



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

December 10, 2018

Dr. Sally Downey, Superintendent
East Valley Institute of Technology
1601 West Main Street
Mesa, Arizona 85201

via email only to XXXX@XXXX

Re: **East Valley Institute of Technology**
OCR Case Number 08-14-2151

Dear Superintendent Downey:

We have completed our investigation stemming from a complaint against East Valley Institute of Technology ("EVIT") alleging discrimination on the basis of disability. Specifically, the Complainant alleged that, during the 2013-2014 school year (SY), EVIT staff: (a) failed to implement her son's individualized education program (IEP); and (b) subjected her son ("Student") to disability-based harassment. We apologize for the delay in resolving this case and appreciate EVIT's patience with the investigatory process.

Our investigation established, by a preponderance of the evidence, that EVIT failed to implement two accommodations in the Student's IEP: (a) allowing the Student to work independently; and (b) providing the Student with extra practice for assessment of applied knowledge. We found insufficient evidence that EVIT subjected the Student to disability-based harassment. Additionally, during the course of our investigation, we identified evidence that caused concerns about EVIT counseling students with disabilities out of EVIT's program. The reasons for our conclusions are set forth in this letter.

Upon being advised of these findings, EVIT entered into a resolution agreement to resolve the matters. A signed copy of the agreement is attached.

I. LEGAL STANDARDS

a. Failure to Implement

The Section 504 regulations, at 34 Code of Federal Regulations (C.F.R.) Section 104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. Sections 104.34-36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. The Office for Civil Rights (OCR) interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and

35.130(b)(1)(ii)-(iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

b. Harassment

The regulations implementing Section 504, at 34 C.F.R. Sections 104.4(a)-(b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. Section 35.130(a)-(b), create the same prohibition against disability-based discrimination by public entities. School districts are responsible under Section 504, Title II, and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school district is responsible for the discriminatory conduct whether or not it has notice.

II. EVIDENTIARY STANDARD

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion as alleged.

III. INVESTIGATION

Our investigation focused on obtaining the evidence necessary to determine whether EVIT discriminated in violation of Section 504 and Title II as alleged. Specifically, our investigation consisted of:

- requesting and reviewing documentary evidence from the Complainant, EVIT, and XXXX ("District"), the Student's home school district;
- interviewing the Complainant, Student, and Complainant's attorney ("Attorney");
- interviewing the District's special education director ("Sped Director")
- Interviewing the special education department chair ("Chair") at the Student's home/base school, XXXX ("School");
- Interviewing the Student's case manager ("Case Manager") at the XXXX, XXXX;
- interviewing EVIT's director of aviation programs ("Director"), EVIT East Campus' principal/ Section 504 coordinator/special education coordinator ("Principal"), and an EVIT counselor who worked with the Student ("Counselor"); and
- requesting and reviewing narrative responses from EVIT.

IV. EVIDENCE

a. Background

During the 2013-2014 SY, the Student was in XXXX grade. He had an IEP, with a primary area of eligibility of XXXX and a secondary area of eligibility of XXXX for diagnoses of XXXX and XXXX. The Student's placement, as determined by his IEP team, was vocational programming in aviation studies at EVIT's East Campus for the first half of the school day and special education at XXXX for the second half of the school day.¹ EVIT offers tuition-free career and technical education programs for students from various area school districts and charter schools.²

The Student turned age 18 on XXXX XX, 2015. He is no longer a student in the District or at EVIT.

b. October 21, 2013 IEP Team Meeting

On October 21, 2013, the Student's IEP team met for an annual review. The IEP from that meeting indicated that the Student would receive the following accommodations on classwork, assignments, and assessments, in all subjects:

- provide consistent daily routine;
- use preferential seating;
- seat close to students who can be helpful;
- allow provisions for physical movements, errands, tasks etc. at HSG;
- option to work independently;
- insure student understands directions before he proceeds;
- frequent comprehension checks by teacher;
- time allowance for tests;
- use spell check and computer for writing;
- use of calculator for math assignments as indicated;
- make provisions for extra practice for assessment of applied knowledge;
- use of smartphone in vocational class only to access electronic agenda; and
- when asking [the Student] for an opinion or assessment, give ample time and probe for a complete answer.

