



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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February 2, 2018

Scott Bailey
Superintendent
Desert Sands Unified School District
47-950 Dune Palms Road
La Quinta, CA 92253-4000

(In reply, please refer to case no. 09-16-1265.)

Dear Superintendent Bailey:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Desert Sands Unified School District (District). The Complainants¹ alleged that the District discriminated against their daughter (the Student) on the basis of disability. Specifically, OCR investigated:

1. Whether the District failed to provide the Student, and other students at a District School, a free, appropriate, public education (FAPE) by failing to provide special education and related services without cost to the students or their parents or guardians;
2. Whether the District failed to provide the Student with (FAPE) by failing to implement the Student's Individualized Education Program (IEP);
3. Whether the Student was treated differently or subjected to harassment by District employees based on her disability; and
4. Whether the District retaliated against the Student.

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 in programs and activities operated 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 education system, the District is subject to Section 504, Title II, and their implementing regulations.

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

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainants and the District. After careful review of the information gathered in the investigation, we concluded that the District did violate Section 504 and Title II and their implementing regulations with regard to one of the issues OCR investigated. This letter summarizes the applicable legal standards, the facts gathered during the investigation, OCR's conclusions, and the terms of the resolution reached with the District.

Background

- The Student, an individual with a disability, was XXXXXXXXXXXX during 2015-16 school year, and was educated in the Severely Handicapped program of a District high school (School), which had two special day classes for students with severe disabilities (SDC/SH classrooms). During the 2015-16 school year, she received services pursuant to an IEP dated May XX, 2015, which stated that she needed a "functional skills curriculum."
- The Student began the 2015-16 school year in Teacher One's SDC/SH classroom. Throughout the 2015-16 school year, the Complainants raised complaints and concerns regarding Teacher One, while also occasionally praising her and other School staff for the hard work and kindness they had shown the Student. The District moved the Student to Teacher Three's SDC/SH classroom on March X, 2016.
- On about January XX, 2016, the District assigned Special Education Teacher Two to be the personal special education teacher for the Student, while keeping the Student's 1:1 Paraeducator, and removed Teacher One temporarily from the classroom. Shortly thereafter Teacher One returned to her SDC/SH classroom, and "co-taught" with Teacher Two, which resulted in the Student having her own special education teacher (Teacher Two) and a 1:1 Paraeducator in Teacher One's class most of the time, until March X, 2016, when the District moved the Student to Teacher Three's SDC/SH classroom, where Teacher Two remained as the Student's personal teacher until the end of the 2015-16 school year. The District held an IEP meeting June X, 2016, XXX XXXXX XXXX XXXXX XXXXXX XXXX XXX XXXXXXXX XXXXX XXXX XXXX XXXXXXXX XXXXXXXXXXX XXXX XXX XXXXXXXX XX XXXX XXX XXXX.

Issue 1: Whether the District failed to provide the Student, and other students at a District School, FAPE by failing to provide educational and related services without cost to the students or their parents or guardians.

Legal Standard

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 IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). 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.

The provision of a free education is the provision of educational and related services without cost to the disabled person or to his or her parents or guardian, except for those fees that are imposed on non-disabled persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a disabled person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the FAPE requirements. 34 C.F.R. §104.33(c).

These requirements are designed to ensure that no student with a disability is excluded from school on the basis of disability and, if a public school district demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Appendix A to Part 104, Paragraph 21.

Facts

OCR's investigation showed the following:

Community Based Instruction

- The District informed OCR that a component of the educational program for some students provided in the SDC/SH classrooms at the school is called Community Based Instruction (CBI), which involved some participating students going out into the community as part of the curriculum.²

² The District informed OCR that students in the two SDC/SH classrooms participated in CBI about once per week, with the CBI activity correlating with the participating students' particular program goals and unique needs. Typically, one group on one week would have an off-site CBI activity while the other group had an on-site activity (e.g., dancing, music, theatre, and building projects with kit material from a building supply store), and then typically the next week the groups would rotate. The District informed OCR that while CBI activities were scheduled once per week, not every SDC/SH student went on every off-site CBI activity, different groups of students had different types of off-site CBI activities, and some CBI activities were dependent on the availability of funds.

