



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

July 9, 2014

Martin Galindo
Superintendent
El Rancho Unified School District
9333 Loch Lomond Drive
Pico Rivera, CA 90660

(In reply, please refer to case no. 09-13-1028.)

Dear Superintendent Galindo:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the complaint referred to above against the El Rancho Unified School District (District). The complaint alleged that Students in the extended school year (ESY) program were discriminated against based on disability. Specifically, the issue investigated by OCR was whether students with disabilities were denied use of the swimming pool at El Rancho High School while students without disabilities were permitted to utilize the pool.

OCR enforces Section 504 of the Rehabilitation Act of 1973 and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

To investigate the complaint, OCR spoke to the Complainant and interviewed parents whose children were in the extended year special day class (SDC) or who participated in discussions with District employees concerning use of the pool, interviewed employees of the District and reviewed documents provided by both the Complainant and the District as well as documents viewed on the District's website.

OCR has determined that the District's policy and practice regarding the use of the swimming pool by students with disabilities was noncompliant with Section 504 and Title II and the supporting regulation. However, the District without admitting to any violation of law, agreed to enter into and implement a remedial agreement, which when fully implemented, will remedy the compliance concerns of OCR.

The following is a summary of the evidence gathered, the applicable legal standard, and OCR's conclusions.

Issue: Did the District deny students in the extended year program, because of disability, equal access to the swimming pool at El Rancho High School?

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 district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability,

- (i) deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service;
- (ii) 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
- (iii) 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.

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 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.

In addition, under 34 C.F.R. §104.4(b)(4) a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that: (i) have the effect of subjecting qualified disabled individuals to discrimination on the basis of disability; or (ii) have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity for individuals with disabilities. The Title II regulations contain a similar provision applicable to public entities, at 28 C.F.R. section 35.130(b)(3).

During its investigation, OCR found that the SDC teacher sent a letter to the parents of students in her class on June 18, 2012 saying the students in the SDC during the extended school year would not be able to use the pool as they had in the past. The

swimming pool is located right in front of the classroom used by the SDC class. The parents were told by the SDC teacher that it was a decision of the Board of Education. When parents asked the Superintendent why there was a change in policy, they were told there was no money to pay for insurance.

OCR spoke to the District's Director of Student Services. He told OCR that, because of accidents that had occurred at other school districts involving swimming facilities, the District's insurer informed the District it would only provide coverage for students in specific P.E. classes or sports teams. Since the class in question, the SDC in ESY, was using the pool solely for recreational use, the Director told OCR that the decision was made that the swim team, the water polo team or summer swim classes could use the pool, but the SDC class could not. However, one parent of an SDC student who had been using the pool during prior summers told OCR that she went to a meeting at the school in the summer of 2012 and saw non-disabled students using the pool for free play, not specifically engaged in any particular organized water sports program.

The District also provided OCR with documentation to explain the District's position and what led to the decision. OCR reviewed a memo dated May 18, 2012 addressed to the Board of Education from the Student Services Department. The memo stated that because of drowning and near-drowning incidents involving students with disabilities at other school districts, they were suspending the use of the pool by students with disabilities during the extended school year 2012. No mention was made in the memo about allowing students with disabilities to use the pool with appropriate safety measures.

Attached to the May 18, 2012 memo were two statements from the insurer concerning swimming pool safety. There was no mention in either statement specifically about the use of swimming pools by persons with disabilities. One statement mentioned establishing safe pool use rules and stated that, after the death of a student at another district's high school pool, that district implemented a policy on the certification of instructors and supervision during PE class, swim practice and meets. The second statement discusses the use of lifeguards as an accident prevention strategy and other risk control measures, including ensuring that PE teachers and coaches be trained in cardio-pulmonary resuscitation (CPR) and water safety instruction (WSI).

OCR reviewed the public Board of Education notes for this period and was unable to find any indication the Board of Education formally adopted any of the policies and procedures related to certification and training of PE teachers and coaches mentioned in the statements from the insurer. No apparent effort was made by the District to provide a certified and trained teacher or coach that would alleviate any legitimate safety concerns related to SDC students using the pool that summer.

OCR also learned that the suspension of the use of the pool by students in the SDC class was continued the following summer, again without providing a certified and trained teacher that would have enabled the students with disabilities to use the pool during ESY 2013. And until midway through the week of June 23, 2014, the SDC

students in ESY 2014 were not permitted use of the pool. According to the Superintendent, the pool was opened for use by the SDC students during that week.

Analysis:

Based on the available information, OCR determined that the District made the decision to eliminate the use of the swimming pool by the SDC class during the ESY because of perceived increased risk related to their disability status. This perceived risk was not individually assessed. In addition, if the District had legitimate safety concerns, it had a duty to take reasonable steps to apply appropriate risk control measures to provide continued access to the pool by students with disabilities in the ESY program. For these reasons OCR finds that the District was not fully in compliance with Section 504 and Title II when it suspended pool use by the SDC class in summer 2012, 2013, and did not permit use of the pool by SDC students until midway through summer 2014.

OCR discussed its findings with the District in February 2014 and sent the District a copy of a draft agreement that would resolve the issues raised in this case. Despite many attempts, the District did not respond in any way to OCR until June 2014, and at that time, the District expressed a willingness to try to resolve OCR's concerns and sign and implement the attached Resolution Agreement (Agreement). In addition, OCR strongly encourages the District to contact OCR to request training for its administrative and special education staff regarding the District's obligations under Section 504.

As set forth by the Agreement, the District has agreed to take the following steps: (1) provide training to ensure that the District has enough qualified staff to offer water safety/swimming adaptive physical education (APE) instruction to qualified disabled students; (2) Develop and issue written notice to the parents/guardians of District students receiving APE services of the availability of water safety/swimming as a possible APE activity/placement; (3) Provide APE curriculum at schools that have a swimming pool to include an equal water safety/swimming benefit for students in APE; and (4) report to OCR on the number of students receiving APE services and water safety/swimming instruction. OCR will monitor the District's implementation of the agreement.

This concludes OCR's investigation of the 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.

OCR is closing this complaint as of the date of this letter. The Complainant is being notified concurrently.

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, 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.

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

If you have any questions, please contact David LaDue, Civil Rights Attorney, at (415) 486-5528, or Nefertiti Sadat, Civil Rights Investigator, at (415) 486-5550.

Sincerely,

/s/

Sara Berman
Team Leader

Enclosure