



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

July 21, 2015

Mr. Alan B. Harris
Schools Legal Service
P.O. Box 2445
Bakersfield, CA 93303

(In reply, please refer to case no. 09-14-1498.)

Dear Mr. Harris:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Tehachapi Unified School District (District). The Complainants alleged that the Student¹ was subjected to harassment by a District employee based on his disability and that 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 (Section 504), and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in 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, as amended, (Title II) 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 the regulations.

The District investigated the complaint from the Complainants alleging disability harassment, made a determination about it, and communicated its finding to the Complainants. In light of the circumstances presented here with regard to the Complainant's notice to the District of discrimination and the subsequent steps taken by the District in response to the same, OCR reviewed, under CPM §110(a)(2) whether, for this District-resolved complaint allegation, the District's resolution met OCR regulatory standards. Therefore, OCR did not independently review the underlying harassment allegation. OCR concluded that the evidence supported a conclusion that the District did

¹ OCR notified the District of the Complainants' and Student's names in a letter dated September 19, 2014. OCR refers to both of the Student's guardians as the Complainants in this letter. The Complainants' and Student's names are not used in this letter in order to protect their personal privacy.

not respond adequately to notice that the Student was harassed on the basis of disability. The District, without admitting to any violation of the law, voluntarily signed the attached resolution agreement which will resolve the areas of noncompliance once it is fully implemented. The applicable legal standards, the facts OCR gathered, and the reasons for our determination are summarized below.

Legal Standards

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), 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 and Title II 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.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. 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, it 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 if one has been created, 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. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

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 recipients/public entities 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]).

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, and employees, including where to file complaints; application of the procedure to complaints alleging harassment by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects.

Factual Findings

To investigate this case, OCR reviewed information provided by the Complainants and the District, including special education and complaint investigation documents, and conducted interviews with the Complainants and a District administrator. OCR's investigation revealed the following:

Background

The Student was 3 years 10 months old at the time of the May 14, 2014 incident from which the complaint stems. He was attending an SDC preschool class at a District elementary school (School) where he received special education and related services under an Individualized Education Program (IEP) based on his disability.

Alleged Harassment of the Student, Discrimination Complaint and District Response

On the afternoon of May XX, 2014 a parent of a different student at the School posted a comment on Facebook describing an interaction she observed between School staff and a small child.

Shortly after the parent witness posted the comment, the Complainants were contacted by a friend who shared the posting with them and who told them she believed the child involved was their grandchild.

On the evening of the same day, the District's Director of Special Education received a phone call from the Student's preschool Teacher that there were several Facebook (FB) postings about an incident that occurred after school that afternoon. The Special Education Director instructed the Teacher to prepare a written statement and to have any aides present during the incident do so as well.

On May XX, 2014 the Complainants filed a Discrimination, Harassment or Bullying Complaint Form with the District and sent a letter to the School Principal alleging in both that their Student's civil rights were violated by an aide who verbally assaulted him on May XX, 2014.

On May XX, 2014 the District's Director of Special Education, who is also the employee identified by the District in its Annual Notice to Parents as its 504 Coordinator², began the District's investigation of the Complainants' complaint. The Director of Special Education told OCR that she received some training on conducting discrimination investigations through her administrative credential program, and from OCR approximately a year ago. Her investigation included written statements from the parent who observed the incident, the Teacher and three classroom aides; interviews with the Teacher and the parent witness, and email correspondence between the parent witness and the Director of Special Education regarding the private messages and related comments posted on Facebook.

Between May XX, 2014 and May XX, 2014, the District made several attempts to contact and gather information from the Complainants, which only resulted in the Complainants informing the District that it should review the information already provided by the Complainants in their written complaint.

The Director of Special Education finished her investigation on June X, 2014, and concluded in her report that based on her interviews and written responses, the allegation of the aide verbally abusing a student wasn't founded. Her report concluded that the Student was not complying with the aide, who was giving the Student directions, for safety reasons, to sit down, and that the Student reacted by hitting the aide. Her report also concluded that the Classroom Teacher witnessed the Student hitting the aide, and that the Classroom Teacher then reprimanded the Student for hitting an adult, and had the Student apologize to the aide. She described that there were no further incidents and that the Student got on his bus and went home.