Notes from the meeting read, in relevant part, "The team further discussed [the Student]'s performance report from EVIT. It was noted that [the Student]'s greatest challenge area is in the laboratory situation which requires a heightened capacity for situational awareness and an ability to respond quickly and accurately."

At the meeting, EVIT staff shared a report about the Student. Notes about that report, made in the IEP, read:

First reports from EVIT indicated that [the Student] really seems to apply himself and takes fairly good notes but tends to get confused on his closed book/notes test. He did quite well on his open note quiz. [The Student] often shares with his HG teachers things

¹ Starting in the 2014-2015 SY, XXXX was renamed XXXX. It was and still is owned by XXXX, a nonprofit corporation.

² East Valley Institute of Technology, About, <http://www.evit.com/about> (last visited Sept. 20, 2018).

what he is learning in his aviation program. The most recent report from his EVIT instructor was that [the Student] had not done very well on his last block test and his teacher has spoken with parents about this. [The Student] is scheduled for a re-test of his last block test. His teacher also inquired about the possibility of teachers at Howard being able to provide some support with projects and presentations and that [the Student] has coming due. His teacher seemed to feel that [the Student] is doing well at their campus. He talked about how [the Student] did really well during a Jeopardy type of game where he was able to help out his team with the correct answers on several occasions. He indicated that [the Student] does not appear to be doing a lot of studying and rushes through his tests. He also encouraged that a system of communication be established between EVIT personnel, parents, HG teacher, and his EVIT instructor.

[The Student]'s greatest challenge, according to his instructor from EVIT will be his ability to demonstrate situational awareness in the actual laboratory situation. The instructor's current assessment is that this is challenging for [the Student]. It was suggested that an on-site visit by Chandler officials might be helpful to assess possible accommodations that could be made to help [the Student] experience success.

According to the Sped Director, EVIT staff said at the meeting that the Student was going to struggle and was not on a "high level" because he had an IEP. This statement was not reported by any of the other IEP team meeting participants who OCR interviewed. She also reported that EVIT staff again said they could not implement certain accommodations – particularly extra time on tests – because of industry standards.

c. Student's Struggles at EVIT

Evidence shows that the Student struggled in EVIT's aviation program, especially in spring 2014. The following are notes written and maintained by EVIT staff:

- February 3, 2014: "Although student seems to grasp the operation of the VOR nav-aid, the concept of course versus radial seems to be a major hurdle [sic] and cannot be visualized."
- February 7, 2014: "Course to course intercepts and chart displays cannot be comprehended. [The Student] seems to be getting frustrated with the instructional repetition of concept."
- February 10, 2014: "Student having difficulty with flight computer problems. I gave him some samples but he did not complete at home. Today we are scheduled for a test and student said he forgot and did not study. Overall he seems less and less motivated and often sleeps in class."
- February 10, 2014: "When I attempted to again explain the out bound radial-inbound course concept to [the Student] didn't seem to want to hear it again and said that 'this stuff is too confusing.'"
- February 11, 2014: "Had to again wake him in class. Not staying on task and then has to be helped. Will send note to advocate."

Emails among EVIT staff, the Case Manager, District staff, and the Complainant further demonstrate that the Student struggled in the aviation program. For example:

- On February 4, 2014, the Chair emailed the Case Manager, “[EVIT has] been clear that they worry about the long term. I wish they would ‘lighten up’ and just let him take the class and get whatever he can out of it.”
- February 5, 2014, the Director emailed the Chair, “[The Student] is not engaged as in previous semesters. At this point the math seems overwhelming and inhibiting his enthusiasm. His head is constantly down on his desk in class and I must call on him periodically to confirm he’s awake.”
- On February 6, 2014, the Chair emailed the Complainant, “I contacted [the Director] re: [the Student] to see how he was doing. He responded that [the Student] has his head on the desk frequently and is not as enthusiastic or engaged. He feels that the math is getting difficult for him.”
- On February 11, 2014, the Instructor emailed the Case Manager, “[The Student] seems less interested as we go on. He did very little outside work on his flight computer problems and he said yesterday that he forgot we are having a block test and did not study. ... Also he has been sleeping in class. ... You may want to pass this on to parents. They did not contact me after our last e-mail.”
- On February 12, 2014, the Complainant emailed her attorney, “[The Student] is feeling overwhelmed and says he wants to quit. Just doesn’t get it.”
- On February 12, 2014, the Counselor emailed the Case Manager, “Currently, his grade for this 9 weeks would be a D but next exam is going to pull it to an F...the exam encompasses very difficult concepts that [the Student] is confused about....the class is moving forward and the instructor feels bad that [the Student] is continuing daily to fall more behind.”

