



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

December 19, 2014

Christopher R. Hoffman
Superintendent
Elk Grove Unified School District
9510 Elk Grove-Florin Road
Elk Grove, CA 95624

(In reply, please refer to case no. 09-12-1425)

Dear Superintendent Hoffman:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Elk Grove Unified School District (District). The complainant¹ alleged that the District discriminated based on disability. Specifically, she alleged:

1. During the 2011-12 school year:
 - a) Sixth grade students with disabilities at Sierra Enterprise Elementary School (School), including the complainant's son (Student), were not provided with the same opportunity to present a speech at the sixth grade promotion ceremony as their non-disabled peers.
 - b) Sixth grade students with disabilities at the School, including the Student, were not included in the field trips taken by the sixth grade class.
 - c) Students with disabilities at the School, including the Student, were not afforded the same opportunity to use tutoring services as their non-disabled peers.
2. The District failed to adequately respond to a May XX, 2012 complaint that alleged that the Student was discriminated against based on his disability when parents at an awards ceremony laughed and made fun of the manner in which he was walking.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA) and their implementing regulations. Section 504 prohibits discrimination on

¹OCR provided the names of the complainant and the Student in its notification letter to the District and is not stating their names in this letter in the interests of privacy.

the basis of disability in programs and activities operated by recipients of federal financial assistance. Title II prohibits discrimination on the basis of disability by certain 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 regulations.

As part of its investigation, OCR received and considered documentation and information sent to it by the complainant and the District and it interviewed the complainant and numerous District staff members. Based on this information, OCR has concluded that there is sufficient evidence to support a finding of noncompliance with respect to allegation 1(a), 1(b), and 2 and insufficient evidence to support allegation 1(c). The facts determined by OCR, the applicable legal standards, and the reasons for OCR's determinations are summarized below.

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,

- (1) deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service;
- (2) provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or,
- (3) 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.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

Under 34 C.F.R. § 104.37, a school district must provide non-academic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation. These services and activities may include counseling, physical recreational athletics, transportation, special interest groups or clubs, and other recreational activities.

Under 34 C.F.R § 104.34(b), in providing or arranging nonacademic and extracurricular activities, including meals, recess periods, counseling, physical recreational athletics, transportation, special interest groups or clubs, or other recreational activities, school districts must ensure that disabled students participate with non-disabled students to the maximum extent appropriate to the needs of the disabled student.

The Section 504 regulations, at 34 C.F.R. § 104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. § 35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a recipient/public entity's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students' parents and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

II. SUMMARY OF FINDINGS

- The District is the fifth largest in the State with an enrollment of approximately 62,000 students in 64 schools.

- For the 2011-12 school year, there were 6,337 students in the District who were enrolled as special education students.
- During the 2011-12 school year, the Student was enrolled in the sixth grade at the School and was receiving special education services through an IEP. The Student's primary eligibility category for receipt of special education services was autism and his secondary was speech or language impairment.
- The sixth grade students at the School were placed into one of four classrooms – two of which were self-contained classrooms with students receiving special education services. The Student was placed in one of the self-contained classrooms. The self-contained classrooms included students from other grade levels such as the fifth grade.
- The sixth grade students were given the opportunity to participate in two field trips during the school year – one to NatureBridge (Headlands Institute) in the Golden Gate Recreation Area and another to Scandia Family Fun Center.
- The NatureBridge field trip was a five day and four night activity that the School promoted as an opportunity for students “to pursue their curiosities through inquiry-based learning” as they:
 - Collect plankton from the lagoon;
 - Watch seals from the coastal bluffs;
 - Study adaptations in the Intertidal Marine Lab; and,
 - Learn geology by sketching the park's unique rock formations in field journals.
- At the beginning of the school year, the School sent to the parents of the sixth grade students an announcement for the NatureBridge field trip that provided the details and a form by which the parents would indicate if their child would participate. The complainant did not receive the announcement, was not informed of the field trip at any time, and only learned of it at the end of the school year. The Student was not asked if he desired to participate in the field trip and did not participate in the field trip.
- The Scandia field trip occurred at the end of the school year. It was a one-day activity at a local entertainment venue that provided an opportunity for the students to participate in car/boat rides, miniature golf, and a video arcade. Parents of the sixth grade students were notified of the trip through a written announcement by the School. The complainant did not receive the announcement, was not informed of the field trip at any time, and only learned of it at the end of the school year. The Student was not asked if he desired to participate in the field trip and did not participate in the field trip.²

²The Student's sixth grade teacher at the time of the Scandia field trip was a substitute teacher and she stated to OCR that none of the sixth grade students in her class participated in the Scandia trip because

