



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

March 10, 2015

Donald Gill Ed.D.
Superintendent
Antioch Unified School District
510 G Street
Antioch, CA 94509

(In reply, please refer to case no. 09-13-1293.)

Dear Superintendent Gill:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Antioch Unified School District (District). The complaint¹ alleged that the Student was discriminated against on the basis of race and disability. Specifically, that since the 2010-2011 school year the Student had been harassed on the basis of race and disability by several classmates, and the District failed to respond appropriately and effectively to notice of the harassment.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, and their implementing regulations. Title VI and Section 504 prohibit discrimination on the basis of race and disability, respectively, in education programs and 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 Department funds, is a public education system, and is subject to the requirements of Section 504, Title II and Title VI.

To investigate this case, OCR interviewed the Complainant, the Student, and District staff and administrators. OCR also reviewed documentation submitted by the Complainant and the District. Based on the evidence, OCR concluded that the District was in non-compliance with the Title VI, Title II, and Section 504 because the District failed to respond adequately the complaints of race and disability harassment. The District, without admitting to any violation of law, entered into a Resolution Agreement that, when fully implemented, will resolve the noncompliance issue identified by OCR.

The facts OCR gathered relevant to the allegations, the applicable legal standards, and the reasons for OCR's determination are summarized below.

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

LEGAL STANDARDS

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. The regulations implementing Section 504, at 34 C.F.R. § 104.4(a) and (b), also prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. School districts are responsible under Section 504, Title II, Title VI, and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability, 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 Section 504, Title II, Title VI and the regulations, once a school district has notice of possible harassment between students on the basis of race, color or national origin, or disability, 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 Section 504/Title II, and Title VI and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit students' 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 students who were harassed make a complaint or otherwise ask 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 conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, the district should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the students who were subjected to harassment. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In addition, the Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. § 104.8 and 28 C.F.R. § 35.106) and adoption and publication

of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b)). The regulations also require that District's designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 104.7(a) and 28 C.F.R. § 35.107(a)).

Harassment or bullying of a disabled student even if it does not create a hostile educational environment could result in the denial of a free appropriate education (FAPE) for the student.²

FACTS

- The Student attended a high school in the District. The Student is African American and has a documented disability of ADHD and Oppositional Defiant Disorder. The Student had an Individual Education Plan (IEP) and was placed on home instruction for the majority of the 2012-13 and 2013-14 school years. She graduated in spring 2014 from the high school.
- The Complainant alleged that the Student has been harassed based on her race and disability at the high school since she was in 9th grade in 2010-11. The Complainant and Student alleged that in 2010 and 2011 the Student had been called “black bitch” and “stupid.” The Student reported that similar comments were anonymously posted about her on a social media site.
- The Complainant also alleged that the Student was involved in an altercation that occurred with four other students (Students A, B, C, and D). The Complainant also alleged that in January 2012 three different high school students attacked the Student. The Complainant believed all the altercations were based on the Student's race and disability and that these incidents led to the Complainant's reports to the District and the District's failure to respond to her complaints. OCR did not find evidence that the Complainant informed the District at the time that she believed these incidents were based on race and disability.
- The Student's problems with other students were discussed at a March 2012 IEP meeting in which an addendum was made to the Student's IEP that placed the Student on home instruction in March 2012. The Student remained on home instruction until about September 2012, when she returned to the high school.
- The Assistant Principal (AP) (who has since retired from the District) stated she met with the Complainant to discuss the possible issues that the Student might experience when she returned to the high school in September 2012. The AP also

² OCR's Dear Colleague Letter: Bullying of Students with Disabilities (October 21, 2014), available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

met with the Student at the time and informed the Student that she should report anything to her if the Student was not comfortable at school.

