



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

June 3, 2016

Mr. Kevin Silberberg
Superintendent
Panama-Buena Vista Union Elementary School District
4200 Ashe Road
Bakersfield, California 93313-2029

(In reply, please refer to case no. 09-15-1481.)

Dear Superintendent Silberberg:

On August 4, 2015, the U.S. Department of Education, Office for Civil Rights (OCR) received a complaint against the Panama-Buena Vista Union Elementary School District (District), which alleged discrimination against the Students¹ on the basis of disability. Specifically, OCR investigated whether the District revoked the Students' intra-district transfer on the basis of their disabilities and failed to follow proper procedures before making a significant change in the Students' placement.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

Under Article III, Section 302 of OCR's Case Processing Manual (CPM), a complaint may be resolved at any time when, prior to the conclusion of an investigation, a recipient expresses interest in resolving the complaint. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving this complaint through a voluntary resolution agreement (agreement). This letter summarizes the facts gathered to date, applicable legal standards, and the terms of the resolution.

Facts Gathered to Date

Background

¹ OCR notified the District of the identities of the Students when the investigation began. We are withholding the Students' names from this letter to protect the Students' privacy.

- The Students are XXXXX who are enrolled in XXXXX grade in the District. Both were evaluated for a speech/language disability in spring 2014, when they were in transitional kindergarten (TK). Both currently receive speech therapy services, pursuant to individualized education programs (IEPs) completed, most recently, in April and May 2015.
- XXX XX XXX XXXXX XXXXXXXXXXXXXXX XXX X XXXXX XXXXXXXXXXXXXXX XXXXX XXXXXXXXXXX XXXX XX XX XXXXXXXXXXX XXX XXXXXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX XXX XXXXX XXXXXXXX XXXXXXXXXXX XXXXXXXXXXXXXXX. The Complainant informed OCR that it is important that Student 1 be enrolled at a school as close as possible to a hospital, so that he can be evaluated quickly, should he develop alarming symptoms. XXXXXX XXXXXXX XXXXXXXXXXXXXXX XXXXXXX (the School) XX XXXX XXXX X XXXX XXXX X XXXXXXXXXXX XXX is closer to an emergency hospital than any other school in the District.
- The District has two policies for granting intra-district transfers. All parents may apply for Open Enrollment intra-district transfer, with students selected randomly. Parents may also apply for admission to a school through an intra-district attendance agreement; these applications are considered individually and granted based on the best interest and welfare of the child. Approval of transfers under both procedures is subject to the enrollment level of the school.
- Before the Students enrolled in TK, the Complainant applied for an intra-district transfer agreement, based on Student 1's medical condition. She attached a letter from the Student's doctor, recommending that Student 1 attend the School, because of its close proximity to an emergency hospital. The doctor based his recommendation on Student 1's XXXXX condition and the need to assess him rapidly if he developed XXXXXXX symptoms. The request was approved. Both Students attended the School, which was not their school of residence, for TK and kindergarten.

Student 1's Section 504 Plan and IEP

- A Section 504 plan (504 Plan) was developed for Student 1 in May 2013, before his TK year began, and was updated shortly after the beginning of the school year. The 504 Plan required that Student 1 be XXXXXXXXXXX XXX XXXXXXX XXXXXXXXXXX XXX XXXX XXXXXXX XX XX XXX XXXXXXXXXXX XXXXX XXXXXXXXXXX XX XX XX XXXXXXX XXXXXXXXXXX XX XXXXX. The notes section of the 504 Plan states that the Complainant submitted a letter from the Student 1's doctor stating that he needed to be at a school close to a hospital, and recommending that he be placed in the same class as XXX XXXX XXXXXXX. The 504 Plan does not otherwise address the Student 1's school placement.
- In May 2014, an IEP was developed for Student 1, providing him with speech therapy services. Student 1's Plan was not explicitly referenced in the IEP, but its provisions were summarized in the IEP notes, and in part, on a page outlining Student 1's classroom accommodations and modifications.

- X---paragraph redacted---X.