According to the Director, by the end of January 2014, the Student was despondent, sleepy, withdrawn, and “done and not mentally there,” and had “shut down.” So, in January 2014, he called the Complainant to tell her that the Student could not do the program and to ask how long “they” were going to keep him in the program.

d. Discussions of the Student Leaving EVIT

No later than February 12, 2014, the Complainant, the Student, EVIT staff, District staff, and the Case Manager began discussing the Student leaving EVIT’s aviation program.

i. February 12, 2014 Emails

The Director emailed the Chair:

[The Student] is having extreme difficulty and is almost despondent in the Instrument Flight course segment. He is unable to retain the cockpit flight instrument set up procedures and cannot visualize the in-flight geometry to properly execute the Laboratory exercises. He spoke to me today about dropping the course, but said he will remain until the end of the quarter for credit. I really don’t think it best for [the Student] to sit/sleep in class knowing he is overwhelmed by the material. Therefore, I would like to know if the quarterly credit is not an issue, is there any way he can be

accommodated back at Hamilton or Grey and not be subject to this condescending environment until quarter's end.

The Counselor emailed the Case Manager and Chair:

I am the counselor at EVIT East and have talked with [the Student] about his career path changes for next school year. We thought he may be able to finish out this semester in his current Aviation class but it is apparent to [the Student] and the teacher that he is very lost at this point. The ability to continue is being questioned because he will not be successful if forced to continue in Aviation this school year. He has currently earned 1.5 credit from EVIT but his academics for this semester may push him into a failing grade and no-credit from EVIT. Is it possible for [the Student] to return to his home school to finish out this semester?

The Counselor emailed the Complainant, "I am not getting the opinion judging from their comments that they feel he can be successful in the program. If you still think he can be successful, you need to call his teachers asap and ask them how you can help. ... If he is going to continue to struggle, the sooner a decision to move on is made the better, credit wise."

ii. February 13, 2014 Emails

The Chair emailed the Complainant, "I called [the Director] today. He strongly feels that [the Student] cannot grasp the content that they are covering right now and thinks that he should drop the class. However, it might be helpful for you to call and speak with him."

The Case Manager emailed the Chair, "I guess we are just waiting to hear from mother that she understands that his teachers have tried to make it work and that the class is just too difficult, that he feels overwhelmed and understands that as well."

The Director emailed the Principal, with the subject, "[The Student]'s Mom":

Finally spoke with her about the situation and played on [the Student]'s demeanor and how he feel[s] so discouraged that he CAN NOT possibly comprehend the material. How we have to start over every day with limited retention. Also about the dynamics of the flight segment which is quite different than the simple recall of information typical of last semester; along with the required intuitive math application which really isn't there. Also, explained that the career fields in aviation are very standardized and require strict certification. Certification which offers NO accommodation. She finally agreed, but will the father? Since [the Student] seems not to like mechanics, I suggested auto as an alternative, so she might be calling you about that tomorrow after she speaks with the Hamilton and Grey folks. Also explained the grade situation, in that if something isn't done immediately and [the Student] fails next week's block test, as he surely will, the "D" which he currently has will most surely result in a failing grade.

iii. February 14, 2014 Emails

The Chair emailed the Case Manager, "EVIT sounds pretty adamant about him not staying."

The Complainant sent an email that read:³ “I spoke with [the Principal] today and expressed [the Student]’s wishes to withdraw from the Aviation program at EVIT. She was completing paperwork to withdraw him with today as his last day. The plan is for him to return to Howard Gray full time and explore other options he may be interested in in the future.” When asked by OCR what prompted the email, the Counselor said that the Student had gone to the Director and said he did not feel comfortable in the program and was not confident that he could do the work. The Complainant’s attorney told OCR that the Student wanted to withdraw from the aviation program because he was feeling defeated and hopeless.

