



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

August 11, 2020

VIA ELECTRONIC MAIL

Jeff Malan  
Superintendent  
Barstow Unified School District  
551 Avenue H  
Barstow, CA 92311

(In reply, please refer to OCR Docket Number 09-19-1163.)

Dear Superintendent Malan:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Barstow Unified School District. The Complainant alleged that the District discriminated against the Student on the basis of disability.<sup>1</sup> Specifically, OCR investigated the following issues:

1. Whether the District received notice that the Student was subjected to alleged verbal and physical harassment on the basis of disability by staff and students, and the District failed to provide a prompt and equitable response to notice of the harassment.
2. Whether the District denied the Student a free appropriate public education (FAPE) with respect to how the Student's educational needs were affected by the alleged harassment or bullying, necessitating changes to the Student's IEP.

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.

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and the Complainant. OCR also interviewed school and district staff during a site visit in September 2019.

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<sup>1</sup> OCR previously provided the District with the identity of the Complainant and the Student. Their names are not included in this letter for privacy reasons.

Based on this investigation, OCR found sufficient evidence that the District was out of compliance with Section 504 and Title II and their implementing regulation with respect to the second issue investigated. The applicable legal standards, factual findings, and resolution of this matter are summarized below.

### **Legal Standard**

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 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

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

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. Similarly, 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 conduct a prompt, equitable and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, 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. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

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

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

### **Factual Findings**

The following facts are relevant to OCR's analysis:

As of the 2018-19 school year, the Student was X years old and according to his IEP, qualified for special education services under the category of Other Health Impairment. He has previously been diagnosed with Attention Deficit / Hyperactivity Disorder (ADHD) and Oppositional Defiance Disorder. The Student also had a medical condition that required him to wear a heart monitor.

The Student was placed in the SUCCESS program at the beginning of the 2018-19 school year. The SUCCESS program was described as a program for mild and moderate students who were emotionally or behaviorally disturbed. The students in the SUCCESS classroom ranged from XXXXX XX XXXXX grade. The teacher for the SUCCESS class (the SUCCESS Teacher) told OCR that the Student was smaller than other students in the class (and one of the younger students in the class).

According to the Complainant, during the first month of school in August 2018, the Student experienced a number of physical altercations and verbal threats. For example, the Complainant stated that on one day the Student was choked and came home with marks around his neck. On another day (August XX, 2018), the Complainant reported that the Student called the Complainant from the classroom because other students had barricaded the Student into the bathroom, choked him and were throwing objects at him. The Complainant told OCR that after that incident she filed a police report because the Student was kicked so hard that the adhesive on his heart monitor came off and he had a cut on his head.

The SUCCESS Teacher acknowledged to OCR that the Student did get hurt a couple of times. As to the incident with the heart monitor, the SUCCESS Teacher told OCR that she remembered that another student had attacked the Student and an aide was not able to intervene fast enough.

After the August XX, 2018 incident, the Student did not attend school the following three days due to safety concerns. On September X, 2018, the District held an IEP meeting at the parent's

request to discuss the Student's placement. At the meeting, the Complainant requested a 1:1 aide for the Student because she wanted to be able to keep him safe. The IEP notes from the meeting indicated that the SUCCESS Teacher had stated that all but one student in the class had represented a safety issue with the Student in some way.

The IEP meeting notes also stated that the Complainant had asked about returning the Student to his home school in a mainstream setting, and that the IEP team agreed that he would be sent back to his home school to mainstream with intensive support. The notes indicated that the Complainant subsequently called and stated that the Student's parents wanted to have the Student mainstream with intensive support at the School, rather than return to his home school. The Principal told OCR that the reason for moving the Student back into a mainstream setting was that the team was concerned about his physical safety in the SUCCESS classroom.

The Student returned to the School on September XX, 2018 and was assigned to a mainstream XXXXX grade class led the General Education Teacher. The Principal and the Director told OCR that once the Student was removed from the SUCCESS class, they did not have the same safety concerns that had existed when he was in the SUCCESS program.

