



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

February 11, 2015

James C. Franco, Ed.D.
Superintendent
Tracy Unified School District
1875 W. Lowell Ave.
Tracy, CA 95376

(In reply, please refer to case no. 09-14-1375.)

Dear Superintendent Franco:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Tracy Unified School District (District). OCR investigated whether the District discriminated against the Student based on disability.¹ Specifically, OCR investigated whether the District:

1. adequately responded to an internal complaint alleging that school staff retaliated against the Complainant for advocating on behalf of the Student's disability related rights, and failed to implement the Student's March XX, 2014, Individualized Education Program (IEP) plan; and,
2. properly evaluated and placed the Student for a suspected disability.

OCR investigated these allegations 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), and their 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 based on disability by public education entities. The District receives funds from the Department and is a public education entity, and therefore is subject to Section 504 and Title II and their implementing regulations.

OCR gathered evidence through interviews with the Complainant and District administrators, and through a review of documents provided by the Complainant and the District. For the reasons explained here, OCR determined that there was sufficient evidence to support a conclusion of noncompliance with the regulations implementing Section 504 and Title II, with respect to the issues investigated. Without admitting any violation of the law, the District has agreed to enter into a Resolution Agreement (attached), to address OCR's findings of noncompliance.

¹ OCR notified the District of the Complainant and Student's identity when the investigation began. OCR is withholding their names from this letter to protect their privacy.

Issue 1: Whether the District adequately responded to an internal complaint alleging that school staff retaliated against the Complainant for advocating on behalf of the Student's disability related rights, and failed to implement the Student's March XX, 2014, IEP.

Legal Standards

Grievance Procedures

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 parents of elementary and secondary school students, 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.

Retaliation

The Section 504 regulations, at 34 C.F.R. § 104.61, incorporate 34 C.F.R. § 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. § 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Background

The Complainant's son (Student) is a student in the District. On May 28, 2014, the Complainant filed this complaint with OCR. OCR opened the complaint and began investigating the allegations. As OCR initiated its investigation, the District notified OCR that it had received the same allegations on May XX, 2014, through its internal complaint process, and was conducting

an internal investigation. The District provided OCR with the results of its investigation on October XX, 2014, and provided a copy of its November XX, 2014, notice of findings sent to the Complainant. OCR's investigation therefore addressed the sufficiency of the District's investigation and complaint process in light of the District's internal investigation.

Findings

District Complaint Processing Policies

The District's Uniform Complaint Procedures (UCP), under Board Policy (BP) 1312.3 and Administrative Regulation (AR) 1312.3, address complaints of discrimination. Specifically, BP 1312.3 states that the District shall use the UCP "to resolve any complaint alleging unlawful discrimination, harassment, intimidation, or bullying in district programs and activities based on actual or perceived characteristics of . . . physical or mental disability . . ." BP 1312.3 further explains that "[t]he Board prohibits any form of retaliation against any complainant in the complaint process." However, BP 1312.3 does not explicitly state that complaints of retaliation for engaging in protected activity on behalf of students with disabilities or other protected areas will be handled pursuant to the UCP.

AR 1312.3(A) states that the UCP shall be used "to investigate and resolve complaints alleging . . . unlawful discrimination" and other specific issues. According to AR 1312.3, the Director of Student Services, Director of Curriculum, or the Assistant Superintendent for Educational Services and Human Resources shall "investigate complaints and . . . ensure district compliance with law." AR 1312.3 further states that a "complaint review shall be completed within 60 calendar days from the date of receipt of the complaint unless the complainant agrees in writing to an extension of the timeline," and "[a]ll complaints shall be investigated and resolved within 60 calendar days of the district's receipt of the complaint." In addition, within ten days of receiving the complaint, the compliance officer "shall provide the complainant and/or his/her representative an opportunity to present the complaint and any evidence, or information leading to evidence, to support the allegations . . ." "Within 30 calendar days of receiving the complaint, the compliance officer shall prepare and send to the complainant a written report of the district's investigation and decision . . ." If the complainant does not agree with the compliance officer's findings, s/he may appeal to the Board within five business days. AR 1312.3 also explains that the District's decision regarding a complaint shall be in writing, and shall include: the "findings of fact based on the evidence gathered," the "conclusion(s) of law," the "[d]isposition of the complaint," [r]ationale for such disposition," "[c]orrective actions" if warranted, notice of the right to appeal to the California Department of Education (CDE)."

