



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

March 7, 2016

Ms. Kirsten M. Vital
Superintendent
Capistrano Unified School District
33122 Valle Road
San Juan Capistrano, California 92675

(In reply, please refer to case no. 09-15-1470.)

Dear Superintendent Vital:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Capistrano 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) when it failed to:
 - a. fully implement the Student's individualized education program (IEP) in the area of speech and language services during the 2014-2015 school year;
 - b. assign an appropriately credentialed speech and language pathologist to the Student during the 2014-2015 school year; and
 - c. provide an extended school year (ESY) placement for the Student in summer 2015.

- (2) Whether the District retaliated against the Complainant when he complained about ESY services by not placing the Student in an ESY program in summer 2015.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability 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, as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that

¹ OCR previously provided the District with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

are filed against certain public entities. The District receives Department funds, is a public entity, and is subject to the requirements of Section 504, Title II, and the regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR concluded that the District violated Section 504 and Title II with regard to issue (1)a, but did not violate Section 504 or Title II with respect to the remaining issues. The applicable legal standards, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Factual Findings and Determination

Legal Standard for Issue 1a-c

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 sections 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). 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. In addition, provision of a FAPE necessitates that a school district assign teachers and service providers with sufficient training and qualifications, including State-authorized credentials, to deliver appropriate instruction and services to students with disabilities.

Issue (1)a: Whether the District failed to provide the Student with a FAPE when it failed to fully implement the Student's IEP in the area of speech and language services during the 2014-2015 school year.

Facts

- The Complainant alleges that the District failed to provide the Student, an individual with a disability, with all of the speech therapy sessions required by his IEP during the 2014-2015 school year.
- The District's first day of school for the 2014-2015 school year was September 4, 2014 and the Student started attending the XXXXXX grade at XXXXX Elementary School (the Elementary School) on this date. The Student's IEP in place at the time, developed on June XX, 2014 at his previous elementary school, had conflicting language on two

different pages concerning the type and frequency of speech and language services required.

- The Elementary School staff interpreted the June XX, 2014 IEP to require the Student to receive speech and language services in a group setting for two sessions of 30 minutes each per week, and in an individual setting for one session of 30 minutes per week.
- The June XX, 2014 IEP also specifically provided that student absences, as well as special school activities, programs, and events that precluded the Student's participation in speech and language services at the designated times, would not be made up.
- An addendum IEP meeting was held on September XX, 2014 to address concerns raised by the Complainant about the Student's placement, including speech and language services. The Complainant noted that the June XX, 2014 IEP was not clear in terms of the number of individual versus group sessions required per week. The District offered to change the services from that day forward up to the Student's annual IEP in November 2014 to two individual and one group session per week. The Complainant believed that the Student needed more speech and language services and did not sign the addendum at that time.
- On September XX, 2014, the Complainant consented to the proposed IEP addendum, which required that the District provide the Student with two individual and one group speech therapy session per week and that each session last 30 minutes long.
- There were additional IEP meetings held on November X, 2014, November X, 2014, and December XX, 2014, and an administrative IEP developed without a meeting dated June XX, 2015. The District proposed adding speech and language push in services two times a month for 20 minutes each, and having a classroom aide attend the group speech sessions two times a month. However, the Complainant did not consent to any of these IEPs, so neither the type nor frequency of speech and language sessions was modified.
- OCR reviewed documentation submitted by the District that provides information regarding when the Student received speech therapy sessions during the 2014-15 school year, what type of session he received (an individual session or a group session), and the length of each session. This documentation included the SLP's handwritten notes and print outs from the District's electronic logging system, Paradigm, in which Speech and Language Pathologists are encouraged, but not required, to record services provided. OCR also interviewed the Speech and Language Pathologist primarily responsible for serving the Student (the SLP).
- OCR noted that there were a number of inconsistencies between the SLP's handwritten notes and the Paradigm print outs regarding when the Student received each speech therapy session and what type of session was received (an individual session or a group

session). In addition, the handwritten notes did not record the length of the sessions. The SLP was able to review her notes, along with the Paradigm entries, and clarify for OCR the date, length, and type of each session the Student received.

