



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

November 1, 2016

Mr. Ernest Bell
Superintendent
Sierra Sands Unified School District
113 West Felspar Avenue
Ridgecrest, California 93555-3520

(In reply, please refer to case no. 09-15-1355.)

Dear Superintendent Bell:

The U.S. Department of Education, Office for Civil Rights (OCR), investigated the above-referenced complaint against the Sierra Sands Unified School District (District). The Complainant alleged that the District discriminated against his son, the Student, on the basis of disability.¹ Specifically, OCR investigated the following issues:

- 1) whether the District failed to provide the Student with a free, appropriate public education (FAPE) by failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education and/or related services because of a disability; and
- 2) whether the Student was treated differently than his non-disabled peers when he was denied an opportunity to participate in recess, school parties, school plays, library privileges and field trips due to his disability-related behaviors.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education entity, the District is subject to Section 504, Title II, and their implementing regulations.

¹ OCR notified the District of the identity of the Student when the investigation began. We are withholding the Student's name from this letter to protect the Student's privacy.

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

Under OCR's Case Processing Manual (CPM) at Article III, Section 302, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. In July 2016, the District indicated that it was interested in resolving allegation 1, and OCR agreed that it was appropriate to resolve the allegation through a Resolution Agreement Reached During an Investigation (Resolution Agreement). With respect to allegation 2, OCR determined that the allegation was untimely pursuant to Article I, Section 106, and is administratively closing the allegation. The applicable legal standards, the facts gathered during the investigation, and the reasons for OCR's determinations are summarized below.

Allegation 1: Whether the District failed to provide the Student with FAPE by failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability.²

Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education 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.

Section 104.32 of the regulations requires school districts annually identify and locate every qualified individual with a disability who is not receiving public education and take appropriate steps to notify the parents/guardians of such individuals of the recipients' duties related to the provision of FAPE. Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

² OCR determined that the allegation regarding the failure to evaluate continued into the 2014-15 school year and was therefore timely.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Facts Gathered to Date

- The Student attended kindergarten (2010-11), first (2011-12), second (2012-13), third (2013-14), fourth (2014-15), and part of fifth (2015-16) grades at XXXXXXXX Elementary School (School) in the District.
- The Student's cumulative Pupil Permanent Record Card included notes by his first, second, third, and fourth grade teachers stating that he struggled to focus.
- According to the District, in May 2012, the Student's parents informed his first grade teacher he would no longer be taking medication for his attention-deficit/hyperactivity disorder (ADHD) and attention deficit disorder (ADD). The Student's first grade teacher wrote in his Pupil Permanent Record Card that the Student "needs to continue to take his meds."
- The District provided OCR its Section 504 Service Plan Handbook (revised 8/2010) and Board Policy 5230 (adopted November 6, 2003), which both discussed a Student Success Team or Student Study Team (SST). According to the Section 504 Service Plan Handbook and Board Policy 5230, a student's school should convene a SST meeting when a student is exhibiting academic, attendance, social and/or behavioral problems. The SST, which includes the student's parents, is required to investigate the needs of the student and may recommend regular education interventions and program modifications. Though the Section 504 Service Plan Handbook states that a parent/guardian may directly initiate a Section 504 Service Plan referral without going through the SST, Board Policy 5230 states "[s]pecial education shall not act upon a referral without documented program modifications."
- Documentary evidence showed that the School called the SST a "Student Assistance Team" (SAT). The District stated that the School convened the SAT for the Student on February XX, 2013, when the Student was in second grade. The Student's SAT included the SAT coordinator, school psychologist, school principal, teacher, and the Student's parents. The SAT Summary and Checklist from the February XX, 2013 meeting included team notes about the Student's difficulty focusing and completing computations with reading. The District stated the team agreed to modifications for the Student, such as preferential seating and increased personal attention by the teacher.
- The SAT met again on December XX, 2013, when the Student was in third grade. The Student's mother participated in this SAT meeting. Notes from the SAT meeting show

“focusing,” “completing assignments,” and “reading/writing” to be problems for the Student. According to the District, the team discussed the Student’s ADHD and ADD. The team found the Student was responding to modifications, agreed to new modifications, and determined that further evaluation was not necessary.

- At the end of third grade, Student’s third grade teacher wrote on his Pupil Progress Report: “[Student] has made some slow growth in reading this trimester. He still becomes easily distracted and has a hard time focusing on his work.” She also wrote in a document entitled “Information Concerning Individual” in the Student’s cumulative file that he “struggles in both reading and math due to lack of focus.”
- During the Student’s fourth grade year, the District stated that the School continued to implement the SAT team’s modifications. The District stated that the Student responded to the modifications and that staff believed they were effective.
- However, at the end of fourth grade, the Student’s teacher wrote in his Pupil Progress Report: “Even with extra attention [Student] is often unable or unwilling to refocus...Unless his attention issues are addressed, he will always find it difficult to learn.” She also wrote in “Information Concerning Individual” in the Student’s cumulative file that he “is below grade level in 4th grade standards because of his inability to focus.”
- In its narrative response to OCR, the District stated it did not have any reason to believe that the Student needed special education or related services because of a disability. Counsel for the District later told OCR that the parents made a comment that they were not interested in an evaluation. However, the Complainant told OCR that SAT meetings did not involve discussions of evaluating the Student for special education and neither he nor the Student’s mother ever declined an evaluation.
- The District’s Section 504 Service Plan Handbook requires that if a school knows or suspects that a student, because of a disability, needs special education, it should provide the parent/guardian with a proposed assessment plan and Notice of Parent/Guardian Rights and Procedural Safeguards. The District’s Board Policy 5210 describes its Child Find policy, which discusses its obligation to identify and locate every qualified individual with a disability.
- The District did not provide the Complainant or the Student’s mother with an assessment plan or Notice of Parent/Guardian Rights and Procedural Safeguards.

