



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

February 12, 2018

**VIA ELECTRONIC MAIL**

(gplutko@pyslud.org)

Dr. Greg Plutko  
Superintendent  
Placentia-Yorba Linda Unified School District  
1301 E. Orangethorpe Avenue  
Placentia, California 92870

(In reply, please refer to case no. 09-17-1480.)

Dear Dr. Plutko:

This letter is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation into the above-referenced matter. OCR investigated whether the Placentia-Yorba Linda Unified School District (District) discriminated against the Complainant's sons (the Students) on the basis of disability. The Complainant alleged that the Students were subjected to peer harassment based on disability and the District failed to respond appropriately to notice of the harassment, including failing to consider the impact of any harassment on the Students' ability to access a free appropriate public education (FAPE).<sup>1</sup>

OCR investigated this complaint pursuant to its authority under 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. OCR also investigated pursuant to its authority under 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 school district, the District is subject to Section 504, Title II, and their implementing regulations.

OCR gathered evidence in this investigation by reviewing documents and correspondence provided by the District and Complainants, and through interviews with District staff, Complainants and the Students. Prior to the completion of OCR's

---

<sup>1</sup> In previous communications with the District, OCR identified Complainants and the Students. In the interest of privacy, we will not do so here.

investigation, the District agreed to implement the attached Resolution Agreement, and OCR therefore did not complete its investigation. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

**Issue:** *Whether the Students were subjected to peer harassment based on disability and whether the District failed to appropriately respond to notice of that harassment, including failing to consider the impact of any harassment on the Students' ability to access their education, resulting in a denial of a FAPE.*

### 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.

Under Section 504, Title II, and the regulations, 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 if it fails 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 conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The school district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any

student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently severe, persistent or pervasive to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors.

In addition, 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. 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.

Under Section 504, if the school receives information that indicates that bullying on any basis is affecting the student's performance or behavior such that the student may no longer be receiving a FAPE, the school should convene the IEP or Section 504 team of a student with a disability to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving a FAPE.

If the school suspects the student's needs have changed, the IEP or Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the burden on the student with the disability to avoid or handle the bullying. In addition, when considering a change of placement, schools must continue to ensure that Section 504 services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

#### Facts Gathered to Date

The Students (Student 1 and Student 2, collectively Students) are XXXXXXXXXXXX twins. During the 2016-2017 school year, they were in XXXXX XXXXX at an elementary school within the District (School). Both students are eligible for special education and related services through Individualized Education Programs (IEP) under the Individuals with Disabilities Education Act of 2004 (IDEA). Student 1 meets eligibility criteria under

the category of Deaf/Hard of Hearing (DHH), and Student 2 is eligible under the categories of DHH and Speech/Language Impairment (SLI). The Students' most recent annual IEPs were held on February XX, 2017. Each Student's IEP provides for placement in the general education classroom. Student 2's IEP also provides for weekly support through DHH, speech and language, and resource specialist (RSP) services. Student 1's IEP provides for weekly RSP and DHH services; he does not currently receive speech and language services.

Complainants allege that the Students were discriminated against on the basis of disability when a group of students repeatedly harassed and bullied the Students throughout the 2016-17 school year and that the School failed to appropriately respond to notice of this harassment. Complainants reported to OCR that, rather than addressing the ongoing harassment, the School blamed the Students for most incidents, resulting in the Students being segregated from their peers and singled-out by staff and administrators. Additionally, Complainants allege that the District's failure to appropriately respond to notice of the harassment, including failing to consider the impact of harassment on the Students' ability to access their educational program, resulted in a denial of a free appropriate public education (FAPE).

The District acknowledged to OCR that it received multiple complaints of bullying during the 2016-17 school year and asserts that it took appropriate responsive action to address the complaints. The District told OCR that, in addition to phone conferences, in-person meetings, and emails between the District and Complainants, School staff investigated the alleged incidents, provided behavioral coaching and positive behavioral interventions and supports (PBIS), recess restrictions, and disciplinary consequences for involved students. Additionally, the District stated that it has taken proactive steps, including providing diversity training relating to DHH for the Students' classmates and bullying prevention training for teachers.

