



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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November 28, 2017

Dr. James Lee
Superintendent
Paradise Valley Unified District
15002 N. 32nd St.
Phoenix, AZ 85032

Re: Paradise Valley Unified School District
OCR Case Number: 08-17-1211

Dear Superintendent Lee:

On March 6, 2017, we received a complaint alleging Paradise Valley Unified School District (District), at XX (School), discriminated on the basis of disability. Specifically, the Complainant alleged that the District discriminated against the Student on the basis of disability when it: (1) found the Student eligible for an Individualized Education Program (IEP) for an Emotional Disability but failed to draft an IEP; (2) unilaterally determined a placement at a separate day school prior to holding an initial IEP meeting; (3) required the Student to attend a shortened school day; (4) did not allow the Student to attend a before- and after-school program offered by the District; and (5) failed to implement the Student's Section 504 Plan for his ADHD.

OCR enforces Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a recipient and public entity, and subject to these laws.

In reaching a determination, OCR reviewed documents provided by the District and Complainant and conducted interviews of the Complainant, School psychologist, the Director of the before and after-school program at the School, School special education teacher, two kindergarten teachers at the School, the School PE teacher, a District support staff member, School nurse, School principal, and School speech and language therapist.

Background

The Student was enrolled in kindergarten at the School during the 2016-2017 school year. He began the school year in a general education classroom with approximately twenty students. During the first week of school the classroom teacher (First Teacher) raised concerns about the Student's behavior to School administrators. The First Teacher described the Student's behavior as daily instances of punching, hitting, and scratching other students. She became concerned that

the Student was hurting the other students in her classroom and she shared her concerns with the Complainant, the School's Psychologist, and the School's Principal.

In response to the First Teacher's concerns, the Psychologist conducted observations of the Student in the classroom. She recommended accommodations but the First Teacher described them as ineffective and described the Student's behavior in her classroom as "getting out of hand." The Psychologist and Principal consulted with the District regarding additional support including the possibility of transferring the Student to the District's transitional kindergarten program. The program was described by the Psychologist as a non-special education program, for students to ease into kindergarten at a slower pace.

The District sent a Support Teacher to observe the Student in order to make additional recommendations. The Support Teacher observed the Student on two consecutive days during the first week of school and concluded that the Student would benefit from more attention in the classroom. She recommended moving the Student to the School's other kindergarten class which was staffed by a more experienced teacher (Second Teacher) and included a student teacher and teacher's aide. After ten days of school, the Student was transferred to the second kindergarten classroom at the School.

According to the School it was after the Student's move to the second kindergarten classroom, and after consultation with the Complainant, that he began attending school for less than a full school day. The Second Teacher did not remember when the Student began a shortened schedule but she recalled that it was soon after he moved into her classroom. The Second Teacher reported that the Student began school at 8:45 AM like the rest of the students but was dismissed at 11:45 AM, after lunch. She recalled that in November or December of 2016, his dismissal time was moved to 1 PM. The rest of the school was dismissed at 3:15 PM.

The Complainant stated that the Student began a shortened schedule on August 9, 2016, when she was asked to bring the Student to the School from 10 AM to 3 PM. Starting on August 26, 2016, the Student's schedule became 8:45 – 11:45 AM. This continued until November 29, 2016 when the Complainant emailed the School to ask if the schedule could be extended to 1 PM. The Complainant said that from January 9, 2017 until the end of the school year, the Student's schedule was 8:45 AM to 2:50 PM. Per the classroom schedule provided by the District, the Student's classroom had "specials" from 2:26 to 3:15 PM.

The Student was unable to attend the following classes during his shortened schedule: Math, Science, Social Studies, Technology, Music, Art, and P.E. When the shortened schedule was extended from 11:45 AM to 1 PM he was able to attend Math.

All parties agree that the Student exhibited challenging behavior during the 2016-17 school year. The Second Teacher described the Student's behavior as a very difficult situation. He would talk non-stop; he would argue; he would run in the classroom; hide under tables; run out of the classroom; grab things; push classmates; tattle on other students without taking any responsibility; repeat certain words or phrases throughout day, like "excuse me;" and make shooting noises while forming a gun with his hand, pretending to shoot his classmates.

