



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

March 12, 2020

Via Electronic Mail

Michael Ghelber
Assistant Superintendent
Morongo Unified School District
P.O. Box 1209
Twentynine Palms, California 92277

(In reply, please refer to OCR Docket Number 09-19-1373.)

Dear Assistant Superintendent Ghelber:

On April 9, 2019, the U.S. Department of Education Office for Civil Rights (OCR), received the above-referenced complaint against the Morongo Unified School District (the District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated:

1. Whether the Student was subjected to harassment by other students based on disability, and the District failed to respond in a timely and effective manner to notice of the harassment.
2. Whether the District denied the Student a free appropriate public education (FAPE) when it failed to consider the effects of bullying, of which it was on notice, as part of the Student's individualized education program (IEP) plan, in order to determine the need for additional or different services as a result of the bullying.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

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

² This allegation was added after OCR's review of the District's data response. The District was notified on October 2, 2019 of its addition to the complaint.

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.

OCR gathered evidence by interviewing the Complainant and reviewing documents and other information provided by the Complainant and the District. Based on the facts gathered to date, OCR identified compliance concerns regarding the timeliness and effectiveness of the District's response to notice of the disability harassment and the District's failure to consider the effects of bullying, as part of the Student's individualized education program (IEP) plan, in order to determine the need for additional or different services as a result of the bullying. Prior to OCR completing its investigation and making a compliance determination, the District expressed an interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual³ (CPM), and OCR determined it was appropriate to do so. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation to date, the reasons for our determination and the terms of the resolution reached with the District.

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 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.

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

³ <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> (March 12, 2020).

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.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

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

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.

Factual Findings to Date

During the 2018-2019 school year the Student was in XXXXXXXX grade and received special education services for a specific learning disability. The Student was exited from the special education program on May XX, 2019.

The Complainant alleged that the District/School's response to the bullying of the Student based on his disability was ineffective and that the School failed to provide him with a safe learning environment. Specifically, the Complainant alleged that the Student had experienced ongoing

disability-based harassment, including verbal and physical conduct, which continued despite repeated reports to the District/School. Incidents reported as early as September XX, 2018 continued throughout the 2018-2019 school year and included taunting, teasing, having rumors spread about him, being physically attacked by some of his peers with and without objects. The harassment of the Student included incidents occurring in XXXX class and on the School bus, and caused the Student to experience depression and anxiety, avoid his peers, miss several days of instruction, and a drop in his academic performance from A's to C's. The Complainant alleged that ultimately, because of the District's failure to protect her Student from this harassment she decided to disenroll him from the District and place him in XXXXXXXXX, an online K-12 school, where the Student remains enrolled to date.

Information from the District

The following incidents involving the Student and others occurred during the 2018-19 school year and are based on reports to School staff and administrators:

- In September 2018, the District received several notices of incidents involving the Student. First, on September XX, 2018, the Student's guardian called the School to report that the Student arrived home from school that day with facial bruising and swelling; she was concerned that she had not been notified although it had occurred during XXXX class. On September XX, 2018, the Student submitted two written statements reporting to the School that one of his peers hit him with a rock and that another student wanted to fight him. There was no information describing or referencing a response to any of these incidents.
- In March 2019, the Student reported, in writing, six separate incidents that occurred: on March XX, 2019, a student launched a sharpened pencil at the Student cutting him on his nose and making him very angry; on March XX, 2019, a student on the bus threw a shoe at him and spread rumors about him; on March XX, 2019, the Student reported three incidents in which three students targeted him by pulling his hat and sunglasses, spread rumors about him, and slammed him to the floor. There were no entries in the database from this timeframe describing or referencing these incidents or a response to them.
- On April X, 2019, the Student reported, in writing, that on March XX, on the bus going home from school, one student physically hit him which caused him to cry and another student hit him with a water bottle. There was no further information provided about the incidents themselves or a response to the same.
- On April X, 2019, the Complainant reported to School staff that the Student was being bullied on a daily basis at school and on the bus. She stated that the Student had submitted many written statements about the incidents and that recently the Student was called an "XX XXXXXXXXX XXXXX XX XXXX." The Assistant Principal (AP) and the Department Chair of Special Education (SpEd) were notified of the report. In response to

the Complainant's report, the AP met with the Student and the Student told him that there was no issue on the school bus and he liked to ride the city bus. The AP also met with the "named aggressors" and who stated they were responding to the Student's aggression towards them.