- The Riverside County SELPA, in its 2015 guidance on CBI posted on its website at <http://www.rcselpa.org/common/pages/displayfile.aspx?itemid=2315960>, defines CBI as regular and systemic instruction in meaningful, functional, age-appropriate skills in integrated community settings, using naturally occurring materials and situations, designed to help the student to acquire and generalize life-skills that enhance his or her opportunities for meaningful experiences and relationships (e.g., live, work, plan, and shop) within the general community. It states that home settings, shopping centers, convenience stores and/or grocery stores, as well as community resources such as public libraries and post offices are important instructional settings, and that student participation in CBI activities will vary based on the individual needs of each student as indicated in IEP goals and/or age/grade.
- Teacher One told OCR that the CBI program was a huge part of helping SDC/SH students in general to get the skills they needed in a real, living environment.
- The Student's May XX, 2015, IEP required community-based training activities for the Student in each of the four goals XX XXX XXXXXXXXXXXX XXXX, labeled with the categories of Education, Independent Living, and Community Experience. The IEP required the Student to participate in a community-based training program and, as appropriate, visit a local library, develop basic home maintenance skills, participate in CBI trips in the community, explore community opportunities for music/art activities, identify local recreation opportunities, utilize public transportation, and learn to shop for purchases.
- Two annual goals in the Student's May XX, 2015, IEP also include community-related objectives for the Student. These objectives called for the Student to read and identify 10 functional/community signs on and off campus, identify the proper amount of money needed to ride the public bus, deposit that amount on the bus, and ask for a bus transfer if appropriate, identify community dangers and maximize safety by staying with her classmates and teachers by stopping at all street corners, looking for cars, using the crosswalk and crossing at appropriate time independent of reminders.

Recycling Program

- OCR learned from interviews and documents that some students, with parental consent, had participated in a Recycling Program conducted in one of the two SDC/SH classrooms for several years, in which they collected and sorted cans and bottles with a redemption value. District staff took the cans and bottles to a recycling center for money, which was used to help buy food and supplies used during SDC/SH class snack time and to pay for some CBI trip activities (e.g., paying for students' public bus fares to an activity, paying students' entrance fees or ticket costs at museums or activities that had fees or costs).
- According to the Complainants and several District witnesses, the Complainants asked that the Student not participate in the Recycling Program, including during the

2015-16 school year. Witnesses told OCR that two to three other students in Teacher One's classroom did not participate in the Recycling Program, because of either their level of functioning, or a lack of parent consent.

- Teacher One told OCR that the Recycling Program was started to help pay CBI costs.
- Students in the other SDC/SH classroom, taught by Teacher Three, did not participate in the Recycling Program, or use funds from it.
- The Complainants told OCR that they were required to pay for public transportation costs each time the Student took a trip, for example to see a movie, or to go to a grocery store to do shopping, or go on other school trips.
- The Complainants stated that because the Student did not participate in Teacher One's Recycling Program, Teacher One asked the Complainants to send \$1.00 per day, \$20.00 per month, for snack expenses. They stated that, in addition, they were asked to provide money for activities that were funded by Recycling Program receipts for other students in Teacher One's classroom.
- A home/school communication log was used almost daily for the Student, typically with an entry by staff usually at the top of the page, followed by an entry by one of the Complainants at the bottom. The Complainants and the District provided copies of log entries to OCR. OCR reviewed entries from December 2012 through April 2016, which included at least 25 requests from staff for money for snacks, water, food supplies for use in classroom food preparation and cooking lessons (domestics), bus transportation, and other CBI-related activity fees and costs.³
- In addition to written communication from School staff to the Complainants in the home/school log about sending money, OCR also found Teacher One communicated to the Complainants about sending money by handwriting notes on District trip authorization forms. These forms, used for parental consent for community-based instruction, generally described the program as including student off-campus CBI activities, provided information about when parents would be notified of off-campus activities and about travel to CBI activities, but did not refer to funding, costs, or money. The following are examples of handwritten notes when Teacher One asked for money, and the purpose:

³ Five of these requests were for money for food and water, some of which appear to be for the Student's personal use, or for other personal purchases such as souvenirs the Student might make while on a CBI trip. However, the SDC/SH program also included instruction in food preparation. Because the Student did not participate in the Recycling Program, the Complainants were asked to send money to pay for the supplies (e.g., food) purchased by the Student at CBI store shopping trips during which the Student was learning how to make purchases, and then later, learning to prepare snacks with the food in class.