On February 17, 2014, the Complainant sent an email that read:⁴

Upon consulting with [the Student]’s attorney ... I have been informed that withdrawing [the Student] from the Aviation Program would be considered a change in placement and he needs to continue to attend until an IEP meeting can be convened. The team needs to discuss all the options that are available to [the Student] to make him successful. [The Student] will be in attendance at EVIT on Tuesday morning going forward until the team can determine what changes will be made.

On February 18, 2014, the Principal replied, “I was aware of the change of placement status and would not have completed drop paperwork until notified by [the District].”

e. Student’s Continued Struggles at EVIT

The Student continued to struggle in EVIT’s aviation program, as evidenced by the following notes made by EVIT staff:

- February 18, 2014: “Woke student up several times in class today while explaining Reverse Sensing which was way beyond his conceptual capability.”
- February 21, 2014: “42% on today’s block test. Most rote recall items correct. Math computations and most geometric conceptual questions not even attempted.”
- February 24, 2014: “Started Instrument practical practice today and student not comfortable working with other classmates. He said he would prefer not to so he wouldn’t lower the combined grade. Wanted to just sleep during session.”
- February 26, 2014: “Did not and will not administer Instrument Nav Block test to student to avoid embarrassment. It would also lower his grade to a nontransferable.”

Emails further demonstrate that the Student struggled in the aviation program. For example:

- On February 24, 2014, the Instructor sent an email that read,⁵ “Is [the Student] going to continue at EVIT? I’m not sure if I should be waking him up or not. If he stays, I’ll expect him to stay awake and participate. I had to wake him several times today and last week.” The Student told OCR that he did not think that he fell asleep in class.

³ The copy of the email provided to OCR does not show the recipient.

⁴ The copy of the email provided to OCR does not show the recipient.

⁵ The copy of the email provided to OCR does not show the recipient.

- On February 27, 2014, the Director emailed the Principal, "It [is] a shame having a student here under these circumstances. He is just overwhelmed." A photograph of the Student sleeping at a computer was attached.

f. March 3, 2014 IEP Team Meeting

On March 3, 2014, the Student's IEP team met. The meeting notes read:

Meeting was opened to discuss [the Student]'s performance and adjustment in EVIT vocational program in aviation. [The Student]'s strength areas were noted in mechanical aspects of the program. It was noted that [the Student]'s greatest challenge area was in the laboratory situation which continues to require a heightened capacity for situational awareness and an innate ability to respond quickly and accurately to in flight simulation. After discussion, and based upon reports from his EVIT teacher as well as input from [the Student], it was the general consensus, with [the Student]'s consent, that his enrollment in the aviation program be discontinued at the quarter break as of March 7th. EVIT personnel were informed of this decision and also were informed that [the Student] intends to maintain the option to reenter EVIT in the fall in another vocational option more closely aligned to his strengths and his interests. EVIT was also informed that [the Student] would spend a day or two shadowing two potential programs during the 4th quarter of the current academic year to help him further clarify his options for the fall semester. In the interim, [the Student] will return to Gray School full time for the fourth quarter beginning March 11th, with a goal of completing his government and economics credits to free up his schedule senior year for additional vocational training. [The Student] will also continue with his current math and English classes. His government class will be pursued through an on-line Chandler school district option.

The team added an addendum to the IEP, which reflected his placement out of the EVIT aviation program. Specifically, the addendum increased the Student's "academic instruction" special education from 120 minutes per day to 270 minutes per day. The start date for the change was noted as March 3, 2013. His other special education and related services remained the same.

According to the Complainant, EVIT staff "stated that they could not make accommodations in the program for [the Student] and cited 'industry standards' as the reason for refusing to accommodate. When asked if OCR was aware of EVIT's position regarding accommodation, EVIT staff stated that yes OCR was aware and had said they could refuse accommodations on the basis of 'industry standards.'" The Attorney shared a similar account.

