Section 504 regulation at 34 C.F.R. §104.7(a) requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the regulation, including any investigation of any complaint communicated to such recipient alleging its noncompliance or alleging any actions that would be prohibited by the Section 504 or Title II regulations.

The Section 504 regulations at 34 C.F.R. § 104.8(a) and the Title II regulations at 28 C.F.R. § 35.106 require that each recipient publish a statement (notice) that it does not discriminate on the basis of disability in its education programs or activities. The notice must state, at a minimum, that the recipient does not discriminate on the basis of disability in its education program or activity, including in admission to or employment in its education programs or activities. The notice should indicate that inquiries concerning Section 504 and/or Title II may be referred to the Section 504/Title II Coordinator(s) or to OCR. The Section 504 regulation at 34 C.F.R. § 104.8 (b) requires that the notice of nondiscrimination be displayed prominently in each announcement, bulletin, catalog, or application form used in connection with its education program and activity and in recruitment of students or employees and it should include the name, office address, and telephone number for the designated Section 504 and/or Title II Coordinator(s).

The regulation at 34 C.F.R. § 104.7 (b) requires a recipient to adopt and publish procedures that provide for the prompt and appropriate resolution of student and employee complaints alleging any actions prohibited by Section 504 and/or Title II and their implementing regulations. Such procedures must provide effective means for preventing and responding to disability-based harassment.

OCR considers a number of elements in evaluating whether a recipient's grievance procedures are prompt and appropriate, including whether the procedures provide for:

1. notice to students and employees of the grievance procedures, including where complaints may be filed;
2. application of the grievance procedures to complaints filed by students or on their behalf alleging discrimination and harassment carried out by employees, other students, or third parties;
3. provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and the alleged perpetrator to present witnesses and evidence;
4. designated and reasonably prompt time frames for the major stages of the complaint process;
5. written notice to the complainant and the alleged perpetrator of the outcome of the complaint; and
6. assurance that the school will take steps to prevent recurrence of any disability-based discrimination or harassment and remedy discriminatory effects on the complainant and others, if appropriate.

Factual Findings

RECIPIENT & COMPLAINANT BACKGROUND

Student Information/Overview of School

During the 2012-2013 school year, the Student was enrolled in the sixth grade at Chastang Middle School (School). The Student had an Individual Education Program (IEP) in place from February 7, 2013 through February 6, 2014. The Student’s medical diagnoses were: Psychotic Disorder; Disruptive Behavior Disorder; Attention Deficit Hyperactivity Disorder (ADHD-combined type); Learning Disorder and Chronic Ear Effusion (hearing deficits). The Student also had a Behavior Intervention Plan (Plan), which included, monitoring and praising the [Student] for appropriate behaviors daily and teachers and school personnel giving verbal praise and redirecting [the Student] to follow school rules.

APPLICABLE DISTRICT POLICIES

Statement of Nondiscrimination

The District’s “Non-Discrimination Statement” states, as is required, that the District does not discriminate on the basis of race, religion, color, national origin, sex, age, or disability in employment or educational services, activities and programs.

Section 504 Coordinator

The District provided a printout of the information on its website notifying the public that its Executive Director of Special Services is responsible for coordinating compliance with Section 504 and cites her name, title and contact information.¹

Student Harassment Policy

The District’s “Anti-Harassment” policy (Policy) states that “*No student shall engage in or be subjected to harassment, violence, threats of violence or intimidation by any other student that is based on any of the specific characteristics [including disability] that have been identified by the Board in this policy.*” The District’s Policy defines harassment as a “continuous pattern of intentional behavior” and notes that it includes, but is not limited to, written, electronic, verbal or physical acts.²

The District’s Policy also states that harassing conduct includes placing a student in reasonable fear or apprehension of harm or inflicting actual physical harm to his or her person, or damage to his or her property such that the conduct would be sufficiently severe, persistent or pervasive enough to interfere with the student’s ability to benefit from the program, impact educational performance or create a hostile environment. The District’s Policy notes that if a violation is

¹OCR verified that the District’s Section 504 Coordinator information is available on the District’s website at: <http://www.mcps.com/?DivisionID=2149&DepartmentID=2018&ToggleSideNav=ShowAll>

²OCR verified that the District’s Anti-Harassment Policy is available on the District’s website at: <http://www.mcps.com/Download.asp?L=1&LMID=80817&PN=DocumentUploads&DivisionID=2150&DepartmentID=&SubDepartmentID=&SubP=&Act=Download&T=1&I=204204>

established, discipline will be issued to the perpetrator consistent with the “Student Handbook and Code of Conduct” (Code of Conduct).³

Reporting, Investigation and Complaint Resolution Procedures

The District’s Policy also outlines the reporting, investigation, and complaint resolution procedures (Procedure) for complaints filed based on a student’s race, sex, religion, national origin, disability, or physical appearance. The Procedure states that complaints alleging violations of the Policy must be made on Board approved complaint forms at the principal and/or counselor’s office and must be signed by the student or parent alleging the violation or by the student’s parent or legal guardian and delivered to the principal or the principal’s designee either by mail or personal delivery.

