



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

October 6, 2014

Dr. Brian McDonald
Interim Superintendent
Pasadena Unified School District
351 South Hudson Avenue
Pasadena, California 91109

(In reply, please refer to case no. 09-13-1422.)

Dear Dr. McDonald:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Pasadena Unified School District (District). The complainant¹ alleged that the District discriminated against her daughter (Student) and other students with disabilities. The specific issues OCR investigated were:

1. whether the District treats students with disabilities who receive bus transportation to and from XXXXXXXXXX Elementary School (School) differently by providing them a shorter school day than their non-disabled peers; and
2. whether the District denied the Student a free appropriate public education (FAPE) by failing to implement her individualized education program (IEP) related to percentage of school day in general education, math goals, and progress reports.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in education programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulations over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives funds from the Department and is subject to Section 504 and Title II.

To investigate this case, OCR reviewed extensive documentation provided by the complainant and the District, interviewed several District witnesses, including administrators, faculty, and staff, reviewed an audio recording of an IEP team meeting, and observed bus arrival and departure times at the School. Based on a careful review, OCR concluded the District is in violation of Section 504 and Title II with respect to the first allegation only. The facts OCR gathered relevant to each allegation, the applicable legal standard, and the basis for OCR's

¹ OCR informed the District of identity of the complainant and Student in our letter notifying the District of the complaint. We are withholding them here to protect their privacy.

conclusions are summarized below.

Allegation One: *The District treats students with disabilities at the School differently by providing them a shorter school day than their non-disabled peers.*

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives 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. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

OCR's investigation of this allegation revealed the following facts:

- At the time of the events giving rise to this complaint, the Student was a XXXXX grader at the School. According to her IEP, the Student has an intellectual disability, among other impairments. Her IEP provided that she would spend 49% of her school day in general education with the support of an aide, and 51% in a Special Day Class (SDC). Her school day was to begin in the general education classroom.
- The District provides transportation by school bus to and from the School for some students with disabilities. It does not provide bus transportation for other students. The Student received bus transportation to and from School.
- The complainant alleged that during the 2012-13 and 2013-14 school years, the school day was from 8:45am to 3:10pm, yet the Student's bus consistently arrived at the School between 9:20 and 9:40; as a result, the Student received 30-35 minutes less instruction per day than general education students. She alleged that other buses transporting students with disabilities also consistently arrived late.
- In December 2013, at the complainant's request, the Student's IEP team changed her placement to a different District elementary school.

2012-13 School Year:

- The District provided conflicting information about the beginning and end of the school day for the 2012-13 school year, and the time buses arrived at and departed the School.
- The District's narrative data response stated that the school day for general education students was from 8:45am to 3:10pm and for special education students, 9:10am to 3:35pm. The same schedule is set forth in a letter the Principal sent to parents at the start of the school year. The District's data response stated that the different schedules were intended to compensate for late arriving buses transporting students with disabilities.²
- The Principal told OCR that, despite the published schedule, the school day for all students was supposed to begin 8:45, and that buses did not often arrive late. He said that if a student's bus did arrive late, the student's teacher was to keep her or him late at the end of the day to make up for the lost instructional time. However, District witnesses did not explain how, in this instance, parents were informed when their children would be kept late, or the District arranged for teachers or buses to stay at the School past their scheduled departure time.
- In a supplemental data response, the District stated that the Student's bus typically arrived by 8:40. However, a daily schedule prepared for the Student by her teachers indicates the Student's bus arrived between 8:45 and 9:20am, and that the Student's bus departed at 3:15pm.
- The teacher of the classroom where the student received general education (Teacher One) told OCR she did not remember what time the Student arrived in the morning, but that it was after the general education students. The Student was the only special education student who received instruction in her classroom. A special education teacher (Teacher Two) told OCR that, though other special education buses arrived on time, the Student's bus consistently arrived late, typically between 9:00-9:15, and that regardless of the time the bus arrived, students who rode it always left class at 3:10 with the other students.
- In an audio recording of a May 20, 2013 IEP meeting, the complainant and her attorney state that the Student did not arrive at school until 9:00 or 9:30. The Principal and the Student's teachers, who were present, did not contradict these statements. The complainant alleged the Principal told her the School could not fix the problem because it had no control over transportation.

² This dual schedule did not account for students who might be transported by bus but do not receive instruction in the special education classroom, such as a student with a mobility impairment but no intellectual disability, or for students educated in the special education classroom but do not use bus transportation.