- For a November X, 2015 trip to the public library using the public bus, asked to send library card and seventy-five cents for transportation.
 - For a November XX, 2015 trip to the XXXXXX XXXXXX, asked to send \$4.00 for the entrance fee.
 - For a December X, 2015 trip to see the movie XXXXXX, asked the Student's mother to purchase the Student's ticket online if she wanted the Student to participate.
 - For a December XX, 2015 trip to the XXXXXXXXXX Shopping Center, asked to send \$1.00 for the bus.
- In interviews with OCR, several paraeducators who had worked with the Student confirmed that the Complainants had been asked to pay for bus transportation, entrance fees, and supplies for the Student. In some cases, these requests were reportedly made of other parents; in other cases, the Complainants were asked to make additional payments because the Student did not participate in the Recycling Program. Paraeducators also stated that they or Teacher One frequently paid for student bus fares and other costs when Recycling Program proceeds were not adequate to cover these expenses.
 - Teacher One told OCR that she explained to parents who attended parent/teacher nights she held for parents, that she would ask them for contributions during the year to pay for costs for CBI trips, such as paying public bus fares or event entrance fees. She stated that if she ran out of Recycling Program money, money for these costs came from parents, or she would pay.
 - As an example, in an August XX, 2016 note to parents, Teacher One wrote, "Until we have some money from our recycling it would be great if you could donate a healthy snack for our class" and in a September X, 2016 note to parents, she wrote, "Thank you for all your donations!...[for a trip] [w]e will use recycling money for this trip but will ask for 5.00 donations to help us. My staff and I will contribute money to help with this event too."
 - Teacher One stated to OCR during an interview that money came from parents in the form of cash, in the form of gift cards, and from her and staff. These funds were used to pay students' entrance fees for CBI trips, to buy supplies and food for students' snacks, and to pay for students' public bus fares. She also stated that absolutely every single parent was asked to voluntarily send money.
 - Regarding the note she wrote on the parent authorization form for the November XX, 2015 trip to the XXXXXX XXXXXX in which she requested that the Complainants send \$4.00 for the entrance fee, Teacher One explained in her OCR interview that she also wrote similar notes to other parents of students in her class asking that they send money. She stated that sometimes, money from a parent would pay for the cost of getting in, and we would pay for lunch (with "we" referring to either staff, or the School).

- Regarding whether the trips she took students on all had an educational component for each student, Teacher One stated to OCR that every lesson out in the community had an educational component tied to each student's IEP. She stated that all of the trips taken by her SDC/SH students had some type of learning opportunity based on a student's IEP goals, which would vary from student to student, but might include how to ride the city bus, how to cross a public street, how to sit in a movie theatre, how to wait in line, or how to pay for a ticket.
- Teacher Three stated to OCR in an interview that he never asked any parents of any students in his class for money to pay for any part of a student's education day at the School, and that parents could send money if they wanted their students to buy an item while at the XXXX, for example. He stated many CBI trips had no cost, such as the XXXX because it waived its entrance fees, and that the XXXXXX XXXXXXXX fees were sometimes paid by a grant from a retail store, and he took students to the XXXXXX XXXXXXXXXXXX on the first day, which was free. He also stated that he and many other teachers paid students' CBI trip costs themselves. As an example, he explained he would teach a student how to purchase a soda at a store, where those skills were part of the educational goals in that student's IEP, and he would use his own money to pay for the soda.
- Teacher Three told OCR that he never used public transportation for students in his class. Teacher Three stated to OCR in an interview that his class received money from a purchase order of around \$100 per year for supplies which was not nearly enough to cover all of the expenses of what he would like to do in the classroom because he ran out of money. He stated that in his class, the supplies and food for domestics class, where students learned and practices skills in preparing food, came from the District when a staff member would show up with food and other items which he guessed were purchased using a separate purchase order.
- In a January X, 2017 email to the District Special Education Director, Teacher One wrote that in the prior year, the class was told it could have a Walmart purchase order to help with supplies for the domestics program, and that the Special Education Director mentioned that any time she needed it, to let him know. She wrote she wanted \$250 this year the same as last year. The Special Education Director responded by email, writing that he could allocate \$250 collectively for the SH program at the School for cooking activities.
- Teacher One told OCR that she called the Student's mother in the morning of January XX, 2016, and explained that because there were insufficient Recycling Program funds, instead of the three activities planned for three groups that day (one hiking, one shopping, and one staying back for other activities) the entire shopping group got cancelled, and that the two students—one of whom was the Student—who had been scheduled to go shopping that day for supplies for the domestics program that would be used to prepare food, would not go shopping and would instead participate in a "fun Friday" activity.

