February 14, 2022

Sent via email only, to: XXXX.XXX.XXX
XXXXX, XXXXX.
XXXXX XXXXXXX
XXXXX XXXXXX XXXXX
XXXXX, XXXXX XXXXX

Re: Bentonville Public Schools
OCR Case No. 07211208

Dear XXXXX:

This letter is to notify you of the disposition of the above-referenced complaint filed on August 2, 2021, with the U.S. Department of Education, Office for Civil Rights (OCR) against the Bentonville Public Schools (District) alleging that the District discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged that her XXXXX was denied a free and appropriate public education when the District failed to adequately respond to reports of disability-based harassment and bullying during the 2020-21 school year and failed to reevaluate her XXXXX in light of these reports.

OCR enforces 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 prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a public entity that receives funds from the Department and is therefore subject to Section 504, Title II, and their implementing regulations. Accordingly, OCR had jurisdiction to investigate and resolve this complaint under Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at http://www.ed.gov/ocr.

OCR investigated whether the District discriminated against the Student on the basis of disability by doing the following:

1. failing to provide a prompt and equitable resolution in response to reports of disability-based harassment and bullying during the 2020-21 school year; and

2. failing to reevaluate the Student to ensure that he received a free appropriate public education after receiving reports of disability harassment and bullying during the 2020-21 school year.

The Department of Education’s mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.
During OCR’s investigation, OCR interviewed the Complainant and spoke with District staff, including the XXXXX XXXXX of XXXXX XXXXX, the XXXXX XXXXX, and the XXXXX of XXXXX XXXXX. OCR also reviewed documentation provided by the Complainant and the District, including: District policies and procedures; witness statements related to complaints of bullying; correspondence between the District and the Complainant; and staff trainings related to disability discrimination and harassment.

Before OCR finished its investigation, the District expressed its interest in resolving the complaint pursuant to Section 302 of OCR’s Case Processing Manual (CPM). OCR found compliance concerns and determined it is appropriate to resolve the Complaint pursuant to a Resolution Agreement.

Factual Background

At the time the complaint was filed, the complainant alleged that her XXXXX (the Student) was XX years old and beginning the XXXXX grade. The Complainant alleged that during the 2020-21 school year the Student was subjected to ongoing bullying and harassment related to his disability (XXXXX). He was on a 504 plan which identified issues regarding his social, academic, and emotional functioning and required the District to provide the following accommodations: break large assignments into smaller tasks; provide a written copy of lecture notes; extended time to complete lecture notes; and, allowed to use text to speech when appropriate. At the time the complaint was filed the Student had been referred for a special education services evaluation to determine the need for an Individualized Education Program (IEP).

Complainant alleged that during the 2020-21 school year, Student was experiencing ongoing bullying in his classroom, primarily by two students (Student 1 and Student 2). Complainant alleged that these students would constantly call Student names, take personal items from Student’s backpack and desk, and ridicule Student regarding his decision to use his personal computer. Complainant alleged that this bullying came to a head in an altercation on March 18, 2021, in which Student 1 punched the Student resulting in the Student receiving a broken nose. The Student underwent surgery and attended school virtually for two weeks.

After the March 18, 2021, incident the Complainant began corresponding with District administrators regarding the Student’s return to school and actions the District would take to ensure the Student returned to a safe environment. The Complainant alleged that after learning of her concerns, the District failed to adequately respond and remedy the bullying or convene the Student’s Section 504 team to discuss possible solutions and the potential need for additional services.

After OCR opened this complaint for investigation, the District reported that, in response to the March 18, 2021, altercation, it conducted an internal investigation into the alleged bullying. The District interviewed the parties involved, including the Student, the two students alleged to have engaged in ongoing bullying, and five of their classmates. Two classmates stated they were not aware of any bullying of the Student. Two other classmates stated that the Student initiated the
argument or altercation before he was punched. And one classmate stated that the Student was punched and described Student 1 and Student 2 as initiating the argument or altercation. Student 1 indicated that the Student had been cussing at him during class and that Student 1 stepped on the Student’s shoe in the hallway, which resulted in the altercation. Student 2 stated he was “sorta messing” with Student in a friendly manner in class and acted like he was taking some of the Student’s candy which made the Student upset prior to the altercation. The District determined that incident did not amount to bullying and that the Student had also made aggressive movements and contact with Student 1 prior to being punched. The District did determine that discipline was appropriate for the student who hit the Complainant’s XXXXX.

The District informed OCR, and the Complainant confirmed, that District administrators spoke with the Complainant on several occasions to address concerns regarding the alleged bullying and the District’s response to prevent bullying in the future. On March 29, 2021, the Student’s Principals met virtually with the Complainant and offered the possibility of changing the Student’s schedule so he would no longer have class with the two students alleged to have bullied/harassed him. The Student’s Principal also informed the Complainant that all of the Student’s teachers and counselors would be made aware of their concerns.

The Complainant emailed the XXXXX XXXXX of XXXXX XXXXX on April 5, 2021, and stated, “[Student] has a 504 and has high-functioning Autism (ASD), known by the school staff; how will he be better protected in the future as a child that is highly vulnerable to bullying?” The XXXXX XXXXX responded to this question that he “has more questions than he probably has answers,” and that they “have options they can put in place.” In the same email, the XXXXX XXXXX informed the Complainant that the District would implement “discrete monitoring” of the students involved, as well as “frequent discussions with counselors/other staff.”

