



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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October 20, 2022

Dr. Risha VanderWey, Superintendent/Director of Student Services  
Mayer Unified School District #43  
PO Box 1059  
12606 East Main St.  
Mayer, AZ 86333

*By email only to: XXX*

Re: OCR Complaint No. 08-22-1555  
Mayer Unified School District #43

Dear Superintendent VanderWey:

This letter is to notify you of the disposition of the above-referenced complaint against Mayer Unified School District #43 (the District) that the United States Department of Education (Department), Office for Civil Rights (OCR), received on August 30, 2022. The Complainant is the parent of a XXX student (the Student) who formerly attended XXX (the School). The Complainant alleges that the District is discriminating on the basis of disability. In particular, the Complainant alleges that the Student was denied the opportunity to participate in the School's XXX program because of his disabilities.

### **OCR Jurisdiction**

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (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. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

### **Summary of OCR's Evaluation of the Complaint**

During OCR's evaluation of the complaint, OCR interviewed the Complainant; reviewed documents pertinent to the complaint allegations, including the District's non-discrimination

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statement, emails between the Complainant and the XXX, the Student’s individualized education program (IEP), and the Parent Student Handbook for the XXX; and had several discussions with the District’s Superintendent.

Before OCR opened the case for investigation and sent the District a data request, the District expressed a willingness to take immediate action to resolve the complaint allegation through OCR’s rapid resolution process (RRP). As described in Section 203 of OCR’s Case Processing Manual (CPM), RRP is an expedited process that can be used to resolve allegations in any of OCR’s statutory areas, either during evaluation or investigation.

OCR determined that it is appropriate to rapidly resolve the allegation through a voluntary resolution agreement under Section 302 of OCR’s CPM because OCR has identified concerns regarding the Complainant’s allegation. As a result, OCR did not open the complaint for investigation and instead rapidly resolved the allegation through the enclosed resolution agreement.

### **Facts**

The Student enrolled in the District during the XXX school year. An IEP was developed for him on XXX. The IEP indicates that the Student’s primary eligibility category is XXX and his secondary eligibility category is XXX. For the XXX school years, the Student was placed in XXX. He is currently in XXX grade.

On August 16, 2022, the Complainant sent an email to the XXX asking if it was too late for the Student to join the School’s XXX team. The XXX responded that practice begins on XXX at XXX, and all the Student needs to do to enroll is submit some forms. The Complainant submitted the required forms, and the Student began attending XXX practices at XXX on XXX.

The Complainant told OCR that on August 29, 2022, she received a phone call from XXX stating that the Student is not permitted to play XXX because he is in the XXX class. According to the Complainant, the following day, the Student’s teacher XXX informed the Complainant by telephone that no students in her class, including the Student, are permitted to play school sports. That day, the bus driver dropped the Student off at home instead of at XXX, where he had been dropped off the prior week, because the bus driver was instructed by the XXX Teacher to take the Student home since he was not permitted to participate in XXX practice.

On September 1, 2022, the Complainant sent an email to the XXX asking if the Student could ride the bus with the team to the game that day. The XXX responded:

[The Student] is still enrolled as a student with the XXX program and is not allowed to participate in sports unless he is no longer enrolled. Please speak with [the XXX Teacher] regarding this matter as I am not in charge of any XXX program rules and regulations.

Later that day, the Complainant [X – phrase redacted – X] so that the Student could play in the XXX game [X – phrase redacted – X]. The XXX responded that once he received confirmation that the Student was XXX, the Student could get on the bus to the game. The Student played in the game that day but did not have the correct XXX because he had missed the practice when they were distributed.

Since then, the Student has continued to play on the School’s XXX team but is no longer XXX. The Student did not receive any education services from September 1, 2022, when the Complainant XXX per the instructions from the XXX Teacher and XXX, until approximately October 5, 2022, when the Student began XXX.

The Complainant told OCR that she spoke to a woman who said that her XXX was similarly told by the XXX Teacher that he could not play XXX when he was in her class XXX years ago. The XXX also told the Complainant that his son was not allowed to play XXX when he was in the XXX Teacher’s class.

The Superintendent told OCR that the XXX Teacher tells parents that students in her class cannot participate in extra-curricular sports programs until they receive “behavior points” because the XXX Teacher is concerned that the students will demonstrate aggressive behaviors in these “unstructured” programs. The Superintendent also told OCR that the process for earning behavior points is set forth in a class handbook. The Superintendent additionally told OCR that she believes the District’s practice of prohibiting students with XXX disabilities from participating in extra-curricular sports is limited to the XXX class, and she is aware of one other student who is currently in the XXX class and is not permitted to play XXX.

The 2022-23 Parent Student Handbook for the XXX class (Handbook) states that “[e]very hour, students have the opportunity to discuss and reflect on their behavior, lose or earn points depending on their choices for the period.” Students are given XXX for every XXX points earned per period. The Handbook additionally states:

[t]o further your students learning in academics and social behaviors, an XXX in the general education setting can be earned. If the student receives XXX points for XXX consecutive days, a general education XXX is earned. The IEP team will make a decision on which class will be chosen. If the student cannot maintain acceptable behavior in their general education out class, they will cease to have that privilege and will return to their XXX classroom.

The Handbook does not mention whether students can earn points to participate in extra-curricular sports.

## **Legal Standards**

### *A. Extracurricular Athletics*

Section 504 and the regulation at 34 C.F.R. § 104.4(a) provides that no qualified person 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.