According to the Sped Director, EVIT staff asked the District would send an aide to EVIT to work with the Student. She replied that the Student did not need an aide; instead, he needed accommodations.

g. Student's Withdrawal from EVIT

On March 19, 2014, the Secretary emailed the Assistant Superintendent, "[The Complainant] also stated that she was unclear why he is being marked absent when she was under the impression [the Student] had been withdrawn from EVIT." The Assistant Superintendent emailed EVIT staff, "I had a good

conversation with [the Student]'s mom. She'll be sending me an email requesting his withdrawal effective 3/7."

On March 26, 2014, the Complainant emailed the Assistant Superintendent, "Due to EVIT's failure to meet [the Student]'s needs, the IEP team concluded after an IEP meeting, that [the Student] should return to his district placement for the rest of the year. His withdrawal is effective March 7th. [The Student] intends to return to EVIT, as part of his transition plan and vocational goals for the 2014-2015 school year."

V. ANALYSIS

a. Failure to Implement

In her complaint, the Complainant broadly alleged that EVIT failed to provide the Student with the accommodations in his IEP. Neither in the complaint, nor during an interview with OCR, did she specifically mention a denial of any of the following accommodations in the Student's IEP: provide consistent daily routine; use preferential seating; allow provisions for physical movements, errands, tasks etc. at HSG; seat close to students who can be helpful; use spell check and computer for writing; or when asking [the Student] for an opinion or assessment, give ample time and probe for a complete answer. Implementation of the remaining accommodations in the Student's IEP is discussed below.

Notably, prior to OCR's on-site interviews of EVIT staff, the interviewer overheard EVIT's Assistant Superintendent direct people in his office, including three interviewees, that, if they were asked about providing accommodations, then they were to say they went "above and beyond" to provide the Student with assistance. The Assistant Superintendent then sat in on the interview with the Principal, who said, five different times during the interview, that EVIT staff went "above and beyond" for the Student.

i. "Option to work independently"

During interviews with OCR, the Director said he paired the Student with "better students" so that the Student could learn. The Director acknowledged that the Student's IEP indicated that the Student was to be provided with the option to work independently and that the Student requested to exercise the option, but the Director explained that working independently was not what the Student needed. Instead, the Director told OCR that he believed the Student needed socialization and did not want the Student to feel different. He also said that the accommodations were "so boilerplate," that some "didn't fit," that he was "not real knowledgeable" about what accommodations should be, and that he just did "what would be best" for the Student. The Student reported to OCR that he told the Director that he wanted to work alone, but the Director had him work in a group and told him that individuals are expected to collaborate in aviation. We found, by a preponderance of evidence, that EVIT failed to implement the Student's IEP by not allowing the Student to work independently.

ii. "Insure student understands directions before he proceeds" and "frequent comprehension checks by teacher"

The Complainant alleged in her complaint that EVIT staff, generally, did not check for the Student's understanding. However, the Director reported that: he checked the Student's understanding of directions by asking the Student whether he had any questions; he would allow the Student to re-take tests; and he would review completed tests with the Student. Additionally, the Student told OCR that

the Director went over tests with him once or twice; that the Director would try to assist him at the end of the day by helping him with his notes and re-explaining material; and that the Case Manager would also help by re-explaining the material from EVIT. Therefore, we found insufficient evidence to conclude that EVIT failed to implement the Student's IEP regarding comprehension checks.

iii. "Time allowance for tests"

The Complainant alleged in her complaint that EVIT staff did not provide the Student with extra time on tests. She wrote that EVIT staff justified the denial of extra time by claiming that had to abide by "industry standards," which did not allow for extra time. However, during a subsequent interview with OCR, the Complainant said she did not know whether the Student was given extra time. Additionally, the Principal told OCR that the Student was allowed extra time on his tests, if he needed it. The Director reported that the Student was always one of the first students to hand in his test and that the Director had to force the Student to take his test back and re-try certain questions. This report was confirmed by the Chair. Finally, the Counselor reported that the Director would go over quizzes and tests with the Student, and then allow the Student to re-take the quizzes and tests. This report was confirmed by the Student. Therefore, we found insufficient evidence to conclude that EVIT failed to implement the Student's IEP with respect to time allowance for tests.