Analysis and Conclusions

A basic tenet of the provision of a free appropriate public education (FAPE) to students by a school district is that the appropriate education must be provided without cost to parents, unless the same cost is normally charged to parents of nondisabled students as part of the regular education program. While special education services may be funded in part by money provided by public or private agencies, they may not be funded through charges or fees required of parents.

OCR concluded that a preponderance of the evidence supported a conclusion that the District failed to provide a FAPE to the Student and to the students in Teacher One's SDC/SH classroom without cost to the parents. The evidence included numerous written communications between School staff and the Complainants in which School staff requested, and the Complainants provided, money for activities and services that were included in the Student's IEP, including CBI activities as well as scheduled classroom activities that covered basic home maintenance skills such as cooking (the domestics program). Some of these requests were explained as charges based on the Student's non-participation in the Recycling Program; others were phrased as charges for services provided to the Student or requests, at times, for donations addressed to all parents.

Teacher One and other witnesses acknowledged that parents were periodically asked for contributions to fund CBI trips and well as classroom snacks and activities. Several interviewees and at least one document from the District stated that parents were asked only for donations. A possible implication of this evidence is that parents were not charged for activities, and that the District would have provided the students the services it offered as a FAPE with or without the parents' contributions. However, among these solicitations, at least one noted that adequate Recycling Program funds were not available for the CBI activities and, in another, that the teachers and paraprofessionals themselves would be donating money to help subsidize the activities. The evidence showed that a CBI trip, scheduled for January XX, 2016, was cancelled because there were no funds to use for the trip. Interviewees told OCR that CBI activities were seen as beneficial and desired by parents and that parents knew that CBI activities could be, and had been, cancelled for a lack of funds. OCR concluded that money requested from parents to contribute to the CBI program, under these circumstances, is not accurately considered a genuine donation, regardless of the label used when a request for it was made.

The Special Education Director informed OCR that he told SDC/SH teachers that they should request money from him for programs in the classes, and in one example provided to OCR, Teacher One did seek funding for the domestics program by contacting the Special Education Director, who made arrangements to provide the funding. In numerous other instances, however, the evidence showed that parents were contacted to be the source of funds for their students' CBI activities and some

SDC/SH classroom activities like the domestics program, instead of the SDC/SH classroom teachers seeking funding from the District.

Section 504, Title II, and their implementing regulations require that school districts provide regular and special education, and related aids and services without cost to parents. OCR concluded that there was substantial evidence that parents were asked to pay for CBI services that were considered an important part of their students' educational program. The fact that many District interviewees told OCR that they paid money out of their own pockets for these costs does not diminish the District's obligation to provide educational services without charge to students. Accordingly, OCR found sufficient evidence of a violation of Section 504, Title II, and their implementing regulations with regard to this issue.

When OCR notified the District of its findings, the District, without admitting to any violation of federal law, voluntarily agreed to enter into the enclosed Resolution Agreement with OCR to resolve the complaint. Under the terms of the Resolution Agreement, the District will reimburse the Complainants and conduct and complete an internal review of the Community Based Instruction program in the two SDC/SH classrooms at the Palm Desert High School to assess what is required to meet the instructional curriculum for the Program and to ensure that all educational activities of the Program (as required by the IEPs of SDC/SH classroom students) are provided to students without cost to the students or their parents or guardians.

Issue 2: Whether the District failed to provide the Student with a FAPE by failing to implement certain services in the Student's May XX, 2015 IEP.

Legal Standard

As explained in connection with Issue 1, Section 504, Title II, and their implementing regulations require school districts to provide a FAPE to each student with a disability in their jurisdiction. Implementation of an IEP developed in accordance with the IDEA is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2).

Facts

The Complainants alleged that the District denied the Student a FAPE by failing to fully implement her IEP during the 2015-16 school year. Specifically, they alleged that the District had not provided required speech services on 26 occasions, had failed to provide the Student with a 1:1 aide in her classroom and bus on certain days or portions of a day, had discontinued CBI trips in the Student's class after March X, 2016, and had failed to provide her with required trips to the library after March X, 2016.

