



Ken Dauber <ken.dauber@gmail.com>

Question about disability harassment enforcement

3 messages

Ken Dauber <ken.dauber@gmail.com>

Sat, Feb 16, 2013 at 11:35 PM

To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Hi Sandy,

Russlynn suggested that I email you about this question. An OCR resolution agreement and a letter of finding against Palo Alto Unified here in California for disability harassment discrimination recently became public, and it has become an issue of interest in the community (here's a link to one of the stories about it: http://www.paloaltoonline.com/news/show_story.php?id=28540). My wife Michele (who's a law professor at Stanford and whom you met at Russlynn's wedding) and I have been helping the family with getting services. It would be helpful for me in talking about the resolution agreement to know how frequent this kind of outcome is. I gathered from the 4-year report that was published in the fall that around 1500 disability harassment complaints were received during that period, but I don't know how many resulted in investigations, and how many of those in findings and in resolution agreements.

I tried to find this information on the Internet but couldn't. Could you point me to a source or give me a rough idea?

FYI, I know of as many a dozen families with similar experiences who are considering filing their own complaints. Is there any thought towards coordinated enforcement?

Thanks,
Ken Dauber

Battle, Sandra <Sandra.Battle@ed.gov>

Sun, Feb 17, 2013 at 8:54 AM

To: Ken Dauber <ken.dauber@gmail.com>

Hi Ken,

Thanks for your email. Addressing harassment and bully in schools has been of concern to the administration. In October 2010, Russlynn sent a letter (see link below) to all recipients of federal aid nationwide reminding them of their responsibility to address bullying and harassment. This was an effort address the issue on a more national basis vs. just investigating individual complaints and providing technical assistance. I would welcome other thoughts about effective coordinated enforcement. Also, when staff are at work next week, I will to provide as much information as is available in response to your complaint data questions.

Best,

Sandy

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (DCL)

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (Fact Sheet)

<http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility> (Press release)

From: Ken Dauber [mailto:ken.dauber@gmail.com]
Sent: Sunday, February 17, 2013 2:36 AM
To: Battle, Sandra
Subject: Question about disability harassment enforcement

[Quoted text hidden]

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Mon, Feb 18, 2013 at 6:17 PM

Hi Sandy,
Thanks, I really appreciate your help. The data on complaints will be very useful.
Ken

[Quoted text hidden]



Question about disability harassment enforcement

3 messages

Battle, Sandra <Sandra.Battle@ed.gov>
To: "Ken Dauber (ken.dauber@gmail.com)" <ken.dauber@gmail.com>

Tue, Feb 19, 2013 at 4:17 PM

Hi Ken, Here is the data received:

Among 1,513 disability harassment complaints received during FY 2009 and FY 2012,

1) the number that resulted of in investigations/OCR involvement: **647** (590 + 57)

--- 43% of total disability complaint receipts

2) the number that resulted in resolution agreements : **118** (87 + 31)

--- 20% of disability complaints resulted in substantive closures

FY 2009-2012 Disability Harassment Complaint Receipts	Count	%
Total Receipts	1,513	
Resolutions	1,456	
- Dismissal	515	35%
- Administrative Closure	351	24%
- Resulted in Substantive Closures	590	41%
<i>No Violation/Insufficient Evidence</i>	<i>348</i>	<i>59%</i>
<i>Successful Conclusion of Early Complaint Resolution-remedy obtained by OCR bringing the parties together w/o need for a formal OCR investigation</i>	<i>119</i>	<i>21%</i>
<i>Case resolved with OCR involvement; no monitoring or agreement required</i>	<i>5</i>	<i>1%</i>
<i>Resolution agreement obtained before conclusion of OCR's investigation</i>	<i>87</i>	<i>15%</i>

<i>Resolution agreement obtained after conclusion of OCR's investigation (non-compliance determination)</i>	31	5%
Pending as of 2/19/2013	57	
Under Investigation	49	
In Resolution/Negotiation	8	

Note, OCR would not be in a position to provide information about the extent or contents of the resolution agreements accepted without review of the individual documents.

Best, Sandy

From: Ken Dauber [mailto:ken.dauber@gmail.com]
Sent: Sunday, February 17, 2013 2:36 AM
To: Battle, Sandra
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Thanks,
Ken Dauber

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Wed, Feb 20, 2013 at 8:23 AM

Sandy,
Thanks, this is extremely helpful. Is the list of school districts represented in the 31 cases in which agreements were obtained after investigation public information? If so, can you send it to me?
Ken

On Tue, Feb 19, 2013 at 4:17 PM, Battle, Sandra <Sandra.Battle@ed.gov> wrote:

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Ken Dauber

Battle, Sandra <Sandra.Battle@ed.gov>
To: Ken Dauber <ken.dauber@gmail.com>

Wed, Feb 20, 2013 at 4:23 PM

Hi Ken,

The names of the schools represented in the 31 cases are not public. However, I treated your request as a FOIA. For 10 of the 31 cases, based on the electronic data available, the compliance concerns that OCR identified were not related to disability harassment; I am not providing the names of these recipients.

