



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

November 1, 2018

VIA ELECTRONIC MAIL

Dr. Amy Nguyen-Hernandez
Superintendent
Adelanto Elementary School District
11824 Air Expressway
Adelanto, California 92301-0070

Re: OCR Case No. 09-17-1105 (Adelanto Elementary School District)

Dear Dr. Nguyen-Hernandez:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Adelanto Elementary School District (District). The Complainant alleged that the District retaliated against her and discriminated against Students 1 and 2 on the basis of race and disability.¹ Specifically, OCR investigated the following allegations:

1. Whether the District disciplined Student 1 differently from other students who engaged in similar conduct due to Student 1's race.
2. Whether the District disciplined Student 1 differently from non-disabled students who engaged in similar conduct in the XXXX room on November XX, 2016.
3. Whether the District treated Student 2 differently from other students in his Gifted and Talented Education (GATE) class by requiring him to take additional assessments due to Student 2's race.
4. Whether the District retaliated against the Complainant for filing a complaint with OCR when it disciplined Student 1 on November XX, 2016 and when it prevented the Complainant and her husband from participating in a School Site Council (SSC) meeting in February 2017.
5. Whether the District failed to provide Student 1 with a free appropriate public education (FAPE) when it did not implement his individualized education program (IEP) and when it disciplined him without following adequate evaluation and placement procedures.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities

¹ OCR previously provided the District with the identities of the Complainant, Student 1, and Student 2. OCR is withholding their names from this letter to protect their privacy.

operated by recipients of federal financial assistance. The District receives funds from the Department and is subject to Title VI and the regulation.

OCR is also 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 in programs and activities operated by recipients of federal financial assistance. In addition, OCR is 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. After careful review of the information gathered in the investigation, OCR concluded that the District did not violate Title VI, Section 504, or Title II with regard to allegations 1, 2, 3, and 4. However, OCR concluded that the District did violate Section 504 and Title II with regard to allegation 5. The applicable legal standards, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Allegation 1: Whether the District disciplined Student 1 differently from other students who engaged in similar conduct due to Student 1's race.

Legal Standard

Under the Title VI regulations, at 34 C.F.R. §100.3(a) and (b), a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1)(i) states that a school district may not, directly or through contractual or other arrangements, on the basis of race, color or national origin, deny an individual any service, financial aid or other benefit.

To determine whether a student has been discriminated against on the basis of race under Title VI, OCR looks at whether there is evidence that the student was treated differently from students of other races under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the student's race.

Findings of Fact

Background

During the 2016-2017 school year, Student 1 was a XXX grade student at a middle school in the District (Middle School). He is African American. Prior to enrolling at the Middle School, Student 1 was enrolled at an elementary school in the District at the beginning of the 2015-2016 school year then moved to home hospital and received instruction at home for the rest of his XXX grade year.

Discipline Incidents

September X, 2016 – Bathroom Fight

According to the Notice of Suspension dated September X, 2016, Student 1 was caught in the restroom fighting and this behavior was seen on video. The Assistant Principal completed the Notice of Suspension, which suspended Student 1 for two days for having violated California Education Code 48900(a)(1) (caused, attempted to cause, or threatened to cause physical injury to another person). According to the District's Director of Child Welfare and Attendance, the Complainant's husband met with the Assistant Principal to discuss the incident and as a result of that meeting, the September X, 2016 discipline was removed from Student 1's record. OCR reviewed Student 1's discipline record and found no entry for this September X, 2016 fight. The Student served the two day suspensions, even though it was subsequently removed from his record.

In her interview with OCR, the Complainant stated that this bathroom fight involved three African American students, including Student 1, and one White student. According to the Complainant, all three African American students were suspended, but the White student was not suspended.

According to the District, Student 1 and three other students were horse playing and "slap boxing" in the boys' restroom, and their conduct was caught on video. All four students were suspended. The District provided OCR with copies of the student discipline reports for the other students who were involved in the September X, 2016 incident, and OCR found that Student A, Student B, and Student C each received three-day suspensions.

Based on the District's submission of student discipline data for the 2016-2017 school year, OCR determined that Student A is African American, Student B is Hispanic, and Student C is African American.

November X, 2016 – Fight at School

The Complainant provided OCR with a Notice of Suspension dated November X, 2016. The Notice of Suspension, completed by the Assistant Principal, stated that Student 1 was blocking a student so that the student could get beat up by another student. Student 1 would be suspended for two days for violating California Education Code 48900(a)(1) (caused, attempted to cause, or threatened to cause physical injury to another person).

The Complainant stated that Student 1 was suspended for two days because the School thought he was beating up another student when he was actually trying to prevent the other student from getting beat up by others. According to the Complainant, the suspension for this incident was taken off Student 1's record.

Student 1's discipline record, which the District provided to OCR, does not show any incident on November X, 2016. The Student served the two day suspensions even though it was subsequently removed from his record.

The District stated it did not have documentation of any incident on November X, 2016 involving Student 1. Based on a copy of Student C's Student Discipline Record, OCR noted that on November X, 2016, Student C was suspended three days for hitting someone outside the classroom. However, OCR could not determine whether this was the same incident that Student 1 was allegedly involved in.

