



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

January 25, 2017

Deborah Flores
Superintendent
Gilroy Unified School District
7810 Arroyo Circle
Gilroy, California 95020-7313

(In reply, please refer to case no. 09-16-1953.)

Dear Superintendent Flores:

The U.S. Department of Education, Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Gilroy Unified School District (District). The Complainants¹ alleged that the District discriminated against the Student on the basis of disability. Specifically, OCR investigated the following allegations:

- (1) Whether the District retaliated against the Complainants and the Student after the Complainants requested that the Student be evaluated for special education and related services by sending a truancy notice to the Complainants.
- (2) 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.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act of 1990, as amended (Title II). Section 504 and its implementing regulation prohibit discrimination on the basis of disability by recipients of Federal financial assistance. Title II and its implementing regulation prohibit discrimination on the basis of disability by public entities. The District receives Department funds, is a public education system, and is therefore subject to the requirements of Section 504, Title II, and their implementing regulations.

OCR began its investigation by gathering and reviewing documents and correspondence provided by the Complainants and the District. After careful review of the information gathered in the investigation, we concluded that the District did not violate Section 504 and Title II with regard to the first issue OCR investigated. Prior to OCR completing its full investigation, the District voluntarily agreed to address OCR's

¹ OCR previously provided the District with the identity of the Complainants and Student, and we are withholding their names from this letter to protect personal privacy.

area of concern with respect to the second allegation that was under investigation. This letter summarizes the applicable legal standards, the facts gathered to date during the investigation, and the terms of the resolution reached with the District.

Issue 1: Whether the District retaliated against the Complainants and the Student after the Complainants requested that the Student be evaluated for special education and related services by sending a truancy notice to the Complainants.

Legal Standards

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 an individual experienced an adverse action caused by the recipient, and the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future, and there is some evidence of a causal connection between the adverse action and the protected activity so that OCR is able to conclude an inference of unlawful retaliation is raised. OCR will then determine if a school district has identified a facially legitimate, non-retaliatory reason for the adverse action. If a school district identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation. OCR examines all available evidence to determine whether the recipient's proffered reasons are credible and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Factual Findings

The following facts are relevant to OCR's analysis.

- The Complainants stated to OCR in their complaint that on February X, 2016, they received a truancy notice dated January XX, 2016. The complaint stated that even after the Complainants contacted the District to explain that the Student's condition had prevented her from attending school, there was no further response from the District regarding the truancy notice.
- The District stated in its declaration to OCR that a truancy letter was sent to the Complainants in error in January, 2016. The cause of the mistake, according to the District's declaration, was inadequate oversight by an administrator of the attendance system which generated the letter. The District stated that it had retained no copies of any truancy notices for the Student.

Analysis

To determine whether the District retaliated against the Complainants, OCR examined whether the Complainants experienced an adverse action caused by the District. The District mailed a truancy notice to the Complainants, which OCR found was an adverse action.

OCR examined whether the Complainants engaged in a protected activity. In this case, the Complainants, as early as November, 2015, requested an evaluation of the Student for consideration of eligibility under I.D.E.A. and Section 504. OCR determined that requesting an evaluation constituted a protected activity and that the District knew of the protected activity. The proximity in time between the protected activity of requesting an evaluation in November, 2015 and the adverse action of notifying the Complainants of the Student's truancy in January, 2016 was evidence of a causal connection between the two actions, and therefore OCR concluded that an inference of unlawful retaliation was raised.

The District stated that sending the truancy notice was a mistake caused by inadequate supervision at the school site. The District also took steps to ensure that any future absences associated with the Student's condition would not trigger a truancy notice because they would be considered excused. This evidence supports the conclusion that the District's reason for sending the truancy notice was not motivated by an impermissible reason, but instead was a nondiscriminatory administrative error which OCR found was a facially legitimate, non-retaliatory reason. There was no evidence that the District's reason for sending the truancy notice was pretext for discrimination. With respect to this issue, OCR concluded that there was insufficient evidence that the District was in violation of Section 504, Title II or their implementing regulations.