Alleged failure to provide speech services

- The Student's May XX, 2015 IEP offered speech services to the Student for 25 minute sessions, sixty times per year.

- The Complainants told OCR they believed that speech services were provided by pulling the Student out of the SDC/SH classroom for at least 2 sessions per week. They stated that usually, the Speech Therapist who provided the services wrote some notes about the service in the home/school communication log, and that they noticed the entries about speech services stopped during the year. The Complainants provided 26 examples of days they believed the Student should have received speech services but did not.
- The District provided documents from the provider of speech therapy services to the Student that tracked the date, whether the Student was present, the minutes of service provided, and on occasion, other notes or comments about the session. For all of the 26 days identified by the Complainants, the District's records showed the Student was offered at least 25 minutes of speech services, except on one day when the documents showed the Student received only 15 minutes of speech services during a particular session, which was compensated for on the next day when the Student received a full 30 minutes of speech services.

Alleged failure to provide 1:1 bus aide

- The Student's May XX, 2015 IEP described the Student receiving a 1:1 bus aide for both morning trips to school, and afternoon trips to home, curb to curb.
- The Complainants identified seven days when the Student did not have a 1:1 bus aide on the bus either to or from school, or both.
- Documentation from the District showed that for four days identified by the Complainants, the District provided a 1:1 bus aide for the Student. While the District represented to OCR in a letter that each of the other three days' bus aide services were also provided by a Special Education Department employee, OCR's review of that employee's hourly and daily time record for these days provided by the District showed that the employee did not create an entry for the morning or afternoon bus trips on these three days, when the employee had otherwise created time record entries on the days when the employee rode the bus with the Student. OCR also found no entries for this employee for these three days in either the Classified Substitute Time Record log, or the Substitute History by Date provided by the District.

Alleged failure to provide 1:1 classroom aide

- The Student's May XX, 2015 IEP described the Student receiving a 1:1 classroom aide all day.
- The Complainants identified seven days when the Student did not have a 1:1 classroom aide either all day, or for specific times of the Student's school day.

- Documentation from the District showed that for four of the days identified by the Complainants, the District provided a 1:1 classroom aide for the Student. While the District represented to OCR in a letter that the other three days' classroom aide services were also provided by a Special Education Department employee, OCR's review of that employee's hourly and daily time record for those days provided by the District showed that the employee did not create an entry for having worked as a 1:1 classroom aide for the Student at any time on these three days, when the time record showed the employee created such an entry on the days the employee worked as a 1:1 classroom aide for the Student. OCR also found no entries for this employee for these three days in either the Classified Substitute Time Record log, or the Substitute History by Date provided by the District.

Alleged failure to provide CBI trips after March X, 2016

- The Student's May XX, 2015 IEP included CBI in the IEP transition plan and annual goals, as described above.
- The Complainants stated to OCR in an interview that CBI trips in Teacher One's class were stopped March X, 2016, and resumed only after the Student was moved to Teacher Three's classroom.
- Teacher One wrote in the Student's home/school log for March X, 2016, "No CBI for the remainder of the year, if you have any questions contact [Special Education Director.]" She informed OCR that this announcement, which applied to the entire class, was based on a decision by the Special Education Director that all SDC/SH students must go on all CBI trips. Teacher One stated that she did not believe that CBI trips could be conducted safely, or with adequate attention to students' IEPs, unless they took place in small groups. Teacher One recommenced CBI trips within a few weeks after the announcement.
- The District moved the Student from Teacher One's classroom to Teacher Three's classroom on XXXXXX March X, 2016. Teacher Three stated that in his classroom, the class, including the Student, went on a CBI trip to a XXXXXX XXXXXXXXXXXX on XXXXXX, March X, 2016.

Alleged failure to provide visits to local library

- Two of the XXXXXXXXXXXX XXXX post-secondary goals included in the Student's IEP required the District to arrange for the Student to visit the local library, "as appropriate," among a number of other community experiences and independent living activities.
- The Complainants told OCR that before the Student's move from Teacher One's SDC/SH classroom to Teacher Three's on March X, 2016, the Student was taken to the library approximately once every two weeks, but after the classroom move, they did not believe that the Student was taken to the library.