iv. "Use of calculator for math assignments as indicated"

The Complainant alleged in her complaint that EVIT did not allow the Student to use a calculator in simulations. However, during an interview with OCR, the Complainant said that the Student was allowed to use a calculator. The Director told OCR that the Student was allowed to use a calculator on assignments. The Chair reported to OCR that the Student was not allowed to use a calculator *on exams*, but did not say that he was not allowed to use a calculator on assignments. The Student's IEP specifically indicated that the Student would be allowed to use a calculator for math "class work/assignments/assessments" and did not indicate that a calculator could be used for "tests." Therefore, we found insufficient evidence to conclude that EVIT failed to implement the Student's IEP regarding the use of a calculator for math assignments.

v. "Make provisions for extra practice for assessment of applied knowledge"

The Complainant alleged in her complaint that EVIT did not provide the Student with opportunities for extra practice for assessment of applied knowledge. Then, during an interview with OCR, the Complainant said that the Student did not go to school early or stay late because of his bus schedule, and was not provided with extra practice time while at EVIT. During an interview with OCR, the Director reported that he did not think the Student was allowed extra time. The Principal indicated that the Student would have been allowed to arrive early or stay late for extra practices, but claimed no one had requested such an opportunity. However, the IEP put the burden on EVIT to proactively "make provisions for extra practice" available to the Student. The Attorney reported that EVIT would not agree to provide extra time for practice because doing so would require staff letting him into the lab. Therefore, we found, by a preponderance of evidence, that EVIT failed to implement the Student's IEP by not providing him with extra practice for assessment of applied knowledge.

vi. "Use of smartphone in vocational class only to access electronic agenda"

During an interview with OCR, the Complainant asserted that the Student did not follow through on the use of an electronic agenda because he thought he already knew his due dates, and thus, did not need to make notes. The Principal told OCR that the Student was allowed to use his phone in any way that he found necessary. The Attorney reported to OCR that, after initial objections, EVIT reluctantly agreed to allow the Student to use his phone for organization. Therefore, we found insufficient evidence to conclude that EVIT failed to implement the Student's IEP with respect to time allowance for tests.

b. Harassment

The Complainant alleged that EVIT staff harassed the Student on the basis of disability by expressing doubts about his ability to be successful in the program and criticism of his performance in the program. The Complainant further alleged that the harassment caused the Student to experience anxiety and lowered self-esteem, to become withdrawn, and to withdraw from the program. Additionally, the Sped Director reported that, as a result of negativity from EVIT staff, the Student felt defeated, "curled up into himself," and "kept getting smaller."

The evidence is clear that EVIT staff were negative about the Student's participation in the program while in the presence of the Student – specifically, during the two IEP team meetings that were held during the relevant time period with the Student in attendance.⁶ For instance, at the October 2013 and March 2014 IEP team meetings, with the Student present, EVIT staff discussed how the laboratory setting was very challenging for him given his abilities and expressed doubt about whether he could be successful.

However, we did not find a preponderance of evidence that the negativity about and questioning of the Student's ability and performance was disability based. Section 504 requires recipients to provide a FAPE to each qualified student with a disability.⁷ To be appropriate, an education must be designed to meet the *individual educational needs* of a student with a disability. Additionally, Section 504 requires recipients to make placement decisions for students with disabilities based "upon information from a variety of sources," including "teacher recommendations."⁸ The context of EVIT staff's statements about which the Student was aware – *i.e.*, IEP team meetings – must be considered.⁹ Truthful information about a Student's performance, both positive and negative, must be shared in IEP team meetings. Even if, *arguendo*, we had found sufficient evidence that the negativity was disability-based, we did not find a preponderance of evidence that it was sufficiently severe, persistent, or pervasive so as to create a hostile environment. While it is clear from the aforementioned evidence that EVIT staff were critical of the Student's ability and performance, the available evidence from the relevant time period definitively shows two occasions, over four months apart, in which their comments were made in the presence of the Student – the October 21, 2013 IEP team meeting and the March 3, 2014 IEP team meeting. Moreover, the available evidence of comments by EVIT staff toward the Student do not demonstrate that the comments were sufficiently severe. In fact, during interviews with OCR:

⁶ The Complainant alleged that EVIT staff were negative about the Student's participation in the program during a tour in June 2013 and an IEP team meeting in August 2013; however, for purposes of this case, we reviewed events that transpired within 180 calendar days of the complaint being filed on March 17, 2014. See Office for Civil Rights, *Case Processing Manual*, Section 106.