- On April X, 2019, the AP spoke to the Complainant about her complaint and that she accepted the Student's plan to continue riding the city bus afterschool. Later that same day, the Complainant emailed a number of School site and District administrators, including, but not limited to the Principal, AP, and District Superintendent, wherein she stated that on more than one occasion, the Student had been verbally and physically attacked. She specifically stated that he had been called an "XXXXXXXX XXXXX XX XXXX", slapped, pushed, and had objects thrown at him. The Complainant stated that the conduct was ongoing and was the worst on the bus and in XXXX. Furthermore, she stated that the School was failing to protect the Student, had not removed the violent students from the buses, and failed to shield the Student from retaliation by those students who were punished. The Complainant concluded that the Student took the city bus, even though it required him to walk one-half mile XXXXXXXX X XXXXXX XXXXX. After receiving the Complainant's email, the Superintendent followed up with the Principal and AP for further information on the concerns raised in Complainant's email. The AP referred the Superintendent to his notes from his conversation with the Complainant earlier that day.
- Additionally, on April X, 2019, the SpEd Department Chair informed the Complainant that he met with the Student, who told him that he was not having issues with students on campus, but that the school bus was the biggest issue. The Complainant stated that Student was constantly being harassed, bullied, and beat up at school and that the Student was not being honest with the SpEd Department Chair about what he was experiencing. The SpEd Department Chair confirmed to the Complainant that the Student was not sitting with the student whom the Complainant was concerned about and the SpEd Department Chair was working on helping the Student improve his social skills. She was also told that the AP was monitoring the situation.
- On April XX, 2019, counselor notes in the database indicated that the Student was being bullied and that the Student had been directed to report incidents of wrongdoing and to fill out a student statement to document any incidents for review and investigation. The counselor noted that the Student reported experiencing retaliation and concerns about his safety.
- On May X, 2019, the Student, in a written statement, reported that a student assaulted him with things from XXXXXXXXXX and took his cell phone. The Student told a teacher, who had the Student's phone returned to him and referred him to write the statement in the office. There was no further information describing or referencing this incident or a response to the Student's report.

- On May XX, 2019, the Student's IEP team held a meeting and determined that the Student was no longer eligible for Special Education services. Team members reported that the Student was proficient and meeting the grade appropriate standards. During the meeting the Student reported verbal teasing, but that it was "nothing out of the ordinary" and that he had one issue on the bus; he stated no bullying was going on. The Student was exited from Special Education services without additional services.

Additionally, on May X, 2019, counselor notes in the database indicated that the Student's XXXX grade had fallen to a 'C' and the counselor discussed with the Student on how to raise the grade. No information was provided regarding the reason for the decline in the grade. On May X, 2019, a truancy letter was issued for the Student's absences on March X, 2019, April XX, 2019, and April XX, 2019. According to the Complainant, the Student did not go to school on some of these days because the Student was being harassed and bullied by other students.

The Complainant informed OCR that on May XX, 2019, she reported to the AP that the Student was hit in the face by another student. The AP's notes in the database state that he began an investigation, disciplined the other student involved, discussed the steps taken with the Deputy Sheriff who inquired with the AP about the situation, and met with the Complainant in response to her request for the same. In an email to the AP, the Complainant shared her proposed solutions for the Student's situation. The AP's notes in the database state that he and Complainant agreed to allow the Student to attend study hall in lieu of XXXX The Student did not attend school on this day and his absence triggered a second truancy letter dated May XX, 2019.

Determination

Issue 1: Whether the Student was subjected to harassment by other students based on disability, and the District failed to respond in timely and effective manner to notice of the harassment?

As noted above, 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. 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.