The Complainant emailed the School requests for a Section 504 plan on September 21 and October 3, 2016. A Section 504 Plan was created on October 10, 2016. The School Nurse coordinated Section 504 plans for the school. The Nurse reported that she was informed by the Principal in early October that the Complainant had requested a Section 504 plan and that a meeting should be held. The Nurse further reported that on October 10th she held a meeting with the Second Teacher and the Student's father, and a Section 504 plan was created for the Student's ADHD.

The Plan's "participants page" indicated that the meeting was attended by the Nurse, Second Teacher, Student's father, and Principal. The Nurse and Principal acknowledged that the Principal did not attend the meeting. The Principal explained that while she tries to attend some Section 504 meetings, she does review all Section 504 Plans and her signature on the "participants page" indicates her approval of the Plan. When asked what would cause her to not approve a Plan she responded that she could not remember ever not approving a Plan.

The Second Teacher's recollection of the Section 504 meeting was that the Plan was already created when she walked into the meeting with the Student's father. She described the Plan as a typical Section 504 plan, a standard document. She also reported that although she was not present while the document was created she believed that she had an opportunity to provide input into the plan because she had constant conversations with the Psychologist about the Student's needs. The Psychologist did not attend the Section 504 Plan meeting and reported that she generally did not play a role in the implementation of Section 504 plans.

The Complainant reported that neither she nor her husband ever attended a Section 504 plan meeting. Instead, the Complainant said she received a call on October 10, 2016 from the School informing her that the Plan was ready to be picked up, which her husband did. The Complainant stated that she and her husband did not meet the Nurse until April 12, 2017, when they asked the School to start providing a dose of medication to the Student during school. The Complainant recalled that the Nurse told her then that it was nice to finally meet them.

The Section 504 Plan contained the following accommodations: consistent routine, preferential seating that includes careful selection of the students nearby, visual supports and manipulatives for math, pacing provided by the teacher to indicate elapsed time and time remaining for in-class assignments, and small group test administration/untimed testing.

The Complainant provided her consent for a special education evaluation on November 10, 2016. The evaluation included testing of academic achievement, a speech and language assessment, a social/emotional assessment through a behavior ratings scale, and a classroom observation by the Psychologist. The District acknowledged that a SST meeting, to determine what evaluations would be conducted, was not held but asserted that they met and engaged with the parents on a daily basis about the Student's areas of needs and they reviewed with the Complainant what testing would be conducted and what they thought was necessary. The Complainant stated that the Psychologist simply asked if she would consent for an evaluation and when she agreed she was told which evaluations would be conducted.

An eligibility meeting (known in the District as a MET meeting) was held on February 10, 2017, approximately 90 days after parental consent was provided. The District stated that the eligibility meeting was not held within the required 60 days because the Complainant repeatedly asked for the meeting to be rescheduled. The Complainant denied that she asked for meetings to be rescheduled. There is no record of the District scheduling an eligibility meeting earlier than February 10, 2017.

At the eligibility meeting the Student was found eligible for an Individualized Education Program (IEP) under the disability category of "xxxx." An IEP was never created for the Student.

All parties agreed that the reason provided by the School for why an IEP was not created was because the Complainant refused to sign the eligibility determination document. The District's position was that it could not move forward with an IEP meeting and draft an IEP until the parents signed the eligibility document, signifying that they agreed with the eligibility determination. The Complainant reported that she refused to sign the eligibility document because she believed that the evaluation report misrepresented the extent of some of the Student's behavior. However, the Complainant did agree that the Student should be found eligible for an IEP and made her position known at the February 10, 2017 eligibility meeting and in subsequent emails to the School.

Although an IEP was not created a potential placement for the Student was discussed at the eligibility meeting. The parties discussed the possibility of the Student attending xxx School. XXXX is an alternative school within the District, serving K-12 students who are eligible to receive services for social, emotional, and/or behavioral needs. The District's position was that the possibility of the student enrolling at xxxx only arose after the parents asked what other potential placements existed, other than the current School.

