



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

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December 20, 2017

Gregory K. Adkins, Ed.D
Superintendent of Schools
Lee County Public Education Center
2855 Colonial Blvd.
Fort Myers, FL 33966

Re: OCR Complaint #04-15-1012

Dear Dr. Adkins:

On October 8, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR) received the above-referenced complaint filed by the Complainant against the Lee County School District (District), alleging discrimination against her daughter (Student), on the bases of disability (Hereditary Angioedema), sex, and national origin (Hispanic). Specifically, the Complainant alleged the following:

1. The District subjected the Student to disability discrimination by failing to timely evaluate the Student for a 504 Plan or Individual Education Plan.
2. Between September 2013 and December 2013, the Lexington Middle School (School) Principal discriminated against the Student on the basis of her disability by harassing the Student and by failing to appropriately respond to peer disability harassment against the Student. Specifically, Complainant alleged that, among other conduct, the Principal discredited the Student's accounts of peer bullying, refused to implement safety measures, intimidated the Student, and provided false information to the Complainant in response to allegations that a white male student (Student 2) harassed the Student through intimidation (staring) and multiple acts of physical aggression (e.g., pulling her hair, knocking her books from her arms, shaking a chair she was standing in, pushing her into lockers, and hitting her in the eye with a spiral agenda);
3. The handling of the Student's complaint constituted discrimination based on gender. In responding to Student 2's conduct toward the Student, District staff made comments about Student 2 possibly "liking" the Student and asked the Student questions about how she and Student 2 felt about each other. However, upon receiving a report that Student 2 threatened a male student (Student 3), the District handled the matter seriously and with respect, and Student 2 was forced to leave the School after the incident involving Student 3; and,
4. The District's handling of the Student's bullying report constituted discrimination on the basis of national origin (Hispanic). Student 3 is white and in response to Student 2 threatening Student 3, the District handled the matter seriously and Student 2 was forced to leave the school.

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As a recipient of Federal financial assistance from the Department, the District is subject to the provisions of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance; Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C §1681 et seq. and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance; and, Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. Sections 2000d et seq., and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, and national origin by recipients of Federal financial assistance from the Department. As a public entity, the District is subject to the provisions of 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, which prohibit discrimination on the basis of disability by public entities. OCR has jurisdiction over this complaint pursuant to Section 504, Title IX, Title VI and Title II.

Based on the complaint allegations, OCR initiated an investigation of the following legal issues:

1. Whether the District failed to evaluate the Student to determine eligibility for special education or related services, thereby violating the Section 504 implementing regulation at 34 C.F.R. § 104.35 and the Title II implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District discriminated against the Student on the basis of disability when the Student was harassed based on her disability by another student, and the Principal and the District failed to adequately respond to the harassment, thereby violating the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
3. Whether the District subjected the Student to discrimination on the basis of sex during the 2013-2014 school year, when it handled her complaint of harassment differently than the complaint of a male student, thereby violating the Title IX implementing regulation at 34 C.F.R. § 106.31;
4. Whether the District subjected the Student to discrimination on the basis of national origin during the 2013-2014 school year, when it handled her complaint of harassment differently than the complaint of a non-Hispanic white student, thereby violating the Title VI regulation at 34 C.F.R. §100.3(a);

During the complaint resolution process, OCR reviewed documents provided by the District and the Complainant and conducted interviews with the Complainant and District staff. Based upon the available evidence, OCR found sufficient evidence to support a finding that the District was in noncompliance with Section 504 and Title II with regard to these complaint allegations. OCR found insufficient evidence to support a finding that the District was in noncompliance with Title IX and Title IV. Set forth below is a summary of OCR's findings.

Background

During the 2013-2014 school year, the Student was enrolled in 7th grade at the School. She has been diagnosed with Hereditary Angioedema and asthma since 2010; however, during the time the Student was enrolled in the District, the District had not identified the Student as a student

with a disability. The Student attended the School during the 2012-2013 school year and half of the 2013-2014 school year. She is currently enrolled in a non-District school.

