



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

December 9, 2016

Mr. Thomas Hoegerman
Superintendent
Apple Valley Unified School District
12555 Navajo Road
Apple Valley, California 92308

(In reply, please refer to case no. 09-16-1059.)

Dear Superintendent Hoegerman:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against the Apple Valley Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated the following allegations:

1. Whether, during the 2014-2015 school year, the District failed to provide the Student with a free appropriate public education (FAPE), when it failed to implement the Student's Section 504 Plan in the Student's XXXXXXXXXX English class.
2. Whether the District failed to respond adequately in its September 2015 response to an internal complaint made by Complainant in July 2015, stating that the Student had been harassed on the basis of disability by a football coach.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. With regard to allegation 1, in September 2016, the District expressed an interest in resolving allegation 1 under OCR's Case Processing Manual (CPM), Article III, Section 302, and OCR agreed that it was appropriate to resolve this allegation through a resolution agreement reached during an investigation. Under Article III, Section 302, a complaint may be resolved at any time when, before the conclusion of an investigation, the district expresses an interest in resolving the complaint and OCR determines

¹ OCR previously provided the District with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

that it is appropriate to resolve the complaint with an agreement during the course of an investigation. With regard to allegation 2, after careful review of the information gathered in the investigation, OCR had sufficient evidence to conclude that the District violated Section 504 and Title II.

The applicable legal standards, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Allegation 1: Whether, during the 2014-2015 school year, the District failed to provide the Student with FAPE, when it failed to implement the Student's Section 504 Plan in the Student's XXXXXXXXXX English class.

Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education 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. 34 C.F.R. §104.33(b)(2). 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.

Facts Gathered to Date

- During the 2014-2015 school year, the Student was X XXXXXXXXXX at XXXXXX XXXXX High School (School). The Complainant alleges that the Student's XXXXXXXXXX English teacher did not implement Student's Section 504 plan because she did not consistently provide him with class notes, and she penalized him for work he submitted late.
- According to the Student's Section 504 Plan, the Student must receive a copy of notes in all his classes. These include print-outs of PowerPoint slides or any information that the Student is supposed to copy down.
- The Student told OCR that the English teacher did not always provide him with notes from the board, and he only received notes once in a while. In the teacher's narrative response to allegations of failure to implement the Section 504 Plan, she was silent on the issue of providing notes.
- The Student's Section 504 Plan also provides "[a]dditional time to complete assignments in all classes" and "modification of assignments when deemed necessary to demonstrate mastery". The Section 504 Plan states that additional time on assignments is negotiable

depending on the assignment, and the frequency of providing additional time is “[a]s needed”.

- The Student told OCR that when he spoke to his English teacher about extra time, she responded that if he turned in work after the deadline, it would be considered late.
- Both the Complainant and the District agree that the Student submitted two book reports and the final project, a 500 word essay, after the deadline for the respective assignments. The book reports were due in early April and early May 2015, and the Student submitted both book reports the last week of school in May. The final project was due on May XX, 2015, and the Student submitted the final project the week of May XX, 2015, the week after it was due. The Student’s final grade in XXXXXXXXXX English was a D.
- In an email to the Complainant on August X, 2015, the English teacher indicated that she marked the Student down for his late final project and book reports. She wrote that the Student did not turn in his assignments on time and “[d]ue to that his grade suffered.”
- The teacher specifically noted the Student’s late final project. She stated the Student “did have the potential to earn a C but his final paper was late which lost him 10%. Also if I remember correctly his presentation of the final project was late, losing him 10% on that assignment.”
- In addition to the late final paper and possibly late presentation, the teacher also noted that the Student’s book reports were late. In her narrative response, the teacher stated that the Student’s two book reports were “2-3 months late,” and in her August X, 2015 email to the Complainant, she stated “one of them [was] one month late and the other two months late.”
- In the August X, 2015 email, the teacher stated that she and the Vice Principal decided to give the Student more time to complete the book reports, and he still did not complete them in a “timely fashion” because he “turned them in the last week of school.” The Complainant told OCR that she met with the Vice Principal in May 2015, and they agreed that the Student would have two weeks starting May XX, 2015 to complete the book reports. According to the Complainant, the Student turned in the book reports on the last day of his two week extension during “the last week of school.”
- In her narrative response, the English teacher stated she met the Student’s accommodation for extra time. The teacher noted that all students were given one month to complete the book reports, and because the Student turned his in late, he had “2-3 months” for the assignments. Similarly, the Student, in turning in his final project one week late, had a total of “about 5 weeks of in class time to work on the final paper.”
- At the end of the summer of 2015, the teacher met with the Assistant Principal to discuss the due dates and time allotments for the Student’s work in the spring 2015 English class. After discussing the assignments and time provided, they decided that the Student’s accommodation for extra time was met.