- The District did not offer evidence that the Student visited the library after she transferred to Teacher Three's classroom, but staff interviewed by OCR confirmed that the Student attended several CBI community experience and independent living activities after March X, 2016, until the end of the 2015-16 school year.

Analysis and Conclusions

In order to provide a FAPE to students with disabilities, school districts are required to provide them with the special education and related services that have been determined to be appropriate for them including, where applicable, fully implementing an IEP developed pursuant to the requirements of the IDEA. OCR did not find sufficient evidence that the District denied the Student a FAPE by failing to implement her May XX, 2015, IEP.

As described above, the preponderance of the evidence showed that the Student received speech services as described in her IEP. The evidence is insufficient to support a finding that the District violated Section 504 or Title II with respect to the provision of 1:1 aides on the school bus and in the classroom. A thorough review of the information provided by the Complainants and the District showed only three instances in which a bus aide and classroom aide each were not available. OCR determined that these were limited and isolated incidents and did not result in a denial of FAPE.

With regard to providing the Student CBI trips, OCR found that the evidence showed the Student moved to Teacher Three's classroom on March X, 2016, three days after such trips were temporarily discontinued in Teacher One's class. The facts also showed that the Student attended a CBI trip in Teacher Three's classroom the next school day after the Student moved to his classroom. Accordingly, OCR found that there was insufficient evidence to conclude the District failed to implement the Student's IEP regarding CBI trips.

With respect to library visits, OCR found that the evidence supported a conclusion that the District implemented the Student's IEP, because library visits were part of a goal written to include diverse activities that were provided to the Student as appropriate, including trips to the library and to other community and recreational venues. The facts showed that once in Teacher Three's classroom, the Student went on CBI trips of the kinds described in her IEP. Accordingly, OCR found insufficient evidence of a violation of Section 504, Title II, and their implementing regulations with regard to this issue.

Issue 3: Whether the Student was treated differently or subjected to harassment by District employees based on her disability.

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, provide different or separate aids, benefits, or services unless necessary to provide qualified disabled individuals with aids, benefits, or services that are as effective as those provided to others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR first examines whether there is direct evidence of discriminatory treatment on the basis of disability. Absent that, 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.

School districts are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school district is responsible for the discriminatory conduct whether or not it has notice.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently severe, persistent or pervasive to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors.

Findings of Fact

- The Complainants alleged that Teacher One had subjected the Student to harassment and/or different treatment on numerous occasions. These alleged adverse actions included making a negative comment aloud in the classroom about her mother, denying the Student a snack, and excluding the Student from certain CBI trips and other activities.

- Because the Student's ability to communicate was in some ways limited, the Complainants often relied on the accounts of school staff related to them for information about Teacher One's treatment of the Student in her class. OCR interviewed teachers, a Program Specialist, and paraprofessionals who worked in the classroom with the Student and School and District administrators who allegedly had knowledge of the Student's treatment. With one exception⁴, none had observed the teacher making negative comments about the Student's mother, denying the Student snacks⁵, or otherwise mistreating the Student.
- The Complainants alleged that, on January XX, 2016, the Student was excluded from a hiking trip arranged by Teacher One after a CBI shopping trip was cancelled for lack of funds. Teacher One informed OCR that she chose participants for each of the three activity groups that day, including the hiking trip, based on student IEP goals and gross motor skill levels. The Student was taken on a shopping trip on the same day.
- The Complainants also alleged that the Student was excluded from a group trip to a grocery store on May XX, 2016, and was instead taken alone to a shopping mall. Teacher Two informed OCR that the decision was based on individual considerations related to the Student's needs.
- The Complainants also alleged that the Student was excluded from a "XXXXXXX XXX XXXXXX" activity on February XX, 2016, because the Student did not have the correct shirt for participation. Staff witnesses informed OCR that XXXXXXXX XXX XXXXXXXX was a mainstreaming activity for students in the SDC/SH program, which took place in one of the SDC/SH classrooms. OCR found that, pursuant to a rule that applied to both students with disabilities and nondisabled students, any student not wearing a specified shirt with a logo was not allowed to participate in the activities. In addition, because of space constraints, on some days even some students who wore the XXXXXXXX XXX XXXXXXXX shirt could not participate.