- OCR's review of the data, as clarified by the SLP, shows the following:
 - The Student did not receive three individual speech and one group session. This occurred during the weeks of September X and XX, 2014, March X, 2015, and May XX, 2015.
 - The District provided the Student with three extra speech sessions during the school year: one extra individual session the week of September XX, 2014; one extra group session the week of October XX, 2014; and one extra group session the week of March XX, 2015.
 - With regard to eight of the speech sessions that the Student received, the District failed to provide the required type of session because the Student received a group session instead of an individual session. This occurred during the following weeks: October XX, 2014; October XX, 2014; December X, 2014; January X, 2015; April XX, 2015; May XX, 2015; June X, 2015; and June XX, 2015.
 - All of the speech sessions that the Student received (both group and individual sessions) were 30 minutes long.

Analysis

From the beginning of the 2014-2015 school year until his IEP was modified and consented to on September XX, 2014, the IEP required that the Student receive two 30-minute group sessions and one 30-minute individual session of speech and language services per week. From September XX, 2014, through the end of the school year the IEP required that the Student receive two 30-minute individual sessions and one 30-minute group session of speech and language services per week.

As described above, OCR's investigation revealed evidence that the District's system for documenting provision of services to students with disabilities is inconsistent and that, in this case, the District failed to fully implement the Student's IEP by not consistently providing him with the required number and type of speech therapy sessions as outlined in the IEP. In this regard, the District failed to provide the Student with a total of three individual speech sessions and one group speech session over the course of the school year. In addition, the District also provided the Student with a group speech session instead of a required individual session eight times during the school year.

OCR noted that even though the District did provide the Student with one extra individual session and three extra group sessions over the course of the school year, this did not fully address all of

the required sessions that the Student either missed outright or received in a group instead of an individual setting. If the extra sessions are viewed as make-up sessions, the Student still missed two individual sessions. In addition, providing the extra sessions did not address the fact that the Student received group sessions on eight occasions when he should have received individual sessions instead. As such, OCR concluded that the District failed to fully implement the Student's IEP with respect to speech and language services, and that this failure constituted a violation of Title II and Section 504.

Issue (1)b: Whether the District failed to provide the Student with a FAPE when it failed to assign an appropriately credentialed speech and language pathologist to the Student during the 2014-2015 school year.

Facts

- As noted above, the IEPs in place for the Student during the 2014-2015 school year required the provision of speech and language services.
- The Complainant alleged that the SLP was not appropriately authorized to deliver speech and language services to the Student.
- The California Commission on Teacher Credentialing (CCTC) is an agency in the Executive Branch of California State Government. According to its website, one of the major purposes of the agency is to serve as a state standards board for the licensing and credentialing of professional educators in California.
- The District submitted documentation to OCR from the CCTC that showed that the SLP held a current Preliminary Speech-Language Pathology Services credential in Language, Speech, and Hearing during the 2014-2015 school year. The CCTC's authorization description for this particular credential states, in part, that it authorizes the holder to provide special education services to individuals with language and speech impairments across the special education disability areas.
- OCR contacted the CCTC and spoke to a Credential Analyst to inquire whether an individual who has a current Preliminary Speech-Language Pathology Services credential in Language, Speech, and Hearing is authorized to provide speech and language services to students before they obtain their Clear Speech-Language Pathology Services credential. The Credential Analyst stated that such an individual was fully authorized to do so and could provide the same speech and language services as an educator with a Clear credential.
- Documentation provided by the District indicates that a separate Speech-Language Pathology and Audiology license issued by the California Department of Consumer Affairs (CDCA) is not required to work in California public schools, including the District.

In addition, it noted that the American Speech and Hearing Association (ASHA) can provide a regional certification, a Certification of Clinical Competence for speech and language providers, but reported that this is not required by the District. Nevertheless, the District noted that both entities require a year of supervised practice to obtain full status, and that the SLP serving the Student was supervised in this capacity by a Lead SLP during the 2014-2015 school year.