The Student's General Education Teacher told OCR that while the Student was physically attending her classroom for no more than a month, she had understood that the SUCCESS Teacher was still technically his teacher during that time and she would ask the SUCCESS Teacher about his work. She stated that the SUCCESS Teacher, however, never came to her classroom and never gave her specific work for the Student and that she did not have a copy of the Student's IEP. She also stated that most of his interactions were with his 1:1 aide who was employed by the District (the Aide). The General Education Teacher stated that her understanding was that the Student was supposed to be in the SUCCESS classroom but was not there because the other children had hurt him.

At the conclusion of the first day of mainstreaming, September XX, 2018, the Principal emailed the Director to say that mainstreaming the Student had been difficult. The Principal and the Director exchanged emails about possibly placing the Student into the Resource Specialist's (RSP) classroom when his behaviors warranted. The Principal emailed the Director again on September XX, 2018 to say that the Student was being physically and verbally aggressive with other students in the mainstream classroom.

On September XX, 2018, according to a text message from the Student's Aide and an email from the Principal, the Student had an altercation with other students from the SUCCESS class during lunch recess. After the incident, the Principal and the Aide stated that the Aide was aware of the timing of recess for SUCCESS students and would not be outside at the same time again. That same day, the General Education Teacher also sent a discipline referral for the Student because he yelled expletives at the teacher.

In a September XX, 2018 email to the Director, the Principal said that she was going to keep the Student in the RSP room to minimize the Student's behavior issues and his contact with the SUCCESS students.

During the week of October X, 2018, School and District staff communicated about scheduling an IEP meeting for the Student. On October X, 2018, the Principal emailed a representative from the SELPA and explained that “a few weeks ago the team agreed to have him mainstream with intensive support so he would be safe (he was being attacked in the SUCCESS classroom by other students)” but that because of his behavior “this week I have placed him with his aide in the RSP room.” She noted that “I need him to be with a teacher in a classroom ASAP, so that’s why this meeting is so important.”

On October XX, 2018, the Student’s IEP team reconvened to discuss his placement. The meeting notes indicate that because the Student had demonstrated escalating behaviors, he was placed with the RSP teacher in her room. The General Education Teacher told OCR that during this IEP meeting there was no consensus as to where the Student should be placed. She stated that during the period that he was placed in the RSP room she was not aware of him being educated by a teacher, but she assumed the SUCCESS Teacher was still responsible for him.

By contrast, the SUCCESS Teacher told OCR that she remembered that the Student was out of school for a period, and that when he came back, he was placed in the RSP room, and she believed the RSP teacher was teaching him. The SUCCESS Teacher said that she believed she started the year with the Student on her roll but did not have him for very long.

The RSP Teacher, meanwhile, stated that unless he was bothering one of her students her only interaction with the Student was to say good morning or when an aide would ask her to monitor the Student while the aide went to the restroom. She told OCR that she had her own separate caseload of students who she was responsible for.

On October XX, 2018, the Principal emailed a District staff person to respond to a request for a list of students who had hit the Student. The Principal stated that she had talked to the SUCCESS Teacher and provided a list of five students, all of whom were in the SUCCESS program.

On October XX, 2018, the Student did not want to get on the bus home after school and so was allowed to call the Complainant. The Complainant told OCR that the Student told her that the Principal had told him that if he did not get on bus they would have to call the Sheriff’s Department and that they would call the authorities who would come and pick him up and take him to a home far away.

According to the Principal, the Student was refusing to get on the bus and insisted that he would spend the night at the school because no one would pick him up. The Principal stated that she told the Student that he could not spend the night at the school because that would be child abandonment and that they would have to call the Sheriff. She said the Student asked if they would take him home or to a different home. The Principal denied having told the Student he was going to go to a different family and stated that the Aide had also told the Complainant that the Principal had not said this. The Principal told OCR that she understood later that because of the Student’s disability and background, the mention of the Sheriff had triggered the Student, but that was not her intent.

Shortly after that incident, the Complainant pulled the Student out of the School. On XXXXXX November XX, 2018, the Student's IEP team reconvened to discuss the results of the Functional Behavior Assessment (FBA). The notes indicate that the District's offer of FAPE was a return to the SUCCESS classroom with a 1:1 aide. The notes also indicate that the SUCCESS teacher had been providing the Student with some classwork for part of the time that he had been out of school.

