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

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ATLANTA, GA 30303-8927

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August 24, 2015

Ms. Mary Ellen Elia
Superintendent
Hillsborough County Public Schools
901 E Kennedy Boulevard
P.O. Box 3408
Tampa, Florida 33601

Re: OCR Complaint #04-14-1748

Dear Ms. Elia:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its complaint resolution process of the above-reference complaint that was filed on September 15, 2014 against the Hillsborough County School District (District), Florida, alleging discrimination on the basis of disability. Specifically, XXXXXXXXXXXXX (Complainant) alleged that his nephew (Student) was being harassed on the basis of disability.

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. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR is also response 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, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department, the District is subject to Section 504. Because it is a public entity, the District is subject to Title II.

Based on the complaint allegations, OCR investigated whether the Student was subjected to disability-based harassment by other students and whether the District failed to take prompt and equitable steps to investigate and respond to the alleged harassment, thereby violating the Section 504 implementing regulation at 34 C.F.R. §104.4(a) and (b)(1)(i)-(iv) and (vii) and § 104.7 and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(i)-(iv) and (vii) and 35.107.

In reaching its determination, OCR reviewed and analyzed documents submitted by the Complainant and the District. OCR also interviewed members of the District's faculty and staff, as well as the Complainant, the Student's Grandmother, and the Student. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to

determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient failed to comply with laws or regulations enforced by OCR, or whether the evidence is insufficient to support such a conclusion.

Based on the investigation, OCR has determined that there is insufficient evidence to support a finding that the Student was subjected to disability based harassment. However, there is sufficient evidence to establish that the Student was bullied or harassed and that the District failed to take appropriate steps to ensure that the Student was not denied FAPE as a result of the bullying in noncompliance with Section 504 and Title II. Although not raised in the complaint, OCR also found that the district failed to comply with the grievance procedures under Section 504 and Title II.

LEGAL STANDARDS

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified disabled person 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. The Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1) states that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified disabled person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) 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 others; (iii) provide a qualified disabled person with an aid, benefit, or service that is not as effective as that provided to others; (iv) provide different or separate aid, benefits, or services to disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aid, benefits, or services that are as effective as those provided to others; or (vii) otherwise limit a qualified disabled person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The Title II implementing regulation at 28 C.F.R. § 35.130(a), and (b)(1)(i)-(iv) and (vii) contain similar provisions.

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or limiting a student's ability to participate in or benefit from the services, activities, or opportunities in the school's educational program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

In investigating a complaint of disability harassment, OCR examines: (1) whether the Student was bullied or harassed based on disability; (2) the bullying or harassment it sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying or harassment; and (4) the school does not respond appropriately.

The Section 504 implementing regulation at 34 C.F.R. § 104.7(b) requires a recipient that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging

any action prohibited by Section 504. The Title II implementing regulation at 28 C.F.R. § 35.107(b) contains a similar provision for public entities. In evaluating whether a recipient's grievance procedures satisfy the foregoing requirements, OCR reviews all aspects of a recipient's policies and practices, including the following elements that are necessary to achieve compliance with Section 504:

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 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 harassment and remedy discriminatory effects on the complainant and others, if appropriate.

Pursuant to 34 C.F.R. § 104.33(a), a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Section 104.33(b) requires that the education program be designed to meet the individual educational needs of persons with disabilities as adequately as those of persons without disabilities are met.

Under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives services pursuant to an IEP or a Section 504 plan and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student is being bullied. Accordingly, under Section 504, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team or the Section 504 team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

BACKGROUND

During the time of this investigation, the Student was in the 8th grade student at Burns Middle School (School). The Student has a Section 504 Plan that lists Attention Deficit Hyperactivity

Disorder as the Student's disability. The Complainant, who is the Student's uncle and resides in another state, alleges that the Student also has Asperger's Syndrome. However, the Student's Grandmother (Grandmother), who the Student's legal guardian and with whom the Student lives, states that the Student does not have Asperger's, but the Student is autistic. The Student's Section 504 plan does not list Autism or Asperger's as a disability.

The Complainant alleges that the Student was being subjected to harassment at school based on his disability. Both the Complainant and the Grandmother contend that the Student has been harassed by two classmates. The complaint alleged that the Student "has had his face spit in, eye glasses thrown on the ground and stepped on, and is normally called derogatory language such as faggot on a daily basis by another student . . . since the beginning of the school year." The complaint alleged that the Student "has issues coping with the constant bullying to the point he has thoughts of hurting himself." The Complainant and the Grandmother assert that the Grandmother reported the alleged harassment to School officials on several occasions, but the School ignored her allegations.