Under Sections 104.4(b)(1)(i) and (vii), a school district cannot deny a qualified person with a disability the opportunity to participate in or benefit from an aid, benefit, or service or limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Section 104.37(a)(1) states that school districts shall provide nonacademic and extracurricular services and activities in a manner that provides students with disabilities an equal opportunity for participation. Section 104.37(a)(2) makes clear that this requirement includes physical recreational athletics and special interest groups or clubs sponsored by the recipient.

Pursuant to 34 C.F.R. § 104.34(b), in providing non-academic and extracurricular services and activities, including physical recreational athletics, a school district must ensure that students with disabilities participate with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.

This requirement means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity. In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. *See OCR, Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics* (Jan. 25, 2013), [www.ed.gov/ocr/letters/colleague-201301-504.html](http://www.ed.gov/ocr/letters/colleague-201301-504.html).

Section 104.37(c) additionally states that “[i]n providing physical education courses and athletics and similar aids, benefits, or services to any of its students, a school district may not discriminate on the basis of disability.” A school district that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide qualified students with disabilities an equal opportunity for participation.

## B. FAPE

The Section 504 regulations, at 34 C.F.R. § 104.33(a), require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions regardless of the nature or severity of their disabilities.

An appropriate education is defined in 34 C.F.R. § 104.33(b)(1) 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.

Pursuant to 34 C.F.R. § 104.33(b)(2), 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.

Section 104.34(a) of the 504 regulations requires public school districts to educate students with disabilities with students who are not disabled to the maximum extent appropriate to the needs of the student with disabilities. A school district shall place a student with disabilities in the regular educational environment unless it is demonstrated that the education of the person with disabilities in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

It is illegal to base individual placement decisions on presumptions and stereotypes regarding persons with disabilities or on classes of such persons. *See* August 2010, “Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973.”

Section 104.35(a) of the 504 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 Section 104.35(c), in interpreting evaluation data and in making placement decisions, school districts shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) 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 the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

### **Legal Analysis**

During OCR's evaluation of the complaint, before OCR had requested data or conducted any witness interviews, the District requested to resolve the allegation in this case rapidly through a voluntary resolution agreement. OCR finds it appropriate to resolve the allegation through a voluntary resolution agreement because it has identified concerns regarding the allegation and the use of a points system in the XXX program to make placement decisions, which are summarized here.

First, OCR is concerned that the XXX Teacher is categorically excluding students with disabilities in the XXX class from participation in the District's extracurricular sports programs, including XXX, based on presumptions about the students' disabilities rather than individualized

determinations about the students' needs and whether any reasonable modifications are needed to ensure the students' equal participation in the District's programs.

Second, OCR is concerned that decisions regarding placement in the regular educational environment (and possibly other decisions regarding equal access to extracurricular programs) are being made unilaterally by the XXX Teacher based on a one-sized, fits all points system – and are not individualized determinations based on the student's needs made by a group of persons, including the students' parents/guardians, who are knowledgeable about the student, the meaning of evaluation data, and the placement options. In addition, conditioning students' access to general education on their success on a point system means that their time inside and outside the general education environment varies day to day and does not consistently match what is in their IEPs.

### **Conclusion**

As discussed above, before OCR opened an investigation of the complaint, the District agreed to voluntarily address OCR's concerns. The enclosed Resolution Agreement requires the District to: a) offer XXX to the Student and provide assurance that all students, including students with disabilities in the District's XXX class, will be provided equal access to the District's extracurricular programs; b) convene an IEP meeting to determine what, if any, compensatory services/remedial measures the District should provide to the Student for [X – phrase redacted – X]; c) invite the other student known to the District who is currently placed in the XXX class and is being excluded from participation in the District's XXX program to participate in the District's extracurricular programs and activities; d) conduct an audit of all students currently enrolled in the School who have been placed in the XXX class for some period of time during their enrollment at the School to determine whether any other students have been excluded from participation in the District's extracurricular programs and activities; e) send correspondence to the parents/guardians of all students identified pursuant to the audit that includes the District's commitment to provide all students, including students with disabilities, with equal access to the District's extracurricular programs and activities, including but not limited to the District's sports programs, and who to contact if a student is not currently being afforded equal access to the District's extracurricular programs and activities; f) send a memorandum to District administrators and teachers and special education staff of the School regarding the District's obligations under Section 504 and Title II; g) provide training to all District administrators and teachers and special education staff of the School regarding the District's obligations under Section 504 and Title II; and h) revise the Parent Student Handbook for the XXX class and other documents to remove the opportunity to gain time in the general education setting by earning points for good behavior.

The Agreement, when fully implemented, will fully resolve the compliance concerns in this case consistent with the requirements of Section 504 and Title II and its implementing regulations. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information that was obtained by OCR to date and are consistent with applicable laws and regulations. OCR will monitor the District's implementation of the Agreement through period compliance reports about the status of its terms. OCR will provide the

District with written notice of any deficiencies regarding its implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. OCR will provide the Complainant with a copy of its final monitoring letter. If the District fails to implement the Agreement, OCR will take appropriate action, as described in the Agreement.

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 the terms of the Agreement and is in compliance with the statutory and regulatory obligations at issue in this case. 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 concludes OCR's investigation of the complaint. This letter 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. 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, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information, to the extent provided by law, that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact XXX, the OCR attorney assigned to this complaint, at XXX.

Sincerely,

/s/

Enclosure: Resolution Agreement

cc: Kathy Hoffman, State Superintendent of Public Instruction  
(by email only to [kathy.hoffman@azed.gov](mailto:kathy.hoffman@azed.gov))