Best, Sandy

Recipient Name	State
OPELIKA CITY SCHOOL DISTRICT	AL
CATOOSA COUNTY	GA
BROWARD COUNTY SCHOOL DISTRICT	FL
OCONEE COUNTY	GA
Northland Community and Technical College	MN
GILBERT UNIFIED DISTRICT	AZ
ACORN MONTESSORI CHARTER SCHOOL 928-772-5778	AZ
DENVER PUBLIC SCHOOL DISTRICT	CO

EAST VALLEY INSTITUTE OF TECHNOLOGY	AZ
CHAFFEY JOINT UNION HIGH	CA
HEMET UNIFIED	CA
VALLEJO CITY UNIFIED	CA
SANTA MONICA-MALIBU UNIFIED	CA
GOLDEN WEST COLLEGE	CA
PALO ALTO UNIFIED	CA
LOS ANGELES TRADE TECHNICAL COLLEGE	CA
SANTA ROSA CITY SCHOOLS	CA
BAKERSFIELD COLLEGE	CA
COLUMBIA COLLEGE-HOLLYWOOD	CA
EDGECOMBE COUNTY SCHOOLS	NC
SOUTHFIELD PUBLIC SCHOOL DISTRICT	MI

From: Ken Dauber [mailto:ken.dauber@gmail.com]
Sent: Wednesday, February 20, 2013 11:24 AM
To: Battle, Sandra
Subject: Re: Question about disability harassment enforcement

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Thanks,

Ken Dauber



Ken Dauber <ken.dauber@gmail.com>

Fwd: Case No. 09-11-1337, PAUSD

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Mon, Feb 25, 2013 at 10:29 PM

Dear Sandy -- Thanks for your earlier responses to my questions about OCR's experience with disability harassment complaints. I'm forwarding you a note that my wife Michele sent to the attorney in the San Francisco office who is handling the PAUSD case, for your information.

----- Forwarded message -----

From: **Michele Dauber** <mldauber@gmail.com>
Date: Mon, Feb 25, 2013 at 4:06 PM
Subject: Case No. 09-11-1337, PAUSD
To: shilpa.ram@ed.gov

Dear Ms. Ram:

I am a professor at Stanford Law School, where I have taught both torts and employment discrimination. I am also a resident of Palo Alto. I'm writing to you about OCR's Resolution Agreement with PAUSD regarding disability harassment dated 12/14/12. I'm well-acquainted with the family of the complaining Student in that case and recently assisted them in securing representation for the IEP process from the legal clinic at Stanford Law School as well as pro bono representation for a possible action for monetary damages.

I have recently had the opportunity to review the documents submitted to you by PAUSD regarding Parts III-VI of the Resolution Agreement (I have not reviewed those regarding the individual student) and I have some significant concerns about the adequacy of PAUSD's recent submission. I am particularly concerned about the compliance with items under III.A. regarding the use of Uniform Complaint Policy (and the legal sufficiency of the district's discriminatory harassment complaint policies generally). I am currently putting those concerns in writing and will forward them to you by the end of this week. I hope that you will take them into account when responding to PAUSD's submission.

Your finding and the enforcement of this Resolution Agreement are vitally important to disabled and other protected classification students in PAUSD, many of whom are in circumstances that are quite similar to the complaining witness in 09-11-1337. Thank you for your hard work on behalf of protecting the civil rights of the district's children.

Please do not hesitate to contact me if you would like to discuss this matter further.

Michele Dauber
[650-521-6005](tel:650-521-6005) (cell)

--

Check out my new book, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State*, from University of Chicago Press (just released in December 2012).

<http://www.press.uchicago.edu/ucp/books/book/chicago/S/bo14216813.html> or visit the book's facebook page at: <http://www.facebook.com/SympatheticState>



Ken Dauber <ken.dauber@gmail.com>

Fwd: Case No. 09-11-1337, PAUSD

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Mon, Mar 4, 2013 at 6:15 PM

Hi Sandy,
I'm forwarding a letter that my wife Michele sent to Shilpa Ram at the San Francisco office of OCR -- Michele and Shilpa have communicated about this and I'm just sending this to you for your information.
Best,
Ken Dauber

----- Forwarded message -----
From: **Michele Dauber** <mldauber@gmail.com>
Date: Mon, Mar 4, 2013 at 6:11 PM
Subject: Fwd: Case No. 09-11-1337, PAUSD
To: Ken Dauber <ken.dauber@gmail.com>

----- Forwarded message -----
From: **Michele Dauber** <mldauber@gmail.com>
Date: Mon, Mar 4, 2013 at 10:22 AM
Subject: Re: Case No. 09-11-1337, PAUSD
To: "Ram, Shilpa" <Shilpa.Ram@ed.gov>

Dear Shilpa:

Attached please find the following:

1. A letter outlining my concerns about the sufficiency of PAUSD's 2/15/13 submission under the Resolution Agreement in Case 09-11-1337;
2. PDFs of Exhibit A and Exhibit B that are referenced in my letter. These are, respectively PAUSD's most recent draft of its proposed harassment policy and regulations; and PAUSD's current UCP policy and regulations.

I hope that you find these materials helpful in your review of PAUSD's submission. PAUSD's Board of Trustees has scheduled consideration and adoption of its proposed harassment policy for March 12. As much of my letter addresses the legal sufficiency of this policy I hope that you will give the matter prompt consideration.

Thank you again for your hard work on this matter. The systemic issues you identified in your investigation and the enforcement aimed at remedying them is of vital importance to protecting the civil rights of the district's children.