November XX, 2016² – XXXX Room Vandalism

On October XX, 2017, there was an incident of vandalism in the XXXX room. The Principal conducted an investigation, which included obtaining student statements and creating a spreadsheet that recorded information from the written statements. He stated that he administered discipline to the students based on the number of student witnesses that reported seeing each student in the XXXX room breaking XXXXXXXXXXXX and throwing rocks and XXXXX XXXXXX. He stated that initially, based on student witness statements, Student 1 was given a five-day suspension. After the Complainant challenged the suspension, it was reduced to three days, from November XX, 2016 through November XX, 2016. The District provided OCR with Notices of Suspension for Student 1 that showed a three-day suspension and a five-day suspension, and his discipline record ultimately shows he was suspended for three days.

Aside from Student 1, nine other students participated in the XXXX room incident, and the District provided the student discipline report and demographic information for each of these nine students. Student B and Student C are African American, and each received a five-day suspension for this incident. Student D's race is "N/A," and he received a five-day suspension. Student E, Student F, Student G, Student H, and Student I are African American, and each received a three-day suspension. Lastly, Student J is White and received a three-day suspension for this incident. All ten students who participated in the XXXX room incident were students in special education, except for Student F.

The Complainant told OCR that there were a total of nine students involved in the XXXX room vandalism incident, including Student 1. She said that the non-African American students did not get suspended. She also stated that the students who were not in Student 1's special education class did not get suspended.

November XX, 2016 – Sexual Assault

The Middle School investigated an incident of sexual assault of a female student by Student 1 and two other students, Student E and Student J, which occurred on November XX, 2016. The female student wrote a statement about how the three students touched her inappropriately, physically restrained her, and tried to pull her pants down. Student K also wrote a statement

²The District provided OCR with three different versions of the notice of suspension issued to Student 1 for vandalizing the XXXX room. The notices of suspension all identify the date of the incident as November XX, 2016. However, in its supplemental data response, the District provided documents showing the XXXX room vandalism occurred on October XX, 2016. In describing the XXXX room vandalism incident, OCR refers to the date listed on the notices of suspension, November XX, 2016.

because he was a witness. He stated that the Paraprofessional was outside the classroom talking to another teacher and Student 1, Student E, and Student J were touching the female student who said “Stop” and pushed them away. Student L, another witness, also wrote a statement that was similar to Student K’s.

The Complainant told OCR in an interview that the Middle School did not investigate the sexual assault allegation. According to the Complainant, the Principal told the female student to change her story.

Documents from the District show that the District suspended Student 1, Student E, and Student J for five days and recommended each for expulsion. As previously stated, Student E is African American and Student J is White, and both are students in special education. Ultimately, the District expelled Student E and Student J on February XX, 2017. The District held an expulsion hearing for Student 1, but it did not expel him (see allegation 5 below).

Other District discipline data

In addition to providing data regarding Student 1’s disciplinary history, the District also provided its February 2018 Fiscal Crisis & Management Assistance Team (FCMAT) Data Report, which included a review of the relationship among discipline, special education, and instruction provided to African American students and other students of color. The FCMAT Data Report included data from the last four school years, as well as data on expulsions and suspensions that were at least five days long. The District found that its African American students, particularly African American students with disabilities, were suspended at much higher rates annually than other students. The FCMAT Data Report also discussed several efforts to address disproportionate discipline: expanding positive behavior interventions and supports (PBIS) at every site; training staff in PBIS, restorative practices, and trauma informed care; providing workshops and training sessions for African American parents in order to address issues related to school success, parent support, discipline, attendance, and family engagement; contracting with various special education and equity experts to provide training to site administrators and staff; twice-a-year training by the Director of Child Welfare and Attendance, and as needed, on administrative training on suspensions, expulsions, and due processes. In June 2018, the District provided OCR with an update regarding these as well as other efforts to address disparities.

Analysis

There is insufficient evidence that the District disciplined Student 1 differently from other students who engaged in similar conduct due to Student 1’s race.

With respect to the September X, 2016 fight in the bathroom, the discipline reports from the incident show that all the students involved in the fight were suspended. Student 1 was suspended for two days, while the two other African American students who participated in the incident (Student A and Student C) were suspended three days and the one Latino student who participated in the incident (Student B) was suspended for three days. The evidence shows that unlike the other three students who participated in the bathroom fight, Student 1 received one fewer day of suspension and the suspension resulting from this incident was removed from his discipline record.

With respect to the November X, 2016 fight at school, the evidence shows Student 1 was suspended for two days, and the suspension resulting from this incident was removed from his discipline record. The District stated that based on its records there was no incident that occurred on November X, 2016 involving Student 1. OCR noted, however, that Student C's discipline record shows he was suspended for hitting someone on November X, 2016, so Student C, who is African American, may have been the other student involved in an incident with Student 1 on November X, 2016. Regardless, there is insufficient information to demonstrate that Student 1 was disciplined differently from any other student involved in a fight on November X, 2016 or that any difference in discipline is related to Student 1's race.

With respect to the November XX, 2016 XXXX room vandalism, the discipline reports from the incident show that all the students involved in vandalism were suspended. The data provided to OCR included Notices of Suspension for Student 1 that ranged from a three-day suspension to a five-day suspension, but Student 1's discipline record ultimately shows he was suspended for three days for his role in this incident. The evidence also showed that Student B and Student C, both African American, as well as Student D, whose race was not provided, received five day suspensions for vandalizing the XXXX room. In addition, Student E, Student F, Student G, Student H, Student I—all of whom are African American—and Student J, who is White, all received three-day suspensions for the XXXX room incident. Thus, Student 1 was not disciplined differently from other students who engaged in the same XXXX room vandalism. Like the majority of the other students who were disciplined for the XXXX room incident, including the White student, Student 1 received a three-day suspension.