Following the Student’s return to school, the Student did not have further incidents with the classmate who broke his nose. While there were incidents involving other classmates, the District investigated these incidents, and it was agreed the Student would resume weekly check-ins with the School Resource Officer. The District communicated with the Complainant through the remainder of the school year regarding these concerns.

During OCR’s investigation, the District and Complainant confirmed to OCR that the District completed an evaluation of the Student in October of 2021, and the Student was placed on an IEP. The Complainant provided a copy of the IEP to OCR, which reflected that the IEP team considered the bullying that the Student had experienced and ways to ensure the Student receives assistance with self-advocacy skills and social skills relating to de-escalation to help keep his focus on academics. The Complainant informed OCR that this IEP better addresses the Student’s XXXXX diagnosis, social skill challenges, and vulnerability to ongoing bullying. Additionally, the District has since posted a copy of its Section 504 Grievance procedures on the District’s website.
Applicable Regulatory Standards

Duty to Respond to Disability-Based Harassment

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual 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. Title II’s implementing regulation contains a similar provision at 28 C.F.R. § 35.130(a).

Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II. 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 denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s 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.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student’s rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student’s ability to participate in or benefit from the educational program.

When disability harassment limits or denies a student’s ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

The Section 504 implementing regulation, at 34 C.F.R. § 104.7(b), requires a recipient 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 the Section 504 regulation.

School districts are required to establish grievance procedures for resolving complaints related to those cases where the complainants allege that employees, other students, or third parties engaged in discriminatory behavior. The grievance procedures must ensure that complaints are resolved in a prompt and equitable manner. In evaluating whether a school district’s grievance procedures are prompt and equitable, OCR will examine, for example, the extent to which notice of the procedures has been provided to students, parents, and employees of the school; whether the procedures afford an opportunity for an adequate, reliable, and impartial investigation; whether reasonably prompt timeframes have been established for the various stages of the complaint process; whether notice of the outcomes of the complaint has been provided to the parties; and whether there is an assurance that any violations will be addressed, and steps will be taken to prevent a recurrence.
**Duty to Re-Evaluate**

The Section 504 regulation, at 34 C.F.R. § 104.3(j), defines a person with a disability, in relevant part, as one who has a mental or physical impairment that substantially limits one or more major life activities. Pursuant to Section 504 and Title II, as amended by the Americans with Disabilities Act Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulator, endocrine, and reproductive functions. An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting.

Under the Americans with Disabilities Act Amendments Act of 2008, the term “substantially limits” shall be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses. Mitigating measures are things like medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment.

The Section 504 implementing regulation, at 34 C.F.R. § 104.35(a), requires school districts to evaluate any person who, because of disability, needs or is believed to need special education or related aids and services. Under Section 504, school districts must conduct the evaluation in a timely manner. When a school is aware of a student’s disability, or has reason to suspect a student has a disability, and the student needs or is believed to need special education or related services, it would be a violation of Section 504 for the school to delay or deny the evaluation.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, when there is information suggesting that a student’s educational program is not meeting the student’s individual needs, a group of knowledgeable persons should consider whether further evaluation or revisions to the student’s Section 504 Plan or placement are necessary.

**Resolution**

Prior to the completion of OCR’s investigation, the facts obtained to date suggest potential compliance concerns regarding whether the District promptly and appropriately responded to the report of a potential hostile environment due to disability-based harassment. One cause for concern was that the District’s policies and procedures use harassment and bullying interchangeably without clear differentiation. There was also a cause for concern with the response to the alleged harassment. While the District promptly interviewed witnesses and communicated with the parents of the Student, additional incidents of alleged harassment occurred. Finally, the District had an obligation to evaluate whether the alleged harassment may have impacted the Student’s receipt of a free appropriate public education.
The District expressed interest in voluntarily resolving the complaint pursuant to Section 302 of OCR’s Case Processing Manual. The District submitted a signed Resolution Agreement (copy enclosed) on February 14, 2022, that, when fully implemented, will address both allegations.

With respect to allegation 1, the Resolution Agreement requires the District to review, and if necessary, update and/or amend its Bullying Policy and/or Section 504 grievance policies and procedures to ensure the District provides for the prompt and equitable resolution of complaints of disability discrimination and harassment as required by Section 504. The Resolution Agreement also requires the District to provide training to staff on the how to recognize and take steps reasonably designed to prevent and respond appropriately to such harassment.

With respect to allegation 2, the District and the Complainant confirmed to OCR that the District completed an evaluation of the Student in October of 2021, resulting in an IEP that will ensure the Student receives additional oversight and assistance to address the social situations that led to the alleged bullying. The Resolution Agreement requires the District to take an additional step to convene the IEP team to determine whether any compensatory services are appropriate.

Please consult the Resolution Agreement for further details.

OCR considers this complaint resolved effective the date of this letter and will monitor the District’s implementation of the Resolution Agreement. When OCR concludes that the District has fully implemented the terms of the Resolution Agreement, OCR will close the complaint. If the District fails to carry out the Resolution Agreement, OCR may resume its investigation.

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. OCR would like to make you aware that individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

The District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. Complaints alleging such retaliation may be filed with OCR.

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

If you have any questions, please contact XXXXXX XXXXX, Attorney, at (XXX) XXX-XXXX (voice), (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXXX.XXXXX.XXX.

1 The Case Processing Manual is available at https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.
Sincerely,

Keith Smith
Supervisory Attorney

Attachment