



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

May 26, 2020

Via Electronic Mail

Dr. David Hansen
Superintendent
Riverside Unified School District
3380 14th Street
Riverside, California 92501

(In reply, please refer to case no. 09-18-1616.)

Dear Superintendent Hansen:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Riverside Unified School District (the District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether, (1) the District failed to provide the Student with a free, appropriate public education (FAPE) when the District failed to implement the Student's IEP plan during the 2017-18 school year, including failed to implement the Student's amplification system, provide an American Sign Language (ASL) interpreter, and provide closed captioning in accordance with the Student's IEP plan. OCR also investigated whether, (2) the District received notice that the Student was subjected to peer harassment on the basis of disability, and the District failed to provide a prompt and equitable response to notice of the harassment; and whether, (3) the District failed to ensure that communication with the Student in the District's afterschool program was as effective as communication with other students in the program and failed to give primary consideration to the Student and his parent in determining which auxiliary aids and services were necessary to provide such effective communication.

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

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

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and the Complainant and interviewing the Complainant. Before the conclusion of OCR's investigation, the District expressed interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual,² and OCR determined it was appropriate. The legal standards, facts gathered, and resolution of the issues investigated are summarized below.

Issue 1: Whether the District failed to provide the Student with a FAPE when the District failed to implement the Student's IEP plan during the 2017-18 school year. Specifically, the District failed to implement the Student's amplification system, provide an ASL interpreter, and provide closed captioning in accordance with the Student's IEP plan.

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 regulation

When a District knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, they have an affirmative obligation to provide effective communication under Title II.³ Under Title II, districts must provide appropriate "auxiliary aids and services" where necessary to provide effective communication;⁴ that is, schools must provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district. Title II requires covered entities, including public schools, to give "primary consideration" to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.⁵

The Title II regulations require that when a public school is providing auxiliary aids and services that are necessary to ensure equally effective communication, they must be provided in "accessible

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

³ 28 C.F.R. § 35.160 (a)(1) provides "A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."

⁴ 28 C.F.R. § 35.160(b)(1).

⁵ 28 C.F.R. § 35.160(b)(1).

formats, in a timely manner, and in such a way as to protect the privacy and independence” of a student with a disability.⁶ The auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. For the auxiliary aid to be provided in a timely manner, it means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. If the student is waiting for the auxiliary aid or service, districts should keep the (student and parent) informed of when the auxiliary aid or service will be provided.

A District must ensure that it meets both its FAPE obligations as well as its obligation to provide effective communication under Title II and that none of the student’s rights under either law are diminished or ignored. If the special education and related services provided as part of FAPE are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met.

Factual Findings

The District’s records state that the Student has a primary disability of “Other Health Impairment” (OHI) and a secondary disability of “hard of hearing.” The Complainant told OCR that the Student has hearing loss (Deaf/Hard of Hearing, or DHH) and related disabilities. The Complainant also told OCR that the Student wears hearing aids in both ears, as well as has a “VP shunt” in his head.

The Complainant told OCR that the Student was XX years old and in the XXXXX grade at a middle school (School) during the 2017-2018 school year. The District provided OCR with a copy of the Student’s March X, 2017 Individualized Education Program (March 2017 IEP) plan; it stated that the Student qualified for special education (SPED) services and was provided with accommodations and supports including a Hearing Assistive Technology (HAT) device for amplification; an amplification system; and American Sign Language (ASL) interpretation for all academics. The District also provided OCR with a copy of the October X, 2017 amendment to the Student’s March 2017 IEP plan, which stated that ASL interpretation would be provided for 410 minutes a day; as well as with a copy of the Student’s March 2018 IEP plan, which specified that the Student’s amplification system should be used in all his classes.

Amplification System

The Complainant told OCR that the amplification system provided by the District consisted of two things: (1) a personal wireless FM amplification device (personal FM device), which consisted of a transmitter with microphone for the teacher and a receiver for the Student, and (2) a sound field system in the Student’s classrooms.

The Complainant told OCR that the District failed to implement the amplification system by, (1) not promptly remedying connectivity issues with the Student’s personal FM device; (2) not using

⁶ 28 C.F.R. § 35.160(b)(2).

the sound field system while the Student's personal FM device was not working properly; and (3) after the Student's personal FM device was replaced in March 2018, not providing training to the Student's teachers, ASL interpreters, and afterschool staff on how to use the new personnel FM device, which resulted in staff not using it or using it improperly.