If you have any questions regarding the foregoing or the attached, or would like to discuss this matter further, please do not hesitate to contact me either via email or by cell phone at [650-521-6005](tel:650-521-6005).

All best regards,

Michele Dauber

4 attachments



Dauber Exhibit B part 2.pdf
18K



Dauber Exhibit B part 1.pdf
29K



Dauber PAUSD Exhibit A.pdf
255K



Dauber OCR letter 3.4.13.docx
208K

March 4, 2013

Michele Landis Dauber
730 Paul Avenue
Palo Alto, CA 9430

Ms. Shilpa Ram
Staff Attorney
Office for Civil Rights
U.S. Department of Education
50 Beale Street, Suite 7200
San Francisco, CA 94105

VIA EMAIL: shilpa.ram@ed.gov

Re: Case Number 09-11-1337

Dear Ms. Ram:

Thank you for the opportunity to comment on the sufficiency of the submission of Palo Alto Unified School District (PAUSD) with regard to the above-referenced complaint. As I mentioned in our email exchange I am Professor of Law at Stanford Law School, and a Palo Alto resident. I am also acquainted with the family involved in this case and have assisted them in obtaining pro-bono counsel. As described below, PAUSD's submission does not appear to meet the requirements of the Resolution Agreement or of relevant legal standards in several important respects. I hope that you will work further with PAUSD to improve these documents.

I reviewed the materials that PAUSD submitted to you on February 15, 2013 in accordance with the Resolution Agreement dated December 15, 2012. I focused on Sections III (Training and Guidance to Administrators Concerning Responding to Complaints of Discrimination Based on Disability) and IV (Notice to Parents and Students). In addition, I reviewed PAUSD's draft Board Policy and Administrative Regulations on Bullying (BP5131.2 and AR5131.2) which were also sent to you, as well as a revised draft of that same policy that appears to have been created on Thursday February 28, 2013 (attached hereto as Exhibit A).

A key issue is that contrary to the Resolution Agreement (and to California Department of Education (CDE) regulations) PAUSD plans not to use the Uniform Complaint Procedure (UCP) for resolving claims of discriminatory harassment. The procedure PAUSD is proposing to use instead of the UCP is inconsistent with the requirements of

the CDE regulations governing the UCP. 5 C.C.R. § 4600-4687.¹ I have communicated this concern directly to district leadership and counsel for the district, though the latest draft I have seen still has this problem.

California Department of Education regulations provide that all written complaints of discrimination, including discriminatory harassment, shall be handled through rules adopted by districts that are consistent with the UCP. *See* 5 C.C.R. §§ 4621, 4630. This requirement specifically applies to procedures for addressing complaints of discriminatory harassment and bullying under AB9 (Seth's Law).² *See* Cal. Educ. Code § 234.1 (2012); 5 C.C.R. §§ 4900, 4962. The specific procedures required by the UCP are set forth primarily in 5 C.C.R. § 4631, and include a complainant's right to present evidence or information leading to evidence, 5 C.C.R. § 4631(b); to receive a written decision by the district within 60 calendar days, 5 C.C.R. § 4631(e); and to have the written decision include the following: conclusions of law reached by the investigator, 5 C.C.R. § 4631(e)(2), notice of the right to appeal the investigator's decision to the CDE, 5 C.C.R. § 4631(e)(6), and a description of the CDE appeal, 5 C.C.R. § 4631(e)(7).

The CDE clearly intends that school districts will apply procedures consistent with the UCP in all cases of discrimination, including cases of discriminatory harassment and bullying. For example, 5 C.C.R. § 4900 requires that the State Superintendent of Education ensure that districts use the UCP to achieve nondiscrimination in state educational programs. Likewise, the regulations regarding discriminatory harassment specifically state that "compliance with the provisions of this division shall be carried out in accordance with" the UCP. *See* 5 C.C.R. § 4962. In addition, the CDE brochure regarding Seth's Law, dated July, 2012 states that the UCP will be followed in investigating complaints under that law, and gives an outline of the UCP requirements. *See* Prohibition of discrimination, harassment intimidation and bullying in California Public Schools, July 2012, *available at*

¹ Although OCR is primarily concerned with the enforcement of federal, not state, law, OCR's Resolution Agreement Section III.A.4 with PAUSD requires PAUSD to utilize the UCP for resolving claims of disability discrimination. The extended discussion of state law here is intended to show that PAUSD's submission does not meet the terms of the Resolution Agreement regarding the use of Uniform Complaint Procedure.

² Seth's Law requires that the district compliance officer ensure compliance with CDE regulations regarding discrimination. Cal. Ed. Code § 234.1(g) (2012). These regulations specifically require that they will be carried out through the use of the UCP. *See* 5 C.C.R. §§ 4900, 4962 ("Compliance with the provisions of this division shall be carried out in accordance with the complaint procedures specified in sections 4601 through 4671 of this Title."). The only procedural requirement of Seth's Law which may not be found in the UCP is the opportunity for a complainant to appeal the resolution of a complaint. *See* Cal. Ed. Code § 234(b)(3) (2012). PAUSD's UCP provision already provides such an appeal. *See* attached Exhibit B, AR1312.3, at Step 3 (describing appeal to the Board of Education).

