



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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September 16, 2022

Dr. Brian Hill
Superintendent
Mesa County Valley School District 51
2115 Grand Avenue
Grand Junction, Colorado 81501

Re: Mesa County Valley School District 51
Case Number 08-22-1237

Dear Superintendent Hill:

On March 3, 2022, the Office for Civil Rights (OCR) of the U.S. Department of Education received a complaint alleging that Mesa County Valley School District 51 (District) discriminated against the Complainant's children (XXX) on the basis of disability. Specifically, the Complainant alleged that the District denied and will continue to deny students with disabilities an equal opportunity to benefit from the District's enrichment program (Program) at what was known during the 2021-2022 school year (SY) as Mesa Valley Community School (School)¹ by:

- (1) denying the Complainant's child, XXX, an opportunity to participate in XXX XXX because XXX was not performing work at grade level because of XXX disability;
- (2) stating that students currently enrolled at the School, who have an Individualized Education Program (IEP) or Section 504 Plan (504 Plan), will have their plan terminated if they choose to re-enroll for the 2022-2023 SY;
- (3) stating that, starting at the beginning of the 2022-2023 SY, the School will not make formal accommodations for students who currently have/previously had 504 Plans, but will instead permit teachers to "make allowances if needed for students with ADHD, etc. as part of good practice as a teacher";
- (4) stating that if a student enrolled at the School is identified by the District as a student with a disability, then the student's parents/guardians must transfer their student to a traditional public school to receive services; and
- (5) stating that to enroll a student with a disability at the School, parents/guardians must acknowledge that their student is not eligible to receive special education services.

On April 15, 2022, OCR initiated an investigation under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance; and

¹ OCR understands that Mesa Valley Community School closed its K-5 school at the end of the 2021-2022 SY and opened a K-5 enrichment program under the name of Mesa Valley Enrichment Program, which is housed within Mesa Valley Community School, at the start of the 2022-2023 SY.

Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §12131 et. seq., and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of federal financial assistance from the Department and as a public entity, the District is subject to these laws and regulations.

During the investigation, OCR reviewed documentation provided by both the Complainant and the District, reviewed District and School policies, and spoke with the Complainant, counsel for the District, and counsel for the School. During the investigation of this complaint and before OCR had sufficient evidence to support findings, the District expressed an interest and willingness to resolve the complaint through voluntary action pursuant to Section 302 of OCR's *Case Processing Manual* (CPM).²

I. Legal Standards

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service; afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; or limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

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.

The provisions of 34 C.F.R. § 104.37 require that recipients, including school districts and any schools authorized by the school district, provide students with disabilities an equal opportunity to participate in and benefit from the districts' nonacademic services, including their existing extracurricular activities. Recipients must conduct an individualized inquiry to determine whether reasonable modifications or necessary aids and services would provide a student with a disability with an equal opportunity to participate in an extracurricular activity, such as the Program. Recipients must make reasonable modifications to an activity if necessary to allow participation by

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

the student with a disability in all aspects of the activity. In determining whether a reasonable modification is legally required, the school district, or school authorized by the school district, must first engage in an individualized inquiry to determine whether the modification is necessary and whether there exist reasonable modifications that could be made, or aids and services provided. It is a case-by-case analysis. Implementation of an IEP or Section 504 plan is not required to meet Section 504's requirements in an extracurricular activity or program for students with disabilities to ensure equal access and participation.

II. Summary of Evidence Obtained to Date

Mesa Valley Community School (School) is a charter school in the District that, during the 2021-2022 SY, served 373 students in grades K-12. As of April 21, 2022. Of those students, 22 were in grades K-5 and had an IEP or 504 Plan. The School's educational model allowed parents to personally direct their child's education through development of personalized learning plans (PLPs), which were individually designed for their child to utilize a homeschool-like approach to the student's education. The annual development of each student's PLP involved collaboration between School staff and parents. Students had the option to enroll in classes in a variety of settings, including at school and at the student's home. Enrollment at the School was open to any child residing within the District who was otherwise eligible for admission to a District school.

The School and District's relationship is governed by a Charter Contract (Contract) that was executed on June 19, 2018. The Contract will expire at the end of the 2022-23 SY unless the District's Board of Education elects to renew the School's charter. The Contract incorporates a "Cooperative Plan for Delivery and Funding of Services to Charter School Students with Disabilities" (Cooperative Plan). Under the Cooperative Plan, the School is responsible for:

Providing all necessary accommodations and instructional/curricular modifications, related services, aids, and supports required by the IEPs, including but not limited to, motor services, paraprofessional services, school psychology services, speech/language pathology services, physical/occupational therapy services, and school health care services.

The Cooperative Plan requires the School to evaluate, place into an appropriate educational setting, and provide services and other accommodations to students determined to have disabilities.

In January 2022, the District and School notified parents of enrolled students that the School would undergo significant changes in the 2022-2023 SY, responsive to guidance from the Colorado Department of Education. Specifically, the School decided to terminate its provision of full-time educational instruction for students in grades K-5 and start a part-time program called the Mesa Valley Enrichment Program (MVEP or Program) for those students. According to the District, all students enrolled in the Program would be considered homeschooled students, who could opt to receive supplemental instruction at the School.

On January 17, 2022, the School informed parents of K-5 students that at the end of the 2021-2022 SY, full-time services for K-5 students would be eliminated and, at the start of the 2022-2023 SY, the School would instead offer an enrichment program. The School wrote, "this means that the majority of [the students'] education will be provided at home, by the parents, with no school oversight." The January 17th letter contained no substantive information concerning special education programs but noted that a second letter would follow.