With respect to the November XX, 2016 sexual assault, the discipline reports from the incident show that the District suspended and moved to expel all three students involved. The School's investigation found that Student 1, Student J, and Student E sexually assaulted a female student. The School issued five-day suspensions for Student 1, Student E, and Student J. Student E is African American, and Student J is White. The District ultimately expelled Student E and Student J because of their involvement in this incident. Though the District held an expulsion hearing for Student 1, the District did not expel Student 1 for reasons related to his disability (see allegation 5 below). The evidence shows that Student 1 was disciplined in the same manner as a White student who engaged in the same behavior.

OCR found that the preponderance of the evidence demonstrated that the District did not discipline Student 1 differently from other students who engaged in similar conduct due to Student 1's race. Thus, OCR finds that the District did not violate Title VI with regard to this issue.

OCR notes that the Title VI regulations at Section 100.6(b) require districts to keep records and be able to submit to the Department of Education reports to show compliance with the regulation that are timely, complete and accurate. As a matter of technical assistance, OCR recommends improving data collection on race and discipline, including measuring suspensions that are shorter than five days and developing metrics to assess the efficacy of measures aimed at reducing different treatment where it is identified.

Allegation 2: Whether the District disciplined Student 1 differently from non-disabled students who engaged in similar conduct in the XXXX room on November XX, 2016.

Legal Standard

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives 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. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR first examines whether there is direct evidence of discriminatory treatment on the basis of disability. Absent that, OCR looks at whether there is evidence that the individual was treated differently from non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

Findings of Fact

The facts OCR gathered regarding student vandalism of the XXXX room can be found in the fact section under allegation 1.

Analysis

There is insufficient evidence that the District disciplined Student 1 differently from non-disabled students who engaged in similar conduct in the XXXX room on November XX, 2016. The Complainant alleged that Student 1, because of his disability, was disciplined more harshly than students without disabilities who were involved in the November XX, 2016 XXXX room vandalism. The evidence shows that of the ten total students who participated in the incident, all but one (Student F) was a student with disabilities. The School suspended all ten of the students who were involved in the incident, including Student F. Specifically, Student F received a three-day suspension like Student 1. Therefore, the evidence shows that Student 1 was disciplined in the same manner as a non-disabled student who engaged in the same behavior.

Thus, OCR finds that the District did not violate Section 504 or Title II with regard to this issue.

OCR notes that the Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.6(b) of the regulations implementing Title VI, which require districts to keep records and

be able to submit to the Department of Education reports to show compliance that are timely, complete and accurate. As stated above, the District's February 2018 FCMAT Data Report examined the relationship between discipline and special education, but it only analyzed data on expulsions and suspensions that were at least five days long. As a matter of technical assistance, OCR recommends improving data collection on disability and discipline, including measuring suspensions that are shorter than five days and developing metrics to assess the efficacy of measures aimed at reducing different treatment where it is identified.

Allegation 3: Whether the District treated Student 2 differently from other students in his GATE class by requiring him to take additional assessments due to Student 2's race.

Legal Standard

As previously stated under allegation 1, the Title VI regulations, at 34 C.F.R. §100.3(a) and (b), prohibit a school district from treating individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1)(v) states that a school district may not, directly or through contractual or other arrangements, on the basis of race, color or national origin, treat an individual differently in determining whether he or she satisfies any admission, enrollment, eligibility or other requirement which must be met to receive any service, financial aid, or other benefit.

Findings of Fact

Background

The District stated that it did not have written policies and procedures governing the nomination, referral, testing, evaluation, selection and assignment of students for participation in GATE programs.

According to the District, it conducts universal GATE screening for all second grade students. The District provided a copy of a model template Permission to Screen notice that the District GATE Coordinator sent in 2016 to parents/guardians of all second grade students. Parents/guardians were asked to respond by November 30, 2016 with their permission to participate in GATE screening for their second grade student.

The District stated that GATE screening for students in grades 3-8 are based upon teacher recommendations. The District provided OCR with a copy of a model template Permission for GATE Screening letter that the District GATE Coordinator sent to parents/guardians of students in grades 3 through 8. The District advised parents/guardians that a teacher recommended their son/daughter for testing for participation in the GATE program and requested their permission to have their son/daughter tested for GATE.

After GATE testing has been administered, the District GATE Coordinator/Coordinator of Curriculum and Instruction will send a letter to the parents/guardians advising them whether or not their child has qualified to participate in the GATE program. In the letter for a student who was identified for participation in GATE, parents/guardians are advised that GATE educational

opportunities may include any of the following at the child's school: differentiated curriculum in the regular classroom provided by the classroom teacher; cluster grouping with other GATE students for differentiated curriculum in the classroom; or, grouping of GATE students for educational enrichment opportunities during the school day.

The District stated that Student 2 was not tested for GATE during his second grade year (2014-2015 school year) because he enrolled at the District school (School) in January 2015, which was after the universal screening for second graders had occurred in November and December 2014.

