



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

April 3, 2015

Dr. Vincent Matthews
Superintendent
San Jose Unified School District
855 Lenzen Avenue
San Jose, California 95126-2736

(In reply, please refer to case no. 09-15-1139.)

Dear Superintendent Matthews:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its resolution of the above referenced complaint filed against the San Jose Unified School District. The complaint alleged that the District discriminated against the Student¹ on the basis of disability. Specifically, it alleged that the District denied the Student an equal opportunity to participate in afterschool sports due to his disability.

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 public educational 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 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.

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

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. 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 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 Complainants and reviewing documents provided by the Complainants and the District.

The Student has autism, and at the time the OCR complaint was filed in January 2015 was XX years old and enrolled in the XXXXX grade. Since the beginning of the XXXXXX grade (2013-14 school year), the Student's educational placement has been at the Creative Learning Center (CLC), a non-public school that primarily serves students with an autism spectrum disorder. There are no afterschool sports activities offered at the CLC.

On August XX, 2013, the District and the Complainants entered into a mediated due process settlement agreement to resolve a variety of issues. The District and the Complainants agreed, among other things, to hold an IEP to discuss the Student's potential participation in extracurricular programs at a District school site.

Through an IEP amendment dated October XX, 2013, the team noted that the CLC had several extra-curricular activity options for the Student to try, such as accessing a nearby private school and setting up activities with other teenagers, before his next annual IEP. The IEP amendment did not provide that the Student would participate in afterschool activities at a District school site.

The Student had his annual IEP meeting on November 18, 2013. The resulting IEP also did not provide for the Student's participation in afterschool activities at a District school site.

The CLC arranged for the Student to participate in an afterschool recreational program at a nearby private middle school during the second half of the 2013-14 school year. Costs were reimbursed by the District as a part of the settlement agreement.

On April XX, 2014 there was another IEP amendment meeting, held in part to discuss the Student's transition to high school. His placement for XXX grade continued at CLC. The school psychologist suggested continuing the Student's involvement in a general education afterschool program and working toward having him take an elective class at a high school campus. The Complainants told OCR that there was some discussion during this meeting of their interest in having the Student participate in afterschool sports at a comprehensive District high school. However, the IEP did not provide for such participation as a part of his placement.

The Student's triennial IEP meeting was initiated on September XX, 2014. The IEP states, in part, that the CLC would schedule mainstreaming opportunities as a part of the Student's school day, and that the District offered a gradual transition back to a comprehensive District high school through exploring participation in one elective course. The District agreed to facilitate observations of various classroom options, and to reconvene an IEP meeting following these observations. The Complainants inquired about the Student's participation in afterschool sports at the high school, and the team agreed to further discuss that request following the classroom observations. The IEP meeting was continued to a later date.

In October 2014, one of the Complainants visited several classes at a comprehensive high school in the District. In November, this Complainant inquired via email about the Student participating in afterschool sports in the District. After some email interchange, the District Special Education Manager clarified that to the degree the afterschool sports request related to the Student's receipt of FAPE, it was most appropriately addressed in the context of an IEP meeting. The Manager stated that if the Complainant was seeking to have the Student participate in afterschool sports apart from his IEP, the Complainant could review the District's website concerning the general process for initiating student participation in afterschool sports.

On December X, 2014, the September IEP meeting was continued. The team, including the Complainants, discussed the results of the observations of various classes at the comprehensive high school, and the type of supports the Student might need to transition into one class there. The team agreed to continue the Student's placement at CLC, with daily mainstreaming at the comprehensive high school for one elective class with a one-on-one aide and transportation

provided. According to the District, the Complainants did not inquire about the Student's participation in afterschool sports during the course of the IEP meeting. The IEP did not document any discussion or determination by the team regarding such participation.

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. At the onset of OCR's investigation, the District expressed an interest in resolving this complaint. The District thereafter entered into the enclosed Resolution Agreement. Accordingly, OCR did not complete its investigation or reach a conclusion as to whether the District complied or 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 offer to convene an IEP meeting to specifically consider whether the Student should participate in an afterschool sports program as a part of his FAPE. If the IEP team determines that he does, the District will amend his IEP accordingly and fully implement it. If the IEP determines that he does not, the District will provide the Complainants with notice of applicable procedural safeguards. The District also agreed to notify the Complainants of the process they should follow if they want the Student to participate in afterschool sports, even if such participation is not required by his IEP. If the Complainants want the Student to participate, the District will develop a memorandum of understanding that lists the supplemental aids, supports, modifications, or services that will be provided in order for the Student to have an equal opportunity to participate. If the District and the Complainants are unable to agree, the District will notify the Complainants of the complaint procedure that they may use to challenge the District's determination.

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 Complainants of the complaint resolution by concurrent letter. Note that the Complainants 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: Jeffery W. Maisen, Esq.
McArthur & Levin, LLP