<http://www.cde.ca.gov/re/di/eo/documents/nondiscrimbrochure1.doc> (last viewed March 1, 2013)

Yet despite these facts, and despite the fact that PAUSD has a currently adopted Uniform Complaint Procedure, *see* PAUSD BP1312.3, AR1312.3, attached hereto as Exhibit B, PAUSD does not utilize the UCP as its procedure for resolving claims of disability harassment discrimination.³

Instead, PAUSD has created an entirely new “site-level” process that is inconsistent with the provisions of the UCP. Under PAUSD’s proposed policy, the UCP can only be used in addition to that “site-level” process and only then if the complainant specially elects it. As detailed below, this simply does not comply with the terms of the Resolution Agreement or with CDE regulations.

- A. The Guidance Memorandum fails to comply with Section III.A.4 of the Resolution Agreement because it does not contain “an explanation that the Uniform Complaint Procedure (UCP) is the District’s Procedure for resolving disability discrimination complaints.” Rather, it describes the UCP as an optional additional procedure that may be specially elected by the complainant.
- B. The Guidance Memorandum instead prescribes a mandatory complaint procedure for resolving complaints of disability harassment discrimination that is not the UCP and which is inconsistent with CDE regulations governing the UCP in a number of important respects. PAUSD’s new “site-level” process is variously described in the Guidance Memorandum as the “site-level complaint process” (page 2, section 4, para. 2) or the “Internal Complaint Investigation” process (page 2, section 5). This “site-level” process is described in greater detail in AR 5131.2 where it is there called the “site-level grievance procedure,” and “Site Investigation Procedures.” *See* attached Exhibit A, at 15-16.

According to the Guidance Memorandum, PAUSD’s new “site-level” process is invoked automatically upon the receipt of a “written complaint form.”⁴ Each

³ Because PAUSD has a UCP (see attached Exhibit B: PAUSD BP1312.3, AR1312.3) it is somewhat mystifying why PAUSD does not merely state on page 5 of its new Bullying Policy (see attached Exhibit A, BP5131.2, at 5) that “Reports of bullying shall be investigated and resolved in accordance with the Uniform Complaint Procedures specified in AR1312.3,” rather than as it currently states “in accordance with site-level grievance procedures specified in AR5131.2.” This change would bring the policy into compliance with both the CDE regulations and the Resolution Agreement.

⁴ PAUSD makes conflicting statements about whether complaints must be made in writing under its new “site-level” process. The Guidance Memorandum states twice that complaints must be in writing. See § 4: “Complaints of bullying shall be investigated and resolved within 15 school days of receipt of the written complaint form,” and § 6: “The alleged victim/complainant/student/employee or parent(s) or guardian(s), on behalf of the

school principal is responsible for receiving and investigating complaints, and for responding to complainants in writing.

As discussed above, under CDE regulations school districts may adopt policies and regulations for addressing discrimination but such policies cannot be inconsistent with the UCP. *See* 5 C.C.R. § 4621. The PAUSD “site-level” process outlined in the Guidance Memorandum is inconsistent with the UCP in the following significant respects:

1. The filing of a written complaint should initiate the Uniform Complaint Procedure but it does not. CDE regulations require that written complaints of discrimination be handled according to the UCP. *See* 5 C.C.R. § 4600 (defining “complaint” under CDE UCP regulations as any “written and signed statement.”); 5 C.C.R. § 4620 (stating that districts “shall investigate complaints . . . alleging discrimination and seek to resolve those complaints in accordance with the procedures set out in this chapter.”); 5 C.C.R. § 4621 (stating that districts may not require that complainants use a specific complaint form to file a written complaint under the UPC); 5 C.C.R. § 4962 (stating that compliance with nondiscrimination requirements “shall be carried out in accordance with the complaint procedures specified in sections 4601 through 4671 of this title”). Although CDE regulations permit a district to resolve complaints “prior to the formal filing of a written complaint,” it is clear that once such a written complaint is filed, it must be investigated and resolved using procedures consistent with the UCP. 5 C.C.R. § 4600(d); 5 C.C.R. § 4620; 5 C.C.R. §4631(g).

Instead PAUSD treats a written complaint as triggering only its new “site-level” process. According to the Guidance Memorandum and the draft PAUSD policy, the complainant cannot opt out of this “site-level” process. The complainant may elect to file a separate, additional written complaint under the UCP (see attached Exhibit A, AR5131.2, at 18), though the process for doing so is not fully described, nor is the interaction of the differing timelines and appeal rights in the two processes delineated.

The treatment of a written complaint as triggering only PAUSD’s new “site-level” process is certain to lead to confusion by complainants and staff, and possibly to PAUSD noncompliance with legally mandated deadlines (see item B.3 below); loss or interference with complainant appeal rights to the CDE, (see item B.4 and n.7 below); and the possibility of direct intervention by CDE. *See* 5 C.C.R. § 4650(a)(1).

student, may file a written complaint. . .” However, the proposed bullying policy itself states that written complaints are merely “encouraged” and “school officials shall investigate all reports of harassment whether or not the report is in writing.” *See* attached Exhibit A, AR5131.2, at 15.

2. PAUSD's new "site-level" process does not include the specific opportunity for the complainant or the complainant's representative or both to "present the complaint(s) and evidence or information leading to evidence to support the allegations of non-compliance with state and federal laws and/or regulations" as required in the UCP. *See* 5 C.C.R. § 4631(b).