The District has adopted Uniform Complaint Procedures (UCP), which are set forth in Board Policy (BP) and Administrative Regulation (AR) 1312.3. BP 1312.3 states that the District "shall" utilize the UCP "to resolve any complaint alleging unlawful discrimination, harassment, intimidation, or bullying against any student" based on actual or perceived characteristics, including mental or physical disability." AR 1312.3 outlines the District's procedural obligations with respect to the UCP. It states that if a complaint is not filed in writing but the District receives notice of any allegation subject to the UCP, the District "shall take affirmative steps to investigate and address the allegations, in a manner appropriate to the particular circumstances." According to AR 1312.3, such a complaint should be investigated by the District's appropriate "compliance officer," resolved within 60 days of the District's receipt of the complaint, and all involved parties should be notified when a determination is made. BP 1312.3 lists the District's compliance officers for various categories of complaints. The Director of Educational Services is listed for "Title IX Sexual Harassment and any other Discrimination Complaints," the Director of Executive Services is listed under ADA Complaints, and the Student Services Administrator is listed under "Bullying, Intimidation Complaints." The AR also states that another compliance officer may be assigned to investigate and resolve the complaint and that, in such a case, the complainant and responded shall be promptly notified of

such an assignment. It goes on to state that “[i]n no case shall a compliance officer be assigned to a complaint in which he/she has a bias or conflict of interest that would prohibit him/her from fairly investigating or resolving the complaint.”

Information provided to OCR by the District and Complainants shows that beginning early September 2016, the Students were disciplined for various behavioral incidents, including becoming confrontational and aggressive when called “out” during competitive elimination games on the playground and roughhousing during lunch and P.E. The Students received disciplinary consequences that primarily included being held out of recess for one to three days following these incidents.

OCR’s review of email communications showed that early in the 2016-17 school year Complainants were responsive to the teachers and the Principal, making clear that Complainants did not condone any misbehavior by the Students. The evidence shows, however, that over time Complainants began to dispute the School’s representation of the facts of various incidents. For example, on October X, 2016, one of the Students’ teachers emailed Complainant to inform that, while playing a game at lunch, Student 1 became frustrated with another student and hit that boy on the head. Complainant replied on October XX, 2016, noting that Student 1 admitted hitting the other student but that he had done so in response to that student pulling and grabbing him to hold him back from the ball. A log of information related to the Students and created by the Principal (Principal’s Log) notes that she did not reach out to Complainant because a teacher had done so. As a consequence for this incident, Student 1 was kept in the office for the rest of the day, held out of recess for two additional days, and required to write an essay about the inappropriateness of his behavior and how to earn back the trust of the Principal and his teachers. No records were provided for OCR review to show whether any follow-up occurred with the other boy.

The District provided information showing that on or about October XX, 2016, the Students’ schedules were changed to address disruptive behavior and aggression between them.

On October XX, 2016, Teacher 1 emailed the Principal with copy to Teacher 2 to confirm that the Principal would be handling all discipline for Student 1 moving forward and stated that she believed Student 1 needed a behavior plan. In an email of October XX, 2016, the Principal confirmed the discipline arrangement and suggested that an IEP meeting be scheduled to discuss concerns regarding Student 1’s behavior.

On October XX, 2016, the speech language pathologist (SLP) replied to a request from one of the teachers for Student 1 to receive SLP support to address his difficulties on the playground. In her email she stated that Student 1 no longer qualified for speech services and would need to qualify in order to receive these services and suggested that if there were a concern that a “continuing speech/language impairment exists has been overlooked and is resulting in these behaviors, it would be necessary to do a new evaluation.” The District provided no evidence of any further discussion of evaluation.

The Principal’s Log records that on January XX, 2017, she conducted an investigation into a complaint from a female student that Student 2 had been poking her with his

violin bow during music class and had made what he believed was a “joke” about “Chinese eyes.” As a consequence, Student 2 received one full day of in-school suspension and was suspended from music class for two additional days, with his seat to be moved away from the female student upon his return. A discipline notice was sent to Complainants on January XX, 2017. The Complainants expressed their disagreement with the punishment and requesting a meeting with the District.

