



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

October 8, 2015

Gabriela Mafi, Ed.D.
Superintendent
Garden Grove Unified School District
10331 Stanford Ave.
Garden Grove, CA 92840

(In reply, please refer to case # 09-15-1300.)

Dear Superintendent Mafi:

The U.S. Department of Education, Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint against the Garden Grove Unified School District. The complainant¹ alleged the District discriminated against her daughter (Student) based on disability (autism). The specific allegations investigated by OCR were whether the District failed to:

1. take appropriate steps to ensure the Student could participate in cheerleading to the maximum extent appropriate to her needs, and/or to determine the accommodations necessary to allow her to participate;
2. properly consider whether participation in cheerleading was a necessary part of the Student's free appropriate public education (FAPE); and
3. respond appropriately to notice of alleged conduct of the Student's cheerleading coach and advisor that created a disability-based hostile environment for the Student, and of other disability-based different treatment.

OCR began its investigation of this complaint under the authority of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination on the basis of disability by public educational entities. The District receives

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

Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the implementing regulations.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a District expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, the District informed OCR it was amenable to resolving the complaint in this manner. OCR and the District entered into the attached agreement to resolve the complaint. Accordingly, OCR did not complete its investigation of the complaint or reach conclusions regarding the District's compliance with Section 504 and Title II.

The applicable legal standards, the facts OCR gathered during its preliminary investigation, and the disposition of the allegations are summarized below.

Legal Standards.

Allegations One and Two. The Section 504 regulations, 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 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.

Under both the Section 504 regulations, at 34 C.F.R. §104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. §35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

The Section 504 regulations, at 34 C.F.R. §104.37(a)(1), require that school districts provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity to participate. In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications to policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Section 35.130(b)(7) applies to the nonacademic and extracurricular activities operated by school districts.

In some instances, IEP or Section 504 teams may determine that a student's participation in an extracurricular or nonacademic activity is required as a necessary component of the student's

FAPE. If so, a school district must develop and deliver appropriate related aids and services through the IEP or Section 504 team process to enable the student to successfully participate in the activity. Where participation in an extracurricular or nonacademic activity is not required in order to provide a student with a FAPE, a school district nonetheless is obligated to provide the student with an equal opportunity to access such activities. A school district must make reasonable modifications to policies, practices, and procedures and provide aids, supports, and services that are necessary to ensure that the disabled student has an equal opportunity to participate, unless it can demonstrate that doing so would be a fundamental alteration to the program or would constitute an undue burden.

Allegation Three. School districts are also responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school district is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

OCR's preliminary investigation showed the following:

Background.

- At the time of the events giving rise to this complaint, the Student was a junior at a District high school (School). The Student is on the autism spectrum and has speech/language impairment. According to her IEP, she has significant deficits in receptive and expressive language skills. Her IEP provides for 71% of her time outside regular class, extracurricular, and non-academic activities.
- The Student began participating in cheerleading in the 2013-14 school year, when she was a sophomore. She was not required to audition.
- The Student's February 2015 IEP reads, under the heading "activities to support transition," that the Student "is participating in cheer...as a means of developing appropriate social skills which will support post-secondary goals."

Allegation 1. Whether the District failed to take appropriate steps to ensure the Student could participate in cheerleading to the maximum extent appropriate to her needs, and/or to determine the accommodations necessary to allow her to participate.

- Throughout the 2013-14 and 2014-15 school year, the complainant raised concerns with District and School administrators that the Student was not allowed to fully participate in the cheer program. Specifically, the complainant complained that the Student was not allowed to do stunting (where an individual cheerleader is supported in the air by others), spotting, and lifting/holding (for example, during formations).
- The evidence reflects that the complainant believed the Student could participate in formation activities, while the cheerleading coach (Coach) and cheerleading advisor (Advisor) were concerned that the Student's participation compromised the safety of other students. The complainant specifically suggested that the Student could stunt, if other cheerleaders acted as spotters.
- The complainant also periodically asked for other modifications to the program to accommodate limitations related to the Student's disability. For example, she asked that the Coach place the Student behind the first row during performances so she could take cues from the other cheerleaders, and eliminate certain moves from routines specifically for the Student. She also requested the District provide training to the Coach on working with students with disabilities.
- A video provided by the complainant shows a performance in which all of the cheerleaders except the Student create pyramid formations; the Student is alongside one of the pyramids, holding up her arms in an apparent mock lift. Another video shows the Student looking to other cheerleaders for cues on which moves to perform.
- In April 2014, the District created a written "plan" related to the Student's participation; this plan was subsequently modified slightly from time to time. The plan memorialized that the Coach and Advisor had safety concerns related to the Student stunting and spotting, but did not specify the related limitations, if any, on the Student's participation. Rather, the plan stated that the Coach and Advisor would "make ultimate decisions...Their decision is final." The plan also does not specify whether the School would make any particular modifications to address the Student's disability-related needs. It was unclear from OCR's preliminary investigation how this plan was developed, or who provided input.
- In a February 2014 email to School administrators, the complainant wrote that her "requests for a list of modifications/accommodations for cheer" had been ignored. OCR's preliminary investigation does not show that the District responded to this email.
- OCR's preliminary investigation did not include interviewing administrators to better understand steps they took to ensure the Student was participating to the maximum extent appropriate, or to determine necessary accommodations.