With regard to her allegations that the District failed to promptly remedy connectivity issues and did not provide a sound system, the Complainant stated that the District provided the Student with his personal FM device in August 2017, and that starting in October 2017, the Student began experiencing connectivity issues, such as static, between the FM device and his hearing aids. The Complainant stated that the connectivity issues were caused by interference from the School's Wi-Fi network, and that she reported the issues to the School. OCR reviewed the Student's October 2017 IEP plan amendment and it included a notation about Wi-Fi interference. The notation also stated that DHH staff were addressing the issue, and that the Student's teachers would use the sound field system in the meantime.

The Complainant stated that the District did not order the Student a new personal FM device until January 2018, and that it was not provided to the Student until March 2018. The Complainant stated that during the intervening time, the Student did not have other amplification because the sound field system in the Student's classroom had been removed while the Student was on medical leave from late October until early December 2017. The Complainant stated that she complained to the Student's DHH teacher in January or February 2018 that the sound field system had been removed, but that the DHH teacher did not do anything. The Complainant told OCR that she complained during the March 2018 IEP meeting that the sound field system had been removed. OCR reviewed notes from the March 2018 IEP meeting, and it did not include this information.

The District stated that it took immediate corrective action whenever it was informed that the Student's personal FM device was having connectivity issues. The District stated that these corrective actions included inspecting, troubleshooting, and eventually replacing the Student's personal FM device in March 2018, as well as ensuring that the new device connected with the Student's hearing aids. The District stated that it determined that the Student's FM device, not the School's Wi-Fi network, caused the connectivity problems, as well as that any connectivity issues after it replaced the Student's FM device were caused by the Student's hearing aids, and that the connectivity issues were not completely resolved until the Student's hearing aids were replaced in May 2018.

The District provided OCR with the DHH department log as well as with notes from the Student's October 2017 and March 2018 IEP plans, which identified problems with the Student's amplification and the steps DHH staff took to address them. A DHH log entry dated May XX, 2018 stated that the Student had received new hearing aids and the FM system worked properly. The District also provided OCR with copies of DHH service log entries stating that the sound field system had been installed on October X, 2017 and removed on May XX, 2018.

The Complainant told OCR that the Student was without amplification during periods in March 2018, when his substitute ASL interpreters did not use his new personal FM device because they were not familiar with it, the Student's hearing aids were broken, the sound field had been

removed. The Complainant told OCR that she complained to the District more than once but that it did not do anything in response. The Complainant told OCR that she complained again, in August 2018, that teachers were not using the Student's personal FM device. The District provided OCR with a copy of the Complainant's August XX, 2018 email to the Principal and the Student's DHH teacher complaining that staff had not received training; and with the DHH teacher's response that the Student's teachers "were not unfamiliar with amplification systems in general." The District's narrative response stated that staff received training on August XX, 2018.

ASL Interpretation

The Student's March 2017 IEP plan stated that an ASL interpreter would be provided for all academic classes. According to the Complainant, the District failed to provide an ASL interpreter approximately two or three times during the period from October 2017 to May 2018, including on February X, 2018 when the Student became ill and went to the nurse's office and his interpreter subsequently left campus. The Complainant stated that the Student was left alone in the nurse's office without ASL interpretation for approximately 45 minutes before she arrived. The District's stated that after this occurred, the interpreter was not be assigned again to the Student.

The Complainant told OCR that the District's failure to provide ASL interpretation continued during the 2018-2019 school year, including on August X, 2019 when the Student was not provided with an ASL interpreter for "Spirit Day," which was the Student's XXXXX grade orientation day; from August XX-XX, 2018, during which the District assigned five different interpreters to the Student who did interpret everything that was being said; as well as on November XX, 2019. The Complainant provided OCR with copies of emails during these time periods showing that she complained to the District. The District's narrative response disputed that an interpreter was not present on August X, 2018; as well as stated that it provided different interpreters in response to each of the Complainant's complaints during August XX-XX, 2018.

