



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

November 12, 2014

Superintendent Antwan Wilson  
Oakland Unified School District  
1000 Broadway  
Oakland, CA 94607

(In reply, please refer to case no. 09-14-1314.)

Dear Superintendent Wilson:

On May 19, 2014, the U.S. Department of Education, Office for Civil Rights (OCR), notified you of a complaint against the Oakland Unified School District which alleged that the District discriminated against the Student<sup>1</sup> on the basis of disability.

OCR investigated whether the District:

1. Denied the Student a free, appropriate public education (FAPE) by failing to timely identify and evaluate the Student for special education and related services;
2. Utilizes methods of administration that have the effect of subjecting students to discrimination on the basis of disability when they transfer from other school sites.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs receiving federal financial assistance from the Department. OCR also has the authority as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation to investigate disability discrimination complaints against public entities. The District is a recipient of federal financial assistance from the Department and is a public entity.

OCR gathered evidence through interviews with the Student's mother (complainant), and District and school site staff. OCR also reviewed documents provided by the District and the complainant.

With respect to the first issue, OCR finds that the preponderance of evidence supports a conclusion that the District denied the Student a FAPE in violation of Section 504 and Title II. With respect to the second issue, OCR finds that the preponderance of evidence supports a conclusion that in violation of Section 504 and Title II the District utilizes methods of administration that fail to ensure that evaluations are conducted in a timely manner and that staff are aware of and implementing the IEPs and Section 504 plans of students who have transferred from other school sites. .

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

The applicable legal standards, the facts gathered, and the basis for OCR's determination are summarized below.

*Issue 1: Whether the District denied the Student a free, appropriate public education (FAPE) by failing to timely identify and evaluate the Student for special education and related services.*

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a 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.

Section 104.35(a) regulations require 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 §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

With respect to Issue 1, OCR found the following:

At the time the complaint was filed with OCR, the Student was a senior at a District high school. The Student has diagnoses of speech/language impairment, ADHD, and a learning disability. The District found the Student eligible for special education when he was in fourth grade and developed an IEP for the Student at that time. The Student left the District to attend a District authorized charter school his sixth grade year from 2007-2008. A printout from the District's electronic special education record-keeping system indicates that the District exited the Student from special education because he "dropped out" on August 27, 2007. A District witness informed OCR that the "dropped out" reason code was improperly selected and primarily due to this error, when the Student enrolled in a District middle school during the 2008-2009 school year, the District did not notify District or school site staff about the Student's IEP.

The Student attended the District middle school from 2008-2010. The District did not have any documentation showing that the Student received special education or related aids and services during this period. The District also was not able to provide OCR with any documentation showing that a Student Success Team or assessment was conducted for the Student during this time, despite the Student's academic and behavior record indicating that he experienced some challenges in the school

environment. The Student finished his seventh grade year with a 2.0 academic GPA, his eighth grade year with a 2.25 academic GPA and had 34 incidents entered into his discipline record for behavior like throwing objects, moving around, and a few physical interactions with other students.

The Student enrolled in a district high school (School A) for his ninth grade year in the 2010-2011 school year. School A developed a Section 504 plan for the Student on March 30, 2011. The Section 504 plan indicates that the Student has ADHD but does not reference an evaluation of the Student's disability-related, individual educational needs. Towards the end of the 2010-2011 school year, the Student transferred to another District high school (School B). However, School B staff did not receive the Student's Section 504 plan from School A or the District.

The Student's initial and subsequent School B enrollment forms state that the Student needed an IEP. The complainant informed OCR that she repeatedly informed School B staff that the Student experienced some academic challenges and previously had a District IEP. Additionally, the complainant asked School B's front office staff for and completed the forms to request a special education assessment of the Student. Although the District developed an assessment plan on October 3, 2011 and the complainant signed it on October 10, 2011 a long delay in completing the assessment and convening and IEP team meeting ensued. When the complainant called or visited the school to inquire about the status of her request, School B staff would inform her that the forms had been misplaced which caused the complainant to have to complete and re-submit the forms several times during the Student's sophomore and junior years.

The assessment was completed on April 26, 2012, seven and a half months after the referral, and the results indicated that the Student might be eligible with a specific learning disability. However, the District's school psychologist reserved the final eligibility determination for the site IEP team. School B did not convene an IEP team to make this determination until the end of the Student's senior year, after this OCR complaint was filed.