Analysis

The facts obtained in the investigation thus far raise concerns that the School did not adequately understand and meet its responsibilities under Section 504 and Title II to provide FAPE to a qualified student with a disability. Specifically, there is a concern that the School failed to implement an accommodation for extra time described in the Student's Section 504 Plan. The extra time accommodation in the 504 Plan was vague, and there is no evidence that the Complainant or Student were informed of how much extra time was permitted or that the Student was exceeding the permitted amount of extra time.

Though the 504 Plan provides that extensions are negotiable, the evidence gathered thus far does not show that the extensions for the book reports or final project were negotiated at the outset but rather discussed after the Student missed the original deadlines. The teacher stated that the Student's final project was one week late and his book reports were between one and three months late, based on the original deadlines. Because the extensions were not negotiated beforehand, it is unclear if the Student's Section 504 Plan permitted this amount of extra time for him.

The Section 504 Plan as written provides the Student with additional time, and the Complainant asserted that the Student submitted the assignments consistent with his 504 Plan. The 504 Plan did not identify that the teacher would make determinations regarding which assignments would be deemed late and which ones would be deemed on time after the fact of their submission. Due to the vagueness of the 504 Plan, it is unclear when extended time from the teacher became too late, and there is a concern that the Student was punished for the lack of specificity.

An accommodation providing extra time on assignments means a student will not be penalized for late work. In this case, the Student's extra time was not negotiated beforehand and he eventually submitted the assignments. The teacher lowered the grade on the submitted assignments because they were not submitted timely. The late penalty raises a concern that the School did not implement the Student's Section 504 Plan, and the District did not comply with the requirements of Section 504 and Title II and their applicable regulations.

OCR also has concerns about the English teacher's provision of class notes to the Student, another service stated in his Section 504 Plan. The Student told OCR that the teacher did not provide notes consistently, and the teacher's narrative response to the allegations in the complaint is silent as to whether notes were or were not provided.

Before OCR completed its investigation, the District expressed interest in a Section 302 Resolution Agreement on September 19, 2016 and OCR determined that a voluntary resolution was appropriate as to this allegation. In order to complete the investigation, OCR would need to interview the English teacher about the accommodations for extended time and class notes and potentially other members of the Section 504 team to ascertain whether a procedure had been specified for determining extended time during that meeting, which may not have been documented in the plan.

Allegation 2: Whether the District failed to respond adequately in its September 2015 response to an internal complaint made by Complainant in July 2015, stating that the Student had been harassed on the basis of disability by a football coach.

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 circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

The Section 504 regulations, at 34 C.F.R. §104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a District's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to complaints alleging discrimination 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 discrimination and to correct its effects.

Findings of Facts

- The District’s grievance procedure for Section 504 and Title II complaints is its Uniform Complaint Procedure (UCP), as outlined in the District’s Annual Parent Notification Packet, Board Policy 1312.3 (BP 1312.3), and Administrative Regulation 1312.3 (AR 1312.3). The UCP is published through the Annual Parent Notification Packet, which provides students, parents, and employees notice regarding the procedure and how to file a complaint alleging unlawful discrimination. The procedures provide that anyone can file a UCP complaint regarding any program or activity run by the District. The procedures further identify the Assistant Superintendent of Human Resources as the UCP compliance officer and describe the timeline for the investigation (60 days) and appeal processes. The procedures prohibit retaliation against a complainant.
- AR 1312.3 provides for a final written decision, which shall include:
 1. The findings of fact based on the evidence gathered;
 2. The conclusion(s) of law;
 3. Disposition of the complaint;
 4. Rationale for such disposition;
 5. Corrective actions, if any are warranted;
 6. Notice of the complainant’s right to appeal the district’s decision within 15 days to the CDE (California Department of Education) and procedures to be followed for initiating such an appeal; and
 7. For discrimination, harassment, intimidation, or bullying complaints, notice that the complainant wait until 60 days have elapsed from the filing of an appeal with the CDE before pursuing civil law remedies.
- In addition to the District’s Annual Parent Notification Packet, BP 1312.3, and AR 1312.3, its UCP process is also outlined in a one-page “Uniform Complaint Procedures Annual Notification” (UCP Annual Notification). According to the Assistant Superintendent of Human Resources, this UCP Annual Notification is posted in each classroom and office in the District. The UCP Annual Notification contains two elements that contradict the procedures in the District’s Annual Parent Notification Packet, BP 1312.3, and AR 1312.3. First, the UCP Annual Notification states the written report of the District’s investigation and decision will be provided to the complainant within 30 days of receiving the complaint. Second, it provides an appeal process to the Governing Board.
- On July XX, 2015, the Complainant filed a “Formal Complaint Form” and an additional 5-page statement with the District. The complaint included allegations that a School Football Coach (Coach) engaged in disability discrimination against the Student and race discrimination against African American football players. The Complainant also alleged that the football coaches retaliated against her sons, both on the football team, after she spoke to them about discrimination and verbal abuse by coaches.
- The Assistant Superintendent for Human Resources told OCR that she investigated the Complainant’s July XX, 2015 complaint. At the District, the Assistant Superintendent is responsible for leading complaint investigations, which includes conducting and taking