- The AP reported that that the Student did not tell her she was harassed by other students. The AP also stated she often made contact with the Student's case carrier; she stated that the Student did not report anything to the case carrier about harassment by other students.
- The Complainant stated that, on or about October XX, 2012, she told the AP that there were several students who were harassing the Student, but the Complainant did not know the names of the alleged harassers. The Complainant told OCR she told the AP that the Student was being called words such as "black, ugly, fat." The AP's recollection was that students were not specifically saying things to the Student, but were giving her mean looks.
- The AP stated that after some research she learned that the Student had the same Physical Education (PE) period as Students A and D – two of the same students with whom the Student had the altercation in the 10th grade. The students used the same locker room, even though they were in different PE classes. The AP stated that the Complainant did not want the AP to talk to Students A and D because she was afraid it would make the problem worse. The AP stated she spoke to Students A and D because school policy required that once an administrator learns of an incident of bullying they have to investigate. The AP reported that she noted her discussion with the Students A and D in the high school's database on October XX, 2012.
- She also talked to the PE teachers who supervised the locker room. The AP stated that the PE teachers were not aware that there was anything going on with the Student and Students A and D.
- The AP also spoke to other students in the PE class. The witnesses told the AP that while there were no verbal exchanges between the Student and Students A and D, they did see the Student and Students A and D looking at each other in the PE locker room in a hostile manner.
- The AP reported that while she talked to Students A and D about what may have been going on in the girls' PE locker room between the Student and Students A and D, she did not talk to the Student.
- The AP reported that she did not inform the Complainant because the Complainant did not want her to make any inquiries about the harassment/bullying with the students and staff for fear of escalating the problem. The AP reported that the Complainant subsequently learned about the steps the AP had taken through the Student after the Student overheard Student D tell other students that the Student was starting "mess again." The AP stated the Complainant contacted her and was upset with her for making the inquiries. The AP stated that after her

conversation with the Complainant, she had another discussion with Student D about talking to other students about the Student, gave Student D a copy of the bullying policy, and reviewed the policy with Student D.

- The school psychologist who worked with the Student until the end of October 2012 reported that the Student shared with her that she was having problems with some female students in her PE class. The school psychologist reported that the Student said that the other students were talking about her in the PE locker room, but she did not know what they were saying, just that they were laughing and pointing at her; the other students never said anything directly to her. The Student did not provide the psychologist with the names of the female students in the PE locker room. The psychologist reported that she gave some suggestions to the Student on how to handle the situation.
- The school psychologist reported that it was around this time that the AP discussed with her the Complainant's allegation that the Student had been harassed. The school psychologist told the AP she did not know the names of the alleged harassers.
- On November X, 2012, an IEP team meeting was held for the Student. The Complainant raised the issue of bullying and harassment of the Student by two female students in the PE class. The IEP team did not discuss the causes or basis of the bullying/harassment of the Student. The IEP team discussed the possibility of moving the Student to a different PE section. The Student stated that she liked the PE instructor and wanted to remain in the PE class, so the IEP team did not remove the Student from the PE class. The IEP team did not discuss whether or how the harassment may have been affecting the Student's ability to benefit from or participate in the education program other than in the PE class.
- On December XX, 2012, the Student was involved in a verbal altercation with Student E in the PE class. Student E had not been involved with any prior negative interactions with the Student. The verbal altercation quickly escalated and the Student became agitated and belligerent, and made verbal threats of physical harm to herself and others, including staff and administrators. The administrators, in trying to subdue the Student, physically held her down to prevent her from hurting herself and others.
- The IEP team convened a meeting to determine whether the Student's conduct on December XX, 2012, was a manifestation of her disability. The Complainant received notice of the meeting but did not participate. The IEP team decided to place the Student on home instruction pending the participation of the Complainant in the IEP team meeting. The IEP team held another meeting on January XX, 2013, in which the Complainant again did not participate. The IEP team determined that the conduct was a manifestation of the Student's disability.

- The Complainant initiated a state due process complaint on January XX, 2013, alleging the District denied the Student a free appropriate public education (FAPE).³
- In early February 2013, the East County NAACP (ECNAACP), on behalf of the Complainant, sent a letter to the District regarding the “harassment and bullying” of the Student and the District’s delay in not providing the Student an “alternative education setting.” The letter, however, did not refer to race and/or disability as the basis for the harassment.
- On or about February XX, 2013, the Complainant and a representative of the ECNAACP met with the Superintendent, school psychologist, and several other District administrators. They discussed the PE locker situation and other incidents of harassment/bullying of the Student. They also indicated that they believed the harassment was based on the Student’s race and disability.
- After the meeting, the District’s Director of Student Support Services (Director) sent an e-mail summary of the meeting to the Executive Director for Secondary Education and copied Associate Superintendent, Educational Services (Associate Superintendent), and the Superintendent. The e-mail listed “several items that need to be investigated as a result of the meeting” including whether the administration at the high school was made aware of the “on-going bullying” of the Student by other students. The e-mail did not discuss whether the bullying was based on race or disability. The e-mail noted the Complainant stated that she was never contacted by the high school about the results of the high school’s response to her complaints. The e-mail did not discuss who was responsible for following up on the items.
- Several of the District administrators with whom OCR spoke stated that they had believed the items listed on the e-mail needed to be completed and that the Executive Director for Secondary Education was responsible for looking into the situation at the high school, including the harassment and bullying.
- The Executive Director for Secondary Education stated that she did not believe there was anything that needed to be done with the e-mail and viewed the e-mail as a “for your information” e-mail. She did not follow-up on any of the items in the e-mail.
- In May 2013, the Complainant filed a Uniform Complaint Procedure (UCP) (AR 1312.3) complaint with the District regarding the December XX, 2012 incident. The Complainant checked off the categories of harassment and bullying based on race, disability, and sex on the UCP form. The Complainant wrote a statement on