Issue One: Whether the District failed to evaluate the Student to determine her eligibility for special education or related services.

Complainant alleged that the District failed to timely evaluate the Student to determine her eligibility to receive FAPE services.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. §104.33(a), (b)(1) and (2), requires a recipient that operates a public elementary or secondary education program or activity to provide a FAPE to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the educational needs of individuals with disabilities as adequately as the needs of individuals without a disability are met and that satisfy the requirements of the regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36 (educational setting, evaluation and placement, and procedural safeguards). Pursuant to the Section 504 implementing regulation at 34 C.F.R. §104.35 a recipient shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

As the Title II implementing regulation provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations, OCR conducted its investigation in accordance with the applicable Section 504 FAPE standards.

Factual Findings

Reason to suspect Student may need special education or related services because of a disability

District staff has been aware of the Student's medical condition since 2010, when the Student attended a District elementary school. The Complainant discussed the condition with clinical and other District staff. Medical documentation provided to the District put staff on notice that the Student had been diagnosed with "allergic urticaria" and angioedema; that administration of medication during the day might be necessary to prevent anaphylactic shock; that the Student has severe allergic reactions to increased stress, heat, and Motrin; that three medications were authorized for use in response to an allergic reaction; and that staff needed to call "911" if the Student did not improve with administration of the medication. The Student's file included a physician's note excusing her from gym. Also, the Student had seven clinic visits to use her inhaler or receive an administration of Benadryl during the approximately three and one half month period from August 15, 2013 through December 4, 2013.

Further, in a November 26, 2013 email to the Student's teachers the Complainant stated that after the Student left school the day of a peer bullying incident involving Student 2, the Student had an asthma attack on the bus and experienced swelling of her tongue and eye. In a December 20, 2013, District-level complaint the Complainant noted that during a November 25, 2013, meeting with the Principal the Student's lip and cheek started to swell and she and the Student needed to leave the meeting to visit the School clinic for medication. The Student's clinic visits increased after the November 22, 2013 incident and Complainant's December 19, 2013, District level complaint provided notice that in the aftermath of the bullying incident, the Student was increasingly sick and needed more medications.

The Student's grades also declined. During the 2012-2013 school year, the Student's grades were A's and B's. During the 2013-2014 school year, the Student's first quarter grades were A's and B's. However, the second quarter final grades included a C+ Critical Thinking and C- in Math 2. According to the Student's progress reports for Fall 2013, as of October 24, 2013, her grades in math and critical thinking were F's and as of November 21, 2013 she had an F in Math and a C- in critical thinking. The Complainant raised the issue of a drop in the Student's grades in her correspondence to District staff.

Whether the Student was evaluated

During the time the Student was enrolled with the District, the District did not conduct an evaluation of the Student to determine whether she has a disability and if so, whether she needs special education or related services. District witnesses provided varying responses for why the Student was not evaluated for special education services. The responses included the following: "the School had never seen anything that impeded her education;" she had only visited the clinic three times during the time she attended the School; "nothing was ever said" about the Student needing "intense accommodations that would warrant" evaluation; and, the School did not receive a request from the Student's parents to evaluate her for special education services.

Analysis and Conclusion

The evidence, viewed under the preponderance standard, shows that District staff had reason to believe that the Student may, because of a disability, need special education or related services. Staff had received information about the severity of the Student's allergic reactions, which resulted in multiple clinic visits during the 2012-2013 and 2013-2014 school years. Further, after the incident involving Student 2, School staff had notice that the Student's condition was worsening and that the Student's grades were being negatively impacted. Nevertheless, the District never evaluated the Student or sought consent to conduct an evaluation. Based on the foregoing, OCR concludes that there is sufficient evidence to support a finding that the District is in violation of Section 504 and Title II, with respect to this issue.

