



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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March 18, 2019

Mr. Benje Hookstra, Superintendent  
Bullhead City Elementary School District  
1004 Hancock Rd.  
Bullhead City, AZ 86442

*Sent via email to xxxxx*

Re: Bullhead City Elementary School District  
OCR Case Number: 08-18-1607

Dear Mr. Hookstra:

This letter is to notify you of the resolution of the complaint OCR received on September 27, 2018, alleging that Bullhead City Elementary School District (the District) discriminated on the basis of disability.

Specifically, the complainant alleged that the District denied her son (the student) a free, appropriate public education (FAPE), by failing to implement his Individualized Education Program (IEP) during the 2018-19 school year. The complainant alleged, for example, that rather than receiving services from a special education teacher in a special education classroom, the student spent most of each day with an aide in the library. In addition, the complainant alleged that the student was treated differently than his non-disabled peers because he was not allowed to dress out for PE classes like the other students.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulation Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; 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. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

In reaching a determination, OCR reviewed documents submitted by the complainant and by the District. OCR also interviewed the complainant and three District staff members, including the student's one-to-one aide, his special education teacher, and his PE teacher.

With regard to the allegation that the student was denied FAPE, OCR finds that the preponderance of the evidence supports that the District violated Section 504 and Title II and their implementing regulations. The District has entered into a Resolution Agreement, which when fully executed, will resolve our compliance concern.

With regard to the allegation that the student was treated differently in his PE class, OCR found that there was insufficient evidence to support that a violation occurred. This letter explains our findings.

### **Background Information**

The student was an XXth grade student at a XXX school in the District during the 2018-19 school year. The student is XXXX, and also has XXXX and XXXX XXXX.

During the time period relevant to this complaint, the student had an IEP dated April 5, 2018. The student's Least Restrictive Environment was identified as "Inside General Class less than 40% of the day." The IEP lists a number of accommodations (for example, having a quiet area for work) and modifications (for example, modification of grade scale criteria). The IEP designates certain special education services to be provided by a special education teacher in the special education classroom, including Basic Reading Skills, Written Expression, Math Calculation, Math Problem Solving, and Behavior Support. The IEP also provides a number of related services, including counseling, transportation, occupational therapy, and speech therapy. Finally, under the heading "Supplementary Aids/Assistive Technology and Services for Students," the IEP provides for "one to one support" in general and special education.

### **Allegation 1: Denial of FAPE**

With regard to the allegation the student was denied FAPE, the complainant raised two concerns. The first was that the student was not being supervised adequately, despite an IEP provision that provided for a one-to-one aide. The second was that rather than receiving services from a special education teacher in a special education classroom, the student was spending most of each day with an aide in the library.

#### *Factual Findings*

OCR confirmed that a one-to-one aide is assigned to the student, pursuant to his IEP. The purpose of the aide is, in part, to maintain the student's safety at school. The special education teacher explained that during the previous school year, there was an incident in which the student got hurt, and he was given an aide after that. The complainant specified that the student had been injured by another student in a self-contained special education classroom; following that incident, the student was moved to a resource placement with one-to-one support.

The complainant explained to OCR that the reason she felt the supervision is inadequate is that incidents of harassment or bullying against the student continue to occur. Specifically, she cited a bruise that appeared on the student's arm in September 2018, which she believes occurred at school; and a "verbal exchange" that occurred with another student during PE in January 2019.

OCR first sought to review whether there was any evidence of a lack of supervision of the student. We interviewed the student's one-to-one aide. She described her role as picking the student up when he arrives in the morning, taking him to the cafeteria for breakfast, following

the student to each class, going to lunch with him, escorting him to use the restroom in the nurse's office, and walking him to the van that takes him to his after school program. She stated that she is with him all day long.

The aide further stated that the only time she might not be with him is if she goes to the restroom, and she has him wait in the office. Additionally, if she is called away, for example, during the OCR interview, she either brings him to the special education teacher's room, or they have another aide stay with him.

In our interviews with the PE teacher and the special education teacher, both indicated that that in their experience, the aide (or a substitute) is always with the student and he is never unsupervised.

OCR next sought to establish whether any injuries to the student occurred while he was under the supervision of the aide, specifically the bruise that occurred in September 2018, and a verbal exchange that occurred in January 2019.

