



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

December 18, 2013

Stanley Rose III
Superintendent
Santa Clara Unified School District
1889 Lawrence Road
Santa Clara, CA 95051

(In reply, please refer to case no. 09-13-1193.)

Dear Superintendent Rose:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Santa Clara Unified School District. The Complainant alleged that the District discriminated against her son (Student)¹, who is Latino and has a disability, on the basis of national origin and disability, and retaliated against the Complainant. OCR initiated an investigation on the following issues:

1. Whether the District failed to respond appropriately and effectively to notice that the Student had been subjected to ongoing harassment by peers on the basis of his national origin.
2. Whether the District denied the Student a free and appropriate public education (FAPE), when the Student's aide was not present when he was harassed on December XX, 2012.
3. Whether the District retaliated against the Student after the Complainant filed an internal complaint of national origin based harassment, by denying requests for an out of district transfer and transportation from home to school made during the spring semester of 2013.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990, and their implementing regulations. Title VI prohibits discrimination on the basis of race, color or national origin in programs and activities operated by recipients of Federal financial assistance. Section 504 prohibits discrimination on the basis of disability in programs and

¹OCR notified the District of the identities of the Complainant and the Student when the investigation began. We are withholding their names from this letter to protect their privacy.

activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities.. The District receives funds from the Department, and is a public school district, and is subject to Title VI, Section 504, Title II, and the regulations.

OCR gathered preliminary evidence through interviews with the Complainant and the Student's father, and several District and School site administrators. OCR also reviewed documents and records submitted by the District and the Complainant.

Under OCR's complaint resolution procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. During the course of OCR's investigation process, the District expressed an interest in resolving the complaint informally. On August 13, 2013, and November 21, 2013, the District submitted a Resolution Agreement (RA) and a follow-up letter of assurance which, when implemented, will resolve issue 1 of this complaint. For this reason, OCR did not complete its investigation or reach findings or conclusions as to whether the District had failed to comply with Title VI. OCR concluded that there was insufficient evidence to establish a violation of Section 504 or Title II in connection with issue 2 and a portion of issue 3, and that the balance of issue 3 had been resolved by actions of the District taken after the complaint was filed. The applicable legal standards and the facts gathered during the partial investigation are summarized below.

Issue 1: Whether the District failed to respond appropriately and effectively to notice that the Student had been subjected to ongoing harassment by peers on the basis of his national origin.

The regulations implementing Title VI, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. School districts are responsible under Title VI and the regulation for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Under Title VI and the regulations, once a school has notice of possible harassment between students on the basis of race, color or national origin, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A district may violate Title VI and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the district fails to take appropriate responsive action. These steps are the district's responsibility whether or not the student who was harassed or his/her parents make a complaint or otherwise asks the school to take action.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

OCR's preliminary investigation showed the following:

- The Student was enrolled in the XXXXXX grade in the District during the 2012-13 school year. The Student received special education services for Attention Deficit/Hyperactivity Disorder (AD/HD) and XXXX XXXXXXXXXX XXXXXX XXXXXXXXXX XXXXXX.
- The Complainant (Student's mother) alleged that, during the past several years, the Student had repeatedly been called derogatory names by other students, including "Burrito" and "Beaner", based on his Mexican-American national origin. She stated that both she and the Student had reported these incidents to school and District administrators.
- On December XX, 2012, the Student was hit repeatedly on the head by another student (Student B). According to both the Complainant and school staff, Student B had called the Student "Burrito" prior to the assault.²
- The Student reported the incident and was interviewed by school administrators, who called the local police department. A police officer came to the school and interviewed the Student and Student B. Student B was suspended pending a disciplinary hearing, and was ultimately transferred to another middle school.
- The School vice principal interviewed the Student and Student B, but no other witnesses. Student B told her that he had heard others call the Student "Burrito" and that he sometimes let them do so, so he thought it was acceptable. The vice principal completed a "Pupil Accident Report" that described the assault, but did not mention the use of a race-based name.
- IEPs developed for the Student during the spring 2013 semester, and information provided by his parents, indicate that the Student had increasing problems with depression and anger after the assault. Notes of IEP meetings include discussions of

² Although the Complainant alleged that the Student had been subjected to harassment during past years, the December XX, 2012 incident was the only one that allegedly occurred during the 2013-14 school year or within 180 days of the OCR complaint. The regulation implementing Title VI, at C.F.R. §100.7(b), requires that complaints be filed within 180 days of the date of the date of alleged discrimination.

options for increased supervision of the Student to protect him from further harassment, the need to accommodate the effects of the Student's medication, and offers by the District of counseling, and therapeutic services.