Issue Two: Whether the District discriminated against the Student on the basis of disability when the Student was harassed based on her disability by another Student and the Principal, and the District failed to respond adequately and took actions which further harassed the Student.

The Complainant contends that the District failed to properly respond to a report that Student 2 was bullying the Student, and that the Principal engaged in conduct that constituted harassment of the Student.

a. Procedural Requirements – Harassment Policy and Procedures

Legal Standards

Pursuant to the Section 504 implementing regulation at 34 C.F.R. § 104.7(a), a recipient that employs 15 or more people shall designate at least one person to coordinate its efforts to comply with Section 504. The 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 regulations at 28 C.F.R. § 35.107 (a) and (b) contain similar provisions for public entities with 50 or more employees. In evaluating whether a recipient’s grievance procedures satisfy the Section 504/Title II requirements, OCR reviews all aspects of a recipient’s policies and practices, including the following:

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 student, or third parties;
3. Provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. Designated and reasonably prompt time frames for the major stages of the complaint process;
5. Notice to the complainant and 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.

Factual Findings

Notice of Nondiscrimination

The Code of Conduct included within the District’s Parent Guide¹ includes a notice of nondiscrimination, which states that the District “does not discriminate on the basis of gender,

¹ During the investigation the District produced a “Parent Guide,” which included the Code of Conduct. The current version of the document is entitled “Parent Guide & Code of Conduct for Students” and is similar to the document previously produced by the District with regard to the items discussed in this paragraph.

race, color, religion, sex, sexual orientation, national or ethnic origin, marital status, or disability, in the provision of educational programs, activities or employment opportunities and benefits that it operates, pursuant to the requirements of Title IX, Title VI, Title VII, Age Discrimination Act of 1967 and Section 504 of the Rehabilitation Act of 1973, 1992, Americans with Disabilities Act and the Florida Educational Equity Act of 1984. This policy extends to both employment and admission to the [District].” The Parent Guide fails to identify the District’s Section 504 Coordinator.

Grievance Procedures

District Policy 4.13 provides procedures for addressing complaints of harassment and discrimination based on disability as well as several other bases. The introduction to the policy states that it applies to harassment and discrimination committed by students; however, some sections of the policy, including the section on sanctions, refer to incidents in which an employee is the alleged harasser. The policy identifies multiple individuals to whom a student or other person may make a report of harassment or discrimination; these individuals include among others, the principal, the school equity coordinator, or other instructional or administrative staff at the site. The policy encourages filing of a complaint within 20 school days after the incident but states that valid complaints filed after that time will be investigated. The policy provides no information about how the validity of a complaint will be determined in the absence of an investigation. The policy provides that anonymous complaints will be accepted, but suggests that the District will provide a limited response to an anonymous complaint that does not “provide sufficient factual basis to establish” that harassment may have occurred. Investigations are to be conducted when the circumstances and factual basis specified in the complaint indicate that harassment or discrimination occurred; they include interviews with the parties and witness as well as review of documents. The policy does not explicitly state that parties have an opportunity to present witnesses and evidence. The determination concerning a complaint is to be made by the Superintendent based upon a recommendation from the building administrator and District director; the recommendation is to be based upon the investigator’s report of his/her findings. Determinations are to be issued no more than 20 school days after receipt of the complaint. The parties are to receive notice of the determination. The policy provides for discipline of anyone who retaliates against someone for filing a complaint or participating in a procedure related to a complaint. Disciplinary sanctions for harassment, discrimination or retaliation can range up to expulsion from school or dismissal from employment. There is no reference to providing a remedy or preventing future occurrences of harassment or discrimination.

