



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

July 14, 2020

VIA ELECTRONIC MAIL ONLY

Kyla Johnson-Trammel, Ed.D.
Superintendent
Oakland Unified School District
1000 Broadway, Suite 300
Oakland, California, 94607
superintendent@ousd.org

(In reply, please refer to OCR Docket Number 09-19-1027.)

Dear Dr. Johnson-Trammel:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint received by OCR on October 11, 2018 against the Oakland Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated the following issues:

Issue 1: Whether the District subjected the Student to harassment based on disability by a teacher; and if so, whether the District responded promptly and effectively to the harassment; and

Issue 2: Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to implement her Individualized Education Program (IEP), subjecting her to a significant change in placement without following adequate evaluation and placement procedures; and failing to convene an IEP meeting to assess whether, as a result of harassment or bullying, her needs had changed requiring changes to her placement.²

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

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.

² On May 8, 2020, OCR notified the parties that OCR was rewording the issues originally identified for investigation into the two issues identified herein.

Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and Complainant. OCR also interviewed the Complainant and the Network Superintendent who oversaw the Student's schools. Based on the facts gathered to date, OCR identified compliance concerns with regard to both issues opened for investigation. Prior to the completion of OCR's investigation, the District indicated an interest in voluntarily resolving the concerns identified by OCR, and OCR determined it was appropriate to do so. The legal standards, facts gathered to date, and a description of OCR's compliance concerns are summarized below.

Factual Findings

When the 2018-19 school year began, the Student was a XXXXXX grader in a combination XXXX grade mild/moderate Special Day Class (SDC) classroom with Teacher 1 at a District school (School). She was previously in the same classroom during the latter part of her XXXXXX year during the prior school year. The Student had an Individualized Education Plan (IEP) and a Behavior Intervention Plan (BIP). The Student's BIP, which included several supports, was designed to address noncompliance with adult requests leading to elopement and unsafe behaviors.

According to the Complainant, during the last week of August 2018, Teacher 1 grabbed the Student by the ankles, dragged her down a hallway, and commented that she "mopped the floor" with the Student. The Complainant told OCR that she learned about the incident from the Principal well after it happened, and that she reported the incident to the police in December 2018. According to the District, the Principal witnessed the incident and immediately reported it to Human Resources, who then investigated the matter and determined that Teacher 1 improperly restrained the Student.³ Subsequently, the District took steps to address the matter with Teacher 1. The District was unable to confirm to OCR whether the investigator determined if the incident constituted disability-based harassment, or whether it informed the Complainant about the investigation's outcome. However, the District confirmed that the Teacher made a statement, not about "mopping the floor" with the Student, but having to do with the Student being on the floor and "sweeping the floor" with the Student.

On September X, 2018, the School held an IEP meeting to review the Student's BIP. According to the meeting notes, in response to the Complainant's concern that the Student's needs were not being met, the District added a daily chart to the Student's BIP and agreed to look into having the Student spend time in a general education class like science, art, or PE. The daily chart broke the Student's day into chunks so that she could earn points/tickets towards a bigger reward. There is no mention of the August 2018 incident involving Teacher 1 or its impact on the Student in the meeting notes.

³ It is unclear if the issue was that Teacher 1 restrained the Student, or the technique Teacher 1 used to do so.

On September X, 2018, there was a behavioral incident where the Student reportedly wrote on other students' faces with marker and dismantled and threw about various classroom materials and equipment. As a result, the Student received a one- or two-day, out-of-school suspension; the Student's discipline records indicate the suspension was for one day, but the Complainant reported to OCR that it was for two days.

On September XX, 2018, there was a second behavioral incident where the Student reportedly dismantled and threw about various classroom materials and equipment, spit at a staff member, and eloped from the classroom. The Student received a two-day, out-of-school suspension for this conduct. The School also removed the Student from Teacher 1's mild/moderate SDC class and placed her in Teacher 2's moderate/severe SDC class until an emergency IEP meeting could be held.

