



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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July 30, 2015

Mr. Calvin Baker
Vail Unified School District
P.O. Box 100
Vail, Arizona 85641

Re: Vail Unified School District
OCR Case Number: 08-15-1004

Dear Mr. Baker:

We have concluded our investigation of the above-referenced complaint filed on October 2, 2014, against Vail Unified School District (the District), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District failed to implement her daughter's Section 504 plan, including providing extra time for assignments and increasing the size of reading material (particularly during testing). Additionally, the Complainant alleged that when she sent a letter to the Superintendent's office regarding the alleged failure to implement her daughter's Section 504 plan, the District failed to respond to her grievance.

We conducted an investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities funded by the U.S. Department of Education; and Title II of the Americans with Disabilities Act and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. The District is subject to Section 504 and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

Based on the allegations presented in the complaint, we investigated the following legal issues:

- Whether the District discriminated against the Student on the basis of disability by failing to provide a free appropriate public education (FAPE) as required by the Section 504 regulations at 34 C.F.R. § 104.33, when it failed to implement a Section 504 plan developed for the Student;
- Whether the District failed to ensure that communication with the Student was as effective as communication with other students by failing to provide appropriate auxiliary aids and services necessary to allow the student an equal opportunity to participate in tests administered by the District, as required by 28 C.F.R. § 35.160 and 34 C.F.R. § 104.4; and
- Whether the District has adopted, and implemented in the Complainant's case, grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and Title II, as required by 34 C.F.R. § 104.7(a) and 28 C.F.R. § 35.107(a).

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

During the investigation, we reviewed documentation provided by the District and the Complainant. We also interviewed the Complainant and District staff. We find that the preponderance of the evidence supports that the District violated Section 504 and Title II as alleged. This letter explains our findings. We thank the District for entering into a Resolution Agreement, which when fully executed, will resolve our compliance concerns.

Implementation of Section 504 Plan and Effective Communication

Factual information

The events alleged in this complaint began while the Student attended X grade at XXXX School during the 2013-14 school year, and continued when she began attending X grade at XXXX School for the 2014-15 school year.

The Student has a history of XXXX. As a result, the District identified her as a student with a disability and implemented a Section 504 Plan during the 2013-14 school year. At an annual review meeting on February 6, 2014, the Student's Section 504 team revised the plan. Under the heading "Specific Accommodations," the team added, "[i]ncrease the size of the reading material whenever possible to decrease the stress of keeping the words/pictures single and clear." Additional provisions of the plan include preferential seating, minimizing board-to-desk copying, extra time for written assignments, allowing the use of cursive writing, and using a sloping surface for reading and writing.

The Complainant did not identify any concerns related to the implementation of the Section 504 plan in the classroom setting. Her concerns specifically related to standardized testing situations (District benchmark tests, a District advanced math test, and state tests).

With regard to the allegation that the Student was not provided extra time on tests, the District informed OCR that students have an unlimited amount of time to complete all standardized tests. We asked the Complainant to identify any specific testing situation in which the Student was not offered sufficient time to complete the test, but she was not able to do so.

With regard to the allegation that the Student was not provided enlarged print materials for testing, many facts are disputed. In our data request, we requested copies of any enlarged print testing materials that have been provided to the Student. The District was not able to provide such copies, or any direct evidence that enlarged copies of tests were provided.

With regard to AIMS testing in Spring of 2014, there is no question that the Student was not provided any form of enlargement or magnification on the first day of testing (with included Reading and Math). Following the February meeting to modify the Student's Section 504 plan, the Student Achievement (SA) teacher contacted the District's testing coordinator to determine if the District could order an enlarged print copy of the AIMS test. The testing coordinator explained to OCR that testing materials are initially ordered in November. There is an additional window in February during which districts can request additional materials. However, this is based on availability and there is no guarantee that a school district will receive materials ordered later. The testing coordinator requested enlarged print testing materials from the state in February 2014, when the Student's 504 Plan was modified, but was notified that they would not be available.

The District did not notify the Complainant that the enlarged print materials were not available, and did not make other provisions for magnification prior to the first day of testing. After the Complainant learned that the Student had not been provided an enlarged print test on the first day, she contacted the school. The school was able to obtain and provide a globe magnifier to the Student for the second and third days of AIMS testing. However, the Student had not previously used this auxiliary aid and was not familiar with it.

With regard to the advanced math placement test in spring of 2014, we interviewed the Student's classroom teacher as well as the SA teacher. Neither teacher was able to specifically recall making an enlarged print copy of the test, but both stated that they believe they would have done this following the issues that arose during AIMS testing. The Complainant disputes this, and provided a copy of an email dated April 22, 2014, in which she requested that the Student be provided the magnification instrument that had been provided during AIMS testing, because the font on the test was small and difficult to see. The SA teacher responded that she would provide the Student an enlarged copy the next day. We confirmed with the District that this was a one-day test, so we infer that the Student was required to take the test a second time.