The aide told OCR that she has never observed another student hit him or engage in deliberate physical contact. She described that she knows she needs to watch what he says to others, so she stays very close. She described allowing more freedom in PE class, where she keeps an eye on him from the side.

Regarding the incident where the student had a bruise in September, when she became aware of the bruise, she asked the student what happened. He responded at different times that he was on his bike, or his brother did it, or he didn't know what happened.

The PE teacher also told OCR that in the fall, the student had shown him the bruise on his arm, and said he got it at home. Then in an IEP meeting, the complainant brought up the bruise and asked the student to explain how he got it. He said he got it at home. The PE teacher also told OCR that he has never seen another student hit the student. The PE teacher indicated that the student is a part of the game in PE class, so he might get hit by a ball or kids bump into each other, but nothing deliberate.

The District provided an email sent by the vice principal to other District staff members on November 13, 2018, describing what had occurred in the IEP meeting the previous day. The vice principal wrote that the complainant stated that the student was still not safe on campus, presenting pictures of a bruise she believed occurred when another student punched him. The vice principal wrote that he pointed out the student is always in sight of the aide. The complainant then claimed that it happened in the boy's bathroom. The vice principal wrote that he immediately asked the student if that was true, and the student said it was not.

The aide described an incident in PE class in January in which another student was harassing the student. A third student alerted her that it was occurring, and she took both boys to the office to talk to the vice principal. The vice principal notified the complainant that a "verbal exchange" had occurred between the students in a January 30, 2019 email, and explained that he held a

mediation between the students and was satisfied that the matter was resolved. The aide specified to OCR that no student was hurt during the incident.

In summary, the evidence indicates that the student is under the supervision of the aide or another appropriate person at all times, although she maintains a greater distance during PE class. OCR confirmed that a verbal incident occurred with another student during PE class in January 2019, and that the adults present intervened and the student was not injured. OCR was unable to confirm that the bruise on the student's arm in September 2018 occurred at school.

Turning to the allegation that the student spent most of his days in the library with an aide rather than in the special education classroom with a teacher, OCR first reviewed the class schedule provided by the District:

Period	Class
1	<b>PE</b>
2	
3	<b>Math Resource</b>
4	
5	
6	<b>Language Arts Resource</b>
7	
8	
9	<b>Advisory</b>
10	<b>Lunch</b>
11	<b>Social Foundations</b>
12	
13	<b>Social Foundations</b>
14	
15	<b>Theater</b>
16	

Based on our interview with the special education teacher, OCR learned that during the periods currently labeled "Social Foundations," the student was originally assigned to inclusion Science and Social Studies classes, meaning that the student was in general education courses, receiving support from his one-to-one aide to modify the content for his academic level.

As described by the aide, after the school year started, she observed that the student's reading level was so low that he was unable to understand the content in the Science and Social Studies classes, even with modifications. As a result, she asked the special education teacher if she could work with him on his reading during those class periods. The special education teacher agreed, and the aide began working with the student in the library on things like phonics, sight words, and reading comprehension.

As the student made progress in his reading level, the special education teacher began to provide the aide with science and social studies materials that were at the student's reading level, which the aide completed with the student in the library.

At the beginning of the second semester (and after the District had been notified of this complaint), the student resumed participation in the general education Science and Social Studies classes, with inclusion services from his one-to-one aide.

In our interview with the special education teacher, she provided this approximate timeline:

- First two weeks of school: the student was in inclusion Science and Social Studies.
- From August through October: the aide worked with the student exclusively on reading skills during those two periods.
- From October through December: the aide began working on lower level science and social studies materials with the student.
- In January: the student returned to inclusion Science and Social Studies classes.

The decision to move the student from the inclusion classes to the one-on-one setting in the library was not made by the student's IEP team, but rather by the aide and the special education teacher. The District's response states that the special education teacher, who is also the department chair, determined that this move to a "more productive setting" did not constitute a change in placement. The District's response also states that the change was explained to the complainant at a November 12, 2018, meeting, and the complainant did not have any questions or objections at that time.

### *Legal Standards*

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

### *Analysis and Conclusion*

We first considered whether the District denied the student FAPE by failing to provide adequate supervision via his one-to-one aide.