In addition to BP and AR 1312.3, regarding the District's UCP, the District's also has policies specific to "Complaints Concerning District Employees," BP and AR 4115.5. BP 4115.5 explains the need for a complaint process "regarding certificated management, or confidential employees of the District." AR 4115.5 explains that parents/guardians may make formal or informal complaints regarding administrators or staff, and explains the process by which the District handles such complaints. There is no specific timeline for resolution of such complaints, except that major stages of the process are required to occur "as soon as is reasonably possible," and there are no specific guidelines regarding interviewing witnesses or examining documents.

The policy requires that the Complainant be informed of the findings and the process to appeal. However, AR 4115.5 also states that the policy is not applicable to any complaint “for which an alternative administrative remedy is available within the District.”

District Investigation & Findings

Prior to filing this complaint with OCR, the Complainant submitted a complaint via letter with the same allegations to the District on May XX, 2014. Specifically, the complaint letter explained that the Student has a disability and the Complainant believed that staff members at the Student’s School were denying the Student’s “educational rights” in retaliation for her efforts to obtain an IEP for him. The Complainant explained that she was restricted from visiting the campus, which she also believed was retaliatory. The complaint raised further concerns, including that the Complainant believed the Student needed to be evaluated for a possible additional disability, that his education was negatively impacted, and that the Student’s March XX, 2014 IEP was not being appropriately implemented by the Student’s teacher. Specifically, the Complainant alleged the Student’s teacher was not signing his agenda and math homework modifications were not applied to his math tests.

The District’s Assistant Superintendent investigated the complaint. Although, according to its Board Policies and Administrative Regulations, the complaint was supposed to be processed under the District’s UCP, the District instead processed the complaint under Board Policy 4114.5 “Complaints Concerning District Employees.”² Since the District processed the complaint under BP 4115.5 rather than its UCP, it did not adhere to the 60 day UCP timeline, and instead took 194 days to issue its findings, via two letters, to the Complainant on November XX, 2014.

In conducting its investigation, the District interviewed the Complainant as well as various school staff, and reviewed documents and other evidence. The District’s investigation found that some of the alleged events took place, but that its employees did not act improperly. The Complainant’s May XX, 2014, internal complaint clearly alleged retaliation for the Complainant’s advocacy for an IEP for the Student, including that several School staff had denied this Student “his educational rights” and engaged in “unprofessional conduct,” which the complaint alleged included staff refusing to allow her to walk her son to class, calling the police who visited her home and told her she could be arrested and sent to jail for “stepp[ing] on campus again,” and related incidents that led the School to restrict the complainant’s ability to visit the school for 14 days. However, the District’s investigation and notice of its findings to the Complainant did not address whether the District retaliated against the Student and Complainant for her IEP related advocacy. Instead, the District simply addressed whether the facts of the events alleged by the Complainant occurred.

The District determined that the School did not allow the Complainant to walk the Student to class, the Principal did contact a School Resource Officer (SRO) about the Complainant’s actions at the school, and the resource officer visited the complainant’s home to discuss the incident. The District also determined that the Principal sent a letter to the complainant on May XX, 2014, withdrawing consent for the complainant to visit the school for 14 days.

² During OCR’s investigation, the District acknowledged that the complaint should have been processed under its UCP.

The District determined that these actions were appropriate, and were “not a violation of District policies or laws.”³ However, the District did not investigate or make findings as to whether the School took these actions in retaliation for the Complainant’s efforts to obtain an IEP for the Student. The District’s findings also did not address implementation of the Student’s March XX, 2014, IEP.

