



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

November 24, 2020

John A. Garcia, Jr., Ph.D.  
Superintendent  
Downey Unified School District  
XXXXXXXXXXXXXX

(In reply, please refer to OCR Docket Number 09-20-1251.)

Dear Superintendent Garcia:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has resolved the above-referenced complaint against the Downey 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:

1. Whether the District denied the Student a free appropriate public education (FAPE) when he was not provided with (1) extra time to complete assignments, (2) the opportunity to make-up assignments, and (3) preferential seating as required by the Student's individualized education program (IEP) plan.
2. Whether the Student was subjected to disability harassment when his teacher made belittling comments.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving 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. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a public entity that receives funds from the Department and is therefore subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR gathered evidence by interviewing the Complainant, the Student, and the Student's teacher, and reviewing documents provided by the District and the Complainant.

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<sup>1</sup> 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.

With regard to Issue #1, prior to the conclusion of the investigation, the District expressed an interest in resolving the issue and OCR found it was appropriate to resolve the issue prior to the conclusion of the investigation. With regard to Issue #2, based on this investigation, OCR found insufficient evidence that the District was out of compliance with Section 504, Title II, and their implementing regulations with respect to the issue investigated. The applicable legal standards, facts gathered to date, and resolution of this matter are summarized below.

### Legal Standard

#### *FAPE – Failure to Implement IEP*

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 students without disabilities 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.

#### *Disability Harassment*

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

A school 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 school 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 school 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.

### Factual Findings

**Issue #1: Whether the District denied the Student a free appropriate public education (FAPE) when he was not provided with (1) extra time to complete assignments, (2) the opportunity to make-up assignments, and (3) preferential seating as required by the Student's individualized education program (IEP) plan.**

During the 2019-2020 school year, the Student was a XXXXX grader with a disability at a high school in the District. The Student received services through an IEP plan. The IEP plan required that, among other things, the Student be provided with "preferential seating," "extra time on assignments on assignments/tests as needed," and the "ability to make-up assignments within a week of due date."

#### *Extra Time to Complete Assignments and Ability to Make-up Assignments*

The Complainant stated that the Student's XXXXXX Teacher (the Teacher) during the Fall 2019 semester did not allow the Student to make-up several assignments that the Student missed, and marked other assignments down for being late in violation of the Student's IEP plan. The Complainant said that the Student was not able to make up reading summaries that were missing from the beginning of the semester and the Student was marked down on assignments relating to a book titled "XXXXXXXXXX" for being late in violation of his IEP plan. The Complainant stated that these were the only specific assignments that he could recall that the Student was not allowed to make-up or was marked down for turning in late, but he stated that the Teacher also marked down other assignments for being late.

According to the District, the Student was provided with all of the accommodations listed in his IEP plan. The Teacher stated in her initial interview that she provided the Student with an opportunity to make up all of his missed assignments for full credit. The syllabus for the XXXXXX course states that students may turn in late assignments, but the assignment will be marked down 10% for each day it is late.

At the beginning of the Fall 2019 semester, the Student was assigned "reading summaries" that were to be completed twice per week and were worth 20 points each. The reading summaries were to be based on a chapter book of the Student's own choosing. For the first few weeks of class, the Student did not complete the reading summaries because he had not chosen a chapter book to use for these assignments.

During his interview with OCR, the Student said that he did complete the reading summaries a few weeks after they were assigned, but the Teacher marked them down for being late. During her initial interview, the Teacher stated that she allowed him to make-up all of the assignments he missed, including the reading summaries and “XXXXXXXXXX” assignment, for full credit.

Following the Teacher’s initial interview, OCR obtained a Student Progress Report (Progress Report) from the District, which showed all of the grades that the Student received during the Fall 2019 semester. The Progress Report indicated that the Student did not receive credit for reading summaries that were due between August XX and October X, 2019, which accounted for 11 missed assignments.

In a follow-up interview, after reviewing the Progress Report, the Teacher remembered that she gave the Student the option of making up the missing assignments or having the remainder of the reading summaries for the semester count for double (40 points), but only if the work product was very good. She said that the Student chose to have the reading summaries count for double points for the remainder of the semester rather than making up the assignments that he missed.

Beginning on September XX, 2019, the Progress Report indicates that the value of the reading summaries increased to be worth 40 points each. The Student received 0 out of 40 points for the assignments on September XX and October X, 2019. The Student also received a 70% or less on four other reading summaries. The Student received full credit for the remainder of the reading summaries for the semester.

The Complainant also stated that the Student was marked down on an assignment titled “XXXXXXXXXX” for turning it in late. The Progress Report indicates that there were nine graded assignments relating to the “XXXXXXXXXX.” The Student received full credit for 7 of the 9 assignments. The Progress report indicates that the Student received 24.5 out of 40 points on an assignment that was due on 9/XX/2019. The Progress Report includes notes under that assignment that read: “Late Work Gave student the opportunity to get the work done over the weekend, with no penalty, student did not complete the work. Completed work in class on 10/X.” The Student received a 75 out of 100 points on the other assignment.