Here, the District received both verbal and written reports from the Student's guardian, the Student, and the Complainant between September 2018 and May 2019, about incidents involving the Student and his peers, ranging from verbal to physical altercations on campus, in classes, and on the school bus. Some of the incidents reported involved derogatory statements about the Student's disability. In the facts gathered to date, OCR found that the District may have conducted some form of inquiry into two incidents relating to the harassment of the Student

based on his disability on April X and May XX, however, the scope of the inquiry and the response is unclear based on the documentation provided to OCR.

In order for OCR to complete its investigation and make a finding as to whether the District was in compliance with Section 504, Title II, and the regulations, OCR would need to conduct interviews with the Student, bus drivers, School administrators and members of the Student's IEP team to further determine whether the reported incidents were disability based harassment and the District's response to the same. However, prior to the completion of OCR's investigation, the District expressed an interest in a voluntary resolution of this matter pursuant to Section 302 of OCR's CPM, and OCR determined that such a resolution was appropriate.

The Resolution Agreement, therefore, requires the District to provide training about conducting investigations of complaints or reports of disability discrimination, including peer to peer disability-based harassment. The training will also cover the District's obligation, with regard to the harassment of a student with a disability, regardless of whether the harassment is on the basis of that student's disability, to take immediate and appropriate action to investigate the issue and as necessary, take steps to stop the bullying and prevent it from recurring.

Issue 2: Whether the District denied the Student a free appropriate public education (FAPE) when it failed to consider the effects of bullying, of which it was on notice, as part of the Student's individualized education program (IEP) plan, in order to determine the need for additional or different services as a result of the bullying.

As noted above, under Section 504 regulations, public school districts are required to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. In addition, Section 504 requires that 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.

OCR's investigation to date revealed that the District received notice that the Student, who at the time was eligible for and receiving special education services, was experiencing conduct which he and his parent/guardian(s) considered to be harassment based on his disability. As reflected in its records, the District was aware that some of the conduct in question may have

been impacting the Student's access to his education, and his FAPE, in particular. Specifically, the District was aware that some of the conduct, both physical and verbal in nature, occurred on the school bus and was directed at the Student based on his disability. For example, the District received written statements dated April X and March XX reporting that the Student was hit by other students on the bus on March XX and had a shoe thrown at him and had rumors started about him on March XX. The District was aware that by April 2019 that the Student was no longer accessing the District's bus services and instead was taking the city bus. The Complainant had also communicated, through her April 2019 email, the occurrence of several incidents where the Student was targeted by his peers at school based on his disability. Second, the School issued two truancy letters in May 2019 documenting the Student's absence from school. One of these letters was issued on May X, 2019, while the Student was eligible for special education services. Third, the counselor's entry documents his awareness that the Student's grade in XXXX, the very class which the Student repeatedly reported bullying by his peers, had fallen without any information about the reason for the decline in his grade.

OCR found no evidence that the District held an IEP meeting to discuss any of the reports of bullying and harassment until May XX, 2019, when the IEP team determined that the Student was no longer eligible for services and exited him from his IEP.

Prior to OCR making a final determination, the District expressed an interest in voluntarily resolving the allegation pursuant to section 302 of OCR's CPM and OCR agreed it was appropriate to do so.

The Resolution Agreement, therefore, requires the District to conduct training for site administrators and staff responsible for responding to complaints or reports of disability discrimination or harassment on the District's obligations, including but not limited to, determining whether, as a result of the effects of bullying, the needs of a student with a disability have changed such that the student is no longer receiving a FAPE, issue a written guidance memo to all appropriate District and School site staff regarding those obligations, and provide OCR with documentation of the same.

Additionally, the Resolution Agreement requires that if the Student returns to the District at anytime during the 2020-2021 school, the District will assess the Student for eligibility under Section 504 and whether compensatory services are required for the Student.

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 as described above, which is aligned with the complaint allegations and the information obtained by OCR during its investigation.

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.

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.

OCR would like to thank David Robinett for his assistance in the matter. If you have any questions regarding this letter, please contact Christina González, Civil Rights Attorney, at (415) 486-XXXX or at christina.gonzalez@ed.gov.

Sincerely,

/s/

Kana Yang
Team Leader

Enclosure

cc: David Robinett (e-mail only)