The Grandmother, also alleged there were two students, who ride the bus with the student, who started teasing him about not playing football. Then they started pushing him around, and they took his tablet from him and broke it. They refer to him as "the boy with the glasses." They were also spitting on him. The Student has a therapist outside the School who tried to go to the School and speak to the administrators about the bullying. The School turned the therapist away because she was not a parent or a guardian. One student stopped the bullying, but the other student never stopped bullying the Student.

The Complainant alleged that the Student is being harassed by another student who rides his bus. This is happening at the bus stop and continues at School, and as a result, the Student cannot ride the bus. The Student started having suicidal thoughts as a result of the harassment. The Grandmother alerted the School of the harassment. However, the School "blew the Grandmother off." The Complainant believes the Student is being harassed because of his disability.

FACTUAL FINDINGS

Notice of Non-discrimination and Anti-Harassment Statement

The District's policy prohibits discrimination on the basis of disability in all District programs and activities. In addition to the Notice of Non-discrimination, the District has an Anti-Harassment Statement that provides that the District does not discriminate nor tolerate harassment on the basis of race, color, national origin, gender, age, disability or marital status in its educational programs, services or activities, or in its hiring or employment practices; and it will take immediate action to eliminate such harassment, prevent its recurrence, and address its effects. The statement further provides that any student or employee found to have engaged in acts of harassments on the basis of race, color, national origin, gender, age, disability or marital status will be promptly disciplined.

Section 504/ Title II Coordinator

The District has two Section 504/Title II Coordinators— the Supervisor for Psychological Services and the Director of Human Resources. The District provides the title, address, and phone number for the Section 504/Title II Coordinators. Specifically, the Coordinator for students is listed as the Supervisor of Psychological Services. The Supervisor for Psychological Services serves as the District Compliance Officer and, as such, is the District's Section 504 contact pertaining to students. The Supervisor for Psychological Services is responsible for coordinating the District's efforts to comply with and fulfill its responsibilities under Section 504 and Title II. The District's Director of Human Resources is the individual listed as the point of contact for harassment complaints in the District's Anti-Harassment statement.

Grievance Procedures

As part of its investigation, OCR examined the District's grievance procedures. The District's grievance procedures do not state that the procedures apply to complaints alleging discrimination carried out by employees, other students, or third parties; they do not provide for the opportunity to present witnesses and other evidence; and, they do not contain an assurance that the school will take steps to prevent recurrence of any harassment or discrimination and to correct discriminatory effects on the complainant and others, even though this provision is contained in the District's Anti-Harassment Statement.

Furthermore, the grievance procedures require a student to ask the alleged perpetrator for a conference. It does not state that the principal will investigate or list the time frames for each step of the process, and the appeal process requires a hearing where the grievant brings witnesses. The District's grievance procedures are being revised pursuant to a Resolution Agreement in OCR Complaint #04-12-1030 which was entered into on September 22, 2014 and is currently being monitored by OCR. When fully implemented, the Resolution Agreement in OCR Complaint #04-12-1030 will correct the non-compliance areas noted above with respect to the grievance procedures.

Notice of Harassment Allegations

The Complainant and the Grandmother allege that the Grandmother reported incidents of harassment to School personnel. The District acknowledges that the bullying allegations were reported to the School on four separate occasions. In August 2013, the Grandmother asserts that she spoke with the School Resource Officer (SRO) regarding harassment (via name calling) of the Student by a classmate (Student X). In March 2014, the Grandmother reported that the Student was being harassed by another classmate (Student Y) and cited an incident in which Student Y shoved the Student into some lockers. In July 2014, while the Student was enrolled in a summer program at the School, the Grandmother telephoned the Principal and informed him that Student X, the same student from the August 2013 incident, was taunting the Student on the bus while being transported to the summer program.

On September 3, 2014, the School administrators and the SRO initiated an in-person conference with the Grandmother concerning an incident that occurred at the school bus stop the previous day in which the Grandmother confronted Student X. Allegedly, both the Grandmother and Student X began shouting obscenities at each other. During this meeting, the Grandmother stated

that Student X was harassing the Student. Finally, on September 12, 2014, the Complainant sent an email to the Principal's secretary concerning harassment of the Student. In the email, the Complainant requested the School's procedures on dealing with bullying. The Principal stated he responded to the email by directing the Complainant to the Student Handbook.