The District stated that Student 2 was enrolled in a non-GATE class in third grade and was not tested for GATE during the 2015-2016 school year. The District's narrative response states and Student 2's transcript shows that he was transferred to independent study in October 2015.

The District stated that the Complainant did not ask for GATE testing for Student 2. According to the District's Coordinator of Curriculum and Instruction, Student 2 was never GATE tested nor was he ever on a list to be GATE tested.

2016-2017 School Year

The District stated that at the start of the 2016-2017 school year, Student 2 enrolled back into the School for fourth grade after being enrolled in independent study the previous year. A District administrator stated that they placed Student 2 in the GATE cluster fourth grade class because that was the only fourth grade class that had space available for him and not because they had any indicators that this was the appropriate educational placement for him. The District explained that classes were already created in June of the previous school year, when Student 2 was not enrolled at the School. Student 2's third grade California Assessment of Student Performance and Progress summative scores were "Standards Not Met" in Language Arts and Math, and he was never GATE identified or tested.

The GATE cluster class consisted of general education GATE students and non-GATE general education high achieving students. Everyone in the class received the same core curriculum as the non-GATE cluster classes except that it moves at a faster pace. GATE students were permitted to complete additional projects.

According to the School Assistant Administrator, she, the Principal, and the Complainant discussed moving Student 2 to a more appropriate class when an opening became available. However, the Complainant did not agree, and so the School left Student 2 in the GATE cluster class.

According to the District, Student 2 had math and language arts deficiencies. The School Assistant Administrator stated that Student 2's teacher (Teacher) had concerns about his low progress in reading as demonstrated on standardized tests. The Teacher completed a packet to initiate the Student Success Team (SST) process on November XX, 2016.

On December XX, 2016, the Complainant sent an email to OCR and the Clerk in the District's Special Education Department. She stated that she was revoking her signature for any further counseling, assessments, or evaluations for Student 2.

A SST meeting was held for Student 2 on December XX, 2016 due to academic and behavior concerns, but the Complainant did not attend this meeting. The SST meeting notes reflect that Student 2 was having difficulty since the beginning of the 2016-2017 school year. According to the SST meeting notes, Student 2 had decoding and comprehension issues and had received low academic scores in reading. He turned in very little work, struggled to stay on task, and did not appear to give effort in reading. Student 2 also was exhibiting behavioral issues, such as leaving class without permission and not returning back to class, as well as spitting and pushing other students. The SST discussed interventions, including a daily behavior report completed by his teacher. The School referred Student 2 for SELPA counseling. The District stated that space subsequently became available in a non-GATE cluster fourth grade classroom so they discussed moving Student 2 into this class.

The Complainant told OCR that Student 2 does very well when he has supervision but the School lets him leave whenever he wants to. She also told OCR that she received a letter from the School, which, according to the Complainant, stated the School wanted him to take a test to be allowed to stay in GATE because he is below average. The Complainant alleged to OCR that the School wanted to test Student 2 because of his race. The Complainant provided OCR with an undated letter from the District, which matched the model template Permission for GATE Screening letter that the District GATE Coordinator sent to parents/guardians of students in grades 3 through 8. The Complainant did not sign the form granting permission for GATE screening for Student 2.

The District stated that an IEP meeting was held for Student 2, and it was determined that he was not a qualified student with a disability and did not qualify for special education services. The IEP team gave the Complainant the choice of either moving Student 2 into the non-GATE fourth grade classroom or independent study.

Student 2's transcript from the District shows that he entered independent study on January XX, 2017. Later, the Complainant chose to place Student 2 into an online independent study program not operated by the District, and on February XX, 2017, he dis-enrolled from the District. The Complainant told OCR on March XX, 2018 that Student 2 currently attends a school which is not in the District.

Analysis

OCR finds there is insufficient evidence that the District treated Student 2 differently from other students in his GATE class by requiring him to take additional assessments due to his race. OCR examined whether there was evidence that Student 2 was treated differently from students of other races under similar circumstances. During the 2016-2017 school year, Student 2 was in fourth grade GATE cluster class, which contained general education GATE students and non-GATE general education high achieving students. The District sent the Complainant a letter requesting permission for GATE testing for Student 2. While the request to GATE test Student 2

in fourth grade was different treatment, OCR did not find the basis of this different treatment to be race. Instead, the evidence supports the District's two legitimate nondiscriminatory reasons for its request to GATE test Student 2: he had not been previously GATE tested and he was struggling academically in his fourth grade GATE cluster class.

First, the evidence shows that unlike the other students in the fourth grade GATE cluster class who were screened for GATE in second grade or were high achieving during the 2016-2017 school year, Student 2 was not GATE tested because he entered second grade in January 2015 after the universal screening took place in November and December 2014, and he was also not a high achieving student. Additionally, he was not GATE tested in third grade during the 2015-2016 school year. The District's request to GATE test Student 2 in fourth grade was not different treatment based on race, but rather based on the fact that he was not previously GATE tested like his fourth grade peers and he was not high achieving.