On October X, 2018, there was a third behavioral incident where the Student reportedly left her classroom without permission, called staff inappropriate names, tore down student work and decorations, and screamed while the teacher attempted to test other students. The Student received a two-day, out-of-school suspension, which she completed on October X and X.

On October X, 2018, the School held an IEP meeting. According to the meeting notes, the Complainant and the District disagreed as to whether Teacher 1 implemented the Student's BIP. The Complainant also requested a 1:1 aide and general education programming at School 2. The team decided to transition the Student to a general education class at School 2 with a minor change to her BIP due to the change in setting. The team also discussed having the School Psychologist transition the Student's BIP to her new teacher (Teacher 3) and connecting Teacher 3 with adults who worked well with the Student to understand how to better work with her. In addition, the team put in a referral for onsite counseling, and the Complainant consented to additional assessments for the Student. Again, there is no mention of the August 2018 incident involving Teacher 1 or its impact on the Student in the meeting notes.

On October XX, 2018, the Student began her placement in Teacher 3's classroom. According to the District, the first day went well, but thereafter, the Student began escaping the classroom daily and outbursts became more frequent.

On October XX, 2018, the Complainant filed this OCR complaint.

On or about October XX, 2018, there was a fourth behavioral incident where, according to District records, the Student threw a shoe and a bookbag, which hit students on their heads. The Student received a two-day suspension. It is unclear if the suspension was in-school or out-of-school because the Student's discipline record indicates it was an "in house" suspension, but in a chart provided to OCR, the District did not identify the suspension as in-school, as it did for another disciplinary incident.

Also around this time in mid-October, the Complainant reported to the Network Superintendent

that Teacher 3 circulated a petition among parents to have the Student removed from her classroom and encouraged parents to complain about the Student to the School and police. The Complainant also alleged that Teacher 3 also permitted other students' parents to sit in the classroom to observe the Student and take notes on the Student's behavior, and she shared information about the Student's IEP with these parents. The District stated that the Network Superintendent investigated the matter by speaking with the Principal, Teacher 3, and the parent who regularly sat at the back of the Student's classroom. The District told OCR that the Network Superintendent informed the Complainant that she had spoken with the three individuals and found no evidence of the alleged conduct. The District also told OCR that it informed all three witnesses that the alleged behavior was inappropriate and would have been violative of the Student's rights.

The Complainant also told OCR that Teacher 3 had the Student stand outside of the classroom by herself on at least two occasions; the Complainant learned about one incident from what Teacher 3 wrote on a daily report for the Student, and the other from another parent.

On October XX, 2018, in an email to the Principal and Teacher 3, among other District personnel, the Complainant requested a meeting regarding the Student's lack of progress in her new class, failure to use the Student's BIP, and daily "harassment" of the Student.

According to District records, on October XX, 2018, at the request of the Network Superintendent, the Principal met with Teacher 3 to create a Student Support Plan. According to that document, Teacher 3 identified her major concern as the Student being with the class only 25 percent of the time, explaining that when the Student felt bored (e.g., when asked to line up with her class at the start of the day or while working on reading, writing, and math), the Student would walk about, ignore attempts at redirection made by adults, and elope. The document states that Teacher 3 tried to address this concern by asking the Student to join her classmates in a kind manner and giving the Student tickets.

On November XX, 2018, there was a fifth behavioral incident where the Student reportedly turned on and off lights and hit, kicked, and grabbed other students. The Student received a two-day, in-school suspension, which she served on November XX and XX.

On November XX, 2018, there was a sixth behavioral incident where the Student reportedly threw her shoes, hitting another student at the School. The Student received a two-day, out-of-school suspension, which she completed on November XX and XX.