District's Response to Harassment Allegations

The District contends that it responded appropriately to each allegation of harassment. With respect to the Grandmother's August 2013 report of harassment by Student X, the District asserts that the SRO spoke with Student X in response to the allegation and gave him a verbal warning. As part of its investigation, OCR attempted to interview the SRO, who is an employee of the Hillsborough County Sherriff's Office. However, Legal Counsel for the Sherriff's Office declined OCR's request for an interview with the SRO. OCR was unable to get more details concerning this incident and of the actions taken by the SRO.

The Principal stated that in March 2014 the Grandmother called him concerning the Student's academic progress. This came as the result of a midterm progress report that came out shortly before the call. The Grandmother also told the Principal that he should talk to the Student about harassment by Student Y. The Principal spoke with the Student, and he indicated that he was having issues with Student Y who shoved him into lockers. After learning of the March 2014 allegation in which the Grandmother alleged that Student Y was harassing the Student, the Principal stated that he spoke with Student Y, contacted his parents, and disciplined him. OCR was unable to establish that this harassment was disability based.

The Grandmother acknowledges that Student Y's harassing behavior ceased after she reported the incident to the School. The Principal also claims that during a telephone conversation with the Grandmother on April 22, 2014, the Grandmother complimented the School's handling of the March 2014 report of harassment. According to the Principal, he spoke with the Student on April 30, 2014, to follow up with him on the harassment incidents, and the Student indicated that he was no longer subjected to any harassment by Student Y.

The school counselor (Counselor) reported to OCR that there were a couple of crisis intervention incidents. Because the Grandmother reported that the Student, in reaction to the bullying, had thoughts of hurting himself, the Student was referred for a Suicide Risk Assessment on April 16, 2014. The Student was emotionally distraught to the point where they felt he needed to be evaluated. The Counselor brought in the school psychologist. The Student was also referred to an outside agency that could help the family. In June 2014, the Student was again referred to the Counselor because he had a burn mark on his arm, which turned out to be self-inflicted. This occurred via a pencil eraser. (The students were playing a game in which they rub a pencil eraser on their arm until it burns them.) The School encouraged the family to continue outside counseling and therapy. There is no evidence that the District convened a Section 504 meeting to determine if the bullying and harassment impacted the Student's ability to receive a FAPE.

The District claims that once the July 2014 harassment allegation was reported to the Principal by the Grandmother, the Principal spoke with the Student, and he informed him that he would prefer the School's Success Coach handle the situation. As a result, the Principal spoke with the

Success Coach about the incident. The Success Coach informed the summer program teachers that there was an issue between the Student and Student X, and instructed the teachers to monitor the behavior of the students. The District reported that the Student successfully completed the summer program. OCR was unable to establish that the issue between the Student and Student X was based on disability.

The Success Coach informed OCR that in September 2014, there was an incident where the Student said that Student X teased him for playing the violin. The next day, the administration got involved because the Grandmother confronted Student X at the bus stop about the bullying of the Student. The Principal, Assistant Principal (AP), the Success Coach, and SRO had a meeting with the Grandmother during which she explained that she confronted Student X because he was taunting the Student and calling the Student names. After meeting with the Grandmother, the School administrators held an in-person meeting with Student X's parents.

The AP informed OCR that after she receives a complaint of bullying, it is her responsibility to speak with the alleged victim and get names of witnesses and potential harassers. She contacts parents and administers discipline if necessary.

When asked by OCR to describe each report of bullying and harassment of the Student, the AP informed OCR that she was around the Student for the 2013-2014 school year because she was assigned to 6th grade. The AP's opinion was that he Student struggled socially to fit in with the other students. The AP also said that the student did work over the summer, did well, and moved from 6th grade directly to 8th grade. The AP stated that she has not heard of any issues in the 2014-2015 school year with respect to bullying and/or harassment. The AP did not recall specific issues that had to be investigated. There may have been an issue about people not being nice to him, but she did not remember specifics.

When asked about her interaction with the Complainant, the AP informed OCR that there was a situation that occurred at the bus stop that was significant. It involved the Grandmother and Student X. She met with the Principal, SRO, and the Grandmother. She spoke with the bus driver and asked her to change the Student's seating. However, she does not believe the Student was riding the bus anymore. The AP followed up with the Bus Driver, and the Bus Driver said things were fine. She said she did not have any issues getting the students to move.