Review of documents provided by the District and Complainants shows that an incident occurred on January XX, 2017 during which Student 2 was repeatedly hit by fellow teammates with a ball during a competitive game. Student 1 came to his brother’s defense and hit one of the offending students with the ball. Complainants’ Log records that as the Students left the field after the incident, the other boys called them “losers” and said “see you suckers.” The initial report by the District to Complainants indicated that the Students were at fault, as was reported to a teacher by the boys who had first hit Student 2. According to Complainants’ Log, and corroborated in an OCR interview with the Students, when Student 1 approached his teacher to tell his side of the story (as his father had directed him to do), the teacher interrupted him and told him to be quiet and that she “didn’t care” what he had to say.<sup>2</sup>

Later that day, the teacher emailed the Principal, writing “it sounds like the four boys who came to me today were not being completely truthful” and that they were “taunting” Student 2 “quite a lot” and that Student A had thrown a ball at Student 2 before Student 1 “stepped in to defend his brother.” According to records, as a result of this incident, Student 1 lost five days of recess. No information was provided to OCR showing what consequences the other boys received.

On February X, 2017, the Principal and the District Student Services Administrator (SSA) met with Complainants. The Principal’s Log records that during the meeting, Complainants shared their concern that the Students were being labeled as “bad kids.” A statement prepared by the SSA in response to the OCR complaint (SSA’s Statement) refers to the January XX incident with the ball throwing as “the first complaint of bullying” and records that Complainant was “very angry” and felt that the teacher’s treatment of his children was “discriminatory.” Complainants’ Log states that during the February X meeting they spoke “extensively” about the Students being “bullied, harassed, physically attacked, discriminated against, mocked, teased, made fun of, badgered” and about a “gang mentality of [the] bullying students.”

The Principal’s Log records a meeting on February X, 2017 between herself, the SSA, Teacher 2, and the Students’ RSP to discuss services and interventions currently in place to support the Students and “to ensure [they] are doing all [they] can to provide a safe and inclusive environment for the boys. The Principal recorded that a behavior goal would be drafted to include in the IEPs for the upcoming February XX, 2017 IEP meetings.

---

<sup>2</sup> The Complainants repeatedly requested that the teacher apologize to the Students for not listening to them during the ball throwing incident. The Students confirmed that the teacher ultimately apologized.

Internal District emails indicate that the School site members of the Students' IEP teams met on February X and February XX, 2017 to discuss the upcoming IEPs. Complainants were not included in these meetings. The District provided OCR with handwritten notes February XX meeting. The notes list "consequences guidelines" that listed what consequences would be for various levels of inappropriate behavior.

Email records provided by both the District and Complainants show that an incident occurred on February X, 2017, while the Students played a game on the basketball courts. Based on review of the communications between the parties and the respective logs kept by each, a dispute exists as to who instigated the quarrel among the Students and their peers and whether the lunch supervisor who stepped in approached the incident in an impartial way. Complainants told the District they believed there was an "ongoing bullying situation."

The District provided OCR handwritten data collected on each of the Students by an aide between February X and May XX, 2017. The data collected relates only to the misbehavior of the Students.

On February XX, 2017, Teacher 2 emailed Complainant with copy to the Principal and Teacher 1 to report that while on recess duty she had seen the Students playing cards together and noted she was proud of their good decision-making. On February XX, 2017, Teacher 1 emailed the Principal to inform that the Students "still" weren't playing games. She asked if she should leave that alone or let them play and stated "[i]f we keep them off the playground, will we have enough observation time before the meeting?" The Principal replied that they should play and requested that Teacher 1 ask them about their choice to play cards.

On February XX, 2017, the IEP team was convened for the Students' triennial reviews. The team, with Complainants' approval, discussed both students within the same meeting. According to the notes, the District shared it had developed a goal to address playground conduct issues and had developed a contract to provides rewards and consequences for behavior. Complainants stated they were concerned about the contract's use of "rule of majority" to deal with disputes on the playground because there is a group of boys who seem to "gang up" on the Students and that, as written, the proposed behavior contract would make the Students "sitting ducks." The Principal shared that she had placed an aide on the playground to "keep an eye out" and be sure the Students were not being targeted. After some discussion, the issue of the behavior contract was tabled by the District in order to move the IEP along. At the end of the meeting, after discussing present levels of performance, progress, goals and services, the topic of the behavior contract was revisited. Complainants refused to sign acceptance of the behavior contracts.

