



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

July 5, 2017

Superintendent Tag Pimentel
Big Springs Elementary School District
7405 Highway A-12
Montague, California 96064

(In reply, please refer to OCR Docket Number 09-16-1441.)

Dear Superintendent Pimentel:

The U.S. Department of Education, Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Big Springs Union Elementary School District (District). The Complainant alleged that the District discriminated against the Student and Complainant on the basis of disability.¹ Specifically, OCR investigated whether the District:

1. Failed to provide the Student a free appropriate public education (FAPE) by changing the Student's placement by frequently sending the Student home for behavior related reasons without first evaluating the Student, and failing to implement the Student's Individualized Education Program (IEP) accommodation requiring that unfinished work be sent home; and,
2. Sought to intimidate the Complainant for advocating on behalf of the Student's rights as a student with a disability by calling the local sheriff's office who visited the Complainant's home.

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

OCR gathered evidence by reviewing documents and correspondence provided by the Complainant and the District, and by interviewing the Complainant and District personnel, including the Principal/Superintendent, and the English Language Arts teacher. Prior to OCR

¹ OCR previously provided the District with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

completing its investigation, the District voluntarily agreed to address the areas of concern identified by OCR with respect to the issues investigated. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

Issue 1: Whether the District failed to provide the Student a FAPE by changing the Student's placement by frequently sending the Student home for behavior related reasons without first evaluating the Student, and failing to implement the Student's IEP accommodation requiring that unfinished work be sent home.

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. 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. In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

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

The Section 504 regulations, at 34 C.F.R. § 104.35(a), require school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids

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and services before initially placing the student and before any subsequent significant change in placement. Subsection (c) requires that placement decisions 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 that is carefully considered and documented. Section 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. 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 act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

Facts

On May XX, 2011, the Student began receiving special education services from the District under the category Specific Learning Disability. During the 2014-2015 school year, the Student was placed in the District's home-school program.

During the 2015-2016 school year, the Student, who was in XXXXXXXX grade, was enrolled at Big Springs Elementary School (School). On September XX, 2015, an IEP was signed providing for shortened assignments, math manipulatives, tests taken with resource personnel, extra time and a calculator. Resource Specialist Personnel (RSP) services were also provided for 50 minutes twice a week. The Student was in a regular education class and activities 100% of the time.

Between October 2015 and May 2016, the Principal/Superintendent reported to OCR that the Student had up to 22 behavior "meltdowns." The Principal/Superintendent stated the meltdowns consisted of long (up to an hour) bouts of loud, inconsolable crying coupled with XXXXXXXX XXXXXXXXXXXX, XXXXXXXX XX XXX XXXXX, XXXXXXXXXXXXXXXXXXXX and choking and moaning noises, which left the Student unresponsive. The School characterized the meltdowns as disruptive, causing classrooms to shut-down and prohibiting learning for other students. The Principal/Superintendent and the Student's English Language Arts (ELA) Teacher told OCR that due to the extreme behavior associated with the Student's meltdowns (wailing, moaning, XXXXXXXX XX XXX XXXXX) an entire wing of the School, affecting 60 students, would go on a soft lock down, wherein the doors were locked and all teaching ceased.

The School reported to OCR that it did not know what triggered the Student's meltdowns and did not know how to prevent or respond to the meltdowns except to call the Complainant. The

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School stated to OCR that it unsuccessfully tried a number of the strategies not included in her IEP to prevent the Student's meltdowns, including allowing the Student to not do her school work, sending unfinished classwork home (though the ELA Teacher stated it was never completed), allowing the Student to color whenever she wanted to, letting the Student sit near her cousin, letting the Student wear a hat and letting the Student text the Complainant whenever she wanted.

The Complainant stated that during the 2015-2016 school year, she was called more than seven times to come to the School to calm the Student. Occasionally, the Complainant was able to soothe the Student, and the Student would remain at School. However, on most occasions (approximately 22 according to the District, though a portion of them were for illness), the Student would leave School after a meltdown and go home with the Complainant.

In January 2016, the Principal/Superintendent contacted the School Psychologist for guidance on how to accommodate the Student. A psychological evaluation was requested by the Complainant and the Principal in March, 2016 but was not completed until May XX, 2016.