District Policy 4.14 is the District’s bullying and harassment policy.² The policy prohibits harassment and details consequences and appropriate remedial actions for students, employees, or third parties who are found to have engaged in harassment. The policy clarifies that complaints may be filed orally or in writing but that formal disciplinary action may not be based solely on an anonymous report. The Principal will assign a designee to investigate the allegation and that investigator must not be the accused perpetrator or victim. The policy states that

² Item 1(h) of the policy defines bullying to include sexual, racial and religious harassment as well as other types of harassing conduct. Item 1 makes no reference to disability-based harassment, but on its face the policy is a general harassment and bullying policy and is not limited to bullying on the bases listed in item 1(h).

interviews of the victim, alleged perpetrator, and witnesses must be conducted privately, separately, and confidentially. The policy lists eleven factors which must be evaluated by the investigator; these factors include whether the conduct adversely affected the student's education or educational environment and whether the alleged victim felt or perceived an imbalance of power as a result of the reported incident. Following a report of suspected harassment a referral for interventions, will be made based on the investigation of the incident; possible referrals include guidance counselor referrals for victims or perpetrators or a referral to the Child Study Team.

The Code of Conduct included within the District's Parent Guide provides for student appeals of decisions based on a policy or procedure. The process begins with a discussion with a teacher, site-based equity coordinator or guidance counselor, followed by a discussion with the School Administrator if a conflict still exists. The next steps are appeals to the following in sequence: the Director of Student Services, followed by the Chief Academic Officer, the Superintendent and the School Board. There is no reference to an investigation, consequences for discriminatory actions or remedies for students subjected to discrimination. A bullying/harassment section of the Code of Conduct refers to Policy 4.14. The Section states that bullying or harassment may be based upon disability or other protected bases.

Analysis and Conclusion

The District's grievance procedures that apply to disability-based discrimination and harassment fail to provide a prompt and equitable process that comports with due process standards. Policy 4.13, which states that it applies to discrimination based on disability, is ambiguous as to whether it applies to harassment or discrimination by employees and makes no reference to harassment by third parties. It provides for an investigation to be completed within a prompt time frame, but does not address the parties' opportunity to identify witnesses or provide evidence other than their own statements. Further it does not include an assurance that the District will take steps to prevent the recurrence of harassment and to correct its discriminatory effects on the student and others, or otherwise address provision of a remedy when harassment is substantiated. The policy does not state that investigations will be impartial. Finally, the 20 day filing time frame could discourage filing of a complaint after the time frame expires; while the policy alludes to investigating complaints filed after the 20th day, it states that it will investigate only complaints deemed "valid" -- a determination that cannot be made without an investigation or other fact-finding process.

Based upon the foregoing, OCR concludes that the District has failed to establish procedures that provide for the prompt and equitable resolution of complaints alleging discrimination or harassment based on disability in noncompliance with of Section 504 and Title II with respect to this issue.³

³ The District's current procedures are also used to address harassment based on other bases covered by OCR including sex. OCR did not review the procedures with respect to any statute other than Section 504 and Title II.

b. Bullying/Harassment of Student and District Response***Legal Standards***

Bullying of a student on the basis of disability may result in a disability-based harassment violation under Section 504 and Title II. When a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If a school's investigation reveals that bullying based on disability created a hostile environment – i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school -- the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. When harassment is carried out by employees during performance of their responsibilities, regardless of "notice," a recipient is responsible for ending the harassment, prevent its recurrence and remedying any effects of the harassment.

Findings of Fact**Peer Harassment**

As discussed with regard to Issue 1 above, the Student has a medical condition which results in potentially severe reactions to allergens or stress. The preponderance of the evidence establishes that on November 22, 2013, following a verbal exchange between the Student and Student 2, Student 2 struck the Student in the face with the spiral portion of his agenda causing visible injury and redness to her eye. Prior to the November 22, 2013 incident the Student and Student 2 had other interactions which involved Student 2 engaging in acts that annoyed or irritated the Student, including knocking the Student's binder out of her hands. Student 2 engaged in acts that irritated some students other than the Student; however, he did not hit any other student.