The IEPs include behavioral goals relating to better handling being eliminated from competitive elimination games without exhibiting negative behaviors. Neither IEP includes either notes or goals concerning steps to be taken to address the impact on the Students of other students' behavior toward them.

A log of incidents recorded by Complainants throughout the year (Complainants' Log) records that after school on March XX, 2017, Student 1 called Complainant upset and crying. Student 1 told his father that while waiting in line to enter his after school program another student (Student A) approached him and said he didn't want Student 1 to feel bad but handed him a note or list that he said had another student's (Student B) thoughts about him. Student 1 showed the note to his afterschool teacher, who placed it in the Principal's box and sent an email notifying the Principal she had done so. OCR reviewed a redacted copy of the handwritten note in question, which lists the following: 1. "not fit"; 2. "don't know how to roast people"; 3. "def (talk weird)"; 4. "Cheat in life"; 5. "make fun of people"; 6. "They're d—" [the letters after the letter 'd' are redacted.]

Complainants' Log states that when Complainant arrived to pick the Students up from the School, they were both visibly upset and kept saying, "[w]e're not retarded." That afternoon, Complainants contacted the Principal and the SSA by email to requesting that the incident, which the Students' father classified as "another bullying incident" involving being attacked mentally.

In an interview with OCR, the Students told OCR that the classmate who created the list only wrote down what others had said about the Students and that he did not want to hurt their feelings but wanted the Students to know what was being said about them. The Principal's Log records that the list was an attempt to "create peace" on the playground and that the student who created the list had only recorded his "conversation about why [the Students] are not liked by their peers." The Principal's Log states that the classmate wrote the "views" of the other boy and that "[t]he list was never written with the intent to give to the boys, as originally first thought." It goes on to state that parents were contacted and "appropriate consequences given." Student 1 told OCR that there was no follow-up conversation to discuss how he or his brother felt after the incident.

On March XX, 2017, the Principal emailed the SSA and the District crisis counselor and wrote that she would need their support "in helping [Complainants] to understand their boys' role in all this."

On March XX, 2017, the Principal, the SSA, and Complainants met to discuss Complainants' concerns and to review the incident involving the list. The SSA reported that the student who provided the note did not mean to hurt or offend Student 1 and that he had "persuaded" the other student to say why he didn't get along with the Students. The District told OCR that Complainants were informed of the Uniform Complaint Procedure (UCP) process and offered an opportunity to transfer schools if they believed this was a good course of action.

On March XX, 2017, one of the Students' teachers emailed the Principal noting that when she had been on playground duty, she had noticed that the Students mostly played together and that when they come to her XXXXXXXX XXXX they always sit together with no other kids.

Student 1 told OCR that sometimes when he and his brother would try to sit with other kids at lunch, this group of boys would come whisper something in the other kids' ears



and the kids would get up and leave their table. The Students believed this was because the boys were telling them not to sit with them and when the Students would tell the aides, they would say it was the Students' fault. "A lot of times we just eat lunch by ourselves," Student 1 said.

During an email conversation of April X, 2017, Complainant told the Principal two students in Student 1's class were laughing at him and telling him he wasn't smart.

Documents provided by Complainants and the District record an incident occurring on April X, 2017, when Complainants were on campus for an event, during which the boys with whom the Students had been having problems were staring, laughing, making faces, and encouraging their group of friends to mock the entire family while the family waited for the front gates to open on the morning of the event. Complainants' Log states that Student 1 told his parents, "this is what they do to us every day." In subsequent email communication between the Principal and Complainants, the Principal noted that she would handle any discipline for the accused boys but pointed out that those boys told her that they felt Complainants were also staring at them and that she was sharing this to say that both had different perceptions of the incident. Complainant responded and pointed out one of the accused boys had been previously brought to the Principal's attention as bullying one the Students.