The Procedure states that the principal or designee will, at his or her discretion, determine if the complaint alleges a serious violation of the policy. If the principal decides that the alleged violation is serious, the principal or designee will undertake an investigation of the complaint. The Procedure states that the investigation will entail the gathering of relevant facts and evidence and will be conducted in a reasonably prompt time period taking into account the circumstances of the complaint. In addition to discipline of students who have violated the Policy, measures that are reasonably calculated to prevent a recurrence of the violation(s) will also be taken by the principal or the school system.

Additionally, the Procedure cautions that any acts of reprisal or retaliation against any student who has reported a violation of the policy or sought relief provided by the Policy are prohibited, and are themselves a violation of the Policy. Confirmed acts of reprisal or retaliation will be subjected to disciplinary sanctions that may include any sanction, penalty or consequence that is available to school officials under the “Student Handbook and Code of Conduct.”

Student Code of Conduct

The Student Code of Conduct defines harassment as “*intent to harass, annoy or alarm another person; [sic] one strikes, shoves, kids, or otherwise touches another person or subjects another person to physical conduct, directs abusive or obscene language or obscene gestures to another person; communicates with another person anonymously or otherwise, by telephone, or [sic] any forms of written or electronic communication in a manner likely to harass or cause alarm.*”

Analysis and Conclusion

OCR found that the District’s harassment policy and procedure do not conform to Section 504 requirements and recommendations:

- (1) The District’s Policy and Code of Conduct incorrectly define harassment as a “continuous pattern of intentional behavior” and, by so doing, fails to note that a single incident which is particularly egregious could be considered sufficiently serious to

³ OCR verified that the District’s Student Handbook and Code of Conduct which also contains the harassment complaint form is available on the District’s website at:
<http://www.mcps.com/Download.asp?L=1&LMID=80817&PN=DocumentUploads&DivisionID=2150&DepartmentID=&SubDepartmentID=&SubP=&Act=Download&T=1&I=351762>

constitute harassment. Additionally, there does not have to be intent to harm in order for harassment to exist.

(2) The District’s Policy should note that failure of a victim to use the designated form and submit it in the preferred manner to the Principal does not relieve the District of its obligation to proceed with an investigation in the instance it receives a verbal complaint from a student or parent or otherwise becomes aware of any harassing comments or conduct. The Principal may be encouraged to complete the form if the Student or parent/guardian does not.

(3) The District needs to designate another person to whom the complaint may be directed in the event the Principal is the harasser or the student or parent/guardian is not comfortable reporting the incident to the Principal.

(4) The District’s Policy states that *the principal or designee will, at his or her discretion, determine if the complaint alleges a serious violation of the policy*. The word “serious” must be deleted from the policy. A “serious” violation is not necessary to obligate the District to respond.

(5) The Policy only covers student-on-student harassment and does not apply to harassment by employees or third parties.

Overall, the Policy *does not* provide for the prompt, adequate, and impartial investigation of *all* complaints (only those that allege peer harassment and are considered *serious*). In addition to the noncompliant items mentioned above, the policies omit several elements required under applicable legal standards, including the opportunity for the complainant and subject of the complaint to present witnesses and other evidence; designated and reasonably prompt timeframes for the major stages of the investigation; written notification to the complainant and subject of the complaint of the outcome of the investigation; and steps to end the discrimination or harassment and eliminate the hostile environment created.

OCR finds that the District is in noncompliance with respect to the grievance procedures. OCR has accepted the District’s offer to resolve the complaint prior to completion of the investigation with respect to the remaining allegations. When fully implemented, the Resolution Agreement signed by the District will resolve the foregoing area of noncompliance and the remaining allegations of the complaint.

In addition, OCR noted that the District’s written grievance procedures apply to multiple bases, including sex, but do not include some additional elements required for procedures used to address complaints of sexual violence.⁴ Also, the listed bases do not include age or identify an age act coordinator.⁵

⁴ OCR has enforcement responsibility for Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 et. seq. and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of FFA. Please see additional guidance at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (Questions and Answers on Title IX and Sexual Violence).

⁵ OCR has enforcement responsibility for the Age Discrimination Act of 1975, 42 U.S.C. §§6101 et seq. and its implementing regulation at 34 C.F.R. Part 110, which prohibit discrimination on the basis of age by recipients of FFA.

OCR will monitor the District's implementation of the aforementioned Agreement to ensure that it is fully implemented, and provide technical assistance as needed. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

This concludes OCR's investigation of the complaint and 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 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.

This concludes OCR's consideration of this complaint. If you have any questions about this letter, please contact Jeweleane Oyesanya, Investigator, at (404) 974-9391, or Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

Deborah Floyd
Acting Regional Director