Closed Captioning

The Student's March 2017 and March 2018 IEP plans included Closed Captioning (CC) as an accommodation for state-mandated assessment tests, but not otherwise as an academic accommodation. According to the District's narrative response, this was because the IEP team had determined that the Student's personal FM device, the sound field system, and ASL interpretation provided adequate access for the Student. According to the Complainant, however, the Student needed CC as an accommodation for an online reading program that was used in the Student's Spring 2018 English class. According to the Complainant, the first two steps of the reading program had CC, but that steps three and four, which included a timed assessment, did not have CC. The Complainant stated that she complained to the Student's English teacher, counselor, and the School's Assistant Principal that CC was not working, and that they tried but were not able to remedy the issue. The District provided OCR with a copy of a May XX, 2018 email from the Student's counselor to the Student's English teacher stating that the Complainant had expressed concern that the Student was missing work due to the lack of closed captioning and asking if there were other accommodations that could be provided to the Student.

The District's narrative data response stated that staff investigated and agreed that CC was not working during the timed assessment, and that it tried remedying the issue but ultimately used a different means to assess the Student's reading comprehension. The District stated that it informed the Complainant on May XX, 2018 by email, as well as during the August XX, 2018 IEP meeting, that the Student was not penalized for the timed assessment, and provided OCR with documentation confirming that it had informed the Complainant that the Student was not be penalized for the portions of the test that were not closed captioned. According to the Complainant, however, this did not address the broader issue that the reading program was not accessible to the Student, which impacted his overall course grade, and more significantly, his ability to learn to read. The Complainant told OCR that the Student is currently reading below grade level.

Additionally, the Complainant stated that movies were shown in the Student's English class without CC. For example, according to the Complainant, the English class teacher used "YouTube CC" while showing the movie "The Outsiders" and it did not accurately reflect the dialogue. The Complainant stated that because this English class was not accessible to the Student, she moved him to a different English class. The Complainant also stated that the Student was not provided with CC while watching movies during the District's afterschool program, Primetime. The Complainant stated that as recently as March 2020, the Student was not provided with CC in a math class.

Legal Analysis and Conclusions

OCR was concerned that the District may have failed to implement the amplification supports included in the Student's March 2017 and March 2018 IEP plans. The evidence gathered to date showed that the District had notice of connectivity issues with the Student's personal FM device as early as October 2017; did not replace the FM device until March 2018; and that the connectivity issues persisted until May 2018, a duration longer than half of the school year.

OCR was also concerned that the District may not have implemented the sound field system accommodation during winter and spring 2018, when the Student was having problems with his personal FM device. The Complainant stated that the sound field system had been removed sometime between October and December 2017; however, the District provided OCR with documentary evidence of its numerous attempts to fix the connectivity issues, as well as evidence that its sound field system was installed in October 2017 and not removed until May 2018.

OCR was also concerned that the District may not have provided the Student with consistent ASL interpretation. The evidence gathered to date showed that an interpreter was not provided for 45 minutes while was in the nurse's office on February X, 2018, and that the Complainant reported problems with the Student's interpreters in August 2018 as well as not having an ASL interpreter as recently as November XX, 2019.

OCR was concerned that CC was not available for some content, including an online reading program and movies in the Student's English class. The District agreed that CC was necessary for the Student to utilize the reading program, that CC was not functioning properly, and that it tried but was unable to remedy the issue. Although the District stated that the Student's grade was not negatively affected by his inability to utilize the timed-test section of the reading program, OCR

was concerned that the inaccessibility of the program may have contributed to delays in his reading proficiency and to his learning, more generally, and that CC may not have been provided as recently as March 2020.

Issue 2: Whether the District failed to ensure that communication with the Student in the District’s afterschool program was as effective as communication with other students in the program and failed to give primary consideration to the Student and his parent in determining which auxiliary aids and services were necessary to provide such effective communication.

Legal Standards

When a District knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, they have an affirmative obligation to provide effective communication under Title II.⁷ Under Title II, districts must provide appropriate “auxiliary aids and services” where necessary to provide effective communication;⁸ that is, schools must provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district. Title II requires covered entities, including public schools, to give “primary consideration” to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.⁹

The Title II regulations require that when a public school is providing auxiliary aids and services that are necessary to ensure equally effective communication, they must be provided in “accessible formats, in a timely manner, and in such a way as to protect the privacy and independence” of a student with a disability.¹⁰ The auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. For the auxiliary aid to be provided in a timely manner, it means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. If the student is waiting for the auxiliary aid or service, districts should keep the student (and parent) informed of when the auxiliary aid or service will be provided.