notes during interviews, determining whether an allegation is founded or unfounded, and issuing the final written decision to a complainant. According to the District, there is no specific burden of proof in the complaint procedure.

- The Assistant Superintendent told OCR she gathered documentary evidence from the school site, including written statements by the football coaches, and interviewed three football coaches, including Coach, the Athletic Director, four football players, and two parents of football players. According to the Assistant Superintendent, every person interviewed stated that the football coaches did not say inappropriate or discriminatory comments to football players. The Assistant Superintendent told OCR that she did not find evidence that supported the allegations of discrimination and retaliation.
- In addition, the Assistant Superintendent stated the Complainant interfered with the investigation by speaking to a football player to influence his statements to the District. The football player's written statement described a mother of a fellow football player approaching him to say Coach called him a racial epithet though the player stated he had never heard Coach say a racial epithet.
- On September X, 2015, the Assistant Superintendent provided the Complainant with a final written decision. The final written decision described the allegations in the Complainant's July XX, 2015 complaint and concluded: "Your concerns noted in the formal complaint were thoroughly investigated. The allegations are determined to be unfounded."
- According to the Assistant Superintendent, she wrote the final written decision and did not include findings of fact or the rationale for the disposition because she had already verbally told the Complainant that there was no evidence to substantiate the complaint. She did not include a notice of the Complainant's right to appeal the decision because she stated the appeal policy is provided to complainants when they file the Formal Complaint Form with the District.
- OCR interviewed Football Player 1, a student-athlete that the Assistant Superintendent interviewed in her investigation. The Assistant Superintendent told OCR that Football Player 1 said he did not hear the football coaches call players "pussy," "dipshit," or "asshole." However, Football Player 1 told OCR that he specifically told the Assistant Superintendent that Coach called the Student a "pussy" and "a bitch." Football Player 1 also said he told the Assistant Superintendent that Coach told the Student, "You'll never play" and "Your mom comes over here and says things...you're a pussy." Football Player 1 told OCR that the Assistant Superintendent did not ask him about disability discrimination, so he did not tell her comments he heard the football coaches make about the Student's disability. These comments include coaches telling the Student, "You have an IEP and you still can't get good grades" and "You have a learning disability, so you can't learn certain plays."
- OCR also contacted Football Player 2, and his parent told OCR that the Assistant Superintendent had interviewed Football Player 2 regarding the Complainant's allegations of disability discrimination by Coach. The parent also told OCR that the

Complainant asked Football Player 2 to lie to the Assistant Superintendent and say the football coaches were discriminatory. Though Football Player 2 was interviewed, his name does not appear on the Assistant Superintendent's interview list or interview notes. Additionally, the Assistant Superintendent did not mention Football Player 2 when OCR asked for summaries of each interview she conducted during her investigation.

Analysis

OCR found that the District did not incorporate appropriate due process standards and did not provide for an equitable resolution of a complaint alleging disability discrimination. The Section 504 regulations, at 34 C.F.R. §104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a district's grievance procedure is prompt and equitable, and in this case, OCR found that the District's procedure was compliant with the minimum requirements of Section 504 and Title II but the District failed to implement its procedure in this particular complaint. The Uniform Complaint Procedure, described in the District's Annual Parent Notification Packet, Board Policy 1312.3, and Administrative Regulation 1312.3, is published and provides notice on how to file a complaint alleging unlawful discrimination. The District's procedure allows anyone to file a UCP complaint alleging discrimination or harassment regarding any program or activity run by the District, and it identifies the Assistant Superintendent of Human Resources as the UCP compliance officer. The procedures also prohibit retaliation. Lastly, the procedures describe a prompt timeline for the investigation (60 days) and an appeal process, and AR 1312.3 details the appropriate components of a final written decision. However, OCR is concerned that the UCP Annual Notification, which is posted in each classroom and office in the District, contains a shortened timeline and different appeal process that contradict the UCP process as outlined by the District's Annual Parent Notification Packet. OCR found the UCP process described in the Annual Parent Notification Packet, BP 1312.3, and AR 1312.3 met the minimum requirements of Section 504 and Title II, but the UCP Annual Notification is inconsistent and can impact an administrator's ability to investigate a complaint and a complainant's appeal rights.