OCR notes that the IEP provision regarding the one-to-one aide does not include any detail about the reason the aide is necessary, or any specific action the aide is supposed to take. It simply lists “one to one support” as a service to be provided. Based on the complainant’s description, as well as the special education teacher’s understanding, OCR determined that the aide was added following an incident in the 2017-18 school year in which the student was injured by peers in a self-contained special education classroom. That incident is not part of this investigation, but this supports the complainant’s belief that the reason for the aide was, at least in part, to ensure the student’s safety from other students while at school.

OCR determined that a one-to-one aide was provided to the student at all times. The aide understood her role as needing to be near the student to prevent incidents from happening. The aide also explained that during PE, she would remain on the sideline to allow the student the opportunity to participate normally, and the complainant generally agreed that this was appropriate.

The complainant explained to OCR that her concern is that, even when adults were present, the student was injured the previous year, so she is concerned that even with the aide physically present, the adults may just be standing by and not intervening when other students bully or harm the student. To support her contention, she pointed to the incidents that have happened this school year, the bruise that appeared in September, and a verbal altercation that occurred in January. OCR was unable to substantiate that the bruise occurred at school. Additionally, we found that verbal altercation while playing basketball, with the aide watching from the sideline, was the type of incident that could happen even when supervision was being provided. Further, the aide did intervene, and the incident did not escalate to physical violence.

OCR determined that these incidents do not establish a failure to implement the student’s IEP or a failure to provide FAPE. However, if the complainant believes that a higher level of supervision is required, which may result in a more restrictive environment, she may wish to raise this with the student’s IEP team.

We next considered whether the District denied the student FAPE by removing the student from inclusion Science and Social Studies classes, and instead providing on-to-one reading skills instruction and lower level science and social studies instruction with his one-to-one aide.

While the student’s IEP does not specifically address the provision of science and social studies instruction, OCR finds that the move from an inclusion setting to a one-to-one setting outside the regular classroom constitutes a significant change in placement. While the change may have resulted in an academic benefit to the student through improved reading skills, placement

decisions generally incorporate multiple considerations in addition to academic benefit, including, as the complainant pointed out, access to general education peers.

As a significant change in placement, this decision was subject to the evaluation and placement requirements of the Section 504 regulation at 34 C.F.R. §104.35(a),(b), and (c), including the requirement that an evaluation be conducted prior to a significant change in placement, and that placement decisions be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. In this case, OCR finds that the placement decision was made in the absence of any re-evaluation, and without convening a group of knowledgeable persons (*i.e.*, the student's IEP team). This is a violation of the Section 504 regulation at 34 C.F.R. §104.35(a) and (c).

### **Allegation 2: Different Treatment in PE Class**

The complainant alleged that the student was not allowed to change into gym clothes (dress out) for his physical education (PE) class, as the other students were. She indicated she had sent gym clothes to school the previous year, and to her knowledge they were still there in one of the special education classrooms.

#### *Factual Findings*

The District's response to this complaint indicates that during the first semester of the 2018-19 school year, the locker room air conditioning system did not work. As a result, the locker rooms were too hot for students to use. The student's PE teacher confirmed that during the first semester, students remained in their street clothes and did not dress out for PE; further, no lockers were assigned to students.

The air conditioning was repaired in November 2018, and students began dressing out for gym in the second semester. The PE teacher and the student's one-to-one aid confirmed that the student is currently assigned a locker and dresses out for PE class.

#### *Analysis and Conclusion*

The evidence shows that none of the students in the class dressed out for PE during the first semester of the 2018-19 school year, and that the student now has a locker and dresses out with his peers. The facts alleged by the complainant were not substantiated. As a result, we conclude that there is insufficient evidence to find that the District discriminated as alleged.

### **Conclusion**

We brought the violation identified during this investigation to the District's attention for resolution. On March 14, 2019, the District entered into a Resolution Agreement to resolve our compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the violation found in this case.

With regard to the allegations for which OCR found insufficient evidence of a violation, the complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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. 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. The Complainant may also file a private suit in federal court whether or not OCR finds a violation.

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, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please do not hesitate to contact XXXX XXXX, Attorney, at (303) 844-XXXX or by email at XXXX@ed.gov. You may also contact me at (303) 844-5942.

Sincerely,

/s/  
Sandra J. Roesti  
Supervisory Attorney

Enclosure – Signed Resolution Agreement