In January, 2013, the then Assistant Principal at School B asked one of the resource teachers to look into the Student's history. The teacher had a difficult time locating any records associated with the Student and Special Education or Section 504, electronic or in hard copy. In an email dated September 5, 2013, the resource teacher emailed the School B principal stating that the complainant believed the Student had an IEP at School A. The email said that School A "wouldn't discuss his [Student's] IEP with me [resource teacher] because they couldn't locate it and I had no written release from Mom." On May 2, 2013, the complainant received the District's "Prior Written Notice" form, denying special education testing because "the first step is the 504 process."

When the 2013-2014 school year started, the resource teacher requested that the Student's general education teachers begin general education program modifications to support the Student's academic success in the classroom. Some modifications included repeating or simplifying instructions, adjustment in class grouping, and one on one tutoring after school. The resource teacher would also check in with the complainant to see if the Student was responding well to the modifications, and the complainant indicated that her son was being supported.

During the Student's spring counseling session of his senior year in high school, his academic counselor informed him that he would not graduate until he passed the math portion of the CAHSEE. The complainant communicated this information to the resource teacher, who attempted to convene a Section 504 meeting for the Student. The complainant was provided a copy of the Section 504

Procedural Safeguards/Parent's Rights document. Since the resource teacher was not trained in the Section 504 process, she did not follow the District's policy to use Web504 – the District's online program for developing Section 504 plans. For this reason, the Student's academic counselor and School B administrator denied the Section 504 plan on April 24, 2014. The Student and his mother were informed, again, that the Student was in danger of not graduating because of the CAHSEE requirement.

On April 30, 2014, the complainant filed this OCR complaint and complained about the situation to a District Board member. Subsequent to communication between the District and OCR about the OCR complaint and the intervention of the Board member, the District's Program for Exceptional Children (PEC) and the School B staff began to communicate about how the Student's IEP evaluation had not been completed in 2012, and assembled an IEP team to review the April 26, 2012 psycho-educational evaluation. The Students' mother received another "Prior Written Notice" form dated May 5, 2014, which supposedly corrected the District's May 2, 2013 "Prior Written Notice" form. However, the May 5<sup>th</sup> form stated that "the first step is an SST (School site team meeting) by general education not a 504" as the basis for the District's denial of a special education evaluation, further confusing the status of the Student's eligibility for special education. However, on May 21, 2014, the District convened an IEP team for the Student which determined that the Student was eligible for special education and developed an IEP for the Student which granted him a waiver from the CAHSEE graduation requirement.

With the CAHSEE waiver, the Student was able to successfully complete the required credits and his senior project in order to graduate from the District at the end of the 2013-2014 school year. The Student participated in the graduation ceremony and senior class activities. The Student is now enrolled and taking classes at a four year university. However, the Student needed the university's summer bridge program to bolster his academic skills, and enrolled in remedial courses at the University to make up for the courses he was unable to advance through in high school.

#### *Analysis of Issue 1.*

Section 104.35(a) of the Section 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. When the Student attended a charter school in his sixth grade year, the District erroneously exited the Student from special education, essentially changing the Student's placement without first conducting an evaluation as required under 34 C.F.R. §104.35 (a). The error resulted in school sites and non-PEC District departments no longer having access to records that would have confirmed that the Student had an IEP. Regardless, OCR determined that the District had reason to believe that the Student may have needed special education or related aids and services at the time he re-entered the District in seventh grade since he had a District-developed IEP when he was a fourth and fifth grader in a District school. Additionally, the Student struggled in District schools during his seventh and eighth grade years and throughout high school. However, despite the Student's special education history in the District, his academic struggles and the complainant's multiple requests for an evaluation, the District did not complete the process for evaluating and placing the Student until the end of his senior year in high school. While the Student had a Section 504 plan for a few months at the end of his ninth grade year at School A and received some informal accommodations from his teachers during his senior year at School B, neither the process School A used to develop the Section 504 plan nor the one School B used to determine accommodations was based upon an evaluation consistent with the requirements of 34 C.F.R. 104.35. Although the District completed a psycho-educational assessment of the Student in April 2012, it took the District over seven months to do so and the assessment report was

not considered by a group individuals knowledgeable about the Student and the meaning of the assessment until the end of the Student's senior year, which was over two and a half years after the District received the complainant's consent to the assessment plan. But for the complainant's persistence in seeking an evaluation of the Student, the Student may not have been in a position to graduate from the District.

Based upon the foregoing, OCR concludes that the preponderance of evidence supports a conclusion that the District violated Section 504 and Title II with respect to Issue 1. The District failed to evaluate the Student for special education and related aids and services and failed to provide such service to the Student for most of the Student's educational history in the District since seventh grade. In order to address the non-compliance determination on Issues 1, the District has agreed to the enclosed resolution agreement that requires the District to provide compensation to the Student for its failure to provide the Student with a FAPE.