³ The Complainant and the District entered into an agreement on March XX, 2013 that included XXX --- paragraph redacted ---XXX.

the form discussing what she believed was excessive force used on the Student by the principal at the high school. The written statement did not discuss race or disability harassment by other students.

- The District's UCP is the process designated for the resolution of complaints of discrimination. The UCP provides that the procedure is to be used for the investigation and resolution of complaints alleging violations of state and federal educational programs, including unlawful discrimination, harassment, bullying and intimidation. The UCP provides that all complaints must be investigated and resolved within 60 calendars of the District's receipt of the complaint. The UCP further provides that the Associate Superintendent of Educational Services is the compliance officer who is responsible for receiving and investigating complaints. The complainant may present evidence to the compliance officer. The compliance officer will provide a written report to the complainant of the District's findings.
- In addition to the UCP, there is a UCP form that complainant's can complete to indicate the find of complaint they are filing. The form contains multiple areas of concern with boxes in which complainants may check-off the reasons for the complaint, including discrimination, harassment, bullying, on the basis of national origin, race, sex, mental/physical disability. The form also allows for a written statement to describe the nature of the complaint.
- The District assigned the complaint to the District's investigator (Investigator) for investigation. The Investigator is a private contractor with the District. He is a former superintendent and educator. He indicated that he had not received any formal training on investigations generally or investigations of discrimination. His investigative skills were based on previous investigations that he had conducted during his time as a district administrator.
- The Investigator stated to OCR that he interviewed the Complainant, but did not interview the Student. He also did not interview the principal or any other witnesses, but requested the principal to provide documentation about the incident. The Investigator stated he did not inquire about the harassment and bullying allegation based on race, disability and sex, even though the Complainant had checked off these three categories on the UCP form. He stated he focused the investigation on the Complainant's written statement that alleged the excessive use of force during the December 2012 incident.
- OCR reviewed the Investigator's file and final report. The file did not contain any interview notes, but included copies of the written statements collected by the principal regarding the December 2012 incident. The final report did not reference any interviews conducted by the Investigator. The report concluded that excessive force was not used against the Student. The report did not address or state any conclusions regarding race, sex, or disability-based harassment.

- The Associate Superintendent stated she was responsible for all UCP investigations. She stated that she usually investigated the complaints or assigned them to other administrators, such as the Executive Director of Secondary Education and the two contracted investigators for the District. She stated that when conducting UCP investigations, if more than one box has been checked on the form as to the type of discrimination alleged, the investigator should at least inquire with the complainant as to why the boxes were checked.
- The Associate Superintendent was not present at the February 2013 meeting with the Complainant and the representative from the ECNAACP, but when OCR showed her a copy of the February XX, 2013 e-mail, she stated that there should have been some follow-up on the allegation of harassment and bullying of the Student.
- The school principal stated he did not recall discussing the alleged harassment and bullying of the Student with any District administrators either before or after the February XX, 2013 e-mail.
- The District has a non-discrimination/harassment/anti-bullying policy, (BP 5145.3). The Board Policy 5145.3 states that staff shall be alert and immediately responsive to harassing or intimidating conduct. The Board Policy requires that individuals who believe they are being subject to discrimination or harassment based on race, national origin, color, mental and physical disability should report the incidents to a staff member. The individual may also file a complaint regarding discrimination or harassment through the UCP.
- The District maintains a log of all complaints filed against the District, including UCP complaints. A review of the log showed that the District received 44 complaints (either in UCP format or other written format) alleging race, disability, or sex harassment and/or bullying from 2010-11 (16 complaints), 2011-12 (13 complaints), 2012-13 (15 complaints). At the time of OCR's file review, there were three complaints filed for the 2013-14 school year about bullying/harassment based on race, sex or disability. The log indicated that the allegations were made by parents/guardians of students from all grade levels and at all the schools in the District.
- OCR reviewed 20 completed investigations conducted by the District during the 2011-12, 2012-13 and 2013-14 school years that alleged any form of bullying and harassment based on race, disability or sex. OCR noted that the records of at least twelve completed investigations did not contain interview notes or documentary evidence related to the investigation; however, all the files contained a letter of finding and notice to the complainant of the results of the investigation.