The Student immediately reported the November 22, 2013 incident with Student 2 to the Principal. In a November 24, 2013 email regarding the November 22, 2013 incident the Complainant advised School staff that the Student has asthma and has been diagnosed with angioedema; a sudden onset of severe laryngeal edema could be fatal; the Student had an asthma attack on the bus ride following the incident; and, when she was met at the bus stop, her tongue had started to swell and her eye was swollen. On November 25, 2013, as the Student and her parents were meeting with the Assistant Principal and Guidance Counselor, the Principal joined in the meeting. The Principal asked the Assistant Principal if he knew who Student 2's parents are and referred to Student 2's family as "very good people" or a "nice family." She also made a comment concerning Student 2's parents trying to correct his mistakes.

The next day, during a meeting with the Complainant and the Student, the Complainant asked about measures to protect the Student and expressed concern about the Student's health and safety while Student 2 remained at the School. In response to the Complainant's concerns, the Principal made a comment which conveyed to the Complainant that it would be better for the Student to leave the School. The Principal's comments and demeanor made the Student feel uncomfortable.

From November 25, 2013, through December 4, 2013, administrators interviewed student witnesses in response to the report concerning the Student and Student 2. Student 2 admitted hitting the Student with his agenda and witnesses confirmed the incident. Some student witnesses also reported that at times Student 2 would annoy the Student. The only motivation for Student 2's conduct evidenced by witness statements is "retaliation" directed at the Student because she was popular. The District concluded that bullying had not occurred, but assigned Student 2 a two day out-of-school suspension for battery. On December 4, 2013, the School mailed letters to the parents of the Student and Student 2 advising that there was insufficient evidence to support a finding that bullying occurred and stating that Student 2 would be disciplined for battery. Additionally, the Complainant's letter provided Complainant the right to appeal within ten days of the letter.

The reports to School and District staff concerning Student 2's conduct did not include information reflecting a connection between the Student's disability and the motivation for Student 2's conduct. Similarly, information obtained during the School's investigation did not reflect a connection between the Student's disability and the motivation for Student 2's actions.

Harassment by Principal

The Student had a visible injury to her eye when she reported the November 22, 2013, incident to the Principal. The Principal responded using the phrase "cause and effect" and stated that Student 2's actions may have been the result of some action taken by the Student. The Student asked to contact her parents to obtain transportation home, as opposed to riding the bus. The Student was unable to reach her parents and the Principal instructed her to catch the bus. By the time the Student arrived at home her face was swollen, she was breaking out in hives, and she required a double dose of her medication.

On November 25, 2013, the day after the Complainant emailed School staff concerning the impact of the November 22, 2013 incident on the Student's medical condition, the Student and her parents met with the Assistant Principal and Guidance Counselor. The Principal joined in the meeting, asked the Assistant Principal if he knew who Student 2's parents are and referred to Student 2's family as "very good people" or a "nice family." She also made a comment concerning Student 2's parents trying to correct his mistakes.

The next day, during a meeting with the Complainant and the Student, the Complainant asked about measures to protect the Student and expressed concern about the Student's health and safety while Student 2 remained at the School. In response, the Principal made a comment which conveyed that it would be better for the Student to leave the School. The Principal also suggested that Student 2 engaged in the behavior toward the Student because he "liked" her.

The Principal's comments and demeanor made the Student feel uncomfortable and she was afraid of the Principal. Thereafter, she had more frequent flare-ups requiring clinic visits, expressed fear and anxiety to the Clinic Assistant and became more moody. The Student felt that the Principal's reaction harmed her more than Student 2's actions.

The School changed the Student's classes but the Student still saw Student 2 in the hallway; he would "stare her down" and she would stay in the middle of a group of friends for protection. In December 2013, the Complainant alleged that she was informed that during a discussion with Student 3 about threats made by Student 2 towards Student 3, the Principal reportedly called the Student "a liar." The Complainant did not allow the Student to return to School after December 13, 2013, at the pediatrician's recommendation due to the exacerbation of the Student's attacks/symptoms related to the stress following the incident.