*Issue 2: Whether the District utilizes methods of administration that have the effect of subjecting students to discrimination on the basis of disability when they transfer from other school sites.*

The Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), provide 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. 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)(4) a recipient may not 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. §35.130(b)(3).

With respect to Issue 2, OCR found the following:

Systemic barriers prevent students from being properly identified and evaluated under Section 504. The District is transitioning to an electronic only record keeping systems for IEPs and Section 504 plans. OCR identified some significant shortcomings related to the transfer of student information to these systems, as well as with administrator and staff knowledge about the District's Section 504 and IEP process.

For example, in the Student's fourth or fifth grade year, his IEP was archived at the District office in hard copy even though the District was concurrently using an electronic record keeping system. A staff person entered the Student's IEP information into the electronic system, but when the Student transferred to a charter school, an incorrect reason code was used that erased all information about the Student in the District's overall student information system. OCR was informed that this was not an uncommon practice and that PEC administrators were now reviewing entries where this code is used, and coaching staff not to use the "dropped out" reason code inappropriately. After the Student re-enrolled back into the District, the District lost track of the complainant's requests for an evaluation, the evaluations themselves, and even the Student's Section 504 plan from School A. The District informed OCR that its new electronic database for IEP records, rolling out during the 2014-2015 school year, will eliminate paper records, and prevent students who transfer out of the District or within the District's schools from being disassociated with their IEP records. Similarly, the District is updating its Section 504 data base by entering or uploading hardcopies of students' Section 504 plans.

OCR identified a concern with the varying perspectives of District and school site staff about the Section 504 and IEP processes. In the records provided to OCR by the District, OCR found four different conclusions from four different District and school site staff about the reason why the Student's IEP did not follow him. These reasons included: there was no record of a prior IEP; the Student dropped out; the Student dropped out and he could only receive health services; and the Student already met his IEP goals. Other concerns OCR identified were a school's denial of a Section 504 plan because it was drafted on outdated forms, and a misunderstanding that a Section 504 assessment or SST assessment were prerequisites for conducting an evaluation to determine whether a student meets the eligibility criteria for special education and related services under IDEA.

### *Analysis of Issue 2*

OCR determined that the combination of the District's failure to ensure that the Student's special education and Section 504 records followed him to the different schools within the District in which he enrolled, along with school site staff's confusion regarding the SST, Section 504 and special education processes is indicative of a method of administration that has the effect of defeating or substantially impairing the District's ability to meet its responsibility for providing a FAPE to students with disabilities – particularly those students who move to different schools within the District. If the receiving school is not aware that a new student has a Section 504 plan or an IEP, it will not implement the plan; the failure to implement will result in a denial of FAPE. Additionally, the failure to provide the placement and services in the Student Section 504 plan or IEP will essentially be a change in placement that will have taken place without the District first conducting an appropriate evaluation. While OCR did not find that any of the involved parties acted to intentionally deny the Student a FAPE, OCR identified several misunderstandings by administrators and staff about the Section 504 process that could prevent students with disabilities from being timely identified and evaluated under Section 504. The District's failure to properly identify, evaluate and provide an appropriate education to the Student for a period of nearly six school years during which time the Student was enrolled in four different District schools— including an elementary, middle and two high schools is evidence of the systemic nature of problem.

Based upon the forgoing, OCR concludes that the preponderance of evidence supports a conclusion that the District violated Section 504 and Title II with respect to Issue 2. In order to address the non-compliance determination on Issue 2, the District has agreed to the enclosed resolution agreement which requires the District to issue cross-departmental guidance and training to its staff to clarify the appropriate situations to refer a student to the SST, Section 504 or special education process; track referrals and responses to SST, Section 504 and special education evaluations at School B; and assess the functionality of its new special education database.

OCR will monitor the implementation of the agreement and is informing the complainant of these findings by concurrent letter.

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.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are

not formal statements of OCR policy and they 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.

We appreciate the District's cooperation during the investigation of this complaint and the assistance of Laura O'Neill and Jacqueline Minor in the resolution process. If you have any questions about this letter, please call Tammi Wong, Civil Rights Attorney, at (415) 486-5564.

Sincerely,

/s/

James M. Wood  
Team Leader

Enclosure

cc: Jacqueline Minor and Laura O'Neill, Office of the General Counsel (by email only)