On April XX, 2017, one of the Students' teachers emailed Complainants to inform that Student 2 was not completing homework. Complainant replied, with copy to the IEP team, that Complainants had noticed that the Students' homework and test performance was getting worse because they were "continuously being bullied, mentally tormented and antagonized by multiple classmates," and referenced the March 2017 note/list. The Principal replied that she had been monitoring the playground herself for the last few weeks and checking in with staff and that she felt confident that the Students were not being bullied and were safe on the playground.

Email correspondence indicates that on May X, 2017, an incident occurred that resulted in Student 2 being prohibited from playing a game for two days for having told a student he would "karate chop his head off." The Principal's Log for the May X incident records that Student 2 told her he made the karate chop comment to the other student to "intimidate him" and scare him so he would leave Student 2 alone. There is no record of whether the Principal asked Student 2 what the other student was doing to him.

On May XX, 2017, Complainant emailed the Principal with copy to the IEP team and the SSA to report an incident during which one of the students from previous incidents kicked the ball away from Student 2. The SSA replied to the email stating that the District wants to know of any specific incidences of bullying or harassment and that the District would like to handle any problems at the school site. Additionally, he asked that Complainant approach staff and the Principal with courtesy and respect. The SSA included a link to the District's UCP form, which he reminded Complainant he had

offered at their previous meeting. Complainants reported to OCR, and the District confirmed, that the UCP link provided did not work.<sup>3</sup>

On May XX, 2017, Teacher 2 emailed the Principal to report that during a game, Student 2 became frustrated while playing and so was told to go play with the XXXXX XXXXX boys, who said to the teacher that Student 2 had better not whine or complain. The Principal forwarded this email to the SSA who responded that they would need to find out from Student 2 what happened and that it didn't sound like a viable strategy in the future to move him to the XXXXX XXXXXXX. He also asked if they would have reacted that way toward any XXXXX XXXXXXX. The Principal replied that she had conducted an investigation and was preparing a letter for Complainants with her findings. In her interview with OCR, the Principal reported she did not recall ever providing a letter to Complainants.

The Principal's Log for May XX, 2017, states that she asked Student 2 if he would like to meet with her, the student his father said was bothering him on the playground on May XX, and another adult to address his concerns. On May XX, 2017, Complainant told the Principal by phone that, per the family's attorney, the Principal should not meet with Student 2 and the alleged bully until after a meeting scheduled for May XX, 2017 with the District.

On May XX, 2017, the Principal's Log records that the same boy from previous incidents took a ball and hit Student 2's back. She removed him from the court and told him he is not to do that to Student 2. The boy told the Principal he did that to everyone. As a consequence, the Principal prohibited the boy from playing that game for the rest of the day.

On or about May XX, 2017, Student 1 reported to one of his teachers that a classmate told him that another boy had called Student 1 a "fat mean boy." Student 1 told OCR that the Principal called him to the office the same day to meet with two other boys, and told him that no one was supposed to tell him about the "fat, mean boy" comment. OCR saw no record of this incident in the Principal's Log.

During her interview with OCR, the Principal said that she tried to contact parents by phone about this and other incidents but they refused to return her calls. When asked about Complainants' request that all communication be in writing, the Principal told OCR that yes, Complainants had requested that, but she "chose not to do that" because she felt that as adults they should be able to come together to resolve problems. She reported to OCR that her refusal to communicate by email for these matters was not communicated to Complainants. Nor was a person designated as a contact person for Complainants moving forward.

On May XX, 2017, Complainants responded to an email from one of the Students' teachers regarding the Students' grades, stating that Complainants were also

---

<sup>3</sup> On or before August 30, 2017, during monitoring on another OCR matter (OCR case no. 09-16-1286), the District updated its link to the UCP complaint form and made it accessible to the public.

concerned about the Students' grades and that they had had difficulty focusing on their work because they continually thought about ongoing issues at school. The teacher did not reply.