A District must ensure that it meets both its FAPE obligations as well as its obligation to provide effective communication under Title II and that none of the student’s rights under either law are

⁷ 28 C.F.R. § 35.160 (a)(1) provides “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”

⁸ 28 C.F.R. § 35.160(b)(1).

⁹ 28 C.F.R. § 35.160(b)(2).

¹⁰ 28 C.F.R. § 35.160(b)(2).

diminished or ignored. If the special education and related services provided as part of FAPE are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met.

Factual Findings

The Complainant told OCR that the Student attended “Primetime”, an afterschool program for District middle school students, at the School from 2:50-5:30 PM on Monday, Tuesday, Thursday, and Friday; and from 12:45-5:30 PM on Wednesday. The Complainant told OCR that on most days she picked up the Student at 5:45 PM. The Complainant stated that during Primetime, students played video games, watched movies, and participated in arts and crafts. The Complainant stated that she was not aware of academic activities during Primetime.¹¹

The Complainant told OCR that in August 2017, she met with the District’s Afterschool Program Coordinator (Primetime Coordinator) and requested an ASL interpreter for the Student during Primetime. According to the Complainant, the Primetime Coordinator responded that the District did not have funding to pay for an interpreter during Primetime. The Complainant told OCR that, as a result, the Student had no ASL interpretation during Primetime for the first month of the 2017-2018 school year. The Complainant told OCR that she met with the Primetime Coordinator in September 2018 and again requested an ASL interpreter for the Student during Primetime, and that the District responded by providing the Student with one hour of ASL interpretation during Primetime. The Complainant told OCR that one hour was not sufficient, given that the Student had to communicate with others throughout the entire program. IEP documents provided by the District confirmed that starting in mid-September 2017, the Student was provided with one hour of ASL interpretation during Primetime. Based upon the schedule provided by the Complainant, OCR calculated that the Student had ASL interpretation for 5.4 of the 15.4 hours per week that he attended Primetime during the period from October 2017 to May 2018.

The Complainant told OCR that the Student was not able to communicate effectively with staff and his peers during the ten hours of Primetime per week when he was without an ASL interpreter, because he was also without his personal FM device, which was required to be left in the nurse’s office overnight to charge, and because there was no sound field system at the Primetime site. The Complainant told OCR that she complained during the October 2017 and March 2018 IEP meetings that more ASL interpretation was needed for the Student at Primetime, as well as that she asked for additional communication support services, but the IEP team refused to discuss it and stated that Primetime was a “separate program.”

The District’s narrative response stated that the Student’s IEP team met on October X, 2017 and discussed the Complainant’s renewed request to have an ASL interpreter present throughout Primetime. The District stated that the IEP team considered the Student’s communication needs in determining that the Student would receive interpreter services during the academic portion of Primetime only, as such services constituted an academic need. The District further stated that the IEP team deferred the determination of necessary services for the Student’s participation in the remainder of the program, which consisted of nonacademic activities, to the Primetime

¹¹ http://riversideunified.org/departments/instructional_services/after_school_programs/p_r_i_m_e_time

Coordinator and that the program would seek funding for it. OCR reviewed a copy of the Student's October 2017 IEP plan amendment, which included a notation that Primetime interpreter time had been discussed; that the one hour of ASL interpretation was paid for out of the SPED budget because it was an academic need, and that Primetime had requested additional funds to pay for additional hours of ASL interpretation for the Student. The notes further stated that a meeting would be held outside of the IEP meeting to address additional interpreter services.

The District did not state whether a meeting was ever held, apart from the October 2017 IEP meeting, to address the Complainant's request for additional interpretation services. The Complainant told OCR that the Primetime Coordinator was not part of the IEP team and was not present at the October 2017 IEP meeting; the District provided OCR with a copy of a narrative prepared by the Primetime Coordinator stating that the Principal had informed her on October X, 2017 that she [the Primetime Coordinator] did not need to attend the IEP meeting. The Student's March 2018 IEP plan, which also included one hour of ASL interpretation during the academic portion of Primetime, included a notation that the Primetime teacher had been excused from attending; there was also no evidence that the Primetime Coordinator had attended.

The District provided OCR with a copy of an October X, 2017 email from the District's "Director of Community Engagement and Extended Learning" to the District's "Assistant Superintendent, Pupil Services & SELPA, Special Education" requesting additional funding for the Student to have an ASL interpreter for all of Primetime. The District did not provide OCR with the Assistant Superintendent's response.