Analysis

Throughout the 2014-2015 school year the Student's IEP required that he be provided with speech and language services. The Complainant alleged that the District failed to implement this provision because he believed that the SLP providing these services to the Student was not authorized to do so. However, OCR determined that the evidence did not substantiate the Complainant's allegation in this instance. As explained above, the SLP had a current Preliminary Speech-Language Pathology Services credential issued by the CCTC, the state entity responsible for the licensing and credentialing of professional educators. Accordingly, she was fully authorized to provide speech and language services. In addition, although not required by the District or the CCTC, the SLP was also pursuing a Speech-Language Pathology and Audiology license through the CDCA, and a Certification of Clinical Competence through ASHA by participating in a supervised practice during the 2014-2015 school year. In this case, the Student received speech sessions from the SLP who, based on her credential, was fully authorized to provide him with speech and language services. Therefore, OCR concluded that the District was in compliance with Section 504 and Title II requirements with regard to this issue.

Issue (1)c: Whether the District failed to provide the Student with a FAPE when it failed to provide an ESY placement for the Student in summer 2015.

Facts

- As noted earlier, there were multiple IEP meetings held for the Student during the 2014-2015 school year. In each IEP, whether signed by the Complainant or not, the District made an offer of an ESY placement to the Student. Specifically, the IEP team recommended that the Student attend an ESY program to prevent regression, and that the ESY program would be held at the Elementary School from July 7 to August 1 from 8:00am until noon each day. The IEPs provided that the Student would receive specialized academic instruction (SAI), as well as individual and group speech and language services as a part of the ESY placement.
- The Complainant participated in additional IEP meetings for the Student on November X, November X, and December XX, 2014. The District and the Complainant thereafter made multiple attempts to schedule another IEP team meeting. The District and the Complainant were unable to schedule an agreeable time to meet.

- On June XX, 2015, the Complainant provided the District with a letter stating that he planned to remove the Student from the District in 10 business days and place him in a private school for the 2014-2015 ESY, 2015-2016 school year, and 2015-2016 ESY.
- Following the Complainant's June XX, 2015 letter, the District again attempted to schedule another IEP meeting. It was unsuccessful. On June XX, 2015, an addendum IEP was developed by the District administratively for the purpose of providing an update to the IEP based on assessment reports that had been completed in January and March 2015. No actual meeting was held since the Complainant was unable to meet at a mutually agreeable time. The June XX, 2015 IEP repeated the District's offer of ESY services, including the proposed dates, times, and location. It expanded the services to be provided to include not only SAI and speech and language services, but occupational therapy and adapted physical education.
- On July X, 2015, the Complainant wrote an email to the District Superintendent stating that the Student's IEP placed him at the Elementary School for ESY in summer 2015, but that the District had refused to provide him details regarding the teacher, classroom, transportation drop-off and pick-up information, and name of the speech therapist. The Complainant took the position that, therefore, the Student was being denied ESY by the District. The Complainant reiterated this position in another email to the Superintendent dated July X, 2015.
- The District's counsel wrote the Complainant a letter dated July X, 2015, in part replying to the Complainant's July X, 2015 email related to ESY services for the Student. Counsel wrote that multiple IEPs conducted during the 2014-2015 school year set forth the District's offer of ESY services to the Student, including that the Complainant had already been informed that the ESY program would be held at the Elementary School from July 7 to August 1 from 8:00am until noon each day. Counsel stated that the District was not refusing to provide the Student with an ESY placement. He explained that the Complainant would have been provided with details regarding things such as transportation drop-off and pick-up information and classroom location, if he had presented the Student for participation in the ESY program, which he did not. Counsel noted that, instead, the Complainant advised the District in writing on June XX, 2015 of his intent to unilaterally place the Student in a nonpublic school, including for ESY services during summer 2015.
- The Complainant sent another email to Superintendent on July X, 2015, reiterating his request for the teacher and classroom assignment for the Student's ESY placement at the Elementary School. He continued to maintain that, because this information was not being provided to him, the District was refusing to provide the Student with ESY services.