In a December 19, 2013, letter to the Superintendent, the Complainant made a District-level complaint against the Principal and other staff. Among other things, she expressed concerns about the Principal making the "cause and effect" comment when the Student reported the November 22, 2013, incident; failing to take the Student's medical condition into account; stating in the Student's presence, that she wanted the Student's allegations verified and that Student 2 is a good kid; asking the Assistant Principal if he knows who Student 2's parents are; suggesting that the Student's parents transfer her; threatening the Student about leaving Student 2 alone; defaming, insulting and intimidating the Student; failing to provide a safe learning environment; and, creating a hostile environment. The complaint also reported that during a follow up interview on December 2, 2013 the Guidance Counselor and SRO made the Student feel uneasy and after Student 2 threatened to kill another student, the Student felt more threatened. The Complainant reiterated her concerns about the Principal's conduct in a September 10, 2014 e-mail to the District's Attorney, Superintendent, and other District employees.

The Superintendent's Office received the Complainant's complaint and sent it to the office of the Executive Director of School Development (EDSD). The EDSD discussed the allegations with the Principal and asked the Principal to submit all relevant data to the office. The EDSD also spoke to the Assistant Principal and Guidance Counselor involved in the investigation. The Principal reported to the EDSD that "the School did what the parent requested to ensure ... [the Student]...would have no further contact with the other student." The EDSD agreed that the incident was properly coded as battery and there was insufficient evidence to meet the definition of bullying. The EDSD handled the complaint solely as an appeal of the outcome of the School's investigation of the peer bullying, and did not acknowledge, or address the allegations concerning the Principal's treatment of the Student.

The Complainant reiterated her concerns about the Principal's conduct in a September 10, 2014 e-mail to the District's Attorney, Superintendent, and other District employees. The Complainant was not notified of the outcome of her District level complaint.

Analysis and Conclusion

District's Notice of Peer Harassment or Bullying

As discussed above, between November 22, 2013 and December 19, 2013, the District had notice of Student 2's conduct and its impact upon the Student. However, the District did not receive information that would provide notice that Student 2's actions might be based upon the

Student's disability. Rather, information provided to the District reflected that Student 2's actions may have been taken because the Student was popular.⁴

Harassment by Principal

The Principal received notice about the Student's condition, how the condition is exacerbated by stress, and the impact of the November 22, 2013 incident upon her health. Despite this notice, in discussing the incident involving Student 2, the Principal, in the Student's presence, asked the Assistant Principal if he knew who Student 2's parents are, made positive comments about Student 2's family, said that the School could not ensure that the students were separated, and minimized the seriousness of the situation that exacerbated the Student's medical condition, by suggesting that Student 2 engaged in the behavior toward the Student because he "liked" her. Further, in the presence of the Student, the Principal responded to the Complainant's expression of concern about the Student's safety and potential exacerbation of the Student's condition, by suggesting it would be better for the Student to leave the School. As a result of the Principal's conduct and the environment that existed at school, the Student felt intimidated by the Principal, had more frequent flare-ups and visits to the clinic, and was ultimately withdrawn from the School based upon her pediatrician's recommendation.

While actual notice is not required to trigger the District's responsibility for harassment carried out by an employee, the District had actual notice of the Principal's conduct. However, there is no evidence that the District investigated the Principal's conduct. Rather, the EDSD viewed the complaint as only the Complainant's disagreement with the peer bullying decision.

Based upon the foregoing OCR, concludes that while the District was not on notice that the Student was subjected to disability-based peer harassment, the Principal subjected the Student to disability-based harassing conduct that was sufficiently serious to interfere with or limit her ability to participate in or benefit from the School's services, activities, or opportunities and therefore created a hostile environment. This hostile environment was created by a District employee and the District was therefore responsible for the conduct and for remedying its effects, but failed to do so. Accordingly, OCR concludes that there is sufficient evidence to support a finding that the District is in violation of Section 504 and Title II, with respect to this issue.