The District also did not provide further information as to why the Student's IEP team determined that the Student needed to effectively communicate during only the academic portion of Primetime; whether the Primetime teacher or Primetime Coordinator was consulted with regard to this determination; why it deferred the determination of what aids and services the Student needed in the non-academic portion of Primetime to the Primetime Coordinator; and how she made that determination as to what services the Student needed to effectively communicate during Primetime, and whether the Primetime teacher was consulted with regard to this determination.

The Complainant stated that as a result of not having his personal FM device or full-time ASL interpretation during Primetime, the Student was not able to communicate effectively with staff and other students, which led to him being harassed based upon his disability (see Issue 3, below). The Complainant further stated that without full-time interpretation and other supports, the Student was excluded from activities such as a trip to a baseball game and a trip to a water park. The Complainant stated that she complained to the District's Primetime Coordinator and to the Primetime teacher that she was not made aware of the water park field trip opportunity, and that they responded that the Student wouldn't want to go to it because he was an introvert. The Complainant could not recall specifically when the water park field trip occurred, and the District's narrative response did not include information about it.

Legal Analysis and Conclusion

OCR was concerned that the District may have failed to ensure that communication with the Student during Primetime was as effective as communication with other students in the program,

including failing to give primary consideration to the Student and his parent in determining which auxiliary aids and services were necessary to provide such effective communication. OCR was further concerned that the Student was without ASL interpretation for 65% of the time he was at Primetime each week, and that without the means to communicate effectively he may have been subjected to disability-based harassment as well as may have been excluded from District-sponsored events such as Primetime field trips.

The District's narrative response stated that the IEP team considered the Student's communication needs when determining that he would receive one hour of ASL interpretation, and that it deferred the decision of whether additional ASL interpretation or other supports were needed during non-academic times to the program's coordinator. However, the evidence gathered to date does not include information about why the District deferred this important determination to the Primetime Coordinator; whether she made the determination; and if so, whether she consulted the Primetime teacher and what the decision was based upon. The evidence also did not indicate what occurred during the academic portion of Primetime. Instead, the evidence gathered to date, including the Primetime Coordinator's narrative statement and the Assistant Superintendent's email, showed that funding concerns played a central role in determining whether the Student received additional interpretation during Primetime.

Issue 3: Whether the District received notice that the Student was subjected to alleged peer harassment on the basis of disability and the District failed to provide a prompt and effective response 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.

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 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.

Factual Findings

The Complainant told OCR that during 2017-2018, the Student was repeatedly subjected to peer harassment based on his disability, that she reported the harassment to the District, and that it did not provide an effective response including failed to adequately investigate and take steps to prevent the harassment from recurring. The Complainant stated that the peer harassment included students making fun of the Student's speech, which she stated is different because he is deaf; taking his possessions; taking his money; trying to get him in trouble; and in June 2018, assaulting him. More specifically, the Complainant described the following incidents.

On December X, 2017, during Primetime, Student C pulled off the Student's beanie, revealing a bandage covering an incision from a recent medical procedure. Other students made fun of the Student for wearing the beanie. The District stated that the Assistant Principal responded by speaking to Student C; as well as sent an email to the Student's teachers, including his Primetime teacher, informing them that other students were telling the Student to take off his beanie, and that staff should tell students that the Student was allowed to wear the beanie and that they (the other students) should focus on their school work. The District provided OCR with a copy of the Assistant Principal's December X, 2017 email.

On March XX, 2018, Student G grabbed the Student's backpack, began taking things out of it, instructed the Student to throw away his backpack and then, after he did so, gave the Student a different backpack and told him to use it instead. The Student told his parents about this incident and that he was afraid of Student G. The Student also complained to his parents that another student (Student S) was pressuring him to look at inappropriate content on his (the Student's) School-issued Chromebook. The Complainant told OCR that she emailed the Student's counselor, English teacher, DHH teacher, and other District administrators and informed them about Students G's and S's actions and asked that a teacher monitor the students' interactions.