Analysis

During the 2014-15 school year, the Student's agreed-upon IEP required that he be provided ESY services, which would have taken place in summer 2015. The IEP stated that the ESY program would be held at the Elementary School from July 7- August 1, 2014 from 8:00 a.m. until noon each day, and that SAI and speech and language services would be provided. This offer of ESY services was repeated by the District in subsequent IEPs with additional services, including adapted physical education and occupational therapy, to which the Complainant did not consent, including in one as late as June XX, 2015.

Based on the evidence summarized above, OCR found that the District did not fail to implement that part of the Student's IEP which required an ESY placement during summer 2015. The facts show that the District stood ready and willing to provide such a placement. However, on June XX, 2015, the Complainant notified the District that he was removing the Student from the District and was placing the Student in a private school, including specifically to receive ESY services in summer 2015. Accordingly, the District reasonably understood that the Complainant was declining ESY services at the Elementary School.

There is no evidence that the District thereafter refused or failed to provide the Student with an ESY placement. Instead, the evidence shows that the Complainant never presented the Student to the Elementary School so that he would be available to participate in the ESY program offered by the District. Although after the ESY program began the Complainant sought to be notified of details such as the classroom location and the names of the teacher and speech therapist, the fact that he had not previously received that information does not lead to a conclusion that the District was refusing to provide the Student with ESY services. The IEP in place clearly outlined the dates, times, location, and services to be provided.

Because there is insufficient evidence to establish that the District failed to implement the provision in the Student's IEP relating to an ESY placement, OCR concluded that the District was in compliance with its obligations under Title II and Section 504 with regard to this issue.

Issue (2): Whether the District retaliated against the Complainant when he complained about not receiving ESY services by not placing the Student in an ESY program in summer 2015.

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to a materially adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. A materially adverse action is an action that could well

dissuade a reasonable person from making or supporting a charge of discrimination. Whether an action is materially adverse is judged from the perspective of a reasonable person in the complainant's position. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Facts

- As noted above, on July X, 2015, the Complainant sent the Superintendent an e-mail complaining that the District refused to provide the Student with ESY for summer 2015 in violation of the Student's IEP rights because it failed to provide him with prior notice of the assigned teacher, speech therapist, classroom, and drop-off and pick-up information.
- As noted earlier, on July X, 2015, the District's Counsel sent a letter to the Complainant stating that the Complainant would have been provided the detailed information by mere request if he had presented the Student for participation at the District's ESY program. The letter also noted that the Complainant advised the District on June XX, 2015 of his intent to unilaterally remove the Student from the District and that he expressed no intent to have the Student participate in the District's ESY program.

Analysis

OCR found that the Complainant engaged in protected activity when he e-mailed the Superintendent on July X, 2015, and stated that the District refused to provide the Student with ESY for 2015 in violation of the Student's IEP rights.

However, the District did not subsequently subject the Student to a materially adverse action. The Complainant alleged to OCR that the District failed to provide the Student with his required ESY placement in summer 2015. If that had occurred, it would have constituted a materially adverse action. However, as explained in detail under Issue (1)c above, OCR concluded that the District did not fail to provide the Student with an ESY placement. Because a materially adverse action has not been established in this case, the preponderance of the evidence does not support a conclusion that the District retaliated against the Complainant in violation of Title II and Section 504.

Conclusion

To address the violation identified with respect to the failure to provide required speech and language services, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement which is aligned with the complaint allegations and the findings and information obtained by OCR during its investigation. The Resolution Agreement requires the District to convene, subject to parent consent, a meeting to decide whether compensatory

and/or remedial services are appropriate to address the speech services that the Student did not receive. If so, the District will provide those services. The Resolution Agreement also requires the District to implement a practice of requiring its speech and language pathologists to consistently and accurately record services provided in the District's electronic log or other appropriate system.

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 agreement until the District is in compliance with Title II and Section 504.

This concludes OCR's investigation of this 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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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 individual may file a 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 Sewali Patel, Civil Rights Attorney, at (415) 486-5380 or sewali.patel@ed.gov or me, at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Enclosure: Copy of Resolution Agreement

cc: Sara Young, Director V - Informal Dispute Resolution for the District (with enclosure)