Issue Three: Whether the District subjected the Student to sex-based discrimination during the 2013-2014 school year.

The Complainant contends that the District treated the Student differently than a male student in that it minimized the seriousness of Student 2's bullying of the Student, while taking Student 2's threat of a male student seriously.

⁴ It is noted, however, that the information that the District received concerning the incident involving Student 2 and its impact on the Student, provided further notice of a need to evaluate the Student for possible services under Section 504, as is discussed with respect to Issue 1 above.

Legal Standard

The regulation implementing Title IX at 34 C.F.R. § 106.31(a) provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient.

The regulation implementing Title IX at 34 C.F.R. § 106.31 (b)(1-4) and (7), provides that a recipient shall not on the basis of sex treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; provide different aid, benefits, or services or provide them in a different manner; deny any person any such aid, benefit, or service; subject any person to separate or different rules of behavior, sanctions, or other treatment; or otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

When reviewing a claim of different treatment based on sex, OCR first determines whether there is evidence that an individual has been treated differently than similarly situated individuals of a different sex. If there is a difference in treatment, OCR determines whether the District has presented a legitimate nondiscriminatory, nonpretextual reason for the difference in treatment.

Factual Findings

On November 22, 2013, the School received a report that Student 2 injured the Student on November 22, 2013, when he hit her in the face with his agenda. The Student reported the incident to the Principal near the end of the day on a Friday. On Monday, the Principal met with the Student's parents and other District staff. During the meeting, the Principal stated that she could address Student 2's conduct immediately if the matter was pursued as only a battery offense. On the day of the meeting and the following day, the Complainant made further reports concerning Student 2 bullying the Student. During one meeting with the Student's parents regarding Student 2's conduct, the Principal said that she had asked Student 2 whether he liked the Student, said the Student is cute, and noted that sometimes socially awkward boys behave "like this" when they like a girl.

The School conducted an investigation of the report under the District's bullying policy, which involves multiple steps and includes a committee decision about whether bullying occurred. Following the investigation and team discussion, the District concluded that bullying had not occurred, but assigned Student 2 a two day out-of-school suspension for battery.

On December 6, 2015 the Assistant Principal received a report from a teacher that on December 6, 2013 Student 2 threatened to kill Student 3, a male student. On December 18, 2013, the Principal received the same report from Student 3's parents. On December 18, 2013, the School investigated the incident involving Students 2 and 3, and found that Student 2 engaged in the offense of "threat and intimidation" against Student 3. Student 2 received two days out-of-school suspension for his misconduct against Student 3. The Student 3 withdrew from the District on December 20, 2013.

The threat toward Student 3 was handled as a discipline matter, for which an Assistant Principal is usually responsible. The School's policy was to address reports of threat within a short time frame. Also, the District's Board Policy 4.09 – "Threats of Violence" - authorized staff to respond rapidly to threats, suggestions or predictions of violence that occur on school property.

Analysis and Conclusion

Prima Facie Case

The District began its investigation of the Student's report one school day after the incident was reported and began the investigation of the report concerning Student 3, eight school days after the incident was initially reported to an administrator. For both incidents, the District imposed a two day out-of-school suspension. Accordingly, the evidence does not support a conclusion that the School initially treated the conduct toward Student 3 with more urgency or that it imposed a harsher sanction for the threat.

The evidence does establish, however, that the Principal imposed discipline for the threat toward Student 3 on the same day that she learned of the incident, while discipline for the conduct toward the Student was imposed eight school days after the Principal learned of the incident. Thus, OCR concludes that the evidence establishes a difference in treatment in the handling of the conduct directed toward the Student and the male comparator.