The "site-level" process merely states that the principal shall conduct an investigation, notify the parents of the involved students of the fact of the investigation, and that interviews of the complainant and the accused harasser will be conducted separately. The right to present evidence and information leading to evidence guaranteed in the UCP is absent from the "site-level" process.

3. PAUSD's new "site-level" process does not include the specific guarantee that a complainant will receive a final decision within 60 calendar days from the receipt of the complaint. *See* 5 C.C.R. 4600(g) (defining "days" as "calendar days" for UCP purposes); 5 C.C.R. 4631(e) (requiring a written decision based on evidence within 60 days of receipt of complaint). Rather, PAUSD's site-level process requires only that written resolution be provided "within 15 school days of the notification as to the filing of the report."⁵ Although it appears likely that the principal's initial resolution decision would fall within the required 60-calendar-day window, there is no guarantee that it would do so. For instance, complaints filed near the end of the school year or during summer recess may fall outside the required 60-calendar-day period.

A far more serious problem is created by the fact that the principal's initial decision may be appealed to the Student Services Coordinator within 15 calendar days of the resolution, but there is **no stated time limit for the Student Service Coordinator's decision of the appeal**. That makes it impossible to determine whether the district will issue a final decision within 60 calendar days as required by the UCP. Indeed it makes it impossible to determine when the district will issue a decision at all.

⁵ The "Notice--Bullying" document submitted by PAUSD to OCR on 2/15/13 pursuant to Section IV of the Resolution Agreement contains a different and conflicting timeline for the determination of complaints under the new "site-level" process than that contained in the Guidance Memorandum and in the proposed policy itself (see attached Exhibit A, AR5131.2, at page 17). The Notice states that complaints will be investigated and resolved within 10 school days while the other documents state that they will be resolved within 15 school days.

A further problem with the internal appeal process is that under the policy, “either party” may appeal -- presumably meaning either the student complaining of disability discrimination or the alleged harasser or discriminator (including employees). See attached Exhibit A, AR5131.2, at 18. Thus, if the alleged discriminator files an internal appeal that takes weeks or months to resolve, then the complainant may lose UCP, CDE or other important rights during the pendency of the alleged discriminator’s appeal.⁶

4. PAUSD’s new “site-level” process contains no requirement that the principal’s decision or the appeal determination decision will include notice of CDE appeal rights or a description of the CDE appeal process as required by CDE regulations. See 5 C.C.R. §4631(e)(6-7) (requiring decision include to notice and description of CDE appeal rights and procedures). This appears to be because there are no such appeal rights under the “site-level” process.⁷

To the contrary, the “site level” process directs the complainant who is dissatisfied with the results of the appeal to the Student Services Coordinator to file an entirely new complaint with the district, this time under the UCP.

5. The resulting tangle of conflicting policies, appeals and timelines in which complainants who file written complaints of disability or other discriminatory harassment are automatically defaulted into a new “site-level” process rather than the UCP is likely to result in negative effects, among them:

⁶ Seth’s Law (AB9) requires appeal rights under the bullying policy only for the individual complaining of discriminatory harassment. See Cal. Educ. Code § 234.1(b)(3) (2012). Appeals by alleged discriminators would be more properly handled under the district’s discipline or personnel policies rather than within its discrimination complaint policy. As discussed *infra* at n.2, Seth’s Law requires that the complainant be afforded an opportunity to appeal.

⁷ There is no indication in PAUSD’s “site-level” process that either the principal’s decision or the appeal determination of the Student Services Coordinator are appealable to the CDE. Rather it seems apparent that only those who elect to use the UCP will have CDE appeal rights and that these rights are waived by all other complainants, because (a) there is no deadline whatsoever for the conclusion of the Student Services Coordinator’s appeal decision and (b) the Guidance Memorandum does mention CDE appeal rights, but only those for complainants who specially elect to use the UCP. See Guidance Memorandum, at § 4; and attached Exhibit A, AR5131.2, at 18 (describing no CDE appeal rights of any kind under the “site-level” process).

- a. A complainant in the “site-level” process who follows the internal appeal process to the Student Services Coordinator before filing a UCP complaint could miss the 6-month statute of limitations for filing a UCP complaint because there is no time limit for the Student Service Coordinator to decide the appeal;
 - b. A complainant in the “site-level” process could be found to have no CDE appeal rights from either the principal’s decision or the Student Service Coordinator’s determination, but would have to wait for the resolution of a second, subsequently filed UCP complaint (assuming no limitation period issue as suggested in subsection (a) above) thus delaying the resolution of discrimination complaints with all of the attendant problems of fading memory, witness unavailability, and lost or damaged evidence that can be occasioned by such a delay⁸;
 - c. A complainant in the “site-level” process could be determined to have missed the required 15-day deadline for appeal to the CDE if CDE determined that either the principal’s decision or the internal appeal decision was in fact an appealable determination;
 - d. A complainant who elects to use both the UCP and the “site-level” policies simultaneously would face numerous, overlapping, and conflicting timelines that make errors by district and school staff in implementing such procedures more likely;
 - e. The procedural complexity of PAUSD’s “site-level” process seems likely to cause undue delay in the implementation of measures intended to address the results of discriminatory harassment for victims and potentially increase the harm of that discrimination to their educational participation. Using the UCP as required by both state law and the Resolution Agreement avoids this undesirable outcome.
6. PAUSD’s new “site-level” process provides that the principal will issue a written determination following the investigation of a complaint of disability harassment. The written decision described in PAUSD’s “site-level” process does not include all of the required elements for a decision under the UCP. In the proposed process, a decision “shall indicate all of