Second, the evidence shows Student 2's SST team had concerns about his placement in the GATE cluster class given his reading level. The District stated it placed Student 2 in the fourth grade GATE cluster class due to space constraints at the School. The curriculum in the GATE cluster class moved at a faster pace, and Student 2 demonstrated challenges with decoding and comprehension. The SST team noted his low academic reading scores and how he completed very little work, struggled to stay on task, and did not appear to give effort in reading. The District discussed moving Student 2 to a non-GATE cluster fourth grade classroom should space become available. The District's request to GATE test Student 2 was not different treatment based on race, but rather based on his performance in the GATE cluster class.

OCR did not find evidence of pretext to undermine these two legitimate nondiscriminatory reasons for requesting to GATE test Student 2 in the 2016-2017 school year. Therefore, the preponderance of the evidence does not establish that the District's request to GATE test Student 2 was based on his race, and thus OCR finds the District did not violate Title VI with respect to this issue.

As a matter of technical assistance, OCR recommends that the District provide notice to parents/guardians of the process regarding the nomination, referral, testing, evaluation, selection, and assignment of students for participation in GATE programs and cluster classes to ensure parents/guardians are aware of the factors used to determine GATE participation and that these factors are not based on the race of the students.

Allegation 4: Whether the District retaliated against the Complainant for filing a complaint with OCR when it disciplined Student 1 on November XX, 2016 and when it prevented the Complainant and her husband from participating in a SSC meeting in February 2017.

Legal Standard

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts

from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory and nonretaliatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Findings of Fact

In an October X, 2016 email to the then-Superintendent and OCR, the Complainant described how Student 2 was being discriminated against in his GATE class because he is the only African American boy in the class.

In an October XX, 2016 email to the Director of Child Welfare and Attendance, then-Superintendent, Principal, Middle School Secretary, Director of Special Education, and District Clerk, the Complainant discussed how the Assistant Principal's searched Student 1 for allegedly stealing a cell phone. She wrote that she will file a complaint with OCR because the District has not responded to her complaints of race and disability discrimination against Students 1 and 2.

In her interview with OCR, the Complainant said that the School disciplined Student 1 on November XX, 2016 because she filed a complaint against them. The District provided documentation showing the suspension from December X, 2016 through December X, 2016 was related to an alleged sexual assault of a female student by Student 1 on November XX, 2016. The School investigated the alleged sexual assault, and the expulsion panel found sufficient evidence that Student 1 violated California Education Code 48915(c)(4) (committing or attempting to commit a sexual assault).

The Complainant also alleged that the District prevented her and her husband from participating in a SSC meeting in February 2017. The Complainant and her husband are members of the Middle School SSC. The Complainant originally told OCR that the Middle School cancelled the February SSC meeting, but the Middle School did not contact her and her husband about the February cancellation. Then, the Complainant told OCR that the District excluded her and her husband from attending the February 2017 SSC meeting. According to the Complainant, the then-Academic Administrator at the Middle School said the SSC was not going to be held due to her OCR complaint.

The Middle School Principal during the 2016-2017 school year stated that the February XX, 2017 SSC meeting was moved to March X, 2017. Rescheduling SSC meetings often happens because SSC meetings are scheduled months in advance, and when conflicts arise with new events, he would reschedule SSC meetings. The Middle School's Records Clerk stated that the

Principal would ask her to contact parents personally and advise them of SSC meetings, and if they did not pick up, she would leave a message.

On March X, 2017, there was a SSC meeting attended by four parents and the Principal. The Complainant and her husband were not present for the March 2017 SSC meeting. Because the SSC meeting did not have a quorum, it was cancelled.

Analysis

To determine whether the District retaliated against the Complainant, OCR first examined whether the Complainant engaged in a protected activity. In this case, the Complainant sent an email on October X, 2016 to the then-Superintendent and OCR about race discrimination against Student 2. In addition, she notified the Director of Child Welfare and Attendance, then-Superintendent, Principal, Middle School Secretary, Director of Special Education, and District Clerk on October XX, 2016 that she was planning to file a complaint with OCR because her complaints regarding race and disability discrimination of Students 1 and 2 to the District were unresolved. OCR determines that filing a complaint with OCR about racial and disability discrimination, including notifying the District of the filing, constitutes protected activity.

According to the Complainant, the District engaged in two adverse actions. First, the District suspended Student 1 beginning on November XX, 2016. OCR finds that disciplining a student constitutes an adverse action. The proximity in time between the protected activities of informing the District about an OCR complaint on October X and XX, 2016 and the alleged adverse action of disciplining Student 1 on November XX, 2016 suggests an inference of a causal connection between the two actions. However, the District provided a legitimate nonretaliatory reason for suspending Student 1 from December X, 2016 through December X, 2016. Specifically, Student 1 was found to have sexually assaulted a female student on November XX, 2016, and OCR found no pretext to undermine District's legitimate nonretaliatory reason for the discipline. With respect to whether the District retaliated against the Complainant for filing with OCR by disciplining Student 1, OCR concluded that there was insufficient evidence that the District was in violation of Title VI, Section 504, Title II and their implementing regulations.

The Complainant alleged a second adverse action: the District prevented the Complainant and her husband from participating in a SSC meeting in February 2017. The evidence shows that there was no February 2017 SSC meeting. The Middle School Principal during the 2016-2017 school year rescheduled the February XX, 2017 meeting for March X, 2017, and the Principal stated that rescheduling SSC meetings frequently occurs because SSC meeting dates are planned far in advance before site or District events are organized and present a conflict. According to the Middle School's Records Clerk, she calls parents on the SSC to inform them about a SSC meeting, and if they do not pick up, she leaves a message. The District has no documentation showing that there was a SSC meeting in February 2017. Because there was no February 2017 SSC meeting, there is insufficient evidence of the alleged adverse action that the District prevented the Complainant and her husband from participating in a SSC meeting in February 2017. OCR concluded that there was insufficient evidence that the District was in violation of Title VI, Section 504, Title II and their implementing regulations with respect to this issue.