On XXXXXX November XX, 2018, the IEP team met again for the Student's annual IEP Meeting. The meeting notes indicated that the Complainant raised concerns about the Student being assaulted or bullied on campus. According to the notes, the IEP team agreed that the intensive individualized services (the 1:1 aide) would provide supervision to keep these events from occurring. The IEP team agreed on a plan for transition back to campus, which provided that during the first week the Student would be given time to establish rapport and would be transitioned back into the classroom and with peers during unstructured activities as tolerated. After the IEP meeting, the Student returned to school on December X, 2018.

The Principal told OCR that the Student did not ever return to the SUCCESS classroom full-time. She stated that the Aide did take him into the classroom a few times but that the plan faltered when the Student attacked the Aide on a couple of occasions. On December XX, 2018, according to an incident report provided by the District, School staff initiated a two-person restraint on the Student after the Student had thrown dirt and rocks in his aide's face and had thrown furniture and hit and kicked staff.

The Student did not return to school after this date. When school resumed after winter break on January X, 2019, the Student was marked absent every day until February 4X 2019, when the Complainant unenrolled the Student in order to homeschool him.

## **Analysis**

*Issue 1: Whether the District received notice that the Student was subjected to alleged verbal and physical harassment on the basis of disability by staff and students, and the District failed to provide a prompt and equitable response to notice of the harassment.*

OCR found that the Student was being bullied by other students in the SUCCESS classroom starting in August of 2018. According to the Principal, the IEP team was concerned for the Student's safety and he was moved out of the SUCCESS classroom for this reason. The September X, 2018, IEP meeting notes also confirm that the SUCCESS Teacher acknowledged that that all but one student in the class had represented a safety issue with the Student. The Principal later compiled a list of at least five students in the SUCCESS program who had hit the Student. In one incident, the Student's heart monitor was kicked or ripped off him. OCR found that once the Student was moved out of the SUCCESS class the frequency of the bullying was significantly reduced.

When OCR evaluates harassment of a student with a disability, OCR first determines if there is sufficient information to demonstrate that the harassment was based on the Student's underlying disability. In this case, there is no evidence that the bullying from other students was directly

based on the Student's disability. As such, OCR did not find that the District's actions constituted a failure to respond to harassment based on disability as described in Issue 1.

The Complainant had also raised concerns about harassment of the Student by staff. OCR did not find sufficient evidence to conclude that the District violated Section 504 or Title II due to any harassment by District staff during this period. Specifically, OCR did not find sufficient evidence to conclude that the Principal harassed the Student with respect to the school bus incident on October XX, 2018. Rather, OCR found that the Principal mentioned the Sheriff in attempting to explain to the Student what would happen if he stayed at the school indefinitely. While this reference to the Sheriff may have had unintended effects, OCR found that it did not constitute the type of harassment that was severe, persistent or pervasive such that it would deny or limit the Student's ability to participate in or benefit from the District's program.

OCR therefore determined that, under Section 303(a) of OCR's Case Processing Manual, a preponderance of the evidence did not support the conclusion that the District failed to comply with Section 504 and Title II as to Issue 1.

*Issue 2: Whether the District denied the Student a free appropriate public education (FAPE) with respect to how the Student's educational needs were affected by the alleged harassment or bullying, necessitating changes to the Student's IEP.*

Under Section 504, OCR determines whether the bullying of a student with a disability on any basis is serious enough that it can result in the denial of FAPE. Under Section 504, as part of a school's appropriate response to sufficiently serious bullying on any basis, the school should convene the IEP team 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 FAPE.

Here, after the Student was being bullied in the SUCCESS classroom during the first month of school, the District convened an IEP meeting on September X, 2018. At that meeting, the Complainant raised concerns about the Student's safety, and the team discussed several responses. After the meeting, the District put the Student on independent study briefly and moved the Student out of the SUCCESS classroom. The IEP team also formally requested a Functional Behavior Assessment (FBA), which later resulted in the provision of a 1:1 aide. The IEP team also met again on October XX, 2018 to discuss the Student's placement.

OCR therefore found that the District did appropriately convene the Student's IEP team on September X, 2018 to respond to the bullying of the Student. However, OCR also found that steps the District took to address the Student's behavior resulted in a denial of FAPE. The District failed to implement the Student's IEP when he was no longer assigned a teacher. OCR also found that the Student's placement was changed outside of the IEP process.