⁸ Under 5 C.C.R. §4650(a)(1), where a district seeks to resolve complaints of discrimination using a complaint procedure other than the UCP, the failure to use the UCP can provide a basis for state intervention, potentially further complicating and potentially delaying the resolution of a discrimination complaint while the question of whether and to what extent the “site-level” process is consistent with the UCP is litigated.

the issues raised, the findings made on each issue and the rationale for each, the corrective action for each issue, if any, and notice of the right to appeal” (see Exhibit A: AR 5131.2, p. 17, “Site Investigation Procedures,” at para. 5).⁹ But in addition to these elements, a Decision under the UCP must contain a conclusion of law, *see* 5 C.C.R. § 4631(e)(2), a notice of the complainant’s right to appeal to the CDE, and a description of the process for initiating such an appeal. *See* 5 C.C.R. § 4631(e)(6-7). None of these elements are included in the “site-level” process.¹⁰

- C. The Guidance Memorandum does not include any “description of what an administrator should do if he or she learns of harassment of a student by a peer or by an employee based on disability” as required by Resolution Agreement III.A.5. This section is simply missing.

Even worse, PAUSD’s new “site-level” process does not require school administrators who learn of harassment to do anything at all. Staff who personally witness harassment must intervene to stop it and report it to the site administrator within 24 hours (See Exhibit A, BP5131.2, at page 4; AR5131.2, at page 14). District and school staff and administrators (other than the principal or designee responsible for receiving complaints) who learn of harassment but do not personally witness it have no obligations under PAUSD’s “site-level” process.

As noted in your Letter of Finding, district administrators have an obligation under Section 504 to take appropriate responsive action to adequately address

⁹ The language used by PAUSD in its policy appears to have been selectively drawn from the Resolution Agreement Section III.A.9, which states that the district’s guidance memorandum will include a statement that “as required by the Uniform Complaint Procedures, the complainant must be provided with written notice of the outcome of the complaint including a statement of all the issues raised, the findings made on each issue and the rationale for each, the corrective action for each issue, if any, and notice of the right to appeal.” PAUSD appears to have neglected to consider the important phrase “as required by the Uniform Complaint Procedures,” and merely included verbatim the language that followed in both the guidance memorandum and the “site-level” process itself. See Guidance Memorandum, at para. 9; attached Exhibit A, AR5131.2, at 17, para. 5. This suggests that PAUSD’s decision not to implement the Uniform Complaint Procedure is intentional rather than accidental, as the only part of this language that is omitted is the reference to the UCP.

¹⁰ Even assuming that PAUSD’s “site-level” decisions are somehow appealable to CDE, the lack of the correct elements in such decisions will result in further delay. Decisions that are appealed to the CDE but which lack the required conclusion of law are returned to the district for correction, occasioning still more delay in the resolution of a discrimination complaint. *See* 5 C.C.R. § 4633 (stating that if an appealed decision of an LEA is missing conclusions of law, CDE may return the decision to the LEA for 20 days for further action before considering the appeal).

serious disability-based harassment about which they knew or reasonably should have known. In the instant case, the harassment experienced by the Student may have risen to the level of creating a hostile educational environment due to the lack of an effective response. *See* Letter of Finding dated 12/26/12, at 8. One of the problems clearly highlighted by OCR’s Letter of Finding is that district and school administrators, including the Superintendent, Trustees, the Director of Special Education, and the Student Services Coordinator repeatedly learned of incidents of harassment (including through written, emailed, and oral complaints) but failed to take appropriate responsive action. Many took no action at all.

Based on that history, it seems that it would be prudent to require that the Guidance Memorandum contain an explicit statement that administrators who learn of harassment (whether or not personally witnessed) are obligated to report that fact to a designated, responsible official so that the district can conduct an impartial inquiry and take appropriate, effective action to stop the harassment where necessary.

- D. The Guidance Memorandum does not contain the required statement that “students, parents or guardians who report disability discrimination, including harassment, must be notified that they can address their complaints through the District’s discrimination complaint process and how to obtain a copy of that procedure” as provided in Resolution Agreement para. III.A.6.

As discussed above, the Guidance Memorandum briefly describes the new “site-level” process and the UCP. However, the Guidance Memorandum fails to instruct staff that they are required to inform reporting students, parents, or guardians who report instances of disability discrimination that they can address their complaints through the UCP (or the “site-level” process for that matter).

- E. The Guidance Memorandum’s statement regarding the content of decisions does not comply with Resolution Agreement para. III.A.9, in that it does not contain the elements “required by the Uniform Complaint Procedure.” *See infra* n.9 and surrounding text.
- F. The definition of “bullying” selected in the policy may be too restrictive when compared with the requirements of federal law barring discriminatory harassment. For example, under this definition conduct is not bullying (and thus not subject to the policy) unless it “involves a pattern of behavior repeated over time,” and it involves an “imbalance of power or strength.” While this definition might often capture discriminatory harassment, it is not consistent with federal law, in which all the facts and circumstances of the alleged harassment are considered including the type of harassment, the frequency and severity of the conduct, the nature of the disability, the age and relationship of the parties, the setting in which the harassment occurred, and other factors. Whether conduct is repetitive is just one factor among many to be considered; in theory a single incident can produce a hostile educational environment if it is sufficiently severe. *See* Russlynn Ali, *Dear*

Colleague Letter, Oct. 26, 2010 (“Harassment does not have to include intent to harm, be directed at a specific target, or *involve repeated incidents.*”) (emphasis added).

