



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

September 11, 2015

Vahn A. Phayprasert
Superintendent
Millbrae Elementary School District
555 Richmond Drive
Millbrae, California 94030

(In reply, please refer to case no. 09-15-1144.)

Dear Superintendent Phayprasert:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Millbrae Elementary School District. The complainant alleged the District discriminated against his son (Student) based on race (African American) and disability (autism and emotional disturbance).¹ OCR specifically investigated whether:

1. the District responded appropriately to notice of possible racial harassment of the Student by peers; and
2. the District failed to consider whether changes to the Student's Individualized Education Program were necessary to address bullying that could affect his ability to receive a Free Appropriate Public Education.

OCR opened this complaint for investigation under the authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and their respective implementing regulations. Title VI prohibits discrimination on the basis of race, color, and national origin, and 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 and its implementing regulations over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds and is subject to the requirements of Title VI, Section 504, and Title II.

¹ OCR informed the District of the identity of the complainant and the Student in our letter notifying the District of the complaint. We are excluding their names here to protect their privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

OCR gathered evidence through interviews with the complainant, and school and District staff and administrators. We also reviewed documents and records submitted by the complainant and the District. Based on the evidence, OCR determined that the District was out of compliance with Title VI and Section 504 with respect to the allegations investigated in this complaint. The applicable legal standards, relevant facts, and basis for OCR's conclusions are summarized below.

School districts are responsible under Title VI and its 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 district has notice of possible harassment between students on the bases 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 school 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 duty whether or not the student who was harassed makes 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 school 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 school does not tolerate harassment and will be responsive to any student reports of harassment. The school also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In determining whether a hostile environment based on race, color, or national origin has been created, OCR evaluates whether the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the school's program. OCR examines all the circumstances, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, race, and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a 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 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.

Additionally, under Section 504, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team or Section 504 team of a student with a disability to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving a FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying. In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

The following facts are relevant to OCR's conclusions:

- At the time of the events giving rise to this complaint, the Student was a seventh grader at a District middle school (School). He is African American. At the School, about 1% of students are African American, 40% are Asian, 20% are White, 20% are Latino, and the remainder are a combination of Pacific Islander, Filipino, and multi-racial.²
- The Student has an Individualized Education Program (IEP) for the disabilities of autism and emotional disturbance. According to his Behavior Intervention Plan (BIP), the Student disrupts instruction and seeks attention in a variety of ways, and uses inappropriate language and gestures (profanity, talk of violence and sex, and mimicking holding weapons). As described by witnesses, the Student is sweet but makes unwelcome physical contact and sexual comments, which leads many of his peers to avoid him. They said he expresses anger by yelling at or about other students.

² California Department of Education, DataQuest, 2014-15.

- According to his IEP for the 2014-15 school year, the Student received, among other services, Specialized Academic Instruction, language and speech services, occupational therapy, and individual counseling through the Department of Mental Health.
- The complainant told OCR another student a grade above the Student (Student One), bullied the Student, including with racial slurs.
- During the summer of 2014, the Student and Student One both participated in Boys and Girls Club (Club), an independent after-school and summer program operated on the School campus. The Director of the Club told OCR the Student complained a few times over the summer that Student One had called him “slave” and “n----r.” He said it was difficult to substantiate, because Student One denied it, there were no witnesses, and there was mutual antagonism between the two students. However, he said, over time, staff found the Student more credible and they perceived that the Student’s behavior toward Student One was primarily reactive. The Director said Club staff discussed this conflict with School administrators when the school year started, including the alleged racial component. He noted that reliable communication was difficult at that time, because the School administration was in transition.
- After school began, the Student participated in the Club’s after school program. Student One did not. The Director said Student One would nonetheless linger at the Club entrance after school, which upset and agitated the Student.
- The Club’s incident report database includes records of three incidents between the Student and Student One. In a July 2014 incident, the students engaged in mutual name-calling. The next entry refers to an incident that occurred before school (not in the Club) on October X, 2014.
- District documentation shows that, in the October incident, the Student reported that three other students, including Student One, kicked his musical instrument case, poured soda on his shoes, pushed him, and called him “slave mother f-----” and “n-----.” The Student described this to the Dean of Students (Dean), among others.
- In response to the report, the Dean interviewed each of the accused students. The Dean told OCR the students acknowledged the physical conduct, but denied the racial language. The Dean said that though he could not confirm racial slurs were used, he and the then-principal (Former Principal) counseled the students that the School would not tolerate such language. For the physical conduct, they assigned the students detention and trash pickup, and had them personally apologize to the Student. The Dean said the Student shook hands with each of the boys, and seemed satisfied. The Dean also referred one of the students (Student A) to a facilitated group focused on developing social skills; his records state that this intervention appeared “effective because we did not have any other incidences between” Student A and the Student.