Specifically, in the two months after the IEP meeting and before the Student was removed from school on October XX, 2018, the Student was assigned to two different physical locations but was not actually assigned to the teachers in those locations and instead worked directly with an aide.

First, from September XX, 2018 to September XX, 2018, the Student was placed in a XXXXX-grade general education classroom. According to the IEP meeting notes, the decision to move the Student to this classroom was made by the Student's parents after the September X, 2018 IEP meeting. The IEP meeting notes stated that the parents had decided to have the Student "mainstream with intensive support." The General Education teacher, however, reported that while the Student was physically placed in her classroom, the SUCCESS Teacher was still assigned as his teacher during this time and that the Student was not officially her student. She stated that she did not attend the IEP meeting that resulted in the Student getting moved to her classroom and was not given a copy of the Student's IEP. She stated that a lot of the Student's interactions were with the aide. She stated that the SUCCESS teacher did not provide her with any information about how to work with the Student.

OCR noted that while an IEP team may appropriately determine that a new placement is necessary for the Student, there is no indication that the IEP team determined that this particular arrangement was appropriate. While initially the team had discussed returning the Student to his home school in a mainstream classroom, the IEP team did not make a determination about placing the Student in a mainstream classroom at this School. The decision was made after the IEP meeting and there is no evidence to suggest that the placement at this School was made by an IEP team. OCR did not find any evidence that the IEP team determined that it would be appropriate for the Student to be placed in a general education classroom but not actually assigned to the general education teacher in that classroom. The IEP meeting notes say that the Student would be mainstreamed at a different school site, which gives no indication that the SUCCESS Teacher was supposed to still be responsible for the Student during this period.

Then, on October X, 2018, the Student's physical placement was moved from the general education classroom to a room where the RSP teacher worked, but he continued to be taught by an aide. The IEP team did not make this decision. Instead, OCR found that an IEP meeting was conducted again on October XX, 2018, two weeks after the Student had been placed in the RSP classroom with his aide.

The October XX, 2018 IEP meeting notes stated that the Student had "been placed with the RSP teacher." However, the RSP teacher, like the General Education Teacher, explained that she was not responsible for teaching the Student even while the Student was physically in her room. The RSP Teacher had her own separate caseload of students and reported that her only interaction with the Student was to say good morning or to monitor him while his aide went to the restroom.

That is, both the General Education Teacher and the RSP Teacher told OCR that the Student was still assigned to the SUCCESS Teacher during this entire time period. By contrast, however, the SUCCESS Teacher told OCR that she believed the RSP teacher was teaching him. OCR therefore concluded that despite the statements by the General Education teacher and the RSP Teacher that the Student was assigned to the SUCCESS classroom during this period, he was not being meaningfully educated by the SUCCESS Teacher during this time period. Instead, despite the Principal's October X, 2018 email to the Director stating that "I need him to be with a teacher in a classroom ASAP," the Student was not with a teacher at least through October XX, 2018.



OCR therefore found that while the District moved the Student out of the SUCCESS classroom in an attempt to respond to the safety issues the Student was facing, the District's response to that bullying denied the Student a FAPE because the Student was effectively denied a teacher during this period.

As a result, OCR found under Section 303(b) of OCR's Case Processing Manual that a preponderance of evidence supported the conclusion that the District violated Section 504 and Title II and their implementing regulations with respect to Issue 2.

### Overall Conclusion

This concludes the investigation of this complaint.

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. The Resolution Agreement requires that the District convene the Student's IEP team meet to determine what compensatory services are necessary to compensate for the time period in which the Student was denied a FAPE, provide training to staff at the School, and ensure that all aides working with special education students are directly supervised by a teacher with a teaching credential.

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.

As to Issue number 1 above, the complainant has a right to appeal OCR's determination 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.

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 regarding this letter, please contact Blake Thompson at (415) 486-XXXX or [blake.thompson@ed.gov](mailto:blake.thompson@ed.gov) or Jessica Plitt at (415) 486-XXXX or at [jessica.plitt@ed.gov](mailto:jessica.plitt@ed.gov).

Sincerely,

/s/

Zachary Pelchat  
Team Leader

cc: David Robinett, Counsel for District