Allegation 5: Whether the District failed to provide Student 1 with FAPE when it did not implement his IEP and when it disciplined him without following adequate evaluation and placement procedures.

Legal Standard

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 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.

The Section 504 regulations, at 34 C.F.R. §104.35(a), require school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. Subsection (c) requires that placement decisions be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources that is carefully considered and documented. Section 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. 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 act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

Findings of Fact

Background

In Student 1's May XX, 2016 triennial IEP, Student 1 has a primary disability of Specific Learning Disability and a secondary disability of Other Health Impairment. The IEP contains placement information, such as specialized academic instruction for 60 minutes, four times a day and home instruction for 300 minutes, one time per week, and supplementary aids and supports, such as cues to assist with behavior and remind Student 1 to stay on task, positive verbal reinforcements, extended time to complete tests and assignments, seating away from distractions, and the opportunity to re-take tests. Student 1 also has a Behavior Intervention Plan (BIP), dated October XX, 2015 for teasing and harassing peers and verbally threatening them with bodily harm when a conflict arises on the playground. According to the pages of the BIP provided to OCR, Student 1 becomes overstimulated and unable to focus in class.

Manifestation Determination and Expulsion Hearing

As with Student E and Student J, the District suspended Student 1 and recommended him for expulsion for his involvement in the November XX, 2016 sexual assault incident described above.

The District emailed as well as mailed the Complainant her Parent Rights and Procedural Safeguards as well as an IEP meeting notice for a meeting on December X, 2016.

On December X, 2016, there was a manifestation determination for Student 1. The Complainant prepared a written statement for the meeting, which the District provided to OCR in its data response. The Complainant wrote that Student 1's suspensions were unwarranted because his IEP was not being implemented and he was being bullied and harassed. She questioned whether there has been any interventions in class, monitoring in the classroom, or collaboration among School staff. She stated that Student 1's BIP should have been reviewed and modified.

The District provided OCR with documents regarding the December X, 2016 manifestation determination. The team included the Director of Special Education, School Psychologist, Principal, two special education teachers, and Student 1's parents. The Complainant asked that the educators involved with Student 1 be present, but the Director of Special Education responded that a general education and special education teacher are present so the IEP team is complete. The parents received procedural safeguards. The team reviewed the November XX, 2016 incident,³ including four witness statements identifying Student 1 as having touched a female student in the classroom without her consent. A police report was taken with the San Bernardino County Sheriff's Department on November XX, 2016 and two deputies came to the Middle School to interview the female student and eyewitnesses on December X, 2016. The team also reviewed Student 1's evaluation, diagnostic results, observations, and current IEP placement and services. The manifestation determination notes reflect that a BIP was "developed but has not been implemented to date." Regarding whether the conduct was a manifestation of Student 1's disability, the team agreed that the conduct was not a manifestation of his disability. Regarding whether the conduct was a result of failure to implement Student 1's IEP, the team could not come to a consensus. The Complainant presented her written statement,

³ The District's documents are inconsistent when they refer to the date of the sexual assault. Some documents, such as this Manifestation Determination document, state the misconduct occurred on November XX, 2016, but others say it occurred on November XX, 2016.

described in the preceding paragraph. The manifestation determination ended with the team not making a determination as to whether the conduct in question was the direct result of failure to implement the IEP and “no recommendations were made at his [sic] time.” On a document entitled “Manifestation Determination Discussion Guide,” the next steps included a referral for counseling and an IEP and BIP meeting. The document also stated that an IEP meeting was held on December X, 2016 to discuss change of placement given the “extension of the suspension pending expulsion in order to provide IEP services during suspension.” However, there is no information about what placement options were discussed.

According to the District’s narrative response, at the December X, 2016 meeting, the team determined the appropriate placement for Student 1 was a non-public school (NPS) and though Student 1’s father consented to this placement, the Complainant did not. However, the notes from the December X, 2016 manifestation determination meeting do not include any information about change of placement. OCR reviewed a February XX, 2017 Addendum/Revision to the IEP, which stated that the District’s last offer of FAPE, “in the IEP dated 12/X/16” was “for [Student 1] to attend Non-Public School with 360 minutes per day SAI-SDC and specialized transportation. The parents consented at that time.” OCR did not receive documentation of a December X, 2016 IEP meeting.

After the manifestation determination, the District placed Student 1 at a NPS, but he had not been attending because the Complainant disagreed with the placement. Student 1’s attendance record accumulated absences because he did not attend the NPS.