On January 27, 2022, the School sent a letter to the parents of students in grades K-4 who were receiving special education services and/or accommodations at the School. The January 27th letter described the School's transition to MVEP and explained that parents of students who received services or accommodations under an IEP had two options going forward: (1) enroll their child at MVEP, where they "are not eligible for special services and the child's IEP will lapse;" or (2) enroll their child in a full-time program in their neighborhood school. The letter stated that students "who have a 504 will continue to receive accommodations per their 504 plan."

On February 22, 2022, the School sent two more letters. The first letter, titled "Parent Update & Overview for 2022-2023," provided a description of MVEP and anticipated schedule options. The second letter, titled "Guidelines of Special Services K-5 22.23," described how the School's transition to the Program would affect currently enrolled students who have an "IEP, 504, ALP, or READ plan." This letter explained that "because homeschool parents by definition are primarily responsible for their children's education, students in the part-time enrichment program won't qualify for SPED (504 or IEP), GT (ALP), or READ-specific services." The letter continued, explaining that for the 2022-2023 SY, teachers would be able to "choose to make allowances if needed . . . as part of good practice as a teacher" for students with disabilities who require services and/or accommodations. The letter stated that the decision of whether or not to institute accommodations and/or services would be "entirely within the discretion of the teacher and [the School]." Finally, the letter stated that if a student at MVEP was found eligible for accommodations and/or services due to a disability, "the parents would have to enroll the student in a traditional public school to have their child receive those services. On the other hand, if the parents choose to enroll their child – then the parents acknowledge that their child would not be eligible to receive special education services."

The District acknowledged that some statements in the School's January 2022 and February 2022 letters were inconsistent with the School's obligations under Section 504. The District and School signed a Memorandum of Understanding (MOU) in April 2022 to address the District's concerns with the content of the School's previous letters. The MOU states, in part:

- the School is committed to ensuring that the Program is operated in accordance with the requirements of Section 504 and Title II, by providing each enrolled child with a qualifying disability with such accommodations, aids, and supports as are reasonably necessary to afford an equal opportunity to participate in or benefit from the academic courses and other activities that comprise the Program or are included within the Program³;
- if the School determines, through a compliant Section 504 process, that a student with a disability enrolled in the Program cannot reasonably participate in or benefit from the academic courses and other activities of the Program, with or without accommodations, aids, or supports, the School shall recommend a change of placement to a District school where an appropriate educational placement can be established;
- consistent with the Cooperative Plan, the School will comply with its child find obligations to ensure that all students enrolled in the Program who are suspected of having a disability or needing special education and related services are identified and evaluated; and
- the School will revise its "Guidelines for Special Services K-5 22.23" to conform to the language of the MOU.

³ The nature and extent of such accommodations, aids, and supports will be determined pursuant to the Cooperative Plan.

Pursuant to the MOU, the District and School drafted a letter and guidelines to correct information that was previously provided to parents and was inconsistent with the School's obligations under both the Charter Contract and Section 504.

The District and School denied the Complainant's allegation that XXX was not permitted to XXX XXX during the 2021-2022 SY. Specifically, the District reported that the School does not have a record of the Complainant requesting X – phrase redacted – X.

III. Analysis

Before OCR completed its investigation, the District expressed an interest in resolving the allegations present in this complaint. Pursuant to Section 302 of the CPM, allegations under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations, and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. The provisions of the resolution agreement must be tied to the allegations and the evidence obtained during the investigation and will be consistent with applicable statutes and regulations.

Based on the allegations and the evidence provided, OCR determined that these allegations may be appropriately resolved through an agreement under Section 302 of the CPM. On September 14, 2022, OCR received the District's signed resolution agreement (Agreement), a copy of which is attached to this correspondence. The Agreement requires the District to:

- (1) offer to convene a group of knowledgeable persons to determine whether the District, at the School, denied XXX an opportunity to XXX XXX because of XXX disability and, if so, whether the District owes XXX compensatory education or related services;
- (2) revise the School's enrollment procedures (Procedures) to ensure they are in compliance with 34 C.F.R. § 104.37;
- (3) send all parents and guardians of students enrolled at the School during the 2021-2022 SY a letter to: inform them that the School's Spring 2022 communications concerning the enrollment of students with disabilities were incorrect; provide assurance that the School does not discriminate based on disability in enrollment; share the School's revised Procedures; and provide contact information for the District's Section 504 Compliance Officer and information about where to find relevant complaint procedures;
- (4) display notices on the District's and School's websites to provide assurance that the School does not discriminate based on disability when enrolling students; and
- (5) provide training regarding disability-based discrimination and the School's new enrollment procedures to both District staff charged with overseeing the School and School staff and administrators.

IV. Conclusion

With this letter, OCR has closed the investigation of Case Number 08-22-1237. The case is now in the monitoring phase. OCR will closely monitor the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively and that the District's policies and practices are administered in a nondiscriminatory manner. The monitoring phase of this

case will be completed when OCR determines that the District has fulfilled the term of the Agreement and is in compliance with the statutory and regulatory obligations at issue in this case. When the Agreement is fully implemented, all allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations. If the District fails to implement the Agreement, OCR will take appropriate action, which may include enforcement actions, as described in the Agreement.

This letter sets forth OCR’s determination in an individual case and should not be relied upon, cited, or construed as a formal statement of OCR policy. 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.

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. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information, which, if released, could constitute an unwarranted invasion of privacy. Individuals filing a complaint or participating in our resolution process are protected from retaliation by federal law.

If you have any questions, you may contact XXX XXX, the attorney assigned to this case, at XXX.XXX@ed.gov or (XXX) XXX-XXXX.

Sincerely,

/s/

Daniel Contreras
Supervisory Attorney

Attachment: Resolution Agreement

Cc: David Price, Counsel for the District
Eric Hall, Counsel for the School
Dr. Katy Anthes, Colorado Commissioner of Education