The Student did not receive a high enough score on the advanced math test to be placed in an advanced math class the following year. The Student received a score of 67.4 percent, and the cut-off for being placed in advanced math was 75 percent. Subsequently, the Complainant placed the Student in an online advanced math program at her own expense.¹ The Complainant asserts that if the Section 504 plan had been followed, the Student could have earned a higher score on the test.

With regard to the Science benchmark in spring of 2014, the classroom teacher and SA teacher stated that the Student was provided an enlarged copy of the test. With regard to benchmark testing during the 2014-15 school year, the Complainant described that students are provided a paper copy of the test on which to "show their work," and then they input the answers on the computer. The Complainant asserts that while the Student was able to enlarge the print on the computer, the printed copy of the test was not enlarged. School personnel told OCR that for all benchmarks, the Student either had an enlarged copy, or had access to a magnifying sheet that she also used for classroom work.

In summary, the evidence is undisputed that the Student was not provided enlargement or magnification on one occasion, specifically Day 1 of the 2014 AIMS test. The preponderance of the evidence also indicates that the Student was not provided enlargement or magnification for the advanced math placement test, and was required to take the test a second time with an enlarged copy. With regard to benchmark testing, there is insufficient evidence to determine whether enlargement or magnification was or was not provided.

Analysis

The Section 504 regulation, at 34 C.F.R. § 104.33, require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular

¹ The District confirmed that the Student will be placed in Advanced Math for the 2015-16 school year without the need for additional testing because she qualified by completing 7th grade math online.

or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of a Section 504 plan developed in accordance with the procedural requirements cited above is one means of meeting the FAPE requirement. OCR interprets the Title II regulation, 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.

When a public school district has determined that certain services are necessary to meet the individualized needs of a particular student with a disability, as documented by establishing a Section 504 plan, the failure to implement that plan results in a denial of FAPE and a violation of Section 504 and Title II.

There is evidence to show that the District did not consistently implement the Student's Section 504 plan with regard to providing enlarged print for testing. As a result, the District has failed to provide FAPE to the Student.

In addition to the Section 504 FAPE regulation, public schools must also comply with the Title II regulation, which include a provision requiring public entities to take appropriate steps to ensure that communication with individuals covered by the law is as effective as communication with others. 28 C.F.R. § 35.160(a). Further, a public entity is required to provide appropriate auxiliary aids and services when necessary to afford individuals covered by the law an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. 28 C.F.R. § 35.160(b)(1). The public entity must give primary consideration to the request of the individual with a disability with regard to the type of auxiliary aids and services provided. 28 C.F.R. § 35.160(b)(2). Title II's effective communication provision may require aids and services that would not be required for the provision of FAPE under Section 504.

By developing a Section 504 plan to address the Student's vision problems, the District effectively acknowledged that the Student is not able to receive information provided visually as effectively as other students are able. The plan states that the Student experiences stress trying to "keep the words/pictures single and clear." The Student has deteriorating vision that cannot be fully corrected with ordinary glasses or contact lenses.

For a student with vision problems, the District must provide auxiliary aids and services to ensure that communication provided visually (e.g., written words or pictures) is as effective as communication provided to others. For the Student in this case, auxiliary aids may include magnification software, large print materials, or magnification equipment. Providing the Student testing materials without auxiliary aids to allow her to see them clearly resulted in communication that is less effective than what is provided to other students.

In addition, the District must provide the opportunity for a person with a disability or an appropriate family member, such as a parent, to request the aid or service that is needed to provide effective communication. It is the person with the disability who is most familiar with his or her disability and can provide relevant information about which aids or services will be most effective. The District must honor that choice unless it can prove that an alternative aid or service is as effective

and affords the person an equal opportunity to participate in and benefit from the District's service, program, or activity.

In this case, to the extent the District provided auxiliary aids in the testing environment, it provided a variety of aids, and not in consultation with the Student or her parents. In some cases, the Student was provided large print materials. In other cases, she was permitted to enlarge the font on a computer screen. In still other cases, she was provided a globe magnifier or magnification sheet. When the globe magnifier was provided, the Student had never previously seen or used the tool, which would negate any basis for confidence in its effectiveness.

Because the Student was not consistently provided the auxiliary aids and services necessary for effective communication and required by her Section 504 plan, the information contained in the tests administered by the District were not communicated to her as effectively as it was to other students. As a result, we find that the District both failed to provide FAPE to the Student, and also violated the effective-communication requirements of Title II and Section 504 when it failed to provide large print testing materials or appropriate tools for magnification.