On December XX, 2016, the IEP team met again to review and make changes to Student 1’s BIP. The Complainant expressed her disagreement with placing Student 1 in a NPS and she asked for a regular education setting or else she would like independent study. The Director of Special Education explained why regular education and independent study are not appropriate. The Complainant also asked how the School was addressing Student 1 getting bullied, and the Director responded that the purpose of the meeting was to discuss whether and how Student 1’s behaviors impeding his learning but the team should also address his needs with regard to other negative behaviors’ impact on Student 1’s ability to access his education. The notes do not show the team followed up on the Complainant’s concerns about bullying, and the Complainant told OCR that the District never addressed the bullying. According to the IEP meeting notes, when the Complainant stated that the site administrators were not aware of Student 1’s IEP, the Director said the site administrators were aware but that they were not responsible for implementing his IEP. Ultimately, the Complainant did not give permission for implementation of the updated BIP until she could take it home and review it.

On February X, 2017, Student 1’s expulsion hearing took place. After hearing from the female student, the Paraprofessional, Student 1’s parents, and Student 1’s grandparents, the panel found there was sufficient evidence to make a finding that Student 1 committed the offense, but the panel had concerns about due process. According to the February XX, 2017 and February XX, 2017 emails from Director of Child Welfare and Attendance to the then-Superintendent and current Superintendent, the expulsion panel was concerned with the following: the manifestation determination was not completed; Student 1’s behavior support plan was not being followed; the Paraprofessional’s inappropriate conduct during the hearing; and given Student 1’s diagnosis of

attention deficit hyperactivity disorder (ADHD), there was no discussion during the manifestation determination of how this incident was not an impulsive act.

Following Student 1's expulsion hearing, the Director of Child Welfare and Attendance wrote an email, dated February X, 2017, to the then-Superintendent and current Superintendent expressing her many concerns about the hearing. The Director of Child Welfare and Attendance wrote that the Director of Special Education previously stated there were no special education concerns and the manifestation determination team had determined the case was appropriate to move forward to expulsion. Then, at the expulsion hearing, Student 1's parents said they did not agree with the manifestation determination team's decision, which caused the Director of Child Welfare and Attendance to check the manifestation determination documents. Upon doing so, she realized that the team did not make a decision on how to proceed because it did not answer whether the incident was caused by failure to implement the IEP nor did it answer if it was appropriate to proceed with discipline. Thus, the Director of Child Welfare and Attendance advised the panel that they had to recommend not to expel Student 1 based on procedural violations, even if they found sufficient evidence that Student 1 committed the offense. According to the Director of Child Welfare and Attendance, had she known about the manifestation determination team's deadlock, she would not have scheduled an expulsion hearing. Given the mistakes made by the District, the Director of Child Welfare and Attendance wrote that she would work with the Director of Special Education to issue a letter to the Complainant explaining the panel denied the expulsion due to "mitigating factors," though it believed the testimony was sufficient to substantiate that he still committed the offense. The Director of Child Welfare and Attendance said this would defend the District because the Complainant wants to appeal the suspension and "[a]lso, this way we aren't pointing blame at any one department."

The next day, February XX, 2017, the Director of Child Welfare and Attendance emailed the then-Superintendent and current Superintendent again. She explained the panel's concerns regarding Student 1's due process rights, which is why Student 1 was not expelled though Student E and Student J were expelled for the same facts, after the same witnesses testified before the same panel. She further wrote: "Somewhere in the process, our team made a mistake and we have to own up, move forward, put supports and a plan in place for the student, a plan in place for our team and hope the student takes advantage of the second chance, if not our team is now prepared and the student will receive the consequences this time."

In a letter dated February XX, 2017, the Director of Child Welfare and Attendance wrote to the Complainant and her husband that the expulsion panel met on February XX, 2017 to consider the Principal's recommendation to expel Student 1. Though the panel found there was sufficient evidence that Student 1 violated California Education Code 48915(c)(4), committing or attempting to commit a sexual assault, "mitigating factors were present that warranted the hearing panel deny the recommendation for expulsion and refer the case back to the IEP team to discuss educational placement. No further disciplinary action will be taken in this case. However, due to the findings of the panel, the suspension for this offense will remain on his disciplinary record."

Starting February XX, 2017, Student 1 began attending a free online school which is not operated by the District. According to the Complainant, Student 1 was not in school since he

was suspended for the November XX, 2016 incident, a suspension which began on December X, 2016. The Complainant told OCR on March XX, 2018 that Student 1 is currently a XXX grader in an independent study program at a school not operated by the District, and he is repeating a year due to the lack of learning while he was in the District.

The Complainant told OCR that Student 1 has been seeing a psychologist because he has been depressed due to the suspensions and attempted expulsion from the Middle School and his feeling that the Middle School administrators did not listen to him.

Analysis

OCR found sufficient evidence demonstrating the District failed to provide Student 1 with FAPE. First, the notes from Student 1's December X, 2016 manifestation determination contain an admission by the District that Student 1's BIP was "developed but has not been implemented to date." Failure to implement a BIP when it is part of a student's IEP or referenced in the IEP as part of the student's placement is a violation of the District's legal obligation to provide Student 1 with FAPE.

Second, the evidence shows the District did not complete Student 1's manifestation determination, yet it moved forward to an expulsion hearing. Section 504 and Title II regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. In this case, Student 1's December X, 2016 manifestation determination ended with the team not reaching a determination regarding whether the conduct in question was the direct result of failure to implement the IEP. Despite the IEP team's inconclusive manifestation determination, the District moved forward with an expulsion hearing for Student 1 on February X, 2017. The expulsion panel had concerns about due process because Student 1's behavior support plan was not being followed, the manifestation determination was not completed, and given Student 1's ADHD diagnosis, there was no discussion evident in the manifestation determination of how this incident was not an impulsive act. The Director of Child Welfare and Attendance expressed concerns about the expulsion hearing, which she stated should not have taken place because the manifestation determination was not conclusive. She admitted that there was a mistake in the process and that her team will move forward with supports and a plan in place. Expulsion is a significant change in placement, and the District failed to comply with due process procedures when it did not conclude the December X, 2016 manifestation determination.