Denial of Intra-District Transfer Request and Change in Placement

- In February 2015, the Complainant submitted an open enrollment application to allow the Students to remain at the School. The request was denied due to lack of enrollment capacity at the School. The Complainant subsequently completed a request for an intra-district attendance agreement based on Student 1's "continuing XXXXX XXXXXXXXXXXX" and the Students' history at the School. The Complainant was informed that her request was denied because classes were full.
- After the Complainant submitted the open enrollment application, but before she submitted the intra-district attendance agreement application, IEP meetings were conducted for both Students. Both IEPs include a page entitled "Record of Change to IEP for Next School Year," and note the change as "transition to XXXXXXXXXXXX Elementary." The Complainant informed OCR that this change was not discussed at the IEP meetings, and that she was unaware that the District was proposing to transfer the Students to another school. The IEP meeting notes do not reflect any discussion regarding the change in school. Student 1's XXXXX XXXXXXXXXXXX, and the related accommodations previously developed for him, are not mentioned in the IEP.
- The District submitted evidence indicating that 25 open enrollment applications were submitted to the School for the 2015-16 school year. All but four of these applications were denied; all of the accepted applications were for students in the upper grades. The District also provided a list of nine residents of the School's attendance area who were not allowed to enroll at the school due to over enrollment. Seven of these students were in XXXXX grade.
- The District also submitted evidence showing that five students with IEPs are currently enrolled at the School through the open enrollment process.
- The evidence also showed that one XXXXX grade student was approved for an intra-district attendance agreement in 2015-16. This student had a sibling already attending the school in an upper grade.
- The Complainant informed OCR that she discussed the denial of the transfer with both the Superintendent and an Assistant Superintendent. She stated that the Assistant Superintendent informed her that the Students were not allowed to remain at the School because their IEPs provided for a transfer to another school.

Legal Standards

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual 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)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service, or afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

The Section 504 regulations, at 34 C.F.R. §104.33, also 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.

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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. 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.

Analysis

As described above, the non-discrimination provisions of the Section 504 regulations, at 34 C.F.R. §104.4(a), prohibit school districts from denying students with disabilities the benefits of

any educational program on the basis of their disability. Pursuant to this prohibition, a district may not deny a student access to an intra-district transfer simply because he or she has a disability. The District provided evidence, however, that the XXXXX grade at the School was over enrolled, and that a large number of nondisabled students, including seven who lived in the school's attendance area, were not allowed to enroll.

In addition to prohibiting different treatment, the Section 504 regulations require that a school district provide students with disabilities with a FAPE, including and related aids and services that meet their individual needs. Under some circumstances, a student may need to be enrolled in a particular school in order to receive a FAPE. OCR reviewed evidence that, at around the time the Students' initial intra-district agreement was approved, the Complainant provided the District with a doctor's letter stating that, because of a XXXXXXXX XXXXXXXXXXXX, Student 1 needed to attend a school that was as close as possible to an emergency hospital. This letter was discussed during a Section 504 meeting at the School. The 504 Plan developed at that meeting, and a subsequent IEP developed the next year, did not address whether placement at the School was a component of FAPE.

The early stages of OCR's investigation raised concerns that the District did not follow the procedural requirements of Section 504 in considering the Complainant's request that the Students remain at their school for disability-related reasons, and did not consider whether the Students' individual needs required that they remain at the School. Because the District expressed an interest in resolving this complaint prior to the completion of the OCR investigation, OCR did not make a determination as to: 1) whether the School failed to follow appropriate procedures, including conducting an individualized determination and an evaluation, before changing the Students' placement; or 2) whether it otherwise discriminated against the Students on the basis of disability in denying their transfer request.

Summary of Resolution and Conclusion

Prior to the conclusion of OCR's investigation, the District, without admitting any violation of law, voluntarily agreed to enter into the enclosed agreement with OCR to resolve the concerns raised in the complaint. Under the terms of the agreement, the District will convene a new IEP meeting for Student 1 and reach a determination regarding the appropriate placement for the Students.

When fully implemented, the agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with Section 504, Title II, and their implementing regulations, which were at issue in this case.

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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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 another complaint 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 would like to thank the District, and the District's counsel Al Harris, for their cooperation during this investigation. If you have any questions about this letter, please contact OCR attorney Katie Riggs at (415) 486-5544 or Katherine.L.Riggs@ed.gov.

Sincerely,

/s/

Kendra Fox-Davis
Team Leader

Enclosure