It is probably the case that PAUSD is trying to do too much with this policy by trying to handle through one policy social climate, bullying, discriminatory harassment, discipline, and complaint policies. It may make greater sense to have a policy that addresses discriminatory harassment and mandates the use of the UCP as required by Seth’s Law, the implementing regulations thereunder, and the OCR Resolution Agreement and then to deal with these other questions separately.

Finally, in reviewing PAUSD’s current and proposed board policies and administrative regulations on discrimination complaints, I discovered that there are at least 5 policies and 3 sets of administrative regulations (including the regulation implementing the UCP) that could have been implemented in response to the harassment in Case 09-11-1337.¹¹

Policies that existed at the time of the events in Case 09-11-1337 that would have been applicable but which were apparently not applied by any member of the school or district staff include: AR1312.1, Complaints Regarding District Employees (providing that it applies to “unlawful discrimination in any program or activity”); BP 1312.3, Uniform Complaint Procedures (applies to “unlawful discrimination”); BP 5145.3, Nondiscrimination/Harassment (appoints 3 different district-level officers as “Coordinators for Nondiscrimination” and provides that all district employees must “immediately report” any incident of harassment to a Coordinator who will immediately investigate it using the Sexual Harassment procedures);¹² and AR 5145.7, Sexual

¹¹ Those policies that would have applied are: BP1312.1, Complaints Regarding District Employees; BP1312.3, Uniform Complaint Procedures; BP5121, Conduct (district claims that this policy was not actually adopted; policy states that it was 1/12/10 and minutes of Board meeting on that date reflect adoption); BP5144, Discipline; BP5145.3, Nondiscrimination/Harassment (stating that AR5145.7 will be used to handle complaints under this policy); BP5145.9, Hate-Motivated Behavior. Those administrative regulations that would have applied are: AR1312.1, Complaints Regarding District Employees (stating that it is to be used for complaints of unlawful discrimination in any program or activity); AR1312.3, Uniform Complaint Procedures (stating that it will be used to address all complaints that the district has committed unlawful discrimination); AR5145.7, Sexual Harassment (detailing process for handling discriminatory harassment complaints). These policies all provide differing and conflicting timelines. None of them other than the UCP AR1312.3 actually satisfy the UCP requirements for handling discrimination complaints. Nevertheless, the implementation of any of these policies would have been preferable to the lacuna left by the district’s failure to implement any of them.

¹² PAUSD’s procedure for addressing sexual harassment, like other forms of discriminatory harassment, should utilize the Uniform Complaint Procedure but it does

Harassment (provides for mandatory reporting and outlines a procedure for investigating harassment complaints). This plethora of policies prohibiting and addressing discrimination and harassment suggest that what is needed is not yet another policy but greater emphasis on consistent implementation of the district's already-existing Uniform Complaint Procedures (see attached Exhibit B, BP1312.3; AR1312.3).

I would in closing like to emphasize that I am aware of other families in Palo Alto who are also struggling with issues substantially similar to those raised in this case, including the lack of an effective district response. Some of these families have stated that they have not filed OCR complaints due to fear of retaliation in an IEP context or otherwise. For that reason, I believe that the systemic problems described in your Letter of Finding dated 12/26/12 are best addressed through full implementation of your Resolution Agreement in this case. I hope you will work further with the district to improve its procedures, Guidance Memorandum, and Notice to Parent and Students.

Thank you for your hard work on behalf of protecting the civil rights of the district's children. Please feel free to contact me via email at mldauber@gmail.com or on my cell phone at 650-521-6005 for further information or if you would like to discuss any of the foregoing.

Very truly yours,



Michele L. Dauber

not. The Sexual Harassment procedure AR5145.7, like the proposed bullying policy, is inconsistent with the UCP.



Ken Dauber <ken.dauber@gmail.com>

Technical assistance for Palo Alto High School Title IX/sexual violence issue

3 messages

Ken Dauber <ken.dauber@gmail.com>

Wed, May 29, 2013 at 8:58 PM

To: "Battle, Sandra" <Sandra.Battle@ed.gov>, "Kim, Robert" <Robert.Kim@ed.gov>, seth.galanter@ed.gov

Dear Sandy, Seth, and Bob:

I am writing to you at the suggestion of Russlynn Ali, who said that when OCR becomes aware of a situation in a particular district it may, on its own initiative, unilaterally offer targeted technical assistance.

Here in Palo Alto some facts have recently emerged that may make this sort of technical assistance helpful, having to do with sexual assault and sexually hostile environment discrimination under Title IX.

Recently the Palo Alto HS student newspaper published a series of stories on what the students called "rape culture" at Paly.