The District acknowledged in internal emails that it made a mistake with regard to the manifestation determination and expulsion hearing, and it took steps to correct the violation. Specifically, the District did not expel Student 1. OCR also notes that the District took steps prior to the expulsion hearing to provide Student 1 with special education and related services. For instance, the District provided a referral for counseling for Student 1 at the December X, 2016 manifestation determination and held an IEP meeting on December XX, 2016 to review and make changes to Student 1's BIP. The District also placed Student 1 in a NPS on or around December X or X, 2016, and there is some evidence that Student 1's father consented to the placement.

In addition to the evidence demonstrating two instances in which the District failed to provide Student 1 with FAPE, this case also raised three areas of concern for OCR. First, at the December X, 2016 manifestation determination, the Complainant prepared a written statement which contained her concerns that Student 1 was being bullied and harassed. OCR is concerned that at the December XX, 2016 IEP meeting, there was no follow-up to the Complainant's expressed statement that Student 1 was bullied while at school. According to the IEP notes, the Director of Special Education acknowledged that the IEP team should address Student 1's needs with regard to the impact of other students' negative behaviors on Student 1's ability to access his education, but she emphasized that the purpose of the December XX, 2016 IEP meeting was to discuss Student 1's behaviors impeding his learning. The notes do not show the team subsequently discussed the bullying concerns. The notes as written could indicate that the team only focused on Student 1's behavior and not the behavior of other students, and the Complainant expressed to OCR that the District did not resolve her concern that Student 1 experienced bullying at the Middle School. As a matter of technical assistance, OCR reminds the District that bullying of a student with disabilities can result in a denial of FAPE under Section 504 and Title II and must be remedied.

Second, OCR is also concerned that the determination to place Student 1 in an NPS setting may have been made without ensuring that Student 1's parents were able to consider carefully all the information and placement options as required by the Section 504 regulations at Section 104.35(c). The District must ensure that a placement decision is made by a group of persons knowledgeable about the child and have procedures to ensure that information regarding placement is documented and fully considered. In this case, the District's narrative response stated that at the December X, 2016 manifestation determination, the IEP team determined the appropriate placement for Student 1 was a NPS, but OCR did not find any reference to placement in the documents from the District regarding the December X, 2016 meeting. Similarly, a February XX, 2017 Addendum/Revision to the IEP stated that the District's last offer of FAPE during the December X, 2016 IEP was an NPS placement which parents consented to, but in reviewing Student 1's cumulative and special education files, OCR did not find documentation from the District regarding a December X, 2016 IEP meeting. OCR notes that the February XX, 2017 Addendum/Revision to the IEP may be referring to the December X, 2016 meeting (and December X, 2016 was a typo), but as stated above, OCR did not review any documents from the December X, 2016 meeting regarding Student 1's placement. A change in placement, especially a significant one such as an NPS, should be appropriately documented, and documents should be adequately maintained in order to ensure the District is following Section 504 and Title II regulations.

Lastly, OCR is concerned that notes from the December XX, 2016 IEP meeting show that when the Complainant stated that the site administrators were not aware of Student 1's IEP, the Director of Special Education responded the site administrators were aware but that they were not responsible for implementing his IEP. The Director's statement appears contrary to Student 1's May XX, 2016 IEP, which contains placement and supplementary aids and supports that require implementation by site administrators, including teachers. The Director's statement that the Middle School administrators are not responsible for implementing Student 1's IEP, in response to the Complainant's concern that the IEP was not being implemented, raises concerns regarding the Middle School's implementation of Student 1's IEP.

OCR notes that Student 1 repeated XXX grade during the 2017-2018 school year though he was enrolled as a XXX grade student at the Middle School in the 2016-2017 school year. According to the Complainant, Student 1 is also receiving counseling due to his feelings of depression regarding how the Middle School administrators treated him, including the attempted expulsion and based on reported bullying and harassment at the Middle School. The IEP team previously noted the importance of counseling for Student 1 as they referred him to counseling on December X, 2016.

Conclusion

This concludes the investigation of this complaint.

To address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement (Agreement) which is aligned with complaint allegation 5 and the information obtained by OCR during its investigation. The Agreement requires the District to issue a guidance memorandum and provide training to all school psychologists as well as all school and District administrators involved in initiating or participating in manifestation determination regarding the circumstances under which a manifestation determination should be conducted, including the process for initiating and conducting the determination. Additionally, the Agreement requires the District to invite the Complainant to meet along with other people knowledgeable about Student 1 to determine whether Student 1 needs compensatory counseling and/or education services as a result of the District's failure to provide appropriate regular and/or special education or related services during the 2016-2017 school year.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the Agreement, OCR will close the 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, retaliate, 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, or Danette Ng, Educational Opportunities Specialist, at 415-486-5555.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure (1): Agreement

cc: Margaret Chidester, Counsel (via email only)