Analysis and Conclusions

The examples of alleged discriminatory treatment given to OCR by the Complainants varied in the amount of detail, such as dates and location, due in part to the Complainants' reliance on what they were told was seen or heard by others. Still, OCR thoroughly investigated the Complainants' alleged examples of ways in which they believed Teacher One and other District employees treated the Student badly or treated

⁴ Because one staff member told OCR about hearing negative comments by Teacher One about the Student's mother, about the Student being denied a snack, and being excluded from certain CBI trips, OCR included questions in other interviews of other staff about the same alleged treatment by Teacher One.

⁵ The Complainants alleged that on one occasion Teacher One refused to allow the Student to eat an apple offered to her by a paraprofessional. OCR concluded that, even if this incident occurred, it did not constitute adverse treatment that could form the basis for allegation finding of discrimination.

her differently than other students. The evidence gathered during OCR's investigation included no direct evidence of discriminatory treatment or of harassment of the Student on the basis of disability, and OCR did not otherwise find sufficient evidence to support a conclusion that the Teacher or other District employees discriminated against the Student by treating the Student differently or harassing her on the basis of her disability. Accordingly, OCR found insufficient evidence of a violation of Section 504, Title II, and their implementing regulations with regard to this issue.

Issue 4: Whether the District retaliated against the Student based on the Complainants' advocacy.

Legal Standard

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.

Findings of Fact

- The Complainants engaged in advocacy for the Student on a regular basis by raising concerns and complaints to the District about the Student's education. They alleged that, in retaliation for this advocacy, the District took actions that harmed the Student, including changing her classroom assignment, excluding her from a dance class, assigning her to pick up trash on campus, and addressing her by a shortened version of her full name. The District denied that the Student was retaliated against after the Complainants' advocacy on behalf of the Student.
- The District changed the Student's classroom assignment March X, 2016 from Teacher One's to Teacher Three's SDC/SH classroom. The Complainants told OCR that the move was bad for the Student because students in Teacher One's SDC/SH classroom were generally higher functioning, had aides, and could get up, dance, express themselves, write on the chalk board, raise hands and answer questions. They stated students in Teacher Three's classroom were more severely disabled, in wheelchairs needing a lot more assistance, and worked only with 1:1 aides, and that

there was little instructional time in Teacher Three's classroom compared to Teacher One's classroom. They described the Student as a "fish out of water" because the Student was not used to so many individual activities and was used to more group activities in Teacher One's classroom. They stated that the Student told them that Teacher Three's class was boring.

- A teacher and several paraeducators told OCR that, generally, students in Teacher Three's classroom had more severe disabilities, were lower functioning, and were at a slightly lower education level than in Teacher One's classroom. They stated that students in Teacher One's classroom generally worked more on reading, writing, math, and academics than students did in Teacher Three's classroom.
- Teacher Two, who continued to work directly with the Student after the classroom assignment change, told OCR that she tried to provide the Student with the same daily activities in the general education environment that she had received prior to her move to Teacher Three's classroom, including art, photography, and dance classes. She stated that she also made sure that the Student received pull-out Speech services and Occupational Therapy services with the same group of students from Teacher One's class that she worked with prior to the March X, 2016 move. In addition, Teacher Two mitigated any social effects of the move on the Student by having one of the Student's friends from Teacher One's class eat lunch as often as possible with the Student.
- Teacher Three told OCR that the composition of the two classrooms was determined each year at the beginning of school as students arrived, and that during the school year, many students simply switched SDC/SH classrooms. He stated that a student moved from his classroom to Teacher One's classroom when the Student moved to his classroom. He stated that students in his classroom had IEP goals for math, behavior, reading, and writing, and that academically, the Student could and did work toward her IEP goals in his classroom.
- District administrators with responsibility for the SDC/SH program told OCR that the SH program in the classrooms at the School were comparable, and the Complainants had continually requested that Teacher One not be the Student's teacher. They stated that both classrooms were set up to address the instruction to students who were in them, no matter who was teaching, and the academic work was related to each student's IEP.
- The District held an IEP team meetings on March XX and June X, 2016, during which the team and the Complainants discussed the issue of the change in the Student's classroom assignment.
- The Complainants told OCR that the Student was excluded from participating in Dance class during the period of OCR's investigation, including on October XX, November XX and XX, and December XX, 2015.