ANALYSIS

The Complainant alleged that the Student was harassed based on her disability and race that had been on-going since the 2010-11 school year, and the high school did not respond appropriately. As stated above, once a school district has notice of possible harassment between students on the basis of race, color, national origin, or disability, it is responsible for determining what occurred and responding appropriately.

The evidence showed that in October 2012, the Complainant informed the AP of her concern that the Student was experiencing name-calling, including “black, fat and ugly.” However, the Complainant also instructed the AP to not investigate the issue. The AP investigated the issue, believing that it was the high school’s responsibility to respond to bullying, and found that the Student was enrolled in PE with two students with whom she had a prior altercation in previous years. The AP talked to the two other students in the PE class, as well as PE teachers and other students. However, she did not interview the Student and did not inform the Complainant that she had talked to the alleged harassers. If a parent or student reports discriminatory harassment, but requests that the school take no action, depending upon the circumstances, including the severity of the reported harassment and the risk of future harassment, the school may nevertheless have a duty to conduct an inquiry. In this case the AP did conduct an inquiry. However, the AP did not interview the Student – the individual who had direct knowledge of the situation. Moreover, it is not clear that the AP treated the matter as possible race or disability discrimination as distinct from general bullying.

Additionally, in the Student’s IEP meeting in November 2012, the IEP team discussed the alleged harassment. However, it appears that the only alternative discussed to address the alleged harassment was to remove the Student from the PE class, which was ultimately not done. If a student is being subjected to harassment based on race or disability (or sex), steps must be taken to stop the harassment; however, the burden of any steps that are taken should not fall on the targeted student.

The District received additional notice of possible discriminatory harassment at a February 2013 meeting, when the Complainant, through the ECNAACP representative, raised the issue of bullying and harassment of the Student based on race and disability with the Superintendent and other District level administrators. While the meeting concluded with the District administrators agreeing that the District would inquire into the Complainant’s allegations with the high school, nothing was done with the information. The administrators at the meeting all had different understandings of the significance of the issues discussed, whether steps were to be taken to address the allegations, and who was responsible for taking those steps. The Complainant was never notified of any action taken in response to the meeting.

Finally, the Complainant again raised the issue of race and disability harassment, along with other issues, when she filed the UCP complaint in May 2013. While the District investigated an allegation of excessive force, the District did not look into the

Complainant's allegations of race and disability discrimination that were also indicated on the UCP form.

OCR finds that the District had notice of alleged race and disability harassment on multiple occasions as described above. Based on the facts summarized in this letter, the preponderance of the evidence shows that the District failed to respond adequately to notice of race and disability harassment, or provide a prompt and equitable response to the Complainant's UCP complaint, as required under Title VI and Section 504/Title II.

Moreover, OCR's file review of the District's UCP complaints over a three year period showed that the District received more than a dozen UCP complaints during each school year that alleged some form of race, sex, or disability harassment or bullying. The files further revealed that in most instances, the District was prompt in its investigations and provided notice to the complaints of the outcome of their complaints. However, the files also revealed that while some investigations were thorough and detailed, others were missing information such as interview notes, including interviews with the complainants, and documentary evidence. Therefore, the preponderance of the evidence supports a determination that the District generally failed to respond promptly and effectively with regard to allegations of race and disability harassment as required under Title VI and Section 504/Title II.

CONCLUSION

The District agreed to address the compliance concerns through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the District to provide training to District administrators, school site administrators, and staff concerning allegations of harassment of students with disabilities and/or racial harassment. The District will also provide training to all administrators and staff who are assigned to investigate allegations of race and disability harassment. The District will further provide to OCR for school year 2013-14 and 2014-15, copies of any documents related to investigation of race and/or disability harassment complaints, if any, including emails, notes, letters, interviews, and/or investigative reports, findings, and corrective actions taken.

OCR will monitor the District's implementation of the Resolution Agreement. Based on the commitments made in the Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter. The Complainant is concurrently being notified.

This letter 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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.

OCR would like to thank you, your staff, and Ms. Stephanie Anello, for your assistance with this matter. If you have any questions about this letter, please contact OCR Attorney, Kana Yang at (415) 486-5382.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure

cc: Ms. Stephanie Anello, Associate Superintendent