⁷ 34 C.F.R. Section 104.33.

⁸ 34 C.F.R. Section 104.35.

⁹ See *Oncala v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

- The Complainant said that: the Student's frustration with EVIT was related to the program content and expectations rather than the way he was treated; and withdrawing the Student was prompted by the Student telling the Director that he was not comfortable in the program or confident in his ability to complete the required work.
- The Director said that: he did his best to hold his tongue because he did not want to embarrass the Student and he attempted to encourage the Student.
- The Chair said that the Student did not want to continue in the program because it was too difficult (and not because of another reason, such as harassment).
- The Case Manager said that EVIT staff did not show patience or sensitivity, but he did not believe EVIT staff were encouraging the Student to leave the program. Instead, the Case Manager said that EVIT staff were sharing concerns about the difficulty and pressure of the work, and the student falling asleep and possibly failing the course.
- The Counselor said that the February 2014 emails about the Student's struggles and possible withdrawal from the program were prompted by the Student telling the Director that he did not feel comfortable in the program and that he did not feel confident that he could do the work.

"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."¹⁰ In short, we did not find sufficient evidence that the conduct of EVIT staff rose to the level of intimidating or abusive.

Since we did not find sufficient evidence that the comments by EVIT staff created a hostile environment, we found insufficient evidence to conclude that EVIT staff subjected the Student to discriminatory harassment.

c. Additional Concern

The practice of counseling out enrolled students with disabilities because of their disabilities by encouraging them to voluntarily transfer or withdraw from the school is prohibited discrimination. If a school believes a currently enrolled student needs additional evaluations, services, or accommodations in order to receive FAPE, the school must follow Section 504 evaluation and placement procedures.

In this case, EVIT staff counseling out the Student was not opened as an allegation; however, there is evidence such counseling out occurred. Some of the Director's communications with the Complainant – *e.g.*, the January 2014 call, February 12, 2014 email, and February 13, 2014 call – could reasonably be considered inappropriate counseling out of the Student. Additionally, the Counselor emailed the Complainant, on February 12, 2014, "I am not getting the opinion judging from their comments that they feel he can be successful in the program. ... If he is going to continue to struggle, the sooner a decision to move on is made the better, credit wise." Further evidence of EVIT staff counseling out the Student includes the Chair's email to the Case Manager on February 14, 2014, which read in part, "EVIT sounds pretty adamant about him not staying." Therefore, the resolution agreement in this case includes language about counseling out students.

VI. CONCLUSION

¹⁰ U.S. Dept. of Educ., Office for Civ. Rights, *Dear Colleague Letter: Guidance on Prohibited Disability Harassment* (Jul. 25, 2000).

The case is now in the monitoring phase. OCR will monitor implementation of this Agreement through periodic reports from EVIT demonstrating that the terms of the Agreement have been fulfilled. We will provide EVIT with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The Complainant will receive copies of our monitoring letters. The monitoring phase will be completed when OCR determines that EVIT has fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegation will be resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. When the monitoring phase of this case is complete, OCR will close this case and send a letter to EVIT, copied to the Complainant, stating that this case is closed. If EVIT fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues above and should not be interpreted as a determination of EVIT's compliance or noncompliance with Section 504 or Title II, or any other Federal law in any other respect.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. Please be advised that EVIT may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint investigation. If this happens, the individual 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, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Jason Langberg, the attorney assigned to the case, at (XXX) XXX-XXXX or XXXX@XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Attachments: Resolution Agreement for OCR case number 08-14-2151

Combined Resolution Agreement for OCR case numbers 08-09-2043, 08-12-2181, 08-13-1204, 08-13-2056, and 08-13-2074

cc (via email): Diane Douglas, Arizona Superintendent of Public Instruction