On December X, 2018, the District convened an IEP team meeting. According to the meeting notes, the Complainant expressed concern regarding the Student's lack of progress, and that the Student was below grade level and constantly out of the classroom. The Complainant requested a non-public school placement, tutoring for the Student because she had been sent out of class to the office for behaviors, and retraining for staff on how to deal with challenging behaviors. The District stated that it would respond to these requests in a timely manner, and it discussed the

range of services available at the District compared to non-public schools. Teacher 3 reported that the Student was performing below grade level, though she had many skills at grade level, and that the Student was out of class regularly due to behaviors. The District determined that an Extended School Year was appropriate, and it offered OT and Speech and Language services, as well as an intensive, counseling-enriched special day class at a different District school (School 2). The District set up a tour of the proposed placement. There is no mention of the August 2018 incident involving Teacher 1 or its impact on the Student in the meeting notes.

On December X, 2018, there was a seventh behavioral incident whether the Student reportedly threw objects at her classmates, hitting four to five different students with them. The Student received a two-day, out-of-school suspension, which she served on December XX and XX, 2018.⁴

On December XX, 2018, the Complainant toured the District's proposed placement and accepted it. The Student's last day at the School was on December XX, 2018. The Student began attending School 2 the following day on December XX, 2018. The District and Complainant agree that the Student is doing well in her current placement at School 2.

Issue 1: Whether the District subjected the Student to harassment based on disability by a teacher; and if so, whether the District responded promptly and effectively to 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. A public school district that receives federal funds is responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment based on disability can result in the denial or limitation of a student's ability to participate in or benefit from educational services, activities or opportunities.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. What constitutes a reasonable response to

⁴ The Student's attendance report shows these two dates as the Student's only suspension days. By contrast, the Student's discipline record for this incident reflects no suspension, and the Student's discipline records for the fall 2018 semester show four in-school and two-out-of-school suspension days in connection with four different behavioral incidents. Meanwhile, in its narrative response, the District reported an undocumented behavioral incident for which the student served two out-of-school suspension days, and it identified a total of two-in-school and seven out-of-school suspension days in connection with five behavioral incidents.

harassment will differ depending upon circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred.

A district provides program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the district is responsible for the discriminatory conduct whether or not it has notice.

The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, and remedy the effects of the harassment. The 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.

Determination

Based on the evidence gathered to date, OCR has a concern that the Student may have been subjected to harassment based on disability by Teacher 1, and the District did not respond promptly and effectively to the harassment. The Complainant alleged that Teacher 1 dragged the Student down a hallway and stated that she was mopping the floor with her due to conduct related to her disability – eloping from class. District-provided evidence shows that the District was aware of the incident, promptly investigated the matter, and took action with respect to Teacher 1 to stop the behavior and prevent it from recurring. The District, however, was unable to confirm whether it made a determination as to whether Teacher 1's actions constituted disability-based harassment against the Student, and whether it informed the Complainant of the outcome of its investigation, as required by Section 504, Title II, and their implementing regulations when district employees engage in disability-based discrimination. This evidence raises a concern that the Student may have been subjected to disability-based harassment and that the District failed to respond promptly and effectively to the harassment.

The Complainant also alleged that Teacher 3 circulated a petition to remove the Student from her class and had parents observe and take notes on the Student during class. The evidence shows that the District had notice of the conduct and promptly investigated by interviewing the individuals who allegedly engaged in or might know about the conduct. The evidence further shows that although the District did not find evidence to support the Complainant's allegations, it still addressed the matter, including the Student's privacy rights, with the witnesses and shared the outcome of the investigation with the Complainant. These responsive steps are consistent with the mandates of Section 504, Title II, and their implementing regulations. Thus, OCR concluded there is insufficient evidence to support a non-compliance finding based on this allegation.

Issue 2: Whether the District failed to provide the Student with a FAPE.