The Dean said he also spoke with the parents of all of the students involved, including the complainant, but did not discuss the alleged racial aspect.

- The same day, the Assistant Principal informed the complainant by email that the Student had been sent to the office for inappropriate language in a separate incident. The next day, the complainant responded, in part, “he has been suffering some targeted bullying...by three boys.” He wrote that Student One had behaved similarly over the summer and “now that there are three boys...[I have] great concern.”
- The Former Principal told OCR she was aware of Student One allegedly bothering the Student at the Club during the school year, and believed the Dean had talked to the Director and concluded the antagonism was mutual. The Dean, however, as well as the Assistant Principal, said that though they were aware of the concern, they did not personally take any responsive steps.
- On December X, 2014, the Student and Student One had an altercation while they were doing trash pick-up as a consequence for earlier behavior. The Dean sent the Student to the office for sexual language. An incident report written by the Student states that the Dean falsely accused him, and that Student One called him “n----- slave,” and kicked and shoved him. The Dean said he was with the students during the altercation, and did not hear Student One use racial language. At the same time, he personally witnessed the Student’s behavior, which the Student denied. He, and other witnesses, said the Student had a history of denying behavior in which he had clearly engaged.
- In an email to the complainant, the Former Principal wrote that she would talk with the Student’s Special Education Case Carrier about this incident, rather than giving him a consequence. Her message does not mention the alleged racial language. In his response, the complainant questioned why the Student was paired with Student One who had “bullied him and called him racial names” in the October incident.
- On December X, 2014, the complainant reported the October incident to the police. He told OCR he did this because the School had not provided him with sufficient information about the incident for him to understand what occurred or how the School responded.
- The School Resource Officer (SRO) responded by interviewing Student One and another of the involved students (Student B). Student A no longer attended school in the District. The SRO’s report states that Student One confirmed that Student A had called the Student “slave” and “n-----” and that Student B confirmed that Student A called the Student “n-----.” Neither student confirmed that Student One used racial slurs. The SRO told OCR that, based on this, he concluded racial slurs were used.

- The police report also shows the Student told the SRO of another incident in which Student One allegedly kicked the Student and stepped on the back of his shoe in November. A contemporaneous record of the Former Principal reflects that the Student also reported this incident to her, and that the allegation was not credible because the two students were in different areas of campus when it allegedly occurred. The Assistant Principal told OCR that he had witnessed and intervened to stop Student One stepping on the back of the Student's shoe, but did not know whether this was the incident referenced in the police report. An incident report dated October XX, 2014 shows the Student also reported a different student stepping on his shoe, to which he responded, "I'm sick of people doing that. STOP!"
- The SRO told OCR that, in response to the information he gathered, he referred the October incident to the district attorney's office, which declined to take further action. He said he did not inform the complainant or school officials of the results of his investigation. The SRO's report reads, "the incident was investigated by the school and all parties were counseled and disciplined." The SRO told OCR this conclusion was based on statements from administrators.
- The Dean was present when the SRO interviewed the students about the October incident. However, he said, he was engaged in something else and did not realize that Student One and Student A had admitted racial language was used during the incident.
- On October XX, 2014, the Student's Special Education Case Carrier emailed the Student's parents, "although the year started off pretty well...we have started to see an increase in negative behaviors [by the Student] over the last few weeks." She also emailed School various individuals involved in the Student's education, noting the increase and describing tools, in addition to the BIP, to help address them.³ A calendar of incidents kept for the purpose of developing interventions for the Student shows that, in the five weeks prior to the October X incident, the Student used profanity or sexual language twice, and in the five weeks following the incident, he used sexual language or profanity nine times, made references to drugs/alcohol three times, and was sent to the office for conflicts with other students twice.
- District records show the Student complained of treatment by peers several times during this time frame that did not involve racial language. On October XX, an administrator counseled three students that "it is neither a joke nor funny to bother [the Student] until he blows up"; on November XX, 2014 the complainant emailed School officials that the Student had been in a physical altercation; in a November XX incident report, the Student wrote that a student threw a rock at him; in a December X