Here is a link to the story: <http://palyvoice.com/2013/04/08/you-cant-tell-me-i-wasnt-raped/>

The facts reported in the story concerned two female sexual assault victims, one of whom was assaulted by a student off campus but experienced severe harassment and retaliation for her report of the assault on campus. The harassment was reportedly so severe that the student left school entirely as a result.

These facts indicate that a sexually hostile environment may have been created not only for the individual victim but for other Paly students who were aware of the discriminatory and retaliatory harassment. It appears likely that school officials may have known or reasonably should have known of these facts, if not prior to the publication of the article, then certainly after it was published and widely disseminated. I think these facts should have triggered a Title IX investigation. However none was conducted and when the superintendent was asked about this, he stated that he did not see what the "nexus" was between the unfortunate events reported in the student paper and the school.

The article on "rape culture" was highly visible. The students and their teacher/advisor were featured on the local NPR affiliate, Huffington Post, and Salon. Nonetheless, no Title IX investigation was conducted despite the facts reported in the story.

One problem is that there is currently no policy in place in PAUSD that includes sexual violence as sexual harassment or provides other elements recommended in the April 4, 2011 Dear Colleague Letter. There does not appear to have been any notice or training of students, faculty, or staff, on the subject of Title IX. Although the DCL states on page 7 that these are not required, it appears that "because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination." Under conditions as those that appear to exist at Paly, as documented in the student paper story, the policy was likely not effective and may have violated Title IX.

My wife Michele is a law professor at Stanford, where she recently headed a five-year process to revamp Stanford's sexual assault disciplinary and Title IX process. Here's an article from last week's local newspaper about her efforts to get PAUSD to conduct an appropriate Title IX inquiry and create remedies for any hostile environment:

http://www.paloaltoonline.com/news/show_story.php?id=29650

As you can see in the story, Michele urged PAUSD to seek technical assistance from OCR.

The lawyers from the SF office were here in PA two weeks ago at a tech assistance event that local parent groups, including one that Michele and I are involved with, organized for parents:

http://www.paloaltoonline.com/news/show_story.php?id=29666

Michele has sent that office several emails and has talked to a team lead in person about whether OCR can unilaterally offer the district TA, but she has received no response. In part as a result of Michele's efforts to ensure that Title IX is followed, the district may now be moving toward conducting an investigation. However, it appears that PAUSD may lack a compliance officer who is properly trained in sexual assault to conduct the investigation, as required by the DCL. It appears that PAUSD (as well as the individual victim in the Paly case, and the rest of the school culture) would really benefit from some technical assistance on the subject of Title IX, sexual assault, and sexual harassment. And, if a sexually hostile environment is found to have been created by the events reported in the Paly student paper story, then the question of remedies (both individual and systemic) is critically important.

I was happy to learn from Russlynn that OCR is able to unilaterally offer PAUSD technical assistance on this issue. Given PAUSD's other recent difficulties with implementing civil rights law this seems like a good idea. I hope that OCR will consider doing so.

Please feel free to contact me at [650-906-4340](tel:650-906-4340) or Michele at [650-521-6005](tel:650-521-6005) if you would like to discuss or need more information.

Best,
Ken Dauber

Battle, Sandra <Sandra.Battle@ed.gov>
To: Ken Dauber <ken.dauber@gmail.com>

Thu, May 30, 2013 at 3:59 PM

Hi Ken,

Thanks for bringing this situation to our attention. I will have OCR-SF contact the Superintendent as early as tomorrow.

Best,

Sandy

From: Ken Dauber [<mailto:ken.dauber@gmail.com>]
Sent: Wednesday, May 29, 2013 11:58 PM
To: Battle, Sandra; Kim, Robert; Galanter, Seth
Subject: Technical assistance for Palo Alto High School Title IX/sexual violence issue

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Ken Dauber

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Fri, May 31, 2013 at 9:22 AM

Hi Sandy,
Thanks, I appreciate it.
Best,
Ken

On Thu, May 30, 2013 at 3:59 PM, Battle, Sandra <Sandra.Battle@ed.gov> wrote:

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Ken Dauber



Ken Dauber <ken.dauber@gmail.com>

Inaccurate news reports about OCR interviews of children without parental consent

2 messages

Ken Dauber <ken.dauber@gmail.com>
To: "Battle, Sandra" <Sandra.Battle@ed.gov>

Tue, Jul 16, 2013 at 11:22 AM

Dear Sandy,

I'm forwarding a couple of recent articles in one of our local papers that claim that OCR interviewed students without parental consent in Palo Alto (specifically, at a middle school, presumably the middle school in the first disability harassment case). The claim was made by one of our school board members, and then repeated in the local paper. Today's headline is:

"Feds' tactics with kids criticized: Agency investigating school district claims it can interview kids without parents' OK."

I thought you might want to pass this on to the public information folks, to see if there is a straightforward way to correct the record and dispel public confusion.

Best,

Ken Dauber

2 attachments



Post article 7-15-2013.pdf

57K



Post article 7-16-2013.pdf

138K

Battle, Sandra <Sandra.Battle@ed.gov>
To: Ken Dauber <ken.dauber@gmail.com>

Tue, Jul 16, 2013 at 12:45 PM

Thanks.

From: Ken Dauber [mailto:ken.dauber@gmail.com]

Sent: Tuesday, July 16, 2013 2:23 PM

To: Battle, Sandra

Subject: Inaccurate news reports about OCR interviews of children without parental consent

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