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. Districts may implement a Section 504 plan developed in accordance with these requirements, or an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) to meet these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

The Section 504 regulations, at 34 C.F.R. § 104.35(a), require school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. Subsection (c) requires that placement decisions be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources that is carefully considered and documented. Sections 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a student who has or is believed to have a disability without evaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to act consistent with the Section 504 regulations in disciplining disabled students.

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

Under Section 504, as part of a school's appropriate response to bullying on any basis, 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. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior.

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.

Determination

The evidence gathered to date raises a concern that the District may have failed to provide the Student a FAPE during the 2018-2019 school year. With regard to whether the District failed to implement the Student's IEP, OCR did not complete its investigation and therefore has not made a determination regarding this allegation; however, as described below, the agreement that the District entered into with OCR addresses this allegation. OCR also notes that with limited exception, it does not review the appropriateness of placement decisions; however, it does have jurisdiction to review evaluation and placement procedures, and here, the District's decision to place the Student in a general education class with minor changes to her BIP, despite escalating behaviors with accompanying losses in class time, raises a concern that the District had reason to suspect that the Student's needs with regard to her behavior were not being addressed and the District may have failed to timely evaluate the Student's disability-related needs to identify an appropriate placement for her. Without a timely evaluation of the Student's behavior-related needs, OCR is also concerned that the IEP team may not have been sufficiently knowledgeable of those needs, before the District made that change in placement in October 2018. With regard to whether the District subjected the Student to a significant change in placement without following adequate evaluation and placement procedures, and whether the District failed to reassess the Student after having reason to suspect that her needs had changed, OCR identified the following compliance concerns.

Despite inconsistencies in the District's data, the evidence shows that the Student likely served nine to 11 out-of-school suspension days during her fall 2018 semester at the School. There is also evidence showing that the Student served two to four in-school suspension days, and she may have been made to stand outside of her classroom at times due to misbehavior, potentially resulting in further losses of instruction time and services during the same time period. Moreover, according to the October XX, 2018 Student Support Plan and the December X, 2018 IEP notes, the Student was in the classroom only 25 percent of the time or less due to her

behaviors. Thus, there is evidence that the Student may have been excluded from her program for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion. If so, this constitutes a significant change in placement. Under such circumstances, the District must evaluate whether the misconduct was caused by or was a manifestation of the Student's disability. The District, however, never determined whether the Student's misconduct was a manifestation of her disability and, as a result, the Student served all discipline imposed on her, may have lost instruction time and services along the way unnecessarily, and may have been in a placement that was not meeting her needs. Also, and as discussed in Section I, above, there is evidence that the Student may have been subjected to disability-based harassment by Teacher 1. The District promptly investigated the incident and took action with respect to Teacher 1. The Student's IEP meeting notes, however, make no mention of the incident or discussion around its impact on the Student's ability to access her education. The Student continued to be placed in Teacher 1's class until September XX, 2018, and the evidence indicates that her behavior continued to interfere with her ability to access the educational program, resulting in the Student's removal from Teacher 1's classroom on September XX, 2018 and placement in two more classrooms, as well as several suspensions, before the end of the semester. This evidence raises a concern that following the incident, the District failed to consider whether it prevented the Student from accessing a FAPE absent additional supports or changes to her IEP, as required by Section 504, Title II, and their implementing regulations.

Taken together, the above evidence raises a concern that the District may have denied the Student a FAPE during her fall semester of the 2018-19 school year at the School.

Summary and Resolution

Prior to OCR concluding its investigation, and to address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegations and the information obtained by OCR during its investigation. A copy of the resolution agreement is attached to this letter.

Conclusion

Based on the commitments made in the enclosed resolution 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 resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the 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.

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, 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.

The Complainant has a right to appeal OCR's determination with regard to Issue 1, as to the petition circulation and classroom observation/note-taking allegations, within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Monique Raco Fuentes (monique.racofuentes@ed.gov).

Sincerely,

/s/

For Kana Yang
Team Leader

Enclosure

cc: Andrea Epps, General Counsel for the District, via e-mail