On June X, 2014, the Director of Special Education sent the Complainants a letter, without details from the report, informing them that based on the investigation, the District determined that the complainant(s) were not subjected to discrimination, harassment, or bullying and that Board Policy 5145.3(a) and Board Policy 5145.7(a) were not violated.

The Director of Special Education did not indicate in her investigative notes, report, or in her interview with OCR that she applied an appropriate standard to determine whether disability harassment had occurred.

Policies/Procedures

The District has a non-discrimination and harassment policy (Board Policy 5145.3) prohibiting discrimination, harassment, and bullying with regard to a number of protected

² During her interview with OCR the Director of Special Education indicated that she was not the 504 Coordinator but that her direct supervisor was responsible for the 504s.

characteristics, including disability. Under BP 5145.3 complaints of discrimination, harassment, intimidation, or bullying are to be conducted in accordance with “site-level grievance procedures specified in AR 5145.7 – Sexual Harassment and Gender-Based Discrimination.” In addition, the District has a Uniform Complaint Procedure (UCP) which also provides procedures for handling complaints of discrimination, including complaints of discrimination based on disability (Board Policy and Administrative Regulation 1312.3). Both AR 5145.7 and the UCP outline the investigative process and the notice required advising a complainant of the District’s investigation and decision.

Analysis

Notice of the Harassment and District Response

OCR reviewed the evidence gathered to determine whether the District’s response after it was notified of alleged harassment on the basis of disability complied with the requirements of Title II and Section 504. OCR concluded that, while the District’s response to the harassment of the Student on the basis of his disability was prompt, the District failed to meet OCR’s regulatory standards with regard to an equitable resolution of the complaint due to the defective manner in which it conducted the investigation, determined whether harassment occurred, and provided notice to the Complainants about the outcome of their claim.

District officials received notice of the alleged harassment within hours of the incident and promptly initiated the investigation within one day of receiving that notice. The District conducted a timely investigation completing it in twenty-one days.

While the District’s investigation was prompt, its use of certain investigation methods undermined the impartiality of the investigation. For example, the Director of Special Education instructed the Teacher, whose alleged discriminatory conduct was at issue, to request, collect, and submit written statements from the three aides who were the principal witnesses to the incident. The District’s gathering of witness statements in this way was not consistent with an impartial inquiry designed to reliably determine what occurred because it potentially subjected these witnesses and their statements to influence and bias which could negatively impact the reliability of the information. OCR reviewed the District’s investigative notes, report, notice of outcome to the Complainants, and interviewed the Director of Special Education and found that none of this evidence showed that the Director of Special Education applied the appropriate legal standard to the facts she gathered. Lastly, the District’s notice to the Complainants was inadequate as it provided the District’s ultimate legal conclusion without including any information regarding its findings of facts or rationale.

In summary, the evidence showed that although the District responded promptly, it failed to respond equitably because it did not conduct a thorough and impartial inquiry, or apply the appropriate legal standard for making a determination about whether disability harassment occurred. Based on the foregoing, OCR concluded there was sufficient evidence to support a finding of noncompliance with Section 504 and Title II with respect to the allegation that the District failed to respond appropriately to the complaint of disability

harassment. OCR will notify the Complainants through correspondence of these investigative findings.

To address OCR's compliance concerns, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegation and the information obtained by OCR during its investigation. Under the agreement, the District will within specified timeframes: (1) re-open and complete its investigation regarding the May XX, 2014 incident, applying the correct legal standard for disability harassment to the facts from the completed investigation; (2) provide OCR with a summary of its investigation, a copy of all supporting documents, and a draft copy of its response to the allegations prior to its issuance to the Complainants; and (3) issue the OCR approved response to Complainants. Based on the commitments made in the attached resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter. OCR will monitor the District's implementation of the Resolution Agreement.

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 Complainants 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 Complainants 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 wishes to thank the District for their cooperation during this investigation. If you have any questions about this letter, please contact Christina Medina, Civil Rights Attorney, at christina.medina@ed.gov or (415) 486-5548.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Enclosure

cc: Susan Andreas-Bervel, Superintendent, Tehachapi Unified School District