The Student's father visited XXXX on February 17, 2017. The Complainant stated that he visited Xxxx because it was put forth by the School as the Student's future placement, should an IEP be created. The Complainant rejected Xxxx as a placement because she was concerned with the Student's safety at XXXX.

The District maintained that Xxxx was not put forth as the Student's placement. The Principal, in asserting that the School did not predetermine that the Student would be placed at Xxxx, stated that if a student requires an alternative placement a special team would be put in place to draft that IEP, and that never occurred in the Student's situation.

The Complainant reported that after she rejected Xxxx as a placement the School began to call her and her husband to complain about the Student's behavior and ask that he be picked up early from school.

Mascot Club (MC) is a fee-based, before- and after-school child care program that is run by the District's Community Education Department. Each school in the District has an on-site manager that runs the program for that particular school. We interviewed the School's Manager of MC. The morning program at the School runs from 6:30 to 8:15 AM. Students are in the School's

playground from 8:15 to 8:45 AM, when school starts. The afternoon program begins at 3:15 PM, immediately after school ends, and runs until 6:30 PM. Enrollment for the program is on a space-available basis.

The MC Manager reported that the Student attended the morning program from August of 2016 until December of 2016. She described the Student's behavior as being very destructive with objects and that he would hit other students. She recalled only one instance in which she asked the Complainant to not bring the Student to the early MC program, it was due to his behavior, but it was only for one day and she reported that she made it clear that he could come back afterwards. The MC Manger went on to report that in December of 2016 she received an email from the Complainant informing her that the Student would only be attending school for half a day and therefore would no longer be attending the morning program.

The Complainant alleged that she stopped bringing the Student to the morning program at the suggestion of the Psychologist. According to the Complainant, the Psychologist believed that the behavioral issues appeared to start at MC and by not having him attend MC it would help with his behavior. She continued to pay the monthly fee because her hope was that he could resume attending MC and she wanted to reserve his space in the program.

Attendance figures at MC show that the Student attended the early program fairly regularly from August 9, 2016 until November 28, 2017. A payment summary report for MC show that the Complainant continued to pay the monthly \$205 fee through April 2017 even though the Student only attended the early program for three more days after November 28th (once in January 2017 and twice in February 2017). The Complainant was credited the monthly fee for April 2017 and was provided a partial credit of \$80 for the month of December 2016.

During the course of our investigation we learned that the following individuals were no longer employed by the District: the Principal, Psychologist, the initial kindergarten teacher, and the MC on-site Manager. The Complainant reported that after the end of the school year she transferred the Student to a private school. She did indicate, however, that she would consider reenrolling the Student at the School if the District agreed to provide him with outside therapy, presumably as compensatory education.

Alleged Failure to Timely Provide Placement After Eligibility

The Complainant alleged that the District discriminated on the basis of disability by failing to provide the Student with an IEP after finding him eligible for an IEP under the disability category of emotional disability.

The Section 504 regulations at 34 C.F.R. § 104.33(a), (b)(1), and (b)(2) require school districts to provide a free and appropriate public education to each qualified student with a disability, who is in the district's jurisdiction, regardless of the nature or severity of the student's disability. A free appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met; the implementation of an IEP is one means of providing a free and appropriate education.

The District's position was that the Individuals with Disabilities Education Act (IDEA) does not allow an assessment team to move forward with creating an IEP until parents sign the eligibility document which signifies that they agree with the eligibility decision. Since the Complainant did not sign the eligibility document the District asserted that it was prevented, by the IDEA, from drafting an IEP.¹

The Student was a qualified student with a disability and therefore the District was required to provide him with a FAPE. The Student had a Section 504 Plan for ADHD, as of October 10, 2016. However, the eligibility team determined on February 10, 2017 that the Student was eligible for an IEP for an Emotional Disability; that determination indicated that the accommodations provided by the Section 504 Plan were no longer sufficient to provide the Student with a FAPE. While an IEP is only one means by which a District can provide a FAPE there is no indication that the District provided any additional supports or services after the February 10th eligibility meeting.