- The transportation logs for the Student's bus for the first week of every month during the 2012-13 school year show that the Student's bus consistently arrived at the School between 9:00 and 9:20am and departed by 3:20pm. Sometimes the bus departed as late as 3:30, but the later departure did not correspond to a later arrival time. The transportation logs show that, in addition to the Student, three other students were typically transported on the Student's bus.

2013-14 School Year:

- The District's narrative data response stated that the school day for general education and special education students in 2013-14 is from 8:45am to 3:10pm. Witnesses consistently stated that this was the schedule.
- The teacher of the classroom where the Student received general education told OCR the Student consistently arrived to class by 8:45. The teacher of the Student's SDC class, who meets students at the buses in the morning, said the buses arrived late the first week of school, but afterward consistently arrived by 8:40.
- An August 7, 2013 letter from the District's Special Education Department to the complainant states that the school bus will pick the Student up for school at 8:34am and drop her off after school at 3:12pm. An online map shows that the Student lives less than a mile from the School.
- OCR reviewed the transportation logs for the Student's bus for the first week of every month during the fall 2013 semester. The logs show that the Student's bus consistently arrived by 8:40am.
- An OCR representative observed the buses arriving at the School the morning of December 5, 2013, and noted they did not all arrive at 8:40, in time for students to get to class by 8:45. The bus logs for that date show three buses arrived at 8:45 and one arrived at 9:00. The Principal did not know why the buses were late, but said it was unusual.

The evidence established that during the 2012-13 school year, the school day for the Student and other students riding her bus regularly began only after instruction had already commenced for other students, and the District did not compensate for the time these students lost. Specifically, a monthly sampling of the bus logs showed that the bus consistently arrived at school 15 to 30 minutes after class began, and departed within 10 minutes of class ending. The more credible witness testimony also indicated that the Student's bus was consistently late and that students who rode it departed at the same time as other students, regardless of when they arrived. As a result, these students missed up to several hours of school time each month of the school year. With regard to the 2013-14 school year, the evidence did not establish that students were regularly deprived of school time. Rather, the bus logs and witness testimony indicated that, with sporadic exceptions, the buses arrived prior to the start of school and departed after the school day ended.

OCR concluded that the District treated certain students with disabilities at the School differently from non-disabled students by depriving them of a full instructional day throughout the 2012-13 school year. The District offered no legitimate, nondiscriminatory reason for this treatment; rather the District denied it occurred despite clear evidence to the contrary. Accordingly, OCR determined that the District is in violation of Section 504 and Section II with respect to this issue. Although OCR did not reach conclusions about the impact of the District's violation on the educational programs of specific students in this case, OCR notes that the failure to provide a student with a full instructional day may also result in a denial of FAPE.

Allegation Two: The District denied the Student a FAPE by failing to implement her IEP related to percentage of school day in general education, math goals, and progress reports.

The Section 504 regulations, at 34 C.F.R. §104.33, require public schools to provide a 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 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 an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting 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.

OCR's investigation of this allegation revealed the following facts:

Percentage of Time in General Education Setting.

- The Student's IEP in effect for 2012-13 provided that she would spend 51% of her school day in an SDC, and 49% in the general education setting. The complainant alleged that the Student did not spend sufficient time in the general education setting due to the Student's consistent late arrival to school for the reasons discussed above.
- The Student began her day in the general education classroom. Her daily schedule for 2012-13 indicates that from 9:20-10:00am, she received instruction in Language Arts and Phonetic Awareness; from 10:00-10:15, she had recess with the general education students; and from 10:15-11:15, she received instruction in Language Arts/Reading Comprehension Skills. After lunch, which was from 11:15 to 12:00, she transitioned to the SDC classroom. However, two days a week she returned to the general education setting from 2:00-3:00 for Social Studies instruction.
- In the SDC classroom, from 12:00-1:00, she received instruction on Language Arts/Written Language and work on IEP goals; from 1:00 to 2:00 she received math instruction; and –

two days a week -- from 2:00-3:00, she worked on her IEP goals.³ The schedule does not show that she received any instruction before 9:20; as noted above, the Student's arrival time at school varied daily. However, any time she was at school before 9:20 she also spent in the general education classroom.

- Assuming the Student daily arrived in the general education classroom at 9:20am and left at 11:15am, returning twice a week from 2:00 to 3:00pm, she spent approximately 695 minutes per week (or 49% of her day) in the general education setting. The Student was in the SDC class from 12:00 to 2:00pm daily, and from 2:00 to 3:00pm twice a week, adding up to 720 minutes or 51%.

Math.