Analysis

According to the District’s findings, it restricted the Complainant’s ability to visit the School, and the Principal contacted the SRO based on her interactions with the Complainant on or about May XX, 2014. The District also determined that the SRO visited the Complainant’s home regarding the incident. Placing restrictions, such as these, on a parent’s ability to visit their child’s school, and/or contacting law enforcement regarding a parent, are potentially adverse actions, as either act by a school district could potentially chill a reasonable person from engaging in protected activity. However, the District did not determine whether these actions were carried out in retaliation for the Complainant’s advocacy on behalf of her son’s disability-related rights, or whether the District had another legitimate non-discriminatory reason or reasons for taking these actions, including whether any reasons offered were a pretext for unlawful retaliation. Similarly, the District’s investigation and findings did not address whether the Student’s March XX, 2014, IEP was appropriately implemented.

The regulations implementing Section 504 and Title II require District’s to provide prompt and equitable grievance procedures for complaints of disability discrimination. Here, the District’s response was neither. The District’s use of its process for complaints against employees (BP and AR 4115.5), rather than its UCP, did not provide a prompt investigation and findings, and instead resulted in a significant delay. Rather than completing its investigation and issuing findings in 60 days, the District took over three times longer, 194 days, to complete its investigation and issue findings. In addition, the District’s investigation was also not equitable because its findings did not apply the correct legal standard to determine whether the Complainant had suffered from retaliation for disability based advocacy on behalf of the Student. Therefore, the District did not provide a prompt and equitable grievance procedure in responding to the complainant’s May XX, 2014, complaint of disability discrimination, as required by Section 504 at 34 C.F.R. § 104.7(b), and Title II at 28 C.F.R. § 35.107(b).

Issue 2: Whether the District properly evaluated and placed the Student for a suspected disability.

Legal Standards

FAPE, Evaluation & Placement & Procedural Safeguards

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

³ November XX, 2014, letter to the Complainant re the District’s internal investigation findings, sent from Associate Superintendent of Educational Services and Human Resources, XXXXXX XXXXXXXX.

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) of the 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. 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.

Section 104.35(c) of the regulations requires that 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.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Findings

Special Education Assessment

The Complainant requested a special education assessment of the Student on or about September X, 2013. Upon requesting the assessment, the complainant provided a letter from the Student's doctor, stating the Student was diagnosed with ADHD. The Student had also scored basic or below basic in testing, but was receiving good grades at the time.

Internal District documents showed a district-wide practice of waiting for six to eight weeks for intervention, before assessing a student for a disability for the first time. Specifically, notes from a District investigative interview with its staff showed that the Student was not assessed in September of 2013 (when the Complainant presented the doctor's diagnosis of ADHD), because the District has a practice of not assessing for special education "until at least" six to eight weeks

have passed, so that they have more data for the assessment. This practice was referred to as a district policy, to wait six to eight weeks before an initial assessment.

Rather than assessing the Student after the parent's September X, request and doctor's note, according to the District, it held a Student Study Team (SST) meeting on September XX, 2013. The District told OCR that "[a]t this time, [it] did not suspect a disability and could not substantiate a need for assessment." The District sent the parent a prior written notice denying the assessment on September XX, 2013. In a September XX, 2014 letter, the District explained that the SST meeting "generated several interventions that should be attempted prior to determining if a special education assessment is necessary" and noted that the Student was "receiving grades of "A's" and "B's" in all subjects except in writing." The District further explained that the "interventions generated at the previous SST should help address [the Student's] weaknesses in writing and therefore the district is refusing the special education assessment at this time." A spring 2014 psycho-educational assessment of the Student explained that the prior requests for assessment in September 2013, were "denied because [the Student] was receiving passing grades," and accommodations were developed by the SST instead of assessing the Student.

The Student's 2012 CST score in math was basic, and he scored below basic in English Language Arts. In addition, a September XX, 2013, email about the Student from a staff member to the principal stated that the staff member suspected the Student had a "learning disorder" and "basically needs extra time to complete assignments and needs modifications as well." Other emails showed that the Student's teachers had observed him having academic trouble for years, trouble staying focused and paying attention, and some had already provided informal accommodations, including reduced homework assignments.