³ District documentation shows the District was also trying to schedule an IEP meeting to discuss the Student's behavior. There were also interim meetings between administrators, the parents, and special education staff. The Student's case carrier made clear in an email to the Student's parents that the School was also still implementing the BIP; the interventions set forth in her email were in addition.

incident report, the Student wrote that Student One kicked and hit him, verbally insulted him, and took the computer he was using. On December X, the Assistant Principal sent an email to other administrators, stating the complainant had removed the Student from school due to bullying. The Student was reportedly out of school for two days.

- A January X, 2015 entry in the Club's records reads, in part, "[Student One] was standing in front of the [Club]...looking inside...[He] began to walk towards [the Student] and...something was said...because [the Student] got upset [and] began yelling...He told me he was upset because [Student One] was calling him a slave...had been teasing him all day...All he wanted was for [Student One] to leave him alone. [He] admitted to calling...names back but only because he was...being harassed all day long." The notes also reflect that, despite telling the Director he was leaving campus, Student One then followed the Student as he walked to another location on campus. As described by the Director, Student One deliberately walked a route that would intersect with the Student's. A staff member followed the Student at a distance until she heard the boys talking, and then made Student One walk away. The database states that staff sent an email to the Principal and Assistant Principal about the incident.
- The current Principal began working at the School mid-year. He said that early in the spring 2015 semester, he spent two days shadowing the Student on campus to provide redirection, support, and proximity, and evaluate whether a 1:1 aide was needed. The IEP team subsequently recommended an assessment to understand how the Student's misconduct related to his disability; the Principal said the School was not disciplining him, because they needed to understand this relationship. However, the Principal said, the complainant was reluctant to consent to the assessment because he distrusted the School, and because the Student was so distracted by his conflict with Student One.
- The Student's IEP team met on January X, 2015. The meeting notes state that the complainant raised the October incident, including the racial language, and said Student One was "taunting and tormenting" the Student at the Club. The notes also read, "[the Student] has been so anxious about this other boy that he has been pulling out his hair and was afraid to go to school." The Student's tendency to pull out his hair when anxious is also noted elsewhere in the IEP documentation.
- The complainant told OCR the Principal told him at this meeting he would ask Student One's father to pick him up directly after school to ensure the behavior stopped. Witnesses were unclear whether this request was made.
- The same day, after the IEP meeting, the Principal emailed the complainant to inform him of an incident involving five students, instigated by the Student's inappropriate behavior toward some girls. The Principal wrote that the Student told him that Student One had called him "slave" and "n-----," "just as [the complainant] had described in the meeting had happened earlier this year or over the summer."

