



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

August 26, 2015

Mr. Aaron Haughton  
Superintendent  
Mojave Unified School District  
3500 Douglas Avenue  
Mojave, California 93501

(In reply, please refer to case no. 09-15-1185.)

Dear Mr. Haughton:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Mojave Unified School District (District). The Complainant alleged that the Student was subjected to harassment by a District employee based on her disability and that the District failed to respond appropriately and effectively to notice of the harassment.<sup>1</sup>

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 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.

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<sup>1</sup> OCR identified the Complainant and Student in our notification letter to you and is withholding their names from this letter to protect their privacy.

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.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district'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 nature of the student's disability; the age and relationships of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred in the district; and other relevant factors.

## **Findings**

The case team's investigation consisted of an interview with the Complainant, an interview with the Student, and interviews with the District employees who were alleged to have harassed the Student. OCR also reviewed the District's response to our data request, other documents and correspondence from the Complainant and District, and publically available information. OCR's investigation showed the following:

### **1. District Policies and Procedures**

- BP and AR 5145.3 prohibit discrimination, including harassment, of students on various bases, including disability. When any report of unlawful discrimination is submitted to or received by the principal or the Coordinator, he/she shall immediately investigate the complaint in accordance with AR 1312.3.
- BP and AR 1312.3 comprise the District's Uniform Complaint Procedures (UCP). The UCP states that District shall investigate and seek to resolve any complaints alleging unlawful discrimination on various bases, including physical or mental disability, in accordance with the UCP.
- Under the UCP, all complaints must be investigated and resolved within 60 calendar days of the District's receipt of the complaint unless the complainant agrees in writing to an extension.
- The initial step in investigating the complaint involves the Compliance Officer providing the complainant and/or his/her representative an opportunity to present the complaint and any evidence or information leading to evidence to support the allegations. The UCP states that the Compliance Officer shall also collect all documents and interview all witnesses with information pertinent to the complaint.
- Within 60 calendar days of receiving the complaint, unless extended by written agreement with the complainant, the Compliance Officer must send the complainant a written report of the District's investigation and decision. The decision will include the findings of fact based on the evidence gathered; the conclusions of law; the disposition of the complaint, including a determination for each allegation as to whether retaliation or unlawful discrimination has occurred; the rationale for such disposition; corrective actions, if any are warranted; and notice of the complainant's right to appeal to CDE. For any decision concerning a discrimination complaint based on state law the decision must also include a notice that the complainant must wait until 60 calendar days have elapsed from filing an appeal with CDE before pursuing civil law remedies.

## 2. Individual Student Background

- During the 2014-2015 school year, the Student was 14 years old and in 8th grade at a Middle School (School) in the District. The Student has been identified as an individual with a disability under the Individuals with Disabilities Educational Act (IDEA) and has an Individualized Education Program (IEP) and Behavior Intervention Plan (BIP). The Student is eligible for special education services under the category of other health impairment (OHI) for Attention Deficit Hyperactivity Disorder (ADHD).
- According to the Student's most recent IEP, she has social and emotional behavior functioning difficulties, in particular "difficulty keeping conversations school appropriate." The IEP also indicates that the Student "needs help with boundaries and personal space" and "does not realize that her intentions to be friendly make other peers and adults feel uncomfortable by her excessive compliments."
- The Student's accommodations and modifications included: (1) that the Student's teachers would ignore minor inappropriate behavior; (2) that the Student's teachers call a parent if the Student's behavior regressed; (3) the provision of a two minute "calming down" break; (4) a seat at the front of the classroom near the teacher, and; (5) the implementation of a behavior support plan.
- The Student's Resource Specialist Program teacher (RSP teacher)<sup>2</sup> told OCR in an interview that the Student acted inappropriately with her and made her feel uncomfortable. The RSP teacher also told OCR that the Student would often say that the RSP teacher was beautiful, sit too close, and follow her around the classroom. The RSP teacher also said that the student once said to her, "I can just stare into your eyes forever."
- The Campus Safety Guard (CSG) also expressed discomfort with the Student. She told OCR in an interview that the Student would say to her "You look like you need a hug" and "You can always count on me if you need a hug or want a shoulder to cry on." The Student also said things like "You look beautiful today" and "Can I go hang out with you in your office? It looks like you need a hand." The CSG told OCR that these statements made her uncomfortable.

## 3. January XX, 2015 Alleged Harassment

- In an interview, the Complainant told OCR that on January XX, 2015, the Student was called to conference with the CSG and the RSP teacher regarding an allegation that the Student sexually harassed two of her classmates. The Complainant told OCR that during the conference the School employees made disparaging comments toward the Student, yelled at her, and forced her to participate in a recreation of the incident. As a result, the Student was brought to tears. The Complainant alleged that this behavior constituted harassment of the Student based on her disability.

