



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

August 22, 2014

Mr. Tom Torlakson
Superintendent
California Department of Education
1430 N Street
Sacramento, CA 95814

(In reply, please refer to case no. 09-14-1236.)

Dear Superintendent Torlakson:

The U.S. Department of Education, Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint against the California Department of Education (CDE). The complainant alleged CDE discriminated her son (Student) ¹ based on disability (mobility impairment). The specific allegations OCR investigated were:

1. Whether the Hearing Officer with the Office of Administrative Hearings (OAH) failed to hold the special education due process hearing in a location with accessible bathroom facilities necessary for the Student to participate in the hearing process; and
2. Whether the Hearing Officer failed to provide the complainant and the Student adequate time to accommodate the Student's accessibility needs.

OCR opened this complaint for investigation under the authority of 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 regulations over complaints alleging discrimination on the basis of disability that are filed against certain public entities. CDE receives Department funds and is subject to the requirements of Section 504 and Title II.

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 recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, CDE informed OCR it would take steps to address the compliance concerns raised in the complaint. OCR and CDE

¹ OCR informed CDE of the complainant's and Student's identities in our letter notifying CDE of the complaint. We are withholding them here to protect their privacy.

entered into an agreement to resolve the complaint on August 22, 2014. Accordingly, OCR did not complete its investigation of the complaint or reach conclusions regarding CDE's compliance with Section 504 or Title II.

The applicable legal standards, the facts OCR gathered during its preliminary investigation, and the disposition of the allegations are summarized below.

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), recipients, in providing any aid, benefit or service, may not directly or through contractual arrangements 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.

In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications in 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. Whether a particular modification or service would fundamentally alter the program or constitute an undue burden is determined on a case-by-case basis. While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.

The program accessibility requirements of the Section 504 implementing regulations are found at 34 C.F.R. §§104.21-104.23; comparable sections of the Title II implementing regulations are found at 28 C.F.R. §§35.149-35.151. Both 34 C.F.R. §104.21 and 28 C.F.R. §35.149 provide that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by disabled persons, be denied the benefits of, excluded from participation in, or otherwise be subjected to discrimination under any program of activity of the recipient. The specific standards used to determine a recipient's compliance depend upon whether the facility in question is new construction or an existing facility, a determination made based on the date of a particular facility's construction and/or renovation. However, at a minimum, a recipient must operate its programs and activities so that, when viewed in their entirety, they are readily accessible to and usable by persons with disabilities.

Under the regulations implementing Section 504¹, at 34 C.F.R. Part 104, students with disabilities are entitled to a free appropriate public education (FAPE), and to procedural safeguards with respect to disagreements concerning FAPE. Section 104.33(b)(2) states that one means of meeting a school district's duty under Section 504 to provide FAPE is the implementation of an individualized education program (IEP) developed in accordance with the IDEA. In California, disputes under IDEA are resolved through mediations and hearings

¹ OCR interprets the Title II regulations consistently with Section 504.

administered by CDE. CDE contracts with OAH to provide these services. Since special education due process hearings are part of the programs and services of CDE they are subject to the nondiscrimination requirements of Section 504, Title II and the regulations.

OCR's preliminary investigation showed the following:

- According to OAH, when scheduling due process hearings and mediations concerning special education issues, it typically asks the school district involved to provide a facility for the proceedings.
- The Student is a high school student with, among other disabilities, a mobility impairment that requires him to use a wheelchair most of the time. He is eligible for services under IDEA and had an IEP at the time of the events giving rise to this complaint. Upon mutual request of the complainant and the district (District) in which the Student attends school, OAH scheduled a due process hearing to review a placement dispute. The hearing began on a morning in March 2014 at the District's Special Education offices.
- According to the complainant, during a late-morning break, she tried to find a bathroom the Student could use; however, none were large enough for the Student's wheelchair. Eventually, she obtained the Student's walker from her car, which allowed him to enter a bathroom. The bathroom did not have handrails. The Student soiled himself before he was able to access the toilet.
- OAH said the bathroom used by the Student was a private, single-toilet bathroom, and was the bathroom closest to the hearing room. OAH told OCR that it did not evaluate whether accessible bathrooms were available at the site.
- After the Student used the bathroom, the complainant returned to the hearing room and informed the Administrative Law Judge (ALJ) of the problem, and the need for the Student to go home to bathe. According to OAH, the District identified a new facility with accessible bathrooms at the ALJ's directive. The ALJ also contacted OAH's ADA Coordinator. Together, they determined that the hearing would reconvene 2.5 hours later, at 2:30pm, at the new location, to allow the Student time to drive home, bathe, eat lunch, and drive to the new facility. The Student's home was located approximately five miles from the original hearing location and seven miles from the new location.
- Around 1:00pm, the complainant emailed the OAH ADA Coordinator to inform him that she could not get to the new location by 2:30 because the Student's wheelchair cushion would not have time to dry; she asked that the hearing be continued until the next day. The ADA Coordinator offered to either reconvene at 3:00 instead of 2:30, or have the complainant and Student participate via phone that day; OAH informed OCR that the OAH ADA Coordinator determined this was a reasonable accommodation for the Student.

- The complainant and the Student arrived at the new hearing location at around 3:15 and the hearing reconvened at 3:26. The Student did not have a wheelchair cushion, which, the complainant said, was uncomfortable for him. The hearing continued until around 7:30pm; according to OAH, this was due to the limited availability of witnesses and agreed to by all parties. The complainant, however, expressed her unhappiness with the late hour.
- According to the complainant, the hearing lasted for seven non-consecutive days.
- Neither CDE nor OAH has written policies or procedures: (a) to ensure that special education hearings and mediations are conducted in facilities accessible to individuals with disabilities, (b) specifying how participants in special education hearings and mediations may request disability-related accommodations, or (c) by which individuals may complain to OAH about inaccessible facilities or failure to provide reasonable accommodations.

As noted above, under OCR's procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, CDE entered into the attached agreement to resolve the allegations in the complaint. In summary, the agreement requires CDE to ensure that OAH, or any successor to OAH: (i) revise its policies, procedures, practices, and notices to ensure special education hearings and mediations are conducted in facilities accessible to individuals with disabilities, (ii) adopt a procedure for special education hearing and mediation participants to request and receive reasonable accommodations, (iii) adopt a procedure for resolving complaints alleging violations of the above policy or procedure; and (iv) notify the public of its obligation to conduct special education proceedings in accessible facilities and provide reasonable accommodations.

Because CDE voluntarily resolved this complaint, OCR did not complete its investigation or reach conclusions as to whether CDE failed to comply with Section 504 or Title II. OCR will monitor CDE's implementation of the agreement. OCR is closing this complaint as of the date of this letter, and notifying the complainant simultaneously. 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 whether or not OCR finds a violation.

OCR routinely notifies recipients that they are prohibited from harassing, coercing, intimidating, or discriminating against any individual for filing a complaint with OCR or participating in the complaint resolution process.

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

Thank you for your cooperation in resolving this case. In particular, OCR appreciates the efforts of Sharon Felix-Rochon, Director, Office of Equal Opportunity. If you have any questions about this letter, please contact Suzanne Taylor, OCR attorney, at 415-486-5561.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure

cc: Sharon Felix-Rochon, Director, Office of Equal Opportunity