- The Principal wrote in the email that he had talked to Student One, who denied using the language, and another nearby student, who did not hear it. He wrote that he would interview other witnesses. However, there is no memorialization of these interviews, and the Principal told OCR that he did not specifically remember conducting them. In his email, the Principal also said he would talk to the SRO about his investigation of the October incident, because of the similarities. The Principal said he thought the SRO had told him he couldn't confirm the racial language.
- The Principal did not take further action on the reported racial language. The Principal told OCR that if he had known the SRO had confirmed racial language was used in the October incident, however, he would have responded differently. He said he suspected the Student was not reliably reporting events, but this was based largely on his understanding that his reports of racial language were never substantiated.
- On January XX, the Principal again emailed the complainant, informing him the Student had "again reported that the same student said the same things, the n word and slave." He wrote, "I could not independently confirm that those words were spoken." The Principal did not document steps he took to investigate the incident, and, in his interview with OCR, he remembered only talking to Student One.
- The Principal told OCR he was motivated to resolve the conflict between the Student and Student One because of the complainant's position that the Student could not be assessed while distracted by it. On January XX, 2015, he emailed the complainant that he had a resolution plan. He wrote first that he would contact the school counselor to develop "a peer mediation plan." The District provided no evidence that this plan was created. The Principal, however, did bring the student together for mediation. He said it was unsuccessful because of both students' behavior, and that if he had anticipated the outcome, he would have asked a trained mediator facilitate the conversation instead.
- The Principal also wrote in the January XX email that he wanted the parents of the Student and Student One to meet, and create "an agreement to govern pick up and drop off, recess, lunch, passing periods," and the Club. The meeting did not happen, and District witnesses had different understandings of the reason. The complainant told OCR he was eager to participate and did not know why it didn't happen.
- Finally, the Principal also wrote, "I will be delivering [a] note to all of [the Student's] teachers as well, so that everyone is on the same page as to this comprehensive approach and can be supportive." The Principal said he thought he talked to the Students' teachers, but could not confirm he had delivered a note, or what he told them. He said he did tell the boys that they should report any contact between them to him. The Director said he not aware of an agreement governing contact or interactions.

The complainant told OCR the Principal did not communicate with him further about any of the proposed steps.

- On February X, 2015, the Principal emailed the complainant that he had received a report that the Student had been sexually harassing a classmate for the past two years. The Principal said that, rather than suspending the Student, he had arranged for sessions with the School counselor to work on social skills.
- The Student's IEP team met again on February XX, 2015. The meeting notes reflect a conversation about the Student's sexual behavior toward girls. The notes reflect discussion of whether this was a manifestation of his disability, and that the complainant reported the Student "cannot control himself when under duress (referring to ongoing conflicts with specific students)." The IEP team did not meaningfully discuss how alleged bullying of the Student might be impacting his FAPE. The complainant said that he believed the bullying was negatively affecting the Student's education, and another witness said he was surprised the IEP team did not discuss the effect bullying on the Student, because it was so significant.
- A few weeks into the spring 2015 semester, the District assigned a 1:1 aide to the Student. The aide was to observe the Student's interactions with other students and intervene as appropriate. Witnesses reported the aide helped regulate the Student's interactions.
- The aide said that in one instance a student who was trying to communicate that the Student was his friend called him "my n----." She said the teacher responded by sending the student to the office, and that the Student did not seem upset by the statement. This incident was not memorialized in documentation provided to OCR by the District. The aide said she was unaware of any other racial language directed at the Student. She also said she was not told that racial harassment was a concern.⁴
- The School's Uniform Complaint Procedure (UCP) specifies that it will be used to resolve complaints of racial discrimination. The complainant told OCR that School officials never advised him of the UCP, or of how to file a written complaint. Notice of the procedure is included in various written resources provided to parents, however. Under the UCP, the District must only follow specified procedures in response to a discrimination complaint if a written complaint is filed, yet there is no instruction to inform complainants of their

⁴ According to an email from the Dean to the Principal and complainant on April XX, 2015, the Student reported an interaction with several other students in which the students exchanged inappropriate insults, including graphic sexual language. The Student alleged that one student called him "fat-assed n----" and another said, "I will get a prisoner to rape the dirty black s--- out of you." Due to the timing of this incident, OCR did not review the District's response to this report.

right to do so. The UCP also specifies that mediation may be used to resolve harassment complaints conditioned only upon all parties agreeing. The UCP does not specify that, where harassment is found, the District will take steps to stop it, prevent its recurrence, and address its impact on the educational environment.

