



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

April 17, 2017

Dr. Nellie Meyer  
Superintendent  
Mt. Diablo Unified School District  
1936 Carlotta Drive  
Concord, California 94519-1397

(In reply, please refer to case no. 09-17-1118.)

Dear Superintendent Meyer:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its resolution of the above-referenced complaint against Mt. Diablo Unified School District (District). OCR investigated whether: (1) the District had failed to provide the Student<sup>1</sup> with a free appropriate public education by failing to provide adequate procedures for evaluation and placement of the Student; failing to implement the Student's Section 504 plan; and by disciplining the Student without following adequate evaluation and placement procedures; and (2) whether the Student was subjected to harassment by other students and District employees on the basis of his disability and whether the District failed to respond appropriately and effectively to notice of the harassment.

OCR began its investigation of this complaint under the authority of Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended (Title II), and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the regulations.

Under Section 302 of OCR's Complaint Processing Manual,<sup>2</sup> a complaint may be resolved at any time prior to the conclusion of an investigation when a recipient expresses an interest in resolving the complaint and OCR determines that it is appropriate to resolve the complaint with an agreement during the course of an investigation. Prior to the completion of OCR's investigation into all the issues in this complaint, the District informed OCR it was amenable to resolving the complaint in this manner. OCR determined that it was appropriate to resolve the complaint before the conclusion of this investigation; as such, OCR and the District entered into the attached resolution agreement (Agreement) to resolve the issues alleged in this complaint.

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<sup>1</sup> OCR notified the District of the identities of the Student and the Complainant when OCR began the investigation. OCR is withholding their names from this letter to protect their privacy.

<sup>2</sup> OCR's Case Processing Manual is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

The applicable legal standards, findings of fact, and the reasons for our determinations are summarized below.

**Issue 1: Whether the District had failed to provide the Student with a free appropriate public education by failing to provide adequate procedures for evaluation and placement of the Student; failing to implement the Student's Section 504 plan; and by disciplining the Student without following adequate evaluation and placement procedures.**

### Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Section 104.35(c) of the regulations requires that placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must 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, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

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

The Student is currently in fifth grade at a District elementary school (School). He is an individual with a disability and has a Section 504 plan.

Regarding the alleged failure to follow adequate procedures in evaluating and placing the Student, a review of documents shows that the Student had an IEP from September 2013 through September 2014, at which point he was exited from special education and placed on a Section 504 plan; the Complainant told OCR that she agreed to this decision at the time, but has since regretted it. In December 2016, the Complainant requested that the Student be evaluated for an IEP, which was completed in March 2017. The Student was not found eligible for an IEP.

Regarding the alleged failure to implement the Student's 504 plan, OCR reviewed the Student's Section 504 plan, dated April XX, 2016. The plan included the following provisions:

- Quiet and private location will be provided to complete tests.
- Student will receive frequent restroom breaks as needed and determined by teacher.
- The teacher will verbally check for understanding with the student.

The Complainant alleged to OCR that the Student's fifth grade teacher (Teacher) failed to implement the above provisions. Specifically, she said that the Student was never provided a quiet, secluded testing environment; was punished by having his recess or free choice time taken away if the Student needed more than two bathroom privileges per week; and was yelled at by the Teacher when the Teacher checked-in with the Student and the Student expressed that he did not understand the material.

The District wrote in its written response to OCR that to its knowledge the accommodations noted in the Student's Section 504 Accommodation Plan were being implemented with fidelity. The District did not provide any documentation to show that the Section 504 provisions described above were being implemented.

Regarding the alleged student discipline without following adequate procedures, the Complainant stated that due to his disabilities, the Student has difficulty meeting the School's behavioral expectations and has been disciplined in the past with suspensions, detentions, and loss of privileges. The Student's discipline record does not show any suspensions for the current school year. The Complainant stated that starting in February 2017, the Teacher sent the Student to the front office for five minutes at a time, every 30 minutes throughout the school day, when the Teacher found the Student annoying. Later in the month, the Complainant informed OCR that the Student was switched to another fifth grade classroom and he has not been sent out of the classroom by his new teacher.

#### Analysis & Conclusions of Law

Regarding the alleged failure to follow adequate procedures for evaluating and placing the Student, OCR is dismissing this allegation due to untimeliness. Pursuant to Section 106 of OCR's Case Processing Manual, OCR will take action only with respect to those allegations that have been filed within 180 calendar days of the date of the alleged discrimination. In this case, the Complainant regrets the decision to exit the Student from special education services, which occurred more than 180 days prior to the filing of this OCR complaint.