The District provided OCR with a copy of the March XX, 2018 email exchange between the Complainant and the Student's English teacher in which the Complainant alleged that Student S was pressuring the Student to look up inappropriate content on his computer, and the English teacher's response that the two students did not interact in his class but that he would keep an eye out. He also informed the Complainant that in a separate incident, the Student had threatened Student G, that the teacher helped intervene, and that the Student then hit Student G on the arm. The teacher stated that the Student's actions were unprovoked. The Complainant responded that it was the first time that she had heard of the Student being involved in anything like that and asked for more information, and for the Student and Student G to be separated. The teacher responded that Student G was "a very quiet and a mild-mannered boy" who was "an easy target" and had not contributed to the incidents. The District provided OCR with a copy of a "Declaration of Witness Incident Form" signed by the Student on March XX, 2018, in which he stated that he had hit Student G and that Student G had scratched him. The District did not include or state whether

there was an incident report from Student G or from other witnesses. The District's narrative response also did not include information about how or if it responded to the Complainant's report that she had informed the teacher that Student G had taken the Student's backpack, or if the District otherwise investigated the Complainant's report that Student S was pressuring the Student to look up inappropriate material on his computer.

On March XX, 2018, during Primetime, Student B told the Student that he forgot his Chromebook charger and, without the Student's consent, began looking through the Student's backpack for the Student's charger. The Student reported Student B's behavior to the Primetime teacher and then went to the restroom. When the Student returned, he discovered that his charger was missing from his backpack and told the Primetime teacher, but she did not do anything. The Complainant emailed the Primetime teacher and asked that the alleged theft be investigated. The District provided OCR with a copy of the Complainant's email. The District also provided OCR with a copy of the Primetime teacher's March XX, 2018 email response, in which she stated that she had no knowledge of the Student being harassed for his charger because it had not been reported to her, as well as no knowledge of the Student ever being bullied at Primetime, and that she would investigate.

The District's stated that the Primetime teacher determined that the charger had been lost by the Student. The District provided OCR with a copy of the Primetime teacher's April XX, 2018 email to the Complainant describing her investigation, including that she asked Student B about the incident and he responded that he had previously borrowed and returned the charger; and that she asked the Student's substitute ASL interpreter, who was sitting nearby, if she had seen anything and that she responded that she hadn't. The Primetime teacher informed the Complainant that Primetime students were responsible for taking care of their own belongings. After the Complainant complained about this response, the Assistant Principal emailed her on April XX, 2018 and stated that the Student would not be fined for the missing charger.

On April XX, 2018, during Primetime, the Student was approached by two students he did not know and was pressured to give them money. According to the Complainant, he was afraid and gave each of the students a \$5 bill, and that they also took a \$20 bill from him. The Complainant told OCR that he informed her of what happened when she was picking him up, and since it had just happened, she went inside to discuss the incident with the Primetime teacher, who teacher refused to speak with her. The Complainant emailed School administrators and asked them to investigate the incident, as well as investigate the Primetime teacher's refusal to meet with her. The District provided OCR with a copy of the Complainant's April XX, 2018 email, in which she asked for an investigation into what happened; noted that the Student was without means to effectively communicate during this portion of Primetime because he was without an ASL interpreter or his personal FM device; and that this was the second time that something had been stolen from him. The Complainant complained that the Student was being targeted and harassed based on his disabilities and that the District was not taking steps to protect him.

The District told OCR that it investigated the theft and determined that it occurred, that the students responsible were disciplined for their misconduct, and that the Complainant was informed of this determination. The District did not state how or when it communicated the determination to

the Complainant. With regard to the Primetime teacher's refusal to speak with the Complainant, the District stated that the Primetime teacher "felt threatened" because the Complainant had stated that she would not leave until the Primetime teacher spoke with her, and the Primetime teacher did not want to do so without an administrator present.

On May XX, 2018, during Primetime, a student grabbed the Student's paper lunch bag off the table and used it to wipe up a water spill on the floor. The bag broke, spilling the contents of the Student's lunch onto the floor. The Complainant emailed the Primetime teacher and asked if the incident had happened, and if so, what steps she had taken to respond; the Primetime teacher responded that a staff member had witnessed the incident and made a written report about it. The District's narrative response stated that a Primetime tutor had witnessed the incident, wrote an incident report, and that the other student was counseled and assigned detention. The District also provided OCR with a copy of a May XX, 2018 email from the Primetime teacher to the Complainant stating that she had determined that the incident was not bullying but an accident, because the other student had been trying to clean something off the Student's lunch bag; as well as with a copy of the Complainant's email response stating that even if the lunch bag accidentally broke, the other student had intentionally taken it without the Student's consent.