The District was on notice of several incidents in which racial slurs were allegedly directed at the Student. In each instance, the District had an obligation to conduct a prompt and reliable inquiry to determine what occurred and, where harassment was found, take effective steps to stop the harassment, prevent its recurrence, and address the impact on the Student. The District first received notice that racial harassment was a potential issue when the Director informed administrators that problems between the Student and Student One over the summer had a racial component. While the District did not necessarily have an affirmative obligation to respond to that report, it was important to consider it when the Student later reported racial incidents, as it suggested a pattern of behavior. When the Student subsequently reported in October 2014 that Student One and other peers used racial slurs during an incident involving physical and verbal aggression, administrators took several responsive steps, including interviewing all of the students involved. The other students' testimony did not corroborate the Student's report regarding the racial language, and, based on this, administrators concluded it did not occur. However, had administrators considered the previous report from the Director, or inquired with him about the relative credibility of the Student and Student One related to that conduct, they might have investigated further and reached more reliable conclusions. Despite the result of their investigation, administrators counseled the students about the significance of racial harassment, and that it would not be tolerated. The students were given consequences for the conduct that was confirmed. These were appropriate steps. However, the District should also have notified the complainant of the reported racial language, and the results of the District's investigation, so the complainant could provide appropriate support to the Student. Further, once the School Resource Officer's investigation later confirmed that the Student was called racial slurs, the District had a duty to respond to that new information. Particularly viewed in the context of the students' other behavior, including physical aggression and damage to the Student's property, the racial language was sufficiently serious to create a hostile environment for the Student. Accordingly, the District had a duty to take steps to ensure the harassment did not recur, and remedy the impact on the Student.

Additionally, the Security Resource Officer's confirmation that the behavior occurred should have informed administrators as they assessed and responded to the Student's later complaints of similar behavior. While the Student was not always an accurate reporter of events, the officer's validation of his initial report, which also revealed that the other students involved had lied to administrators, was also relevant to his credibility. Yet administrators' common perception that the Student's reports had never been substantiated apparently influenced the thoroughness with which they conducted later investigations, and their diligence in responding to reported incidents; specifically, School officials did not consistently interview unbiased witnesses, although they were available; follow-up with the Director on reports of Student One antagonizing the Student after school; take sufficient steps to separate the students; follow

through on proposed steps to resolve the conflict between the students; or discuss the alleged language with Student One's parents, who could have intervened at home, or – often -- with the complainant. Officials acknowledged to OCR that they would have viewed the Student's later allegations differently if they had known the Student was telling the truth about language used during the October incident.

OCR was also concerned that administrators attempted to resolve the conflict between the Student and Student One through mediation. While mediation is an appropriate response to some types of conflict, and clearly well-intentioned in this case, a student who complains of harassment should not be required to work out the problem directly with the alleged perpetrator, particularly not without appropriate involvement by a trained facilitator such as a counselor or mediator. Further, administrators never informed the complainant of the right to initiate a formal complaint process.

The evidence also showed that the Student's IEP team did not adequately consider whether the alleged bullying and harassment of the Student was negatively impacting his receipt of FAPE. The complainant reported during IEP team meeting that the Student's ability to focus at school, and his emotional state, were negatively impacted by the alleged bullying and harassment by Student One and others. Documentation from the District showed several incidents reported by the Student involving both Student One and other students. Yet the team did not consider whether corresponding changes to the Student's IEP were necessary to ensure he continued to receive a FAPE. Although the Student was also engaging in problematic and harassing behavior that complicated the situation and made it difficult for School officials to resolve the alleged bullying, this did not diminish their obligation to address it.⁵

For the reasons stated, OCR determined the District is in violation of Title VI, Section 504, Title II, and their implementing regulations. To resolve the noncompliance, the District agreed to take the steps in the enclosed Resolution Agreement. OCR will monitor the District's implementation of the agreement.

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. We are closing the complaint as the date of this letter, and notifying the complainant simultaneously. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and they should not be relied upon, cited, or construed as such. OCR's

⁵ OCR was also concerned whether the Student's conduct toward his peers, and their negative responses to his conduct, were disability-based; however, it is clear from the record that the Student's IEP team was actively discussing this possibility and sought to assess the Student to better understand it. The District was challenged by the complainant's reluctance to consent to an assessment, and did conduct one upon receiving his permission.

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 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Suzanne Taylor, the attorney assigned to this case, at (415) 486-5561.

Sincerely,

/s/

Anamaria Loya
Team Leader

cc: Kathryn Meola, Chief Deputy County Counsel, San Mateo County

Enclosure