- The complainant alleged the Student's general education teacher did not instruct the Student in math during the 2012-13 school year, contravening the math goals in her IEP.
- The IEP in effect during the school year had four math goals. It provided the SDC teacher was responsible for two of them, while the SDC teacher and general education teacher were both responsible for the other two. The IEP is otherwise silent regarding responsibility for providing math instruction.
- In its data response, the District reported that the Student's SDC Teacher was responsible for achieving math-related goals. It nonetheless reported that the general education teacher (Teacher One) taught math during "morning calendar time" while the SDC Teacher taught math in the afternoon.
- Teacher One told OCR that she began each school day with math instruction, including working with the calendar, counting, comparing numbers, and adding and subtracting. After math, she said, the class worked on phonics and reading.
- As noted above, the Student typically missed the beginning of class due to her bus arriving late, and her daily schedule showed that instruction on phonics began at 9:20. The Principal told OCR that if the Student missed morning math due to arriving late, Teacher One communicated this to the SDC Teacher, who would ensure that the Student received any missed instruction. He said that math wasn't shown on the Student's daily schedule because teachers have discretion about what to teach during the morning routines.
- The SDC Teacher, however, told OCR that she provided math instruction in the afternoon, as shown on the Student's daily schedule, and did not think math instruction was provided at all by Teacher One during the Student's time in general education.

³ The fifth day was a minimum day, and she did not receive instruction between 2:00-3:00.

- The recording from the May 2013 IEP meeting reveals the IEP team discussed responsibility for implementing the math goals. Teacher One stated that she began phonics instruction in the morning as soon as the Student arrived to class. The SDC Teacher stated that she taught the Student math in the afternoon, and the Student received math homework from Teacher One as part of the homework packet given to all students in the general education classroom.
- The Student's progress report for the end of the 2012-13 school year indicated that she was making "good" or "steady" progress on each of the goals at issue.

Progress Reports.

- The District provided copies of progress reports dated January 2012, May 2012, November 2012, February 2013, May 2013 and October 2013. The reports include information on the Student's progress toward each of the goals in her IEP. The District stated that the progress reports are placed in envelopes and sent home with students each trimester. The Student's 2012-13 and 2013-14 SDC teachers confirmed to OCR that they sent the progress reports home with the Student. They indicated that the complainant also received report cards, and periodic communications through a journal or email about the Student's progress.

The complainant alleged that the District did not implement the Student's IEP in three respects: percentage of time spent in the general education environment, provision of math instruction, and provision of progress reports. Regarding the percentage of time the Student spent in general education, the complainant was concerned that the Student's late arrival time negatively impacted the amount of instruction she was receiving in the general education setting. The number of instructional minutes the Student received overall was unquestionably negatively impacted by her late arrival; as noted above, this may itself result in a denial of FAPE. However, the evidence indicated that the percentage of time the Student spent in the regular education setting relative to the SDC class complied with the IEP.

With respect to math instruction, OCR's job of assessing the District's compliance was complicated by the conflicting evidence the District provided about how the Student's teachers shared responsibility for the math goals. Statements indicating that the general education teacher provided math instruction to the Student at the start of the school day were not credible, particularly since the Student regularly arrived to class late. OCR gave more weight to contemporaneous statements of the teachers during the IEP meeting indicating that, while the SDC teacher provided math instruction directly to the Student, the general education teacher assigned the Student relevant homework. Because the IEP is not specific regarding how math instruction was to be provided, OCR could not conclude that the teachers' approach to achieving the math-related goals constituted a violation of the Student's IEP.

Finally, with respect to provision of progress reports, the evidence showed that the Student's SDC teachers prepared reports three times a year on the Student's progress in achieving each

of the goals in her IEP. Witnesses consistently stated these reports were sent to the complainant on a regular basis, and there was no evidence to contradict their statements.

For the reasons stated above, OCR could not conclude by a preponderance of the evidence that the District failed to implement the Student's IEP during the 2012-13 school year.

To resolve the compliance concerns identified by OCR with respect to the first allegation, the District entered into the attached Resolution Agreement. OCR will monitor the District's implementation of the agreement.

OCR is closing this complaint as of the date of this letter, and notifying the complainant simultaneously. 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. The complainant may have the right to file a private suit whether or not OCR finds a violation.

OCR reminds the District that it is prohibited from harassing, coercing, intimidating, or discriminating against the complainant or anyone else for filing a complaint with OCR or participating in the complaint resolution process.

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

If you have any questions about this letter, please contact Suzanne Taylor, OCR attorney, at 415-486-5561.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure

cc: XXXX XXXXXX, Consultant (via email)