In her follow-up interview with OCR, the Teacher indicated that she did mark the assignment down for being late. The Teacher stated that she marked it down because she gave him an entire month to complete the assignment. She stated that she had to mark it late because the class needed to move on to the next assignments in the plan.

### *Preferential Seating*

In his interview with OCR, the Complainant stated that the Teacher did not provide the Student with preferential seating in accordance with his IEP plan. According to the Complainant, the Teacher had provided the Student with a seat at the front of the class at the beginning of the year. The Complainant stated that at some point in the middle of the semester the Teacher began to primarily teach from a different point in the classroom, which was further away from the Student and off to the side.

The Student stated that he was initially seated in the front of the classroom. He stated that the Teacher moved his seat from the front of the room to the very back row in either October or November 2019. The Student stated that the Teacher did not provide him with an option to choose his seating and did not check with him prior to changing the seating arrangement. The Student said that Teacher's reason for the change in seating was because she wanted to rearrange the seating chart and to find him a perfect place to sit. According to the Student, this negatively affected his point of view, his ability to hear the lessons, and his ability to work with his friends.

The Teacher stated that the Student was initially seated at the front of the classroom, but she did move him during the semester because she felt that he was distracting another student. She stated that prior to moving him she asked the Student and the Student's case manager if it was ok to move him. The Teacher stated that she allowed the Student to choose his new seat, and the Student chose a seat in the middle of the classroom.

### **Analysis**

As the District requested to resolve the complaint, OCR did not conclude its investigation. However, based on the investigation thus far, OCR has preliminary compliance concerns with respect to whether the Student was marked down for turning in assignments late and was moved to the back of the classroom in violation of the accommodations in the Student's IEP plan. The Progress Report indicates that the Student was marked down for turning in an assignment less than one week late. Further, OCR had concerns that other assignments had been improperly marked down for being late as those assignments had each been marked down by the same percentage, which was consistent with the Teacher's syllabus with regard to late work.

Additionally, the Teacher's memories and explanations of the facts surrounding the case were inconsistent and changed when presented with new evidence.

However, prior to the conclusion of OCR's investigation, the District expressed interest in voluntarily addressing the issues raised in the complaint under Section 302 of OCR's Case Processing Manual, and OCR determined that it was appropriate to do so.

### **Issue #2: Whether the Student was subjected to disability harassment when his teacher made belittling comments.**

The Complainant stated that during the Fall 2019 semester the Teacher made several belittling comments to the Student. The Complainant states that the Teacher made statements about how the Student was "failing the class" or "how he just could not learn" compared to other students in the class. The Complainant told OCR that the Teacher also belittled the Student when the Teacher told the Student not to interrupt the class when he asked a question, even though the teacher was not lecturing at the time; reprimanded the Student in class for being disruptive and distracting others when the Student was trying to help other students; told the Student's group that she thought they were the smartest group, but she guessed that was not true after they got an answer wrong in class; and called the Student "rude and disrespectful" for not raising his hand before providing an answer in class. The Complainant said that the Teacher also

stated that her previous students were hard workers who all went to college, which was perceived by the Student as putting her current students down.

The Teacher denied making any of the above comments. The Teacher stated that she considered the Student to be one of her best students and often asked him to help other students with their work. She also noted that she never reprimands or belittles students for not raising their hands when commenting or asking a question because she understands that students learn in different ways.

### **Analysis/Resolution**

In evaluating a District's responsibilities under Section 504 and Title II with respect to an allegation that an employee harassed a student, OCR first considers whether the harassment was sufficiently serious to deny or limit a student's ability to participate in or benefit from the program based on disability. In this case, OCR was unable to substantiate whether the Teacher made the alleged comments. However, OCR determined that the actions described by the Complainant, even if true, were not sufficiently serious to deny or limit the Student's participation in the class based on disability. Furthermore, many of the comments described by the Complainant were directed at the Student and other students in the class as a group, which indicates that the comments were not made on the basis of the Student's disability.

Based on the information provided by the Complainant and District, OCR determined, pursuant to Section 303(a) of the Case Processing Manual, that there was insufficient evidence to establish that the District discriminated against the Student in violation of Section 504 and Title II regarding Issue #2.

### **Overall Conclusion**

This concludes the investigation of this complaint.

With regard to Issue #1, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement (Agreement) which is aligned with the complaint allegation and the information obtained by OCR during its investigation. The Agreement addresses the compliance concerns identified above with respect to the District's implementation of the Student's IEP plan in compliance with Section 504 and Title II.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of Issue #1 as of the date of this letter and notifying the complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegation. 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.

With regard to Issue #2, this concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of Issue #2 as of the date of this letter and notifying the Complainant concurrently. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

The Complainant has a right to appeal OCR's determination with regard to Issue #2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete, inaccurate, 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.

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 Robert Paping at (415) 486-XXXX or at [robert.paping@ed.gov](mailto:robert.paping@ed.gov).

Sincerely,

/s/

Joseph Wheeler  
Team Leader

cc: Meagan M. Kinsey