Analysis

OCR has concerns that the District did not evaluate the Student in a timely manner, even though it had reason to believe that the Student needed special education or related services because of a disability. The evidence gathered to date shows that the District had knowledge of

the Student's ADD and ADHD and the impact on the Student's academic performance, yet it did not evaluate the Student for special education services nor did it provide the Complainant or the Student's mother with procedural safeguards after making a determination that further evaluation was not necessary.

In addition, the District's Board Policy 5230 contains a statement that "[s]pecial education shall not act upon a referral [for evaluation] without documented program modifications." The requirement not to refer a student for a special education assessment unless there are documented program modifications conflicts with Section 504's requirement to "conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability."

Furthermore, even with the modifications developed for the Student through the SAT process, which included preferential seating and increased attention from the teacher, the Student's third and fourth grade teachers noted he experienced ongoing difficulty with focusing, completing assignments, and reading and writing. His third grade teacher wrote that the Student "struggles in both reading and math due to lack of focus." His fourth grade teacher wrote the Student "is below grade level in 4th grade standards because of his inability to focus." Despite federal regulations and the District's Board Policy 5210 and Section 504 Service Plan Handbook, which correctly state that the District is responsible for proactively identifying children who may need special education programs and services, the District did not identify and evaluate the Student for special education or related services.

Counsel for the District told OCR that the District did not evaluate the Student because the Student's parents did not request an evaluation and commented that they were not interested in an evaluation; the Complainant told OCR that an evaluation was not discussed at the SAT and that the parents never declined an evaluation or stated that they were not interested in an evaluation. In addition, the District stated that the Student's SAT, which included the teacher, school psychologist, school principal, and SAT coordinator, made a determination at the December XX, 2013 meeting that further evaluation was not needed, but did not provide the Complainant or the Student's mother with procedural safeguards. If the possibility of an evaluation was discussed and denied, then the District was required to provide the parents with procedural safeguards, which included information about the parents' right to a hearing and review procedure, if he or she disagreed with that decision. 34 CFR §104.36.

In order to complete the investigation of this allegation, OCR would need to interview individuals involved in the Student's SAT to determine whether an evaluation was discussed and offered. As discussed above, prior to completing the investigation, the District expressed a desire to voluntarily resolve this complaint and OCR agreed that such a Resolution Agreement was appropriate.

Allegation 2: Whether the Student was treated differently than his non-disabled peers when he was denied an opportunity to participate in recess, school parties, school plays, library privileges and field trips due to his disability-related behaviors.

34 C.F.R. §104.37 requires a school district provide non-academic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation. These services and activities may include counseling, physical recreational athletics, transportation, special interest groups or clubs, and other recreational activities. The Complainant's allegation regarding the denial of non-academic and extracurricular activities on the basis of disability-related behavior was limited to the Student's 2013-14 school year and to alleged actions by Student's third grade teacher. According to the Complainant, the School did not deny the Student these opportunities in the 2014-15 school year. Because the Complainant filed his complaint with OCR on May 14, 2015 and the allegations occurred in the 2013-14 school, allegation 2 is untimely and is being administratively closed pursuant to Section 106 of the CPM.

Conclusion

To address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement, which is aligned with the complaint allegations and the concerns raised during OCR's investigation. Under the Resolution Agreement, the District will disseminate a guidance memorandum and provide training on Section 504 regulations, which require the District to identify and locate every qualified individual with a disability, conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability, and have a system of procedural safeguards with respect to any action taken by the District regarding the identification, evaluation or placement of a student. The guidance memorandum and training will also discuss the District's new Board Policy 5230, revised on August 20, 2015. During negotiations, the District provided OCR with the revised Board Policy 5230, which resolves concerns about the District's SST policy by removing inaccurate terms from the previous Board Policy 5230. Lastly, the Resolution Agreement requires the District offer to evaluate the Student for special education and related services and provide the Complainant with procedural safeguards.

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant and District concurrently. When fully implemented, the Resolution Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Resolution Agreement until the District is in compliance with Section 504, Title II, and their implementing regulations, which were at issue in the case.

OCR's determination in this matter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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

Please be advised that the District may not harass, coerce, intimidate, 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 regarding this letter, please contact Annie Lee at annie.lee@ed.gov or (415) 486-5594.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

CC: XXXX XXXXX, Counsel for Sierra Sands Unified School District