Legitimate Nondiscriminatory Rationale

OCR next examined the reasons for the two different time frames for the Principal's actions. The incident involving the Student was reported as an instance of bullying and the Principal viewed the bullying characterization as a factor that triggered a different, more protracted process.

Pretext Analysis

The preponderance of the evidence does not support a conclusion that the Principal's use of different processes to respond to the two situations was a pretext for sex discrimination. Under District and School policies threats of violence were to be handled quickly. The Principal proposed addressing Student 2's conduct as a battery rather than as a bullying complaint and told the Complainant that doing so would result in a faster resolution. While administrators were not entirely consistent in their understanding of all aspects of the procedure for responding to bullying complaints, the preponderance of the evidence establishes that a bullying report triggered a specific process which involved documenting the report, interviewing witnesses and a committee decision about whether bullying occurred.

Based on the foregoing, OCR concludes that there is insufficient evidence to support a finding of noncompliance with Title IX, with respect to this issue.

Issue Four: Whether the District subjected the Student to discrimination on the basis of national origin during the 2013-2014 school year.

The Complainant contends that the District treated the Student, who is Hispanic differently than Student 3, a white non-Hispanic student, in that it minimized the seriousness of Student 2's bullying of the Student, while taking Student 2's threat toward Student 3 seriously.

Factual Findings

As discussed above, Student 2 engaged in misconduct toward both the Student and Student 3. During one meeting concerning the incident in which Student 2 injured the Student, School staff allegedly asked whether the Student's parents needed a translator. As discussed above, the District investigated both reports concerning Student 2's conduct, using two different processes, and imposed the same sanction for both incidents. However, the sanction for the incident involving Student 3 was imposed on the same day that the incident was reported to the Principal, while the sanction for the misconduct toward the Student was imposed eight school days after the Principal learned of the incident.

Analysis and Conclusion

For the reasons discussed with regard to Issue 3, the evidence establish different treatment of the Student and Student 3, with regard to the span of time between the report of the incident to the Principal and the imposition of a disciplinary sanction for Student 2's conduct. Thus, the evidence establishes a prima facie case of different treatment. However, also for reasons discussed above with regard to Issue 3, the preponderance of the evidence establishes a legitimate nondiscriminatory, nonpretextual reason for the difference in treatment.

Based on the foregoing, OCR finds that the evidence is insufficient to support a finding of noncompliance with Title VI, with respect to this issue.

On November 8, 2017, the District agreed to implement the enclosed Resolution Agreement (Agreement). Among other things, the Agreement requires the District to do the following: (1) offer counseling to the Student, (2) identify steps and supports to eliminate and/or remedy any hostile environment created during the 2013-2014 school year, (3) invite the Complainant to reenroll the Student, (4) offer to evaluate the Student pursuant to Section 504, (5) determine whether the Student needs compensatory or remedial services, (6) review all complaints of discrimination filed by the Student and/or Complainant, (7) revise the disability-based harassment policy, (8) publish the revised policy, (9) provide training to administrators, faculty, and staff on Section 504 and Title II, (10) provide training to the Section 504/Title II Coordinator and any staff who investigate complaints of disability harassment on the District's obligation to address allegations of disability harassment and how to conduct Section 504/Title II investigations, and (11) provide training to administrators, faculty, and staff on the revised disability-harassment policy. On November 15, 2017, the District extended a written offer of reenrollment and counseling to the Complainant. On December 5, 2017, the District evaluated the Student pursuant to Section 504.

When fully implemented, the Agreement entered into by the District will resolve the issues of noncompliance. OCR will monitor the implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case.

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.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. 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.

OCR will proceed with monitoring the Agreement, effective the date of this letter. OCR will monitor the District's implementation of the aforementioned Agreement to ensure that it is fully implemented. 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 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.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this matter, please contact Mrs. Adrienne Harris at (404) 974-9370.

Sincerely,

Melanie Velez
Regional Director