As a result, we find that the District failed to provide the Student with a FAPE after finding him eligible for an IEP on February 10, 2017, in violation of 34 C.F.R. § 104.33(a), (b)(1), and (b)(2).

Alleged Unilateral or Predetermined Placement at a Separate Day School

The Complainant alleged that the District discriminated on the basis of disability by unilaterally or predetermining a placement at a separate day school prior to holding an initial IEP meeting and drafting an initial IEP.

The Section 504 regulation at 34 C.F.R. § 104.35(c) requires school districts, when making placement decisions, to draw upon information from a variety of sources; establish procedures to ensure that the information obtained is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and placement options; and ensure that students with disabilities are educated with their non-disabled peers to the maximum extent appropriate to the needs of the student with a disability.

The Complainant alleged that the District raised the notion of placing the Student at Xxxx, an alternative school, and that she understood that if the Student were provided with an IEP it would include placement at Xxxx. The District asserted that it only offered the Complainant an opportunity to visit Xxxx, after the Complainant asked what other placement options, aside from the current School, were available. The District further asserted that any determination about a future placement would have been made at an IEP meeting.

There is a clear disagreement between the parties about the purpose behind the parents' visit to Xxxx. However, after the eligibility meeting the Student continued to attend the School and he

¹ OCR does not enforce the IDEA. Nonetheless, the IDEA has no such requirement that parents must agree to eligibility or sign an eligibility document before an IEP can be created. There is a requirement that parents must consent to the initial provision of services under an IEP but the parties never reached that point because an IEP was never created and IEP services were never offered.

remained at the School through the end of the school year. There was never any change in the Student's enrollment nor was there any documentation indicating that his enrollment would change. Since an IEP meeting and services were never drafted or offered, we cannot determine whether services under an IEP would have been contingent on a placement at Xxxx.

As a result, we find insufficient evidence that the District violated 34 C.F.R. § 104.35(c) when it offered the Student's parents the opportunity to visit Xxxx School.

Alleged Discrimination on the Basis of Disability by Requiring a Shortened Schedule

The Complainant alleged that the District discriminated on the basis of disability by requiring the Student to attend a shortened school day during the 2016-17 school year.

The regulations implementing Section 504 at 34 C.F.R. § 104.33(a) and (b)(1) requires school districts to provide each qualified student with a disability in its jurisdiction a free appropriate education, regardless of the nature or severity of the student's disability. A free appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. The Title II implementing regulation is interpreted consistently with the standards set forth in the regulation implementing Section 504.

The parties disagree as to how the Student came to have a shortened schedule during the 2016-17 school year. The District asserted that it occurred through consultation with the Complainant, that the Complainant was in agreement with the shortened schedule, and each of the changes to the schedule was initiated by the Complainant. The Complainant alleged that the shortened schedule was initiated by the School. She reported that the Psychologist told her that the Student appeared to struggle with transitions and that the shortened schedule would eliminate the need for him to change classrooms to attend art, music, and P.E. and it would avoid the transition from lunch back to the classroom for math, social studies, and science. The Complainant also stated that the Student's schedule was only extended at her insistence.

The parties do agree, however, that the Student had a shortened schedule during the 2016-17 school year. The impetus for the shortened schedule was the Student's behavior during the school day. On October 10, 2016, the District provided the Student with a Section 504 Plan under the disability category of ADHD. Therefore, as of October 10, 2016 at the latest, the District regarded the Student as an individual with a disability. Whether the Complainant agreed to or initiated the shortened schedule is not relevant. Notwithstanding the Complainant's denial that she initiated the shortened schedule, if the District believed the Student required a shortened schedule due to his disability it could have discussed and memorialized such a change in a Section 504 Plan or IEP. This did not occur, and the Section 504 Plan did not note that the Student needed a shortened school day.

The Student's shortened schedule, which continued throughout the school year, constituted prohibited different treatment based on his disability.

The shortened schedule also resulted in a failure to implement the Student's Section 504 Plan. The Plan included specific accommodations in math, however, the shortened schedule did not allow the Student to receive math instruction until after November 29, 2016 when the Complainant requested that the schedule be extended from 11:45 AM to 1 PM.

