



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

October 16, 2018

VIA ELECTRONIC MAIL

Nancy Albarrán
Superintendent
San Jose Unified School District
855 Lenzen Avenue
San José, California 95126

(In reply, please refer to case no. 09-18-1341.)

Dear Superintendent Albarrán:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against San José Unified School District (District). The complainant¹ alleged that the District had discriminated against his son (Student) based on disability.

OCR began its investigation of this complaint under the authority of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination on the basis of disability by public educational entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the implementing regulations.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, the District informed OCR that it was amenable to resolving the complaint in this manner. OCR and the District entered into the attached agreement to resolve the complaint. Accordingly, OCR did not complete its investigation of the complaint or reach conclusions regarding the District's compliance with Section 504 and Title II. The applicable legal standards, the facts OCR gathered during its preliminary investigation and the disposition of the allegations are summarized below.

¹ OCR notified the District of the complainant's and Student's names at the beginning of the investigation. We are withholding their names from this letter for privacy reasons.

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. 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 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.

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.

Facts

OCR's preliminary investigation showed the following:

The Student was enrolled in the XXXXX grade in the District during the 2017-2018 school year and had an Individualized Education Program (IEP). The complainant reported to the District that the Student had been harassed based on his disability on several occasions at school and had experienced unhappiness and school apprehension as a result. The complainant also alleged that

due to the Student's social skills deficits, the Student was unable to recognize when his peers engaged in harassing conduct toward him. Finally, the complainant alleged that the District's responses to his complaints of harassment had not remedied the effects of the harassment on the Student.

In its data response, the District acknowledged receipt of the complainant's complaints, and described its efforts to address his concerns, including convening IEP meetings and investigating the incidents listed in his complaints. The District also provided correspondence between several District staff members that included discussion as to when to resolve allegations or concerns of bullying or harassment at the school site and when to bring such concerns to IEP meetings.

Resolution and Conclusion

In September 2018, OCR contacted the District to discuss the complaint, and the District indicated its interest in voluntary resolution. As noted above, under OCR's procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, the District entered into the attached agreement, signed October 8, 2018, to resolve the complaint. The agreement requires the District to (1) hold an IEP meeting for the Student; (2) develop a support plan for the Student; (3) draft and circulate guidance that clarifies the District's responsibilities to students with disabilities who report allegations of harassment based on disability or any other basis; and (4) investigate any complaints of disability harassment filed by the complainant that are pending with the District. Since the District agreed to voluntarily resolve the complaint, OCR did not complete its investigation or reach conclusions regarding the District's compliance with Section 504 and Title II with respect to this complaint. OCR will monitor the District's implementation of the agreement.

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 this complaint as of the date of this letter and notifying the complainant by concurrent letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

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

OCR thanks you for your cooperation in resolving this complaint. If you have any questions, please contact the case resolution team.

Sincerely,

/s/

Zachary Pelchat
Team Leader

cc: Jodi Lax, Associate Superintendent, Division of Instruction
Dane Caldwell-Holden, Director, Student Services