Regarding the alleged failure to implement the Student's Section 504 plan, the Complainant alleged that the District failed to provide the Student with a quiet and private testing location, with frequent bathroom breaks as needed; and with check-ins by his Teacher for comprehension. The Complainant's allegation, if true, raises concerns about the District's implementation of these provisions of the Student's Section 504 plan and would demonstrate deficiencies in the District's compliance with Section 504 and Title II. Prior to the completion of OCR's investigation of this issue, the District entered into the Agreement to resolve this issue. The Agreement, among other things, requires the District to evaluate the Student for special education (completed in March 2017), to notify all individuals with responsibility for implementing the Student's Section 504 plan on their responsibilities, and to provide written guidance and in-service training to District staff on Section 504 compliance.

Lastly, regarding the alleged student discipline without following proper procedures, the evidence is lacking that the District engaged in disciplinary removals of the Student that resulted in a significant change in placement. The Student's discipline record shows that the Student was not suspended this school year. The Complainant's allegation that the Teacher frequently removed the Student from class in five-minute increments, if true, raises a concern but by the Complainant's own account, this situation lasted for a short period of time, at most a couple of weeks, before she took action to switch classrooms, which resolved the concern.

**Issue 2: Whether the Student was subjected to harassment by other students and District employees on the basis of his disability and whether the District failed to respond appropriately and effectively to notice of the harassment.**

**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, Title II and the regulations 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

In cases of student-to-student harassment, once a school district has notice of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A school district may violate Section 504, Title II and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3)

the district fails to take appropriate responsive action. These steps are the district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

### Findings of Fact

The Complainant alleged that the Student was subjected to disability-based harassment by three District employees. First, she alleged that a playground supervisor made derogatory comments to the Student and took away his lunch privileges for seemingly benign behavior such as telling another child that he cheated during a game or for purportedly asking a question that the school janitor found embarrassing. Second, she alleged that the School's substitute vice principal (VP) treated the Student unfairly in handling several incidents involving other students. For example, the VP took no action when another child injured the Student immediately after school, and in a separate incident, disciplined the Student when he denied making an inappropriate comment, telling the Student that was never acceptable to deny an incident when questioned by an adult. Finally, the Complainant alleged that the Teacher hated the Student and yelled and humiliated him in front of his peers, mocking the Student's low math scores and ripping up his assignments in class. When the Complainant met with the Teacher after school to discuss his treatment of the Student, the Complainant told OCR that the Teacher became indignant, and used profanity while describing the Student as annoying. On Feb. XX, 2017, the Complainant told OCR that the Student was switched to another fifth grade classroom, and he is doing much better.

Regarding the alleged harassment by his peers, the Complainant told OCR that other students picked up on the derogatory comments made by the Teacher and teased the Student with derogatory comments related to disability or calling him annoying. OCR interviewed the Student, who stated that few kids, whom he identified by name, were mean to him, calling him "weird" and other derogatory names, and in one instance, tried to beat him up. The District wrote in its response to OCR that the Student's disciplinary record includes documented incidents of the Student causing or attempting to cause physical injury, willful use of force, and willful defiance and disruption of school activities.

### Analysis & Conclusions of Law

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.

Here, the Complainant alleged that the Student was harassed by three employees and other students. The Complainant's allegation, especially the alleged comments by the Teacher and other students regarding the Student's academic abilities or aptitude, if true, would raise concerns and possible deficiencies in the District's compliance with Section 504 and Title II. Prior to the completion of OCR's investigation, including whether the alleged harassment was based on disability, whether it was sufficiently serious to deny or limit the Student's ability to

participate in or receive educational benefits, whether the District had notice of the alleged peer harassment, and whether the District's response to the alleged harassment was appropriate, the District entered into the attached comprehensive Agreement that resolves this issue. The Agreement, among other things, requires the District to convene a meeting for the Student to determine whether the Student needs compensatory and/or remedial services related to any adverse effects experienced by the Student due to the alleged harassment and denial of FAPE, to identify employees who will serve as the Student's and his family's point of contact to resolve any incidents of alleged harassment and/or denial of FAPE, to provide mandatory training to School staff on the District's use of positive behavior approaches and the District's prohibition on disability harassment, and to provide age-appropriate information to students at the School on what constitutes disability harassment.

### Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

When fully implemented, the enclosed Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in this case.

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, threaten 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 law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this letter, please contact Jenny Moon, civil rights attorney, at 415-486-5538 or [jenny.moon@ed.gov](mailto:jenny.moon@ed.gov).

Sincerely,

/s/

Anamaria Loya  
Chief Attorney  
San Francisco Regional Office

Enc.

Cc: Bryan Cassin, Administrator for Alternate Dispute Resolutions