- Staff witnesses told OCR that the Student strongly liked Dance class, but that there were a few occasions when the Student did not want to go to Dance class, and would verbalize by saying, “No Dance.” None had ever seen anyone deny or prevent the Student from going to Dance class, including on the dates specified by the Complainants.
- The Complainants stated to OCR that the Student was observed on April XX, 2016 picking up trash (not recyclable items) despite their expressed wish that she not do so.
- The notes from the Student’s March XX, 2016 IEP team meeting, which was attended by Teacher Three, indicate that that Complainants asked whether the Student was participating in the Recycling Program, and that the team informed them that she was not. Teacher Three’s class did not participate in the Recycling Program, and he was eventually made aware that the Complainants did not want the Student involved in that program. According to Teacher Three and Teacher Two, Teacher Three’s class engaged in a vocational education program that involved walking on campus, looking at community signs, tending the class garden, and picking up any trash. On April XX, 2016, Teacher Three invited the Student to join the vocational education group for the walk around the campus as a way to address the Complainants’ claims that the Student was not being included in activities.
- On May X, 2016, the Student’s father emailed Teacher Three and others, stating that the Student should do everything with other students, including gardening, pointing out signs, and walking on campus, but that she should not pick up trash. OCR found no evidence that the Student picked up trash after this email.
- The Complainants stated in an OCR interview that everyone called the Student by a shortened version of her full name, instead of her full name, because Teacher One told everyone to use the shortened version of her full name.
- Witnesses interviewed by OCR consistently stated that when they were made aware of the Complainants’ preference for the Student to only be called by her full name, that they only called the Student by her full name, with very few exceptions. Several witnesses stated that the Student would refer to herself, both verbally and in writing, using the shortened version of her full name and that she thought using the shortened name was enjoyable and funny. When any witness was aware of the shortened name being used, OCR asked if they observed any difference or any change in the Student’s behavior when someone used the shortened name for her, instead of her full name. No witness noticed any change or difference in the Student’s behavior of any kind.

Analysis and Conclusions

The Complainants alleged that the District retaliated against the Student after the Complainants advocated for the Student, and complained to the District about the

Student's education. OCR found that the Complainants' manifold communications to the District about the Student represented protected activity for the purposes of a retaliation claim. However, OCR found that the District's actions raised by the Complainants failed to rise to the level of adverse actions, and thus did not constitute retaliation.

As to the change of the Student's classroom assignment, OCR notes that placement for a student with a disability generally refers to the services offered as part of a FAPE reflected in a student's IEP, not only to the physical location in which those services are provided, nor to specific individuals who provide those services. OCR determined, based on a preponderance of the evidence, that the Student received the services in her IEP in both classrooms and had no loss of educational opportunity or services based on her IEP when in one or the other SDC/SH classroom. OCR also found that Teacher Two took significant steps to ease the Student's transition from one classroom to the other. As such, combined with evidence of the Student making adequate progress toward her goals, OCR found the move was not an adverse action.

With respect to the issue of the Student's Dance class, OCR found no evidence the Student was excluded from Dance class as alleged by the Complainants, and therefore there was no adverse action. Similarly, as to picking up trash, the preponderance of the evidence showed that the one instance of the Student joining a class activity in Teacher Three's classroom, during which students could, and did pick up trash, was an isolated instance which when brought to Teacher Three's attention, did not recur and therefore this was insufficient to be considered an adverse action for the purpose of a retaliation allegation.

Regarding the alleged adverse action of the Student being called a shortened version of her full name, instead of her full name, OCR found that the evidence supported a conclusion that often, the Student called herself the shortened version of her full name and also wrote it as her name, and because a preponderance of the witnesses stated that they either never called the Student by a shortened name, or very quickly used her full name after they were told not to use the shortened name, OCR found there was no adverse action.

In summary, OCR found insufficient evidence of retaliation under Section 504, Title II, and their implementing regulations.

Overall Conclusion

This concludes OCR's investigation of this 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. Based on the commitments made in the Agreement, OCR is closing this complaint as of the date of this letter and notifying the Complainants concurrently.

The District, without admitting to any violation of federal law, voluntarily agreed to enter into the enclosed Resolution Agreement with OCR to resolve the complaint.

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 Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainants 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this letter, please contact the case resolution team.

Sincerely,

/s/

Katherine L. Riggs
Acting Team Leader

cc: Dina Harris (*via email only*)
District counsel

Enclosure