- During a series of IEP meetings convened to discuss the Student's placement for the 2013-14 year, the parents requested that he be placed in a small high school outside of the District. On August XX, 2013, the parties tentatively agreed that he would be placed in a non-public school for students with XXXXXXXXXXX, XXXXXXX and XXXXX XXXXXXXXXXXXXXXXXXXXXXX, which offers intensive therapeutic services.
- In September 2013, the Student and his parents attended a meeting at the non-public school. After reviewing materials provided to them at this meeting, the Student's parents concluded that the school was not appropriate for the Student.
- On September X, 2013, the Student's parents enrolled him in a charter school in XXX XXXX, California, that is not affiliated with the District.³
- The Student returned to the District in late October 2013. On November XX, 2013, his parents removed him from the District for 60 days to enable him to attend a residential placement in another county.

As part of their non-discrimination responsibilities under Title VI, school districts are expected to provide students with a nondiscriminatory environment that is conducive to learning. For this reason, when a school has notice that a student has been subjected to harassment based on his or her race or national origin harassment, it must thoroughly investigate to determine whether the alleged acts occurred, whether they were based on race or national origin, and whether they created a hostile environment for the student. If it finds that such an environment has been created, it must take prompt and effective action to end the harassment and ensure that it does not recur. Such action must also be designed to remedy the effects of the harassment on the affected student.

Early in OCR's investigative process, the District approached OCR with a request to resolve this complaint voluntarily. OCR's complaint resolution procedures provide that a complaint may be

³ The Student's parents informed OCR that they had been assured by several District administrators and staff members that the District would pay for transportation to a charter school. Correspondence from the parents to the District suggests that this expectation was based, at least in part, on the terms of the Student's IEP, which included home to school transportation. Because the Student was not placed in the charter school through the IEP process, the District was not obliged, as a matter of FAPE, to implement a portion of the Student's IEP to provide him with home-to-school transportation. OCR does not have jurisdiction over the parents' allegation that the District reneged on an oral agreement, made outside the IEP process, to provide such transportation.

According to the parents, the Student's transfer to the school, and their request for transportation, was based on concerns for his safety at District schools, and on a California state law that requires districts to facilitate inter-district transfers of students who have been subjected to bullying or harassment. Because OCR does not enforce state law, we take no position as to the merits of this claim.

closed prior to the conclusion of an investigation if the recipient enters into an agreement that, when fully performed, will remedy the complaint. At the time of the request, it appeared that the parties had agreed to place the Student in a non-public school, where he would be separated from the students who had allegedly harassed him, and where he would receive specialized counseling⁴. OCR determined that this placement made additional individual actions unnecessary. On August 26, 2013, the District provided OCR with a Resolution Agreement in which it agreed to develop guidance for staff on race/national origin based harassment, and to provide training to all middle school staff who regularly work with students on the content of the guidance, and on recognizing and responding to evidence of harassment.

Shortly after the Resolution Agreement was signed, OCR learned that the Student would not be attending the non-public school, and that the parents and the District had not agreed on an alternative placement. As of the date of this letter, the Student's parents have informed OCR that the Student is not enrolled in the District, but is likely to return. OCR and the District therefore discussed additional steps that could be taken to ensure that the Student is not subjected to harassment on his return.

On November 21, 2013, the District provided OCR a written letter of assurance stating that, should the Student return to the District, it would take necessary steps to ensure that he is not subject to a hostile environment. The District specifically agreed to 1) address the Student's safety through the IEP process, including his placement with appropriate peers, and 2) designate a site-level contact to whom the Student could report incidents of harassment, and who would be responsible for ensuring that all such incidents are investigated and resolved.⁵ A copy of this letter is attached.

OCR concluded that implementation of the Resolution Agreement and of the District's November 21, 2013, commitment will resolve the Complainant's allegations concerning the December 2012 incident. For this reason, OCR did not complete its investigation of this incident, and reached no findings as to the District's compliance with Title VI in connection with that allegation.

Issue 2: Whether the District denied the Student a free and appropriate public education (FAPE), when the Student's aide was not present when he was harassed on December XX, 2012.

The Section 504 regulations, at 34 C.F.R. §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

⁴ Under many circumstances, a student who has been subjected to harassment on the basis of race or national origin may need individual counseling to remedy the effects of the harassment. In addition, an individual remedy generally involves specific steps to ensure that the harassment did not recur, including steps to separate the student from the alleged harasser(s) and to ensure that future incidents are promptly and effectively addressed.

⁵ The parents informed OCR that they did not wish to request counseling at this time.

of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Our investigation showed the following:

- At the time of the December XX, 2012, incident, the Student was receiving services under an IEP that was adopted on December XX, 2011. The IEP included the provision of “intensive individual service” – i.e., a 1:1 instructional assistant – for five hours per day.
- The Student had been assigned an individual aide to work with him during the day and during an after-school program. The aide was not with the Student immediately after school, when he was hit by Student B.
- The December XX, 2011, IEP did not explain the reasons for assigning an individual aide to work with the Student. The IEP did include the aide among the individuals listed as responsible for addressing the Student’s goals and objectives concerning academic performance and classroom behavior. It contained no indication that the aide was expected to supervise the Student at all times, or that she was expected to protect him from assault by other students.
- IEP addenda developed after the December XX incident included explicit provisions for intensive supervision of the Student at all times.