As a result, we find that the District discriminated on the basis of disability in violation of 34 C.F.R. §§ 104.4 and 104.33(a) and (b)(1) when it provided the Student with a shortened schedule during the 2016-17 school year.

Alleged Denial of the Opportunity to Participate in a District Program

The Complainant alleged that the District discriminated on the basis of disability by not allowing the Student to attend a District run before and after-school program, known as Mascot Club.

The regulations implementing Section 504 at 34 C.F.R. § 104.4(b)(1)(i) and (b)(1)(vii) prohibits school districts from denying a qualified student with a disability with the opportunity to participate in or benefit from the aid, benefit or service, or otherwise limit their enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

The Complainant alleged that the Psychologist recommended that she not bring the Student to the early MC program because she believed that his behaviors began at MC and that they might improve if he did not attend. The School's position is that it had little to no involvement with MC, which is run by the District through its community education department. The MC Manager for the School reported that the Student stopped attending MC sometime in December, after she received an email from the Complainant that stated because the Student was only attending for a partial school day, he would no longer be attending MC.

In each instance, whether due to the Psychologist's recommendation or as a result of the Student's shortened schedule, it was the District's actions that caused the Complainant to no longer bring the Student to MC. Those actions by the District were due to concerns about the Student's behavior, which were a manifestation of his emotional disability.

As a result, we find that the District discriminated on the basis of disability in violation of 34 C.F.R. § 104.4(b)(1)(i) and (b)(1)(vii) by not allowing the Student to attend the District's before- and after-school program.

Alleged Failure to Implement the Section 504 Plan

The Complainant alleged that the District discriminated on the basis of disability by failing to implement the Student's Section 504 Plan.

The regulation implementing Section 504 regulations at 34 C.F.R. §104.33, requires school districts to provide each qualified student with a disability in its jurisdiction a free appropriate education, regardless of the nature or severity of the student's disability. A free appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as

adequately as the needs of persons without disabilities are met. Implementation of a Section 504 Plan developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections is one means of meeting the requirement of a free and appropriate education.

The Complainant alleged that the School failed to implement the Student's Section 504 Plan when it failed to provide the Student with movement breaks. While there are emails from the Complainant to the School indicating that movement breaks should be used, the actual Section 504 Plan does not include an accommodation of movement breaks. Therefore, the District could not have failed to implement the Section 504 Plan as it pertains to movement breaks, because that accommodation was not included in the Plan.

The Complainant also alleged that the School failed to implement the Section 504 Plan when it failed to provide the Student with untimed testing and small group test administration. The Student's Section 504 Plan included small group test administration/untimed tests as an accommodation and the Teacher asserted that it was provided and gave examples of how all of the students in her class were provided with that accommodation through the assistance of parent volunteers.

The Plan also included extra time for tests, and specifically stated that it should be provided for math. The District failed to implement the Section 504 Plan when it failed to provide the student with extra time for math tests from approximately August 26, 2016 to November 29, 2016. This was the time period when the Student's schedule was 8:45 to 11:45 AM and excluded math instruction.

As a result, we find that the District failed to implement the Section 504 Plan, in violation of the Section 504 regulations at 34 C.F.R. §104.33.

Conclusion

We find that the District did violate Section 504 of the Rehabilitation Act of 1973 when it: failed to draft an IEP after finding the Student eligible for an IEP; required that the Student attend a shortened school day; did not allow the Student to attend a District run before- and after-school program; and failed to fully implement the Student's Section 504 Plan. We find insufficient evidence that the District unilaterally determined a placement at a separate day school prior to holding an initial IEP meeting.

A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, these violations will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

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. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the District stating that this case is closed.

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 in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, we may release this document, related records, and correspondence upon request. If OCR receives a request, we will protect personal information to the extent provided by law.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by Federal law.

Thank you for the District's cooperation in this matter. If you have any questions, please contact XX, at XX. I can be reached at (303) 844-6083.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Copy of Resolution Agreement

cc: Rob Haws, Gust Rosenfeld P.L.C., attorney for the District; Diane Douglas, Arizona State Superintendent of Public Instruction