The District held a second SST on October X, 2013 to monitor the Student's progress with the interventions proposed at the SST meeting. In a handwritten letter to the principal dated October X, 2013, the Complainant reiterated her desire that her son be assessed for an IEP. In October 2013, the Complainant also reported that the Student had social problems that she believed were related to a disability. On October XX, 2013, the principal provided a second prior written notice also denying assessment. On October XX, 2013, the Complainant removed the Student from the District to provide home schooling.

In January 2014, the Complainant re-enrolled the Student and requested another special education assessment dated January X, 2014. This time, the District agreed to assess the Student, developing a plan on January XX, 2014. The Student was assessed between February XX and March X, 2014, for suspected disabilities in the areas of specific learning disability, speech or language impairment, and other health impairment. At the time of the Student's IEP, he was earning low grades in reading, math, science, and writing. The Student's 2013 CST scores in math and English Language Arts were lower than his 2012 scores. The school psychologist recommended that the Student qualify for an IEP based on specific learning disability and other health impairment. The IEP team found him eligible for special education based on a specific learning disability March XX, 2014, and developed an IEP. The student was not assessed for a Section 504 plan, because he was found eligible under IDEA.

Analysis

OCR found that, based on the doctor's note and staff's observations in September 2013, the District had reason to suspect that the student had a disability, triggering its obligation to evaluate the Student for a disability pursuant to 34 C.F.R. § 104.35. However, the District did not evaluate the Student because of a practice, as described by District staff, of waiting six to eight weeks to attempt other interventions through the SST process, prior to evaluating students for suspected disabilities. Although attempting other interventions through the SST process to support students in order to avoid over-identification of students as individuals with disabilities may be appropriate in other circumstances, here, the District had specific information about this individual student to suspect a disability. This information included the student's academic difficulties, a doctor's diagnosis, and a parental request for an evaluation. This information should have led to an evaluation to determine whether the Student was indeed an individual with a disability who qualifies under IDEA or Section 504. The District's decision not to evaluate the Student was not an individualized one, but was based on an inappropriate universal policy or practice of delaying evaluations of students suspected of having a disability.

The District's failure to initiate the evaluation process in September 2013 caused a significant delay – until February/March 2014 – in identifying the Student as an individual with a disability eligible for services under IDEA. Because the Student was found eligible for an IEP on March XX, 2014, the evidence shows that he was denied services to receive a FAPE for several months during the interim, as a result. Therefore, OCR determined that the District was not in compliance with Section 504 at 34 C.F.R. §§ 104.34 and 104.35, and the Student was denied a FAPE as required by 34 C.F.R. § 104.33 during this time.

Conclusion

For the reasons explained above, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to the issues investigated. After OCR notified the District of its conclusions, without admitting to any violation of law, the District entered into a signed agreement (Agreement) that, when fully implemented, will resolve the issues in this complaint. Pursuant to the Agreement, the District will: 1) revise its UCP to clarify that it covers allegations of retaliation for engaging in protected activity, including allegations of retaliation by District employees; 2) conduct training for District and site administrators regarding promptly and equitably responding to complaints of discrimination; 3) complete its investigation of the Complainant's allegations of retaliation and failure to implement the Student's IEP, and issue such findings; 4) issue a written memorandum explaining the District's responsibilities to evaluate students for a suspected disability without delay; and, 5) hold an IEP for the Student and determine any appropriate compensatory education services to make up for the delay in identification, or any failure to implement the Student's IEP. The signed Agreement is enclosed with this letter. 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. 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.

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 in federal court whether or not OCR finds a violation.

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 privacy.

OCR would like to thank the District for its cooperation in resolving this case and specifically, we would like to thank Director of Student Services, Sam Strube, for his assistance. If you have any questions, please contact OCR staff attorney Brian Lambert, at (415) 486-5524 or Brian.Lambert@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: Sam Strube, Director of Student Services, Tracy Unified School District (email)