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<sup>2</sup> The RSP teacher is also the Student's IEP Case Manager.

- The CSG told OCR that she is responsible for School safety and student discipline. She told OCR that she handles approximately 2-3 referrals for discipline of students with disabilities per month. She could not recall having had training on interacting with disabled students, and is not given a copy of student IEPs, accommodations, or modifications for the students for whom she disciplines. The CSG stated that she was aware that the Student had a disability because she knew that the Student was in an RSP class. The CSG stated that she was also responsible for counseling the Student to help improve her inappropriate behaviors and make friends.
- The RSP teacher told OCR that for two periods a day she teaches a math and study skills class for the Student. Also, as the Student's case manager, it was her responsibility to ensure that teachers were aware of the Student's accommodations and modifications.
- The CSG stated that on January XX, 2015 two girls approached her between class periods to say that the Student had touched them on their chests. Soon thereafter the Student approached her to tell her what happened. The CSG asked the Student if she purposefully touched the girls on the chest. The Student said that it was an accident. The CSG told the Student that she would call her to the office later.
- The CSG told OCR that when she called the Student into her office, she again asked the Student whether she had touched the girls inappropriately. The Student responded that it was an accident. A Resource Classroom Aide (RCA) was also present during this conference. The CSG asked the Student to demonstrate how the high-five attempts were made, using CSG and RCA as stand-ins for the two girls. The Student demonstrated what happened, and the CSG told the Student that her demonstration did not make sense. The CSG continued to question the Student about whether the touching was accidental. The Student began to cry and told the CSG that it didn't matter because nobody would believe her anyway.
- OCR asked the CSG if she believed that the Student had touched the girls on purpose, in an effort to determine why the CSG continued to question the Student and ask her to recreate the incident. The CSG did not provide a clear answer. Later in the interview, the CSG stated that she believed that the Student touched the girls on purpose, but only after OCR questioned how she made the determination that the Student should be suspended.
- The Student told OCR that during the conference she was asked to write a statement of what took place. In her statement, she wrote that she accidentally touched one girl's shoulder, and accidentally touched the other girl's chest. The Student said that the CSG read her statement and told her "this is not what you are supposed to write" and started yelling at her. The CSG said that she had some concerns with the Student's original statement and asked her to change it.
- At this point the RSP teacher came into the office inquiring about what happened. The Student told OCR that when the RSP teacher came into the room she said "this is gross and disgusting and this has been happening with [the Student] for way too long." The RSP teacher told OCR that she told the Student if the allegations were true, the

Student's behavior was disgusting and inappropriate. She also told OCR that she said the behavior had gone on for too long. The Student told OCR that this statement was particularly upsetting to her because the Student felt that the RSP teacher didn't like her.

- The CSG told OCR that she wrote a report recommending that the Student be suspended for sexual harassment. According to the Student's Discipline Record, the Complainant was notified by phone on Thursday January XX, 2015 (the same day that the incident occurred) that the Student would be suspended for five days starting on Monday February X, 2015.
- The Student told OCR that as a result of this incident, she was gossiped about, other students said that they didn't want to be her friend anymore, and that she felt embarrassed and judged. The Complainant told OCR that she felt she had no choice but to move the Student to a different school to complete the school year. The Complainant transferred the Student to a charter school. For the remainder of the 2014-15 school year, the Student attended the Charter school two days a week and did home study three days a week.

#### 4. Internal District Complaint and Investigation

- OCR requested that the District provide a copy of any complaints made by the Complainant regarding disability based harassment and a description of how the District responded to those complaints. The District provided OCR with a copy of three letters written by the Complainant, as well as the District's written response following an in-person meeting with the Complainant.
- On Friday, January XX, 2015 the Complainant wrote a letter to the School objecting to the Student's suspension and requesting that the Student not miss school until the Complainant's issues with the suspension were resolved.
- On Monday, February X, 2015, the Complainant and the Student met with the CSG, the RSP teacher, the District Special Education Director, and the School Principal. The CSG told OCR that the Complainant wanted an explanation of what happened on January XX, 2015. The CSG explained to the Complainant her understanding of what transpired. The parties were unable to come to an agreement on the suspension.
- On February X, 2015, the Complainant wrote a letter to the Principal stating that "it appeared that none of the staff before me were currently educated on how to handle students with ADHD" and "[n]ot one person in your meeting even your special education teacher...spoke about putting a behaviorhal [sic] plan in place, or counseling by someone educated in ADHD." The Complainant also wrote that the RSP teacher "should know her comment based on what she believes my child did 'is gross and disgusting' is a form of verbal abuse" and "not acceptable ever." The Complainant finally stated that she believed that a neutral party should have investigated whether or not sexual harassment occurred because it is "a serious accusation and should leave no room for biases." The next day the Complainant removed the Student from the school and from the District, and enrolled the Student in a charter school.