- At the conclusion of the school year, the School held a promotion ceremony and an awards ceremony for the sixth grade students. The Student was being promoted to the seventh grade and participated in both ceremonies.
- Three sixth grade students were selected by School staff to give a speech during the promotion ceremony. The staff selected one student from one of the two general education classrooms and two students from the other general education classroom to give the speech.³ The students in the self-contained classrooms, including the Student, were not considered in the selection process.
- Prior to making a selection for the promotion ceremony speeches, the students in the general education classrooms were provided with a written summary of what was expected to be included in the speech while the students in the self-contained classrooms, including the Student, were not provided the written summary.
- The School also prepared a document that described the “procedures” for the promotion ceremony. The document has the following entries:
 - We need to choose two students to read the Pledge of Allegiance from [the special education teachers’ classrooms].
 - Two students ([from the special education teachers’ classrooms]) rise and approach the stage. One students [sic] say, “Please stand for the Pledge of Allegiance” the next students [sic] says, “Ready? Begin”.
 - Then [the School principal] will introduce [one of the general education classroom teacher’s] student speaker.
 - [The School principal] will introduce [the other general education classroom teacher’s] student speaker.
- The students in the self-contained classrooms, including the Student, were not afforded the same opportunity as students without disabilities to be considered to give a speech at the promotion ceremony.
- The School offered an after school tutoring service for use by students at the School. The program required the submission of an application. Three families submitted an application for the program during the 2011-12 school year and all three were approved for participation in the program. The Student, however, was not eligible for

she “opted them out” of it. She explained that she believed that she did not have sufficient support staff to allow her to split the staff between the activity at Scandia and her classroom where the fifth grade students would remain during the Scandia activity. She thus determined to keep her sixth grade students in the classroom while the rest of the sixth grade students at the School went to Scandia.

³Traditionally, there have been only two students who have given speeches at the promotion ceremony – one from each of the general education classrooms. This year, however, it was determined that three students would give a speech because two students in one of the classrooms were determined to be equally qualified.

the program because it was available only to students enrolled in the grades kindergarten, one, two, and four.

- On or about May 16, 2012, the complainant attended the sixth grade awards ceremony with the Student. When the Student proceeded to walk to the stage to receive an award, the complainant overheard other parents laugh at and mock the way that the Student walked because of his disability.
- After the awards ceremony, the complainant reported the other parents' mocking of the Student to the School principal and made a verbal complaint about their behavior. The complainant did not know the other parents, their names, or who their children were. The complainant informed OCR that the principal responded to her complaint by stating that there was nothing that she could do about the other parents.
- The complainant then called the District's administrative offices and made the same complaint to it about the other parents' treatment of the Student. The administrative assistant who spoke with the complainant created a written record of her complaint and addressed it to the District's Director for PreK – 6th Grade Education (Director). The assistant also sent a copy of it to the School principal.
- The District did not investigate the complaint made to its administration offices. Instead, it requested that the School principal look into the matter and resolve it informally with the complainant. The principal stated to OCR that she spoke with the teachers at the School who were at the ceremony and asked them if they had witnessed or heard the other parents' behavior. She stated that none of the teachers saw or heard the other parents' behavior and that the inability to identify the other parents prevented any further investigation of the complaint. She verbally informed the complainant of this and took no further action in the matter.
- The District has adopted and implemented an Uniform Complaint Procedures (UCP) policy that is intended to address complaints of discrimination and harassment of students based on their disability (the UCP has been designated as Board Policy and Administrative Regulation 1312.3). The District's UCP requires that all complaints of discrimination be addressed to, investigated by, and resolved by an Associate Superintendent who is designated as the compliance officer. The UCP further requires that the compliance officer create and maintain a record of a discrimination complaint and the actions taken to address it, offer to the complainant an opportunity to participate in an "investigative meeting" at which the complainant can provide any additional or further information about the complaint, prepare and send to the complainant a written report of the District's investigation and resolution of the complaint, and advise the complainant of the ability to appeal the District's determination and of any available rights to pursue a civil action in court. None of these actions was taken in response to the complainant's complaint to the School principal and the District's administration offices.

- The District informed OCR that it did not follow its UCP with the complainant's report of the other parents' actions because the complaint was a verbal complaint and its UCP requires a written complaint of discrimination. It further stated to OCR that the complaint was not subject to its UCP because the actions of the other parents could not be considered actions of the District that failed to comply with federal law as required by the District's UCP.

III. ANALYSIS AND CONCLUSIONS

A. Participation in Extracurricular and Other Nonacademic Activities

As previously stated, Section 504, Title II, and their respective implementing regulations prohibit the District from treating an individual differently because of his or her disability. They further require the District to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation and ensure that disabled students participate with nondisabled students to the maximum extent appropriate to the needs of the disabled students.