On June X, 2018, during Primetime, a student threw a ball and, according to the Student, pencils, at the Student's head which hit his hearing aid and VP shunt. The Complainant told OCR that she was informed during pickup that it had occurred and that she was extremely upset because the Student was still healing from a medical procedure to his head. The Complainant stated that she emailed the Primetime teacher and asked about the incident and did not receive a response.

The District's narrative response stated that the Student was hit in the ear by a soft ball while playing a darts-style game, and that a staff member responded by directing the other student to aim at the bullseye. The District stated that when staff members told the Complainant what happened, she did not listen and made disparaging comments about the Primetime teacher. The District provided OCR with copies of two incident reports dated June X, 2018. Both reports focused on the Complainant's behavior when she was notified that the incident occurred, including that she became angry and made a disparaging remark about the Primetime teacher. Neither report contained details such as who threw the ball; whether it hit the Student; whether Primetime staff had witnessed the incident, and if not how they had determined that it was an accident; and why they had prepared incident reports about the Complainant's comments but not about the incident.

On June X, 2018, Student C grabbed the Student by the neck. The Student told the Complainant that Student C had tried to strangle him, and that he had done so in a classroom in front of others including the Primetime teacher, the Student's interpreter, and the Primetime tutor. The Complainant stated that the Principal told her the incident was serious, and that Student C would be removed from the Student's class for the rest of the year. According to the Complainant, Student C was in the Student's class the next day. The Complainant stated that she complained to the Principal but did not receive a response. The Complainant told OCR that on other occasions, Student C would "mouth words" to the Student and pretend that he (Student C) was talking when he wasn't, knowing that the Student would become upset that he couldn't hear him. The Complainant did not state whether she or the Student informed the District of these other incidents.

The District stated that it investigated and determined that Student C had tried to choke the Student. The District stated that the Student and Student C were separated immediately after the incident happened, and that Student C was sent home and told he could no longer participate in Primetime. According to the District, the incident occurred because the Student had refused to give Student C a cookie, and made a derogatory comment about a picture Student C was drawing. The District provided OCR with copies of incident reports submitted by students and the Primetime tutor. OCR reviewed the incidents reports, and the students' reports differed in their accounts of what transpired before the incident, but not that it had occurred. The Primetime tutor stated that he did not witness the incident but was informed of it by other students; there was no incident report from the Primetime teacher or the Student's ASL interpreter, and the District did not state whether they witnessed the incident.

The Complainant told OCR that prior to the start of the 2018-2019 school year, she emailed the Principal (formerly the Assistant Principal) and the Student's counselor asking them to ensure that the Student and Student C were not in the same class, and that they assured her that he would not be. The Complainant told OCR that she discovered on the first day of school, August XX, 2018, that Student C was in all of the Student's classes. The Complaint told OCR that she complained to the Principal, who referred her to an administrative staff person, who made changes to Student C's schedule so that he was not in the Student's class. However, according to the Complainant, even after the changes were made Student C continued to be in the Student's physical education class.

The District's narrative response stated that, with regard to these incidents of alleged disability-based harassment, "The District is not a guarantor that students will always behave appropriately and civilly," and that whenever inappropriate behavior was discovered, the District took action reasonably calculated to stop it and prevent it from recurring, including disciplining other students.

Legal Analysis and Conclusion

OCR is concerned that the Student may have been subjected to disability-based harassment that may have impacted his ability to access a FAPE. OCR is also concerned that the Student may have been subjected to disability-based harassment, and that the District's response may not have been prompt and effective. The evidence gathered to date showed that the Complainant notified the District at least three times during the period from October 2017 to May 2018 that the Student had been subjected to peer harassment, which the Complainant stated was disability-based, and as well as informed the District of additional incidents before the end of the 2017-2018 school year. That the harassment included incidents of physical contact with the Student's head – for example, Student C pulling the Student's beanie off, and unidentified students throwing a ball and possibly other objects that hit the Student in the head, where he has a shunt and wears hearing aids – supports the Complainant's assertion that the harassment was disability-related. The evidence also showed that the incidents were sufficiently serious to deny or limit the Student's ability to participate in or benefit from his educational program, including that his money was stolen, his property was damaged, and he was assaulted by a classmate.