Adoption and Implementation of Grievance Procedures

Factual Information

In our data request, we asked the District to provide its policies and procedures for responding to grievances addressing disability discrimination. In response, the District provided several board policies related to Section 504, but none of the policies included information about its grievance procedures.

The District also provided a document titled "Section 504 Notice of Parent and Student Rights." This document enumerates 16 rights of parents and students under Section 504. Item 15 on the list states, "You also have a right to present a grievance or complaint to the District's § 504 Coordinator John Carruth, 13801 E. Benson Hwy., Vail, AZ, 85641, telephone number: _____ (or designee), who will investigate the situation, take into account the nature of the complaint and all necessary factors, and respond appropriately to you within a reasonable time."

The District did not provide any documents that include the procedures that would be used to resolve a grievance under Section 504 or Title II.

The Complainant sent a letter to the District's Superintendent on September 19, 2014. In the letter, the Complainant expressed her concern with the implementation of the Student's Section 504 plan: "The school system has not accommodated [the Student] during testing for difficulties with her near and far-sighted vision." The Complainant wrote that the Student was not provided the accommodation of small-group testing for benchmarks, that she was not provided enlarged reading material during testing, and she was not allowed extra time for written assignments during testing. The Complainant concluded that "the school district is in violation of certain requirements in [the Student's] Section 504 [plan] and is not making a good faith effort to provide her agreed upon accommodations." The Complainant requested the Superintendent's assistance in resolving her concerns.

In its response to OCR, the District acknowledged receiving this letter, but denied that it was a grievance or complaint, but rather an expression of concern. The letter was provided to the District's Section 504 coordinator (an associate superintendent) for handling. We asked the Section 504 coordinator if he considered the letter a grievance under Section 504. He stated that he did not view it as a grievance. He believed the Complainant was raising concerns, and he pointed her in the direction to resolve the concerns at the campus level. The Section 504 coordinator sent the Complainant an email on September 25, 2014: "I'd be happy to discuss your concerns regarding [the Student's] 504 Plan and VAHS. I just took a quick look at [the Student's] grades in Powerschool and it appears as though she is doing very well academically. The councilor [sic] at VAHS ... handles all of the 504 plans at that site. I am copying him on my response in case you haven't had a chance to discuss your concerns with him first." The Complainant replied that the counselor was in the loop, and she would like to discuss her concerns with the Section 504 coordinator. The Section 504 coordinator did not contact her, and the Complainant continued to bring concerns about the implementation of the Student's plan to campus-level personnel.

Analysis

Pursuant to the Section 504 and Title II regulations, the District is required to adopt and publish grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and Title II. 34 C.F.R. § 104.7(b), 28 C.F.R. § 35.107 (b).

The single paragraph in the District's Section 504 document is not adequate to provide prompt and equitable resolutions incorporating due process standards. While the District has designated a Section 504 coordinator and provided notice of where complaints may be filed, the published information does not provide procedures that ensure a prompt and equitable investigation will be conducted. There are no designated time frames, no provision for notifying parties of the outcome, and no assurances that the District will take steps to prevent the recurrence of any violation and correct the effects of discrimination.

Additionally, we conclude the District did not provide a prompt and equitable resolution of the Complainant's grievance. The District asserts that the letter the Complainant sent to the District in September 2014 was not a grievance within the meaning of the regulations. While the letter did not contain the specific words "grievance" or "complaint," we view the letter as plainly alleging actions prohibited by Section 504 and Title II, including the assertion of a "violation" with respect to rights established by the regulations. While the Complainant did receive an emailed response from the District's Section 504 coordinator, the response was inadequate to provide a prompt and equitable resolution. The coordinator did not take steps to investigate a possible violation of Section 504 or Title II, nor notify the Complainant of the results.

As a result, we conclude the District is in violation of the Section 504 and Title II regulations in this regard.

Conclusion

We brought the violation identified during this investigation to the District's attention for resolution. On July 28, 2015, the District entered into a Resolution Agreement to resolve our compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the allegation in this case.

This concludes our 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. We are closing the investigation of this complaint effective the date of this letter and will monitor the District's implementation of the Agreement.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Additionally, be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please contact XXX XXXX, Attorney Advisor, at (XXX) XXX-XXXX, or me at (303) 844-4506.

Sincerely,

/s/

Thomas E. Ciapuci
Supervisory Team Leader

cc: Kathleen McNaboe, Director of Special Education (via email)

Dianne Douglas, State Superintendent of Public Instruction

Enclosure