Allegation 2. Whether the District failed to properly consider whether participation in cheerleading was a necessary part of the Student's FAPE.

- As noted above, cheer is referenced in the Student's IEP as a social activity to facilitate her transition to post-secondary life. However, according to OCR's preliminary investigation, the District did not consider cheer to be part of her FAPE.
- The complainant told OCR that she requested cheer be part of the Student's FAPE multiple times. OCR reviewed two emails dated May and June 2014 in which she made this request to the Student's case manager. In the latter email, she specifically asked that cheer be written into the Student's IEP, and that the IEP specify that she would be taught stunting. The case manager responded that the Student "does not need cheer to make adequate progress toward IEP goals and objectives...The district does not see a need to add cheer stunting to the IEP at this time. The District is open to discussing educational concerns...during the IEP process." Notice of the complainant's due process rights was not included in the email.
- In September 2014, the complainant wrote to the Assistant Superintendent, "at the IEP meeting last week, the district's attorney said she would forward me a letter stating the status of [the Student] being taught stunting. I have not received anything." The Assistant Superintendent responded, "Please refer all IEP related questions to the Office of Special Education." The District did not provide evidence of any follow-up correspondence.
- Documentation reviewed by OCR did not evidence any discussion by the IEP team of whether cheer should be part of the Student's FAPE, and OCR's preliminary investigation did not include interviews with administrators about this issue. As noted above, the evidence also did not show whether the District went through any process to consider how fully the Student should participate in cheer, or whether accommodations were necessary.

Allegation 3. Whether the District failed to respond appropriately to notice that conduct of the Student's cheerleading coach and advisor created a disability-based hostile environment for the Student, and of other disability-based different treatment.

- Over the course of the 2013-15 and 2014-15 school year, the complainant repeatedly raised concerns about the Student being excluded, ostracized, and bullied by the Coach and Advisor, as well as other cheerleaders. The complainant clearly communicated that she believed this alleged treatment was based on the Student's disabilities; for example, she repeatedly referenced perceived mistreatment of the Student as a "special needs" child, and used the word "discrimination."
- Documentation provided by the District does not show that the District consistently investigated the complainant's allegations of a hostile environment, or reached conclusions about whether harassing conduct had occurred. For example, there are no investigative records memorializing that administrators interviewed the Student, other cheerleaders, or other witnesses, nor is there written communication with the complainant stating the District had investigated and reached conclusions regarding the merit of her allegations.
- In fall 2014, the complainant made formal written complaints against the Coach, the Advisor, and the Assistant Superintendent, alleging discrimination against the Student based on disability. Included in the complaints were allegations of different treatment (specifically, that the District had improperly excluded the Student from certain cheer activities, and deferred to the Coach and Advisor regarding the Student's participation), and harassment (bullying and ostracism).

- The District responded by two brief letters reading, in part, and “I interviewed [the Coach]. We discussed the concerns noted in the complaint. I am satisfied [she] did not engage in any discriminatory behavior, rather she performed her duties as coach in an equitable manner and kept the safety of the team in mind at all times” and “I am confident that the employees...have done their jobs in an appropriate manner and have no further questions.”
- While the District’s documentation reflects that administrators interviewed the personnel accused in the complaint, it does not reflect other investigation. The District’s communication with the complainant also does not acknowledge the numerous allegations the complainant raised, or that the District had reached conclusions on the merits of each of those allegations. OCR’s preliminary investigation did not include interviewing administrators to better understand what investigation they conducted.

As noted above, under OCR’s procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a District expresses an interest in resolving the complaint. Prior to the completion of OCR’s investigation, the District entered into the attached agreement to resolve the allegations in the complaint. The agreement requires the District to, in sum: convene a multidisciplinary team meeting to determine whether participation in cheerleading is necessary for the Student’s FAPE; develop, based on individualized determinations, a written plan listing any supplemental aids, supports, modifications, or services necessary for the Student to have an equal opportunity to participate in cheerleading, and any limitations on the Student’s participation; designate a school-level administrator to whom the cheerleading advisor and coaches, and the complainant, will report if they have questions about implementation of the Student’s multidisciplinary or other written plan; provide training to its cheerleading staff on, among other things, how to integrate students with disabilities into the cheerleading program; provide investigative training to administrators; conclude its investigative and resolution process with respect to the complainant’s allegations that the Student was subject to a disability-based hostile environment during the 2014-15 school year; and adopt a procedure describing the process for ensuring that students with disabilities have an equal opportunity to participate in extra-curricular activities.

Because the District voluntarily resolved this complaint, OCR did not complete its investigation or reach conclusions as to whether the District failed to comply with Section 504 and Title II. 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.

This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and they should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, 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.

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

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact OCR attorneys Suzanne Taylor (415-486-5561; suzanne.taylor@ed.gov) or Naghmeh Ordikhani (415-486-5588; naghmeh.ordikhani@ed.gov).

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure

cc: Lexe Davidson, District Legal Counsel