The Complainant alleged that the District failed to implement the Student’s IEP in December 2012, since the individual aide assigned to assist him was not with him when he was attacked on December XX. Because implementation of an IEP is one means of complying with the FAPE requirements of the Section 504 regulations, the failure to implement a student’s IEP may deny the Student a FAPE, in violation of Section 504. In this case, however, OCR determined that the Student’s IEP did not require that the aide supervise him at all times. The evidence did not establish that the IEP in effect at the time of the incident was not implemented. For this reason, OCR concluded that the District did not violate Section 504 in connection with this allegation.

Issue 3: Whether the District Recipient retaliated against the Student after the Complainant filed an internal complaint for race and national origin based harassment, by denying requests for an out of district transfer and transportation from home to school made during the spring semester of 2013.

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit school from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Our investigation showed the following:

- The Complainant alleged to the District on numerous occasions between September 2011 and April 2013 that the Student had been subjected to harassment on the basis of his national origin and on the basis of sex.
- During the spring semester of 2013, the Student’s parents informed the District that his symptoms of XXXX had worsened as a result of the December XX, 2012, incident, and that it was unsafe for him to walk to and from school. At IEP meetings on February XX and March XX, and April X, 2013, they requested that he be provided with “curb to curb” transportation. Their request was denied at the first two meetings, but granted on April X. The Student received transportation services for the remainder of the 2012-2013 school year.
- The Complainant alleged that she requested a “safety transfer” to another District, and that her request was denied.
- Under California state statute, students who have been subjected to bullying and harassment may, under some circumstances, be given priority for interdistrict transfers under existing interdistrict attendance agreements or, in the absence of an agreement, be given additional consideration for the creation of an interdistrict attendance agreement should those victims choose to pursue an interdistrict transfer. See California Education Code §46600 (a).
- The Complainant provided OCR with a copy of an interdistrict transfer request for the 2013-14 school year. Although the request did not specify the school or district to which the Student wished to transfer, the request was approved on April 24, 2013.
- During several IEP meetings during the 2012-13 school year, the Complainant requested that the Student be placed in a school outside of the District. Until August 2013, the District continued to contend that the Student’s needs could be adequately served in a District placement.

OCR determined that the Complainant engaged in protected activities when she complained to the District that her son had been subjected to harassment on the basis of national origin. The evidence establishes that school and District administrators were aware of this advocacy.

The Complainant alleged that the District denied her requests for home-to-school transportation in the spring semester of 2013. OCR confirmed that the Complainant's requests for home-to-school transportation were initially denied, but determined that request was granted on April X, 2013. We determined that the April decision resolved this allegation.

The Complainant also alleged that the District failed to grant her request that the Student be allowed to transfer to a school in a different district, despite his entitlement under state law to receive such a transfer. The only formal transfer request that the Complainant provided to OCR indicates that her request was granted in April 2013. It is clear, however, that she made frequent requests to District administrators and IEP members that the Student be placed in an appropriate setting outside the District, and that these requests did not result in such a placement during the spring 2013 semester.

OCR observed that the Complainant's requests for a transfer were apparently based on her belief that 1) because the Student had been subjected to bullying and harassment, state law required the District to locate a safe placement for the Student in another district and to provide him with transportation to that placement, and 2) because of the Student's disabilities and his history of being bullied, he required a placement outside the district. Although OCR does not interpret or enforce state law, we note that the state statute, on its face, does not appear to require that a sending district provide placement assistance or transportation to a student who has been subjected to bullying or harassment. We therefore conclude that the failure to provide these services does not constitute an adverse action under Title VI retaliation standards.

Except under extraordinary circumstances, OCR does not review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of Section 504. For this reason, OCR generally does not consider a school district's refusal to grant a parent's placement request, made in the context of an IEP meeting, to be an adverse action that can form the basis for a retaliation claim. In this case, the District met frequently with the parents in IEP meetings that included knowledgeable persons and reviewed applicable evaluation information. A disagreement between the parties as to whether the District was able to provide the Student with a safe and appropriate placement will not be considered an adverse action under these circumstances.

Because OCR determined that the Complainant's transportation allegation was resolved, and that the refusal to place the Student in a different district was not an adverse action under Title VI, OCR concluded that the preponderance of the evidence did not establish that the Complainant was subjected to retaliation in connection with these specific allegations. We note that OCR has reached no conclusions concerning the Complainant's retaliation allegations currently being addressed in OCR case number 09-13-1477.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

If you have any questions about this letter or OCR's investigation, please contact Nefertiti Sadat, Civil Rights Investigator, at (415) 486-5550, or Katherine L. Riggs, Civil Rights Attorney, at (415) 486-5544.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Enclosure

cc: XXXX XXXXXX, XXXXXXXX X XXXXX, XXX