On June X, 2017, an IEP meeting was held whose purpose, according the IEP addendum notes, was "to discuss academic progress and parent concerns."<sup>4</sup> Complainants told OCR that they made clear that they wished to discuss their ongoing concerns regarding harassment and bullying but were told that the meeting would focus only on academics. The notes reflect no discussion of Complainants' concerns regarding bullying or harassment.

In an interview with OCR, the Students told OCR that they felt picked on all year by a group of boys in their class. The said that the boys would talk about them when they were in line and cover their mouths so that the Students couldn't read their lips. They also perceived that the kids would change the rules while they were playing games so they could call the Students "out." The Students acknowledged to OCR that they sometimes did not respond appropriately, but said they felt very frustrated and hurt by what they perceived as this group of students trying to get them kicked out of the School by getting them in trouble. The Students told OCR that sometimes they didn't want to tell adults that they were being picked on because when they had, they were blamed for incidents.

The Students told OCR that their grades went down for a while because they would get distracted when trying to do their work. Student 1 said he was distracted thinking about what would happen or had happened during lunch. Student 2 did not specify what distracted him but said he "spaced out" during exams.

The District informed OCR that, in addition to the individual responses described above, the School provided student assemblies and training on several occasions. According to the Principal's Log, on February X, 2017, she held "Rules Refresher" assemblies by grade level to remind students of behavioral expectations and to "promote kindness, tolerance and respect." A February X, 2017 entry in the Principal's Log lists interventions the School had implemented to date: provided PBIS assemblies; informed staff of Complainants' concerns; monitoring of the playground; intervening when conflict arose and teaching social skills on the playground; providing clear behavioral expectations of the Students; assigning the Students as peer mentors on the primary playground. On May X, 2017, the School organized a tolerance training related to hearing loss in the Students' classes. On May XX, 2017, representatives from the County Office of Education provided training for staff on bullying, harassment, and school safety. Materials provided for OCR review indicate little if any emphasis was placed harassment based on protected categories. Staff were provided a booklet on bullying prevention. Additionally, the Principal secured a school-wide bullying assembly for students to occur in or about September 2017.

---

<sup>4</sup> Because of a scheduling miscommunication, only the Resource Specialist, speech therapist and, briefly, the principal attended this meeting.

Information provided by Complainants to OCR indicates ongoing issues between the Students and other students, including some of those involved in incidents from last school year. The Students have been subject to disciplinary measures as a result of at least some of these incidents.

Prior to the conclusion of this investigation, the District requested to resolve this matter pursuant to Section 302 of the CPM. OCR determined this complaint was appropriate for resolution under Section 302 because the facts gathered by OCR thus far raised compliance concerns, but OCR needed additional evidence to conclude the investigation and reach findings.

### Analysis & Conclusions of Law

#### *Notice of Harassment and District Response*

Based on a review of the facts gathered to date, OCR identified a potential deficiency with respect to the promptness, thoroughness, and impartiality of the District's response to notice of possible bullying and harassment of the Students. The data reviewed thus far indicates that there was ongoing conflict between the Students and a group of their peers and that, as early as October 2017, Complainants made the District aware of their belief that the Students were not being given a fair opportunity to share their version of events. At the very least the note/list incident of March 2017 provided notice that the alleged harassment/bullying might be related to the Students' disability. As spring 2017 progressed, Complainants became increasingly vocal about their belief that the Students were being subjected to ongoing harassment and discrimination.

Once the District has notice, whether constructive or actual, of potential harassment based on disability, Section 504 requires that it determine what happened and respond appropriately. Under the District's own policies, such notice requires a response through the UCP, whether or not the harassed students or his/her parents file a formal complaint. The investigation must be prompt and thorough, and the response to a finding of harassment must be designed to stop the harassment, eliminate the hostile environment, remedy the effects of the harassment on the student who was harassed, and prevent the harassment from recurring. In many cases, in order to be thorough such an investigation must examine the cumulative effects of a series of actions in creating a hostile educational environment for students.

Here, the evidence suggests that each complained of incident may have been looked at as a stand-alone event and that the District may not have considered the totality of the circumstances to determine whether the Students were subjected to a hostile environment due to ongoing harassment by a group of peers. For this reason, the evidence raised concerns as to whether the District's response was thorough.