Though the District's grievance procedure satisfied Section 504 and Title II, the District failed to implement its procedures when addressing the Complainant's complaint of harassment by the football coaches. First, the District's notice to the Complainant of the outcome of her complaint was inadequate. The letter to the Complainant contained one sentence stating the allegations were unfounded and did not provide further description or analysis. The letter is insufficient notice of the outcome based on Section 504 and also fails to meet the District's own policy. The District's AR 1312.3 requires that notice be provided in writing and include findings of fact, conclusion(s) of law, rationale for the disposition, notice of the complainant's right to appeal, and notice that the complainant wait 60 days from the filing of an appeal before pursuing civil law remedies. However, the District's final written decision to the Complainant did not contain these elements. AR 1312.3 requires these elements in writing, even if the Assistant

Superintendent stated that she already told the Complainant there was no substantiating evidence and gave the Complainant information about appeals.

In addition, the District's investigation of the Complainant's complaint violated Section 504 and Title II because it was not adequate and reliable. Specifically, the District's interview process in this case failed to incorporate appropriate due process protections to ensure reliability. Though the Assistant Superintendent told OCR that she takes notes during interviews, there were no interview notes for Football Player 2. There were interview notes for Football Player 1, but the Assistant Superintendent's notes from the interview contradicted what Football Player 1 told OCR he told the Assistant Superintendent. Because there is no specified burden of proof in the procedure, OCR could not determine how the District weighed contradictory evidence and whether it considered any evidence supporting the Complainant's allegations in this case. OCR was also concerned that the Assistant Superintendent did not ask Football Player 1 about any comments by football coaches regarding the Student's disability, as disability discrimination was an allegation in the complaint.

Testimonial evidence from the Assistant Superintendent and the parent of Football Player 2, as well as a written statement by another football player, raise significant and troubling issues about the Complainant's interference with the investigation. However, this does not alleviate the concern that the District's investigation itself was not thorough. In particular, the interview practices in this investigation were not reliable or complete, and failed to meet appropriate due process standards.

After reviewing all documentation of the District's investigation and resolution of the Complainant's July XX, 2015 complaint, OCR found by a preponderance of the evidence that the District did not provide a resolution process that meets Section 504 and Title II's requirements for an equitable and prompt process that incorporates appropriate due process standards.

Conclusion

To address the allegations in the complaint, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement, which is aligned with the complaint allegations and the findings and information obtained by OCR during its investigation. Pursuant to the Resolution Agreement, the District will disseminate guidance memoranda and provide training on the Section 504 and Title II requirements to provide FAPE to all students with disabilities and prohibit discrimination and harassment of a student based on disability. The guidance memoranda and training on disability harassment and discrimination will include types of conduct that could constitute disability-based harassment, the District's procedures to resolve disability discrimination complaints, the responsibilities of administrators who learn about harassment of a student based on disability, notifications to students and parents/guardians about the District's discrimination complaint process and procedures, standards for investigating disability discrimination complaints, a prohibition on retaliation, and designation of a knowledgeable individual at the District to serve as a resource for any administrators or school site staff who have questions about the prohibition of disability discrimination and harassment.

The Resolution Agreement also requires the District replace the UCP Annual Notification in all classrooms and offices in the District with a revised notification that is consistent with the Uniform Complaint Procedure described in the District's Annual Parent Notification Packet. Lastly, the Resolution Agreement requires the District to remove any reductions on the Student's sophomore English assignments related to tardiness and revise the Student's sophomore English grade as needed to reflect the revised points.

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the District and the Complainant concurrently. When fully implemented, the Resolution Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with Section 504, Title II, and their implementing regulations, which were at issue in this case.

OCR's determination in this matter 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. 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 should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, 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 Annie Lee, Civil Rights Attorney, at Annie.Lee@ed.gov or 415-486-5594.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: XXXXXXXXX XXXXXXXXXX, Counsel for Apple Valley Unified School Distirct