



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

August 19, 2014

Dr. Donald Evans  
Superintendent  
Berkeley Unified School District  
2020 Bonar Street, Suite 322  
Berkeley, California 94702

(In reply, please refer to case no. 09-14-1158.)

Dear Superintendent Evans:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its resolution of the above referenced complaint filed against the Berkeley Unified School District. The complaint alleged that the District discriminated against the Student<sup>1</sup> on the basis of disability. Specifically, it alleged that the District denied the Student an equal opportunity to participate in after school programs at XXXXXXXX Elementary School---Berkeley United in Literacy Development (BUILD) and Berkeley Links Enrichment, Academics and Recreation to the Needs of Students (LEARNS)---by failing to provide him curb-to-curb transportation as a disability-related service.

OCR initiated its investigation of the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the implementing regulations. Section 504 prohibits discrimination on 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 subject to the requirements of Section 504, Title II, and the implementing regulations.

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

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<sup>1</sup> OCR notified the District of the identity of the Student and the Complainant when the investigation began. We are withholding their names from this letter to protect their privacy.

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.

Under both the Section 504 regulations, at 34 C.F.R. §104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. §35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

The Section 504 regulations, at 34 C.F.R. §104.37(a)(1), require that school districts provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity to participate. In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications to policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Section 35.130(b)(7) applies to the nonacademic and extracurricular activities operated by school districts.

In some instances, IEP or Section 504 teams may determine that a student's participation in an extracurricular or nonacademic activity is required as a necessary component of the student's FAPE. If so, a school district must develop and deliver appropriate related aids and services through the IEP or Section 504 team process to enable the student to successfully participate in the activity. Such related services could, in some circumstances, include transportation to and/or from the activity. Where participation in an extracurricular or nonacademic activity is not required in order to provide a student with a FAPE, a school district nonetheless is obligated to provide the student with an equal opportunity to access such activities. A school district must make reasonable modifications to policies, practices, and procedures and provide aids, supports, and services, including transportation, that are necessary to ensure that the disabled student has an equal opportunity to participate, unless it can demonstrate that doing so would be a fundamental alteration to the program or would constitute an undue burden.

OCR began its investigation by interviewing the Complainant and District staff and reviewing documents provided by the Complainant and the District. The Student is diagnosed with Autism Spectrum Disorder and a speech and language impairment. During the 2013-14 school year, he was enrolled in the first grade at the School. Among other supports and services, his IEP provided for curb to curb transportation between school and his home at regular school start and end times. BUILD was a free after-school one-on-one tutoring program, and LEARNS was a before and after-school program that provided academic support, cultural enrichment, community building, and recreation. These after-school programs, in combination, operated from the time the school day ended until 5-6 p.m. The District provided after-school program participants bus service to a nearby middle school drop-off point where their parents could meet them, or parents could pick them up from the School.

In January 2014 the Complainant began inquiring about the Student participating in the BUILD and LEARNS programs. During an IEP meeting for the Student in February 2014, the Complainant requested that participation in these after-school programs be added as a component of his IEP. She also requested that the District provide the Student curbside transportation home from the after-school programs. The Student would have been able to use the transportation provided to other participants in the after-school program, however the Complainant was unable to pick the Student up from the drop-off point because of her own disability. The IEP team determined that participation in the after-school programs was not required in order to provide the Student with a FAPE, and did not amend the IEP to provide for specialized transportation at the conclusion of the after-school programs. The Complainant told OCR that it was her understanding that the District would not consider providing specialized transportation unless participation in the after-school programs was required as a matter of FAPE. However, several District personnel told OCR that disability related services, supports, and modifications may be provided to students with disabilities participating in these after-school programs even if participation is not required by the student's IEP.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a school district expresses an interest in resolving the complaint. Prior to the conclusion of OCR's investigation, the District expressed an interest in resolving the complaint issue. The District thereafter entered into the enclosed Resolution Agreement. Accordingly, OCR did not complete its investigation or reach conclusions as to whether the District failed to comply with Section 504 or Title II with respect to the issue raised by this complaint.

Through the Resolution Agreement, the District agreed to confirm the Student's eligibility to participate in the BUILD and LEARNS programs and, through a memorandum of understanding, to provide curbside transportation and other aids, supports, or services necessary for the Student to have an equal opportunity to participate in the programs. The District also agreed to develop and implement a written procedure to ensure that all students with disabilities are provided the aids, supports, services, and modifications necessary to have an equal opportunity to participate in District nonacademic and extracurricular programs and activities.

Based on the commitments made in the Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter. OCR will monitor the District's implementation of the Resolution Agreement through completion. OCR is informing the Complainant of the complaint resolution by concurrent letter. The Complainant may file a private suit in Federal court whether or not OCR finds a violation.

This concludes OCR's investigative process 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 with OCR 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.

OCR appreciates the courtesy and cooperation extended by you and your staff during the complaint resolution process. If you have any questions, please contact Julie Baenziger at (415) 486-5502, or me at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod  
Team Leader

Attachment

CC: Dr. Susan Craig, Director, Student Services