Issue 2: 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.

Legal Standards

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.

Section 104.35(a) 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 section 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. Under subsection (c) of the same, placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

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 and Preliminary Analysis

- The Student was a first grade student at an elementary school in the District (School) during the 2015-16 school year. At the time this complaint was filed, the Student was in second grade at the School, and was identified by the Complainants as a student with a disability, which was not disputed by the District.
- The District used a health plan for the Student during the 2015-16 school year, that contained instructions to allow the Student unrestricted bathroom use, access to the health office if she experienced pain or complications from her disability, access to a set of clean clothes, permission to have extra time to eat means slowly, and to notify the Complainants of any health office visits and to seek the Complainants' advice for further care while the Student was at School.
- The Complainants requested an assessment for special education or for a Section 504 plan on November XX, 2015, noting concerns for the Student that included little to no progress in reading and math, and social and emotional concerns.
- The District's Section 504 policy, described in its *Section 504 Handbook*, provides that if a student is referred for evaluation by parents, then the evaluation of the student should take place within a reasonable time frame. District documents, such

as the *Section 504 Handbook*, and the *Section 504 Parent and Student Rights* document, require that parents be provided with notice of procedural safeguards.

- The District held a January X, 2016 Student Study Team (SST) meeting that included the Complainants and District staff. The District stated in its declaration that the Complainants agreed during this meeting to postpone an assessment until after a School intervention program could be implemented. However, in a February XX, 2016 letter to the School Principal, the Complainants wrote that they did attend an SST meeting on January XXX, but that the SST team refused to give the Complainants the assessment they wanted and failed to give them prior written notice. The Complainants' letter indicated that the failure to address the Students needs caused the Student to miss school.
- The January X, 2016 SST meeting notes included some actions and modifications for the Student's teacher (e.g., pre-reading and having the Student read aloud and not to herself) while noting that a Section 504 plan was a "maybe." There was no evidence that the District provided to the Complainants a copy of procedural safeguards.
- The District stated in its declaration that it was on break from February XX through February XX, 2016. It stated that the Complainants emailed the District Director of Student Services on February XX, 2016 and complained about the failure to evaluate the Student.
- The Student's records from the District include a February XX, 2016 letter from the Student's pediatrician that describes her medical condition, and makes a recommendation for an IEP to assess the Student's cognitive reading and math deficits.
- The District held a March X, 2016 SST meeting that included the Complainants and District staff. The SST meeting notes include notations that the Complainants expressed that they felt the District was not doing what the Student needs, and were biased toward not having the Student assessed. The District, in its declaration to OCR, stated that during the meeting, the School Psychologist stated that the SST would consider a Section 504 plan because of the Student's medical condition, and that the District provided the Complainants an assessment plan dated March X, 2016, which the District received back signed by the Complainants on March X, 2016.
- The District conducted cognitive testing of the Student on March XX, 2016, and conducted academic testing of the Student on April XX, 2016.
- The Multidisciplinary Assessment Report, dated May X, 2016, written by the School Psychologists stated that the Student could appropriately be considered for a Section 504 plan for her documented medical issues and attendance difficulties, and recommended as appropriate accommodations preferential seating, access to a

nurse's office for restroom use, excused medical appointment absences, and extra time to complete work assignments.