The facts in this matter establish that the District failed to comply with the above-stated requirements. The actions of the District, through the School, with respect to the promotion speech, NatureBridge activity, and the Scandia field trip amounted to a categorical exclusion of the Student and other students with disabilities because of their disability and their resulting assignment to a self-contained classroom. An individual assessment is required in order to determine what, if any, accommodations may be necessary to permit an otherwise qualified individual with a disability to participate in a particular event or activity. In this matter, the School did not perform an individual assessment or evaluation of the Student prior to determining that he could not participate in the promotion speech or NatureBridge activity. Moreover, for these two activities, the Student never reached the stage of the School denying his participation since the ability to participate was never offered to him. If the determination to exclude the Student and other students with disabilities from these two activities was based on only assumptions and stereotypes that they were incapable of participating due to their disabilities then this is the type of determination and exclusion that the regulations proscribe.

The same prohibition against categorical exclusion of the Student and the other students with disabilities applies to the refusal or failure to permit them to attend the Scandia field trip. While it is understandable that the teacher might have concern about having adequate resources to staff both the classroom and the field trip if the students with disabilities were permitted to participate in the field trip, such a concern does not permit or justify a determination to exclude the students with disabilities from attending the field trip. The ability and right of the students with disabilities to attend the field trip to the same extent possible as the students without disabilities is not contingent upon the District having adequate resources to permit the students' participation. The students with disabilities must be provided with an opportunity to participate that is equal to that

of the nondisabled students and this equal opportunity includes the same level of resources necessary to permit participation without additional cost or burden to them and with a level of support from the District that enables participation on the same terms and conditions as the nondisabled students.

With respect to the tutoring program, there is insufficient evidence to support the allegation since the Student was not eligible to participate in the program.

B. Complaint Investigation and Resolution

The regulations require the District to provide a prompt and equitable resolution to complaints of disability discrimination and harassment. In this matter, OCR has concluded that the District failed to meet this requirement after the complainant reported the actions of the other parents who were mocking the Student's manner of walking.

The District has enacted its UCP policy to satisfy the requirements that it provide a prompt and equitable disability discrimination and harassment compliant procedure. The UCP policy, however, was not utilized in this matter to address the complainant's internal complaint about the other parents' actions. The District's failure to utilize the UCP policy and instead address the complainant's internal complaint in an informal manner did not provide a prompt and equitable response to her.

The complainant's report undoubtedly was one based on disability since the other parents' actions were based on one of the manifestations of the Student's disability – the way in which he walked. The principal's initial response to the complainant's report – that there was nothing that she could do about the other parents – was not a proper response since the District has an obligation to investigate and remedy acts of discrimination and harassment that occur at its events and activities regardless of whether the individuals committing the acts are employees of the District or not.

The District's assertion that the parents' actions were not subject to its UCP policy is likewise misplaced. Section 504, Title II, and their implementing regulations impose upon the District the obligation to ensure that all of its programs, activities, and services are offered in a nondiscriminatory manner. The obligation includes a requirement that the District address and respond to the discriminatory acts of others who are using or participating in its programs, activities, and services and it cannot ignore reported or known acts of others' discrimination. The District's failure or refusal to address acts of discrimination committed by others within its programs, services, or activities is, itself, a failure to comply with federal law governing its programs, specifically, Section 504 and Title II.

The District's assertion that the complainant's report was not subject to the UCP process because it was not a written report is also unavailing. Section 504, Title II, and their respective implementing regulations do not require that a complaint be in writing and a verbal complaint of disability discrimination or harassment triggers the same responsibility to provide a prompt and equitable response as a written complaint.

Furthermore, the complaint in this matter was eventually reduced to writing by the administrative assistant who spoke with the complainant and, thereafter, wrote out her complaint and forwarded it to others in the District.

Because the District improperly excluded the complainant's internal complaint from its UCP process and the informal resolution provided to her was not equitable, the District was not in compliance with the requirements of Section 504, Title II, and their implementing regulations.

IV. CONCLUSION

OCR concluded that the preponderance of the evidence established that the District failed to provide the Student with an equal opportunity to participate in extracurricular and other activities and failed to adequately respond to the complainant's internal complaint of discrimination.

The District has agreed to the enclosed Resolution Agreement to resolve the compliance issues in this case. The Agreement provides that the District will revise various policies and procedures so that they more effectively ensure that students with disabilities are afforded the same opportunities as their peers without disabilities, revise its UCP to ensure that it addresses and properly resolves oral complaints, provide District-wide and School specific training on the issues of equal opportunity and discrimination complaint processing, and provide to the Student any compensatory education or services necessary due to his exclusion from various activities.

OCR concludes that the actions agreed to by the District in the enclosed Agreement will resolve the compliance issues in this case and OCR will monitor its implementation.

This concludes OCR's investigation of the complaint and 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 herein.

This letter sets forth OCR's determination in an individual OCR case, 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 complainant 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, it 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.

The complainant may file a private suit in court whether or not OCR found a violation.

OCR thanks the District for its assistance and cooperation in resolving this matter. If you have any questions about this letter, please contact Alan Konig, Civil Rights Attorney, at (415) 486-5527 or Alan.Konig@ed.gov.

Sincerely,

/s/

James M. Wood
Team Leader

Encl.