Additionally, during that same month, the Student reported the bus stop incident to his Language Arts Teacher. The Teacher alerted the Success Coach, and discovered that the Success Coach was already aware of the incident. Because the Student and Student X were in the same Physical Education class at the time, the School administrators changed Student X's schedule, so the two students would not have a class together. Additionally, the Assistant Principal spoke with the bus driver and instructed her to change their seats on the bus, so the students would not have to sit near one another. The bus driver complied with the Assistant Principal's instructions. However, the District, Complainant, and Grandmother acknowledge that the Student stopped riding the bus in the Fall 2014.

In response to the harassment complaints from the Grandmother, the District asserts that the School issued verbal warnings to the students involved, contacted the students' parents, provided

counseling to the Student, followed up with the Student and his Grandmother, changed Student X's class schedule, and reassigned seats on the school bus. The Grandmother and the Student have confirmed that all of these steps were taken except the counseling. However, the District forwarded OCR a list with more than a dozen dates on which the Student was counseled about numerous issues, including difficulty with peers. However, both the Grandmother and the Student maintain that no counseling was provided. According to the Student, the harassment by Student Y stopped in the Spring 2014 and the harassment by Student X has stopped, and he and Student X do not have any contact.

The evidence shows that Student was being subjected to harassment, although the evidence is insufficient to show that the harassment was based on the Student's disability. OCR interviewed the Student, who stated that he was called names such as "faggot", referred to as "gay" in a manner the Student understand to be harassing, and "boy with glasses," his tablet was broken and his glasses were knocked off his face, but neither Student X nor Student Y were aware of his disability. The Student also states that Student X and Student Y never mentioned his disability or alluded to a disability in general. Additionally, the Grandmother and the Student did not give any details to support that harassment was based on disability or a perceived disability. The evidence, however, does support that the Student was bullied and harassed by Student Y and X. All parties involve agree that harassment allegations were reported to the School, thereby giving the District notice of the bullying and harassing conduct.

ANALYSIS & CONCLUSION

The Complainant and the District acknowledge that harassment allegations were reported to the District. The Complainant asserts that the School took no action despite being notified of the harassment. However, the evidence shows that the School officials took action each time it was notified of a harassment allegation, and the Grandmother and Student confirm that these actions took place and that the harassment and bullying has stopped. The evidence is insufficient, however, to support that the harassing actions were on the basis of the Student's disability.

OCR next considered whether the non-disability based bullying denied the Student FAPE under Section 504. OCR considers several factors, including, but not limited to whether the school knew or should have known that the effects of the bullying may have affected the Student's receipt of FAPE services (i.e. adverse changes in the Student's academic performance or behavior indicating that the Student may not be receiving FAPE). If so, OCR then considers whether the school met its ongoing obligation to ensure FAPE by promptly determining whether the Student's educational needs were still being met, and if not, making changes, as necessary, to his IEP or Section 504 plan.

In this case, the School's investigation revealed that bullying was occurring. The District's decision to conduct a suicide risk assessment, after being notified by the Grandmother of her concerns, illustrates that the bullying may have had some impact on the Student's receipt of FAPE services. In this case, the Student's Section 504 team should have met to determine whether a change in the Student's services was warranted.

Based on a preponderance of the evidence, OCR finds sufficient evidence that the District failed to provide the Student with FAPE, following the District's knowledge that bullying may have impacted his FAPE needs, in violation of the regulations implementing Section 504 and Title II.

The District has agreed to take the steps detailed in the attached Agreement, which requires the District to convene a Section 504 meeting to evaluate the Student to determine whether he needs additional or different services. The District will also determine if the Student needs compensatory services as a result of the District's failure to convene a Section 504 meeting after being notified in Spring 2014 that the bullying and harassment was having an effect on the Student. The District will also conduct training of its staff concerning its obligations to ensure that students with a disability who receive services pursuant to an IEP or a Section 504 plan and who are the targets of bullying or harassment on any basis continue to receive FAPE. With regard to the violations found with the grievance procedures, the District is in the process of correcting those under a Resolution Agreement on Complaint #04-12-1030 that was signed on September 22, 2014, and is currently being monitored.

* * *

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.

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. A complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact XXXXXXXXXX at XXXXXXX or XXXXXXXXXX at XXXXXXXXXX.

Sincerely,

Melanie Velez
Regional Director