- On February XX, 2015, the Complainant notified the District that she was requesting an Appeal Hearing. The Complainant wrote that she did not agree with the decision to suspend the Student nor with the comments placed in the Student's discipline record. She argued that the Student was treated harshly because of her ADHD and the personal issues that the CSG and RSP teacher had with the Student due to behaviors that were related to the Student's disability. The Complainant requested that the District expunge the Student's Discipline Record. On February XXXX, the Complainant filed the instant OCR complaint.
- On April XX, 2015 the Complainant and the Complainant's advocate attended a meeting with the Superintendent to challenge the Student's discipline records. On April XX, the Superintendent sent the Complainant a letter describing the meeting that took place. The Superintendent stated that during the meeting they discussed the role of due process and fairness in enforcing discipline, the definition of sexual harassment and how it is enforced and communicated, events leading to the Student's discipline and the reasons for the discipline, and special education practices and IEP goals. There was no indication that the parties discussed the Complainant's disability harassment allegation.
- The District offered the Complainant two options to resolve her complaint: (1) the discipline record would remain in place, with the Complainant and Student's statements to remain part of the permanent record; or (2) the discipline record would be removed, and the Complainant would agree to withdraw the statements. After requesting clarification of what portions of the discipline record would be removed, the Complainant agreed to option two.

## **Analysis**

OCR first investigated whether the Student was subjected to harassment by District employees. Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by denying a student's participation in the institution's program. Harassing conduct may take many forms, including verbal acts and conduct that is physically threatening, harmful, or humiliating. The evidence gathered by OCR shows that at the conference the CSG raised her voice at the Student, asked her to recreate an alleged incident of sexual harassment, and asked her to change her written statement of the event. The RSP teacher told the Student that her behavior was disgusting and that it had been going on for far too long. Both the RSP teacher and the CSG were authority figures that the Student admired and wanted to please (from their own accounts the Student frequently complimented them and followed them around). As a result, the Student was brought to tears by their actions. Finally, the evidence indicates that the District employees were motivated by their experience of discomfort with what they described as the Student's inappropriate behaviors—behaviors which are documented as directly related to the Student's disability.

The actions by the District employees had an immediate and significant negative effect on the Student. She was harmed in a way that limited her ability to benefit from the educational program. Therefore, OCR finds that this conduct was sufficiently serious to create a hostile environment and constitute harassment. OCR finds that the District, by a

preponderance of evidence, has failed to comply with Section 504 and Title II regarding this allegation.

OCR next investigated whether the District adequately responded to the harassment. OCR evaluates the appropriateness of the District's response by assessing whether it was prompt, thorough, and effective. If harassment is found, the District should take reasonable, timely, age-appropriate, and effective corrective action. When the alleged harassment concerns a District employee, the school district is responsible for the discriminatory conduct whether or not it has notice. Nonetheless, in this case the Complainant put the District on notice on several occasions – including at in-person meetings at the school and with the District – of alleged harassment based on disability by District employees. The Complainant's letters raised concerns with what she described as "harsh treatment," "verbal abuse" and unauthorized interrogation of her daughter. Upon receipt of the Complainant's disability harassment complaints, the District responded to other issues raised in the complaints, but did not respond to the allegations of disability harassment.

In summary, although the District took some steps to address the Complainant's concern with the Student's discipline record, this response was not reasonably calculated to remedy the effects of harassment on the Student or repair the educational environment, as required by Federal law and the District's policies. As a result of the District's failure to meet its own investigative policy and federal regulations, OCR finds the District is not in compliance with Section 504 and Title II with respect to this allegation. OCR will notify the Complainant 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) take effective action, through training and written guidance, to ensure that individuals responsible for the investigation of harassment complaints are knowledgeable of their responsibilities under the District's policies and procedures; (2) take effective action, through training and written guidance, to ensure that individuals working with students with special needs are knowledgeable of the District's policies and procedures for providing a FAPE under Section 504 and Title II; (3) hold an IEP meeting for the Student (if the Student returns to the District) to evaluate whether the Student needs services to remedy the effects of the harassment; and (4) provide the Complainant with written documentation of the expungement of the Student's disciplinary record. 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 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 wishes to thank the District for its cooperation during this investigation. If you have any questions about this letter, please contact Carolyn Wade, Civil Rights Investigator, at [carolyn.wade@ed.gov](mailto:carolyn.wade@ed.gov) or (415) 486-5563, or Abony Alexander, Civil Rights Attorney, at [abony.alexander@ed.gov](mailto:abony.alexander@ed.gov) or (415) 486-5590.

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosure

cc: Stacy L. Inman, Counsel, Mojave Unified School District