- The District held an IEP meeting on May X, 2016, at which the IEP Team reached the conclusion that the Student was not eligible for special education under the IDEA. The notes from the meeting showed that the Complainants were notified of their rights, and indicated that a Section 504 plan would be developed. Documentation from the meeting provided a description of responses to the Complainants' questions and concerns they raised during the meeting about whether the assessment was adequately comprehensive, including that the assessments took place over four days, during different parts of the day to assess the Student's social and emotional development, and that the assessments included in class observations of the Student.
- On October X, 2016, District staff met to review the Student's health plan. Notes from the October X, 2016 meeting showed that the District planned to schedule a meeting to develop a Section 504 plan.
- The District held a Section 504 team meeting on November X, 2016, and another 504 team meeting on January X, 2017. The Student's November X, 2016 Section 504 Plan includes accommodations to provide the Student unrestricted bathroom use, use of the bathroom in the School office, preferential seating, drinks of fluids or water often, and other supplies for the Student. The documents from the November X, 2016 and the January X, 2017 Section 504 Team meetings do not reflect that the topic of compensatory educational services was considered, or discussed, at either meeting. The January X, 2017 Section 504 team made no adjustments to the accommodations that were to be provided for the Student, but the team did decide to convene an IEP Team meeting before the end of January, 2017.
- Documents from the November X, 2016 and January X, 2017 Section 504 Team meetings indicated that the District provided the Complainants with copies of their procedural safeguards.

Summary and Resolution

In determining whether a district or school has timely conducted an evaluation of a student, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures. The District's policy's requirement for an evaluation within a reasonable time frame is not incompatible with completion of an evaluation within a 60-day period.

The District did not conduct an assessment of the Student during the 60-day period between November XX, 2015 and February XX, 2016—that does not include days the School was on breaks—that was a period of time during which an evaluation normally should have been performed. Moreover, District staff who attended the March X, 2016 SST meeting made the decision that a Section 504 plan for the student should be

considered, but failed to take steps to evaluate the student, and then to schedule and hold a Section 504 team meeting. There was no evidence that the District provided notice of procedural safeguards to the Complainants before, during, or at any other time reasonably approximate to the March X, 2016 SST meeting despite the SST team having taken an action related to the identification and evaluation of the Student.

The District conducted testing of the Student March XX, 2016 and on April XX, 2016, and then held an IEP team meeting on May X, 2016. The IEP team reached the decision that the Student did not qualify for special education services under IDEA. Notes from the May X, 2016 IEP team meeting indicated that the Complainants were provided a copy of procedural safeguards. Even though the IEP team recorded its decision during the May X, 2016 meeting that the Student should be considered for a Section 504 plan, the District did not follow-up after the IEP team meeting during the remaining weeks of the 2015-16 school year to hold a Section 504 team meeting.

To determine whether the District failed to timely evaluate, OCR would need further information from the District; namely interviews with several employees for exact details surrounding when requests to evaluate were received, when and if they thought the Student had a disability, and whether they thought the Student needed and special education or related services because of a disability. Details would be needed regarding any interventions used as a result of SST recommendations, and for how long. However, prior to the conclusion of OCR's investigation, the District indicated its interest in voluntary resolution. Pursuant to Section 302 of OCR's Case Processing Manual allegations and issues under investigation may be resolved at any time when, prior to the conclusion of the investigation, the district expresses an interest in resolving the allegations and issues and OCR determines that it is appropriate to resolve them with an agreement during the course of the investigation.

On January 19, 2017, the District entered into the attached resolution agreement, which when implemented, is intended to resolve the concerns identified by OCR regarding this issue that was under investigation. Pursuant to the resolution agreement, the District agrees to hold a Section 504 or an IEP team meeting to discuss and determine whether the Student needs compensatory and/or remedial services as a result of any failure to conduct an evaluation of the Student during the 2015-16 school year.

Under the terms of the Resolution Agreement, the District will draft and distribute an OCR approved guidance memorandum, which will address requests for evaluation under Section 504 or IDEA and the process for timely identification, evaluation, and provision of procedural safeguards. The District will conduct training for all School staff and administrators responsible for the identification, evaluation, and placement of students.

Based on the above referenced agreement, OCR is closing the investigation phase of this case. 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. Based on the

commitments made in the Agreement, OCR is closing this complaint as of the date of this letter and notifying the Complainants 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. The Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 Complainants 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, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact David Christensen at (415) 486-5554 or via email at david.christensen@ed.gov, or me at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod
Program Manager

cc: Mary T. Hernández (*via electronic copy only*)
District Counsel

Enclosure