Additionally, the District's UCP requires that any investigation be conducted by unbiased compliance officer with no conflict of interest. That the District elected to keep any handling of Complainants' allegations at the School site level raises a concern for OCR given that Complainants repeatedly expressed dissatisfaction with the School's handling of the matter and the Principal's involvement therein.

Further, OCR would expect that schools address bullying behavior in such a way that ensures the burden does not fall on the student with a disability. Here, the evidence raises concerns that the Students were isolated from same-age peers as a response to their allegations. To the extent that the District responded by gathering data, for example by assigning an aide to monitor the Students' interactions with others, the records provided to OCR show that the information focused on the Students' behavior rather than the actions of other students. The School also prepared behavioral contracts and behavioral goals that centered on reward and punishment of the Students without any conflict resolution and with limited discussion of the consequences for accused bullies, which might have actually *contributed* to a hostile environment for the Students and a resultant denial of FAPE. To make a finding with respect to this concern, however, OCR would need to review other students' records and interview additional witnesses.

### *FAPE Considerations*

When a student with a disability is subjected to harassment of any kind, whether related to the student's disability or not, a school district has an additional obligation to consider whether the harassment impacted the student's ability to access a FAPE. OCR's review of the information provided to date raises a concern with respect to this issue. The email communications between the parties show that the Students' classroom performance declined during the 2016-17 school year and that Complainants expressly indicated to the District their belief this was the direct result of peer harassment the Students alleged they were being subjected to. Furthermore, the District had concerns about the Students' aggressive behaviors in response to being eliminated in games and yet, to the extent that the District responded to concerns about falling grades or concerning behavior, the evidence suggests it did so primarily through the lens of discipline as opposed to disability. The IEP meeting notes that OCR reviewed did not expressly address any possible adverse impact of harassment on the Students' ability to access their education. As part of an appropriate response to alleged harassment, a district should consider the findings of a thorough and impartial investigation and all information relating to changes in a disabled student's needs, including, if necessary, any additional evaluation or assessment. While not specifically at issue in this matter, as a matter of technical assistance, OCR reminds the District that any changes to the IEP must be made in accordance with the procedural requirements of IDEA, including those governing parental participation.

Under Section 302 of OCR's *Complaint Processing Manual* (CPM), OCR complaints may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest and OCR determines that it is appropriate to resolve the complaint with an agreement reached during the course of the investigation. For OCR to reach findings in these expressed areas of concern, OCR would need to conduct additional investigation, including interviewing additional District staff and other students involved in the multiple reported incidents and the response to those incidents, and reviewing the disciplinary records of the other students involved. With respect to the alleged denial of FAPE, OCR would also need to obtain further documentation of the

Students' current academic and social-emotional status and interview participants in the Students' IEP meetings.

#### Summary of Resolution and Conclusion

Prior to the conclusion of OCR's investigation, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement (Agreement). The Agreement is aligned with the complaint allegations and the information obtained by OCR during its investigation, and it addresses the concerns identified by OCR during the investigation to date.

Under the Agreement (attached hereto), the District will conduct an investigation in accordance with its UCP policies into whether the Students were subjected to disability-based peer harassment and whether any harassment or any failure on the part of the District to appropriately respond resulted in a hostile environment. In addition, the District will provide age-appropriate training for students at the School on bullying and harassment, particularly based on perceived or actual disability, and site-level administrators and staff will receive training on how to appropriately respond to notice of disability-based harassment, including the duty to investigate allegations of harassment or bullying based on a disability, designation of a person responsible for receiving and responding to such complaints, and monitoring by OCR of the District's implementation of these practices. Finally, based on the findings of its investigation, the District will convene the Students' IEP teams to determine whether compensatory or remedial services are necessary to remedy any loss of FAPE resulting from either any harassment or any failure by the District's to appropriately respond to notice thereof.

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

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. A 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 anyone because they filed a complaint or participated in the

complaint resolution process. If this happens, a complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Maria Asturias, Civil Rights Attorney, at (415) 486-5595.

Sincerely,

/s/

Katherine Riggs  
Acting Team Leader