OCR was concerned that the number of incidents, the escalation in severity of the incidents, and that at least one student (Student C) was involved in multiple incidents, showed that the District's

response may not have been effective at stopping any disability-based harassment and preventing its recurrence. For example, OCR was concerned that Student C was originally placed in all the same classes as the Student for 2018-2019.

OCR was also concerned that the District may not have investigated any of the incidents as disability-based harassment, specifically; rather, the evidence gathered to date showed that the District determined that the incidents were either accidents; or that the Student was at fault or partially at fault for the incidents' occurrences. For example, that the Student may have refused to give Student C a cookie and made fun of his drawing is not justification for Student C's response: choking the Student. Similarly, when the Complainant informed the Student's English teacher that Student S was pressuring the Student to look up inappropriate websites, the English teacher responded without evidence of investigating that the Student did not interact with Student S in class, and that the Student, with no provocation, had threatened and hit Student G, whom the English teacher described as "quiet", "mild-mannered", and "an easy target." The District stated that Primetime teacher investigated determined that the Student had lost his charger; however, neither the District's narrative response, nor emails from the Primetime teacher that were included with the District's data response, showed that the Student had reported to the Primetime teacher that Student B had gone through the Student's backpack looking for the charger before it went missing. There was also no evidence that the Primetime teacher interviewed the Student, or other students seated nearby, as part of her investigation; there was also evidence, contrary to her statement that she had no knowledge of the Student ever being bullied at Primetime, that she had been informed by the Principal on December X, 2017 that Student had been bullied by Student C when he removed the Student's beanie.

OCR was further concerned that the District may not have taken steps to ascertain whether a hostile environment occurred at Primetime, and whether steps were needed to eliminate the hostile environment and prevent any harassment from recurring. The evidence gathered to date showed that during Primetime, the Student had his money stolen, his property damaged, and had a ball thrown at his head that, according to staff incident reports, hit him in the ear/hearing aid. The evidence also showed that the Student was without his personal FM device and an ASL interpreter when these incidents occurred. However, there was no evidence that the District assessed for whether the harassment limited the Student's access to District programs because of his disability.

In sum, the evidence gathered to date raises serious concerns that the Student may have been subjected to peer harassment on the basis of his disability, and that the District may have failed to provide a prompt and effective response to notice of the harassment (at Primetime in particular) and, if necessary, may not have taken steps to remedy the hostile environment and prevent harassment from recurring.

Prior to the conclusion of OCR's investigation, and before OCR had interviewed any District staff or administrators, the District expressed interest in voluntarily resolving the concerns raised by OCR's investigation to date. On May 25, 2020 the District entered into the enclosed resolution agreement (Agreement).

Under the Agreement, the District has agreed to provide training to all certificated staff and Primetime staff at the School about the barriers to learning experienced by DHH students, the different types of resources available to DHH students in the District, the prohibition on disability-based discrimination and harassment, how to recognize and respond to allegations and incidents of disability-based discrimination and harassment, and the District's policies and procedures for responding to allegations and incidents of disability-based discrimination and harassment; the District has also agreed to provide training to all staff who are designated as being responsible for receiving and investigating complaints of disability-based harassment at the School and the Student's current school. Additionally, the District has also agreed provide IEP implementation training to all staff at the Student's current school and at the School who have responsibilities for implementing the Student's IEP plan, as well as to principals, assistant principals, and the Primetime program manager; and to create and implement a system to document the timely arrival of ASL interpreters at the beginning of each school day, including informing the parent or guardian of a late arrival, and if necessary providing additional supports until the ASL interpreter arrives.

The District has also agreed to convene an IEP team meeting for the Student, during which it will review the Student's approved accommodations with respect to Title II's effective communication requirements, and determine whether the Student needs compensatory and/or remedial services as a result of the District's alleged failure to provide appropriate regular and/or special education or related services during the 2017-2018 school year. Finally, the District has agreed to review all its DHH vendors to ensure that some of the products and services they provide, including the products and services required by the Students, are compatible with his hearing aids; as well as to inform OCR of any further incidents of disability-based harassment directed at the Student during the current school year (2019-2020), and to provide information about how it responded to the alleged incidents.

Overall Conclusion

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 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 individual 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, please contact OCR Civil Rights Attorney Matthew Wood at (415) 486-XXXX and Matthew.Wood@ed.gov.

Sincerely,

/s/

Joseph Wheeler
Team Leader

Encl.

cc: Katelyn E. Trottier, Fagen, Friedman & Fulfrost LLP.