Prior to the end of May, 2016, the County Office of Education Psychologist/Behavior Specialist was contacted again. The Principal stated to OCR that the Psychologist/Behavior Specialist stated that the Student may benefit from an alternative education classroom but that "at this time, probably will not be placed in one." No reason was provided for why a change in placement was not warranted at the time despite the fact that the Student continued to struggle with her behavior and was repeatedly removed from the learning environment and sent home. On May XX, 2016, the evaluation was completed and the IEP identified the Student as a student with an Emotional Disturbance. OCR requested, but received no documentation that the District created a Behavior Support or Intervention Plan for the Student. The May XX report stated that the Psychologist recommended, but did not conduct a functional behavior assessment of the Student. Pursuant to the May XX, 2016 IEP, the Student was placed in a self-contained special education placement in another District.

Neither the September nor the May IEP includes the accommodation that teachers will send unfinished classwork home for completion. The ELA Teacher stated to OCR that both she and the Math and Science Teacher sent work home, but that it never came back completed.

On July XX, 2016, in its data response to OCR, the District acknowledged that "timely assessments of [the Student's] behavior did not occur."

On August X, 2016 the District reported to OCR that its records show that the Student left school due to illness or a meltdown 22 times, but the records do not reflect which incidents were meltdowns and which were illness related, or the number of minutes that the Student was sent home by the District due to disability-related behaviors. The District had no disciplinary records for the Student for the 2015-2016 school year.

Analysis

OCR found that the Student's September 2015 IEP placed her in a general education classroom with RSP services for 50 minutes twice a week. The IEP did not address strategies or interventions to use if the Student engaged in what School staff characterized as meltdowns or

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other disruptive conduct in the classroom. The District's documentation shows that the Student was sent home approximately 22 times during the 2015-2016 school year following meltdowns (and occasional illness) where the Student would cry loudly, be unresponsive, and disrupt learning in the classroom. While for some of these 22 occasions the Student missed only a portion (half day) of instruction time, the facts gathered to date raise a significant concern that the Student missed more than 10 days of school for a series of similar disability-related behaviors, effectively constituting a significant change of placement.

The School attempted to prevent and respond to the Student's conduct with informal strategies such as allowing the Student to not do her school work, sending unfinished classwork home (though it was not completed), allowing the Student to color when she wanted to, letting the Student sit near her cousin, letting her wear a hat, letting her text the Complainant whenever she wanted, and allowing her to go home. The School's informal strategies for responding to the Student's conduct were developed outside of the IEP process and were not based on tests and other evaluation materials that were reliable, administered by trained personnel, and valid for the purpose for which they were used, as required by 34 C.F.R. § 104.35(b). In addition, to the extent the informal strategies used constituted a placement for the student, these strategies were not developed by the IEP team and through the IEP process, and therefore made by a group of persons knowledgeable about the student, the evaluation data, and the placement options, as required by 34 C.F.R. § 104.35(c). As acknowledged by School staff, their responses were put in place because they did not know what to do to effectively address the Student's behavior. Not only did these strategies fail to prevent the Student's behavior, they denied the Student instructional time while at School, and removed her from school altogether by sending her home, which was also inconsistent with the District's responsibility to provide a FAPE and educate the Student in the least restrictive environment with her nondisabled peers, as required by 34 C.F.R. §§ 104.33 and 104.34(a).

OCR also identified a deficiency because the Student was sent home approximately 22 times, which may have constituted a significant change in placement requiring an evaluation pursuant to 34 C.F.R. §§ 104.33-104.36. However, the District did not complete the evaluation until the end of the school year. The District acknowledged to OCR that it failed to conduct a timely evaluation of the Student. During the three months between the initiation and completion of the Student's evaluation, the Student's behavior escalated, and she continued to be sent home for portions of the day or the entire school day. Indeed, during this time the Psychologist conducting the evaluation stated that the Student would benefit from an alternate placement, but that it would not come to fruition that year despite the fact that the Student continued to struggle with her behavior and was repeatedly removed from the learning environment and sent home.

Accordingly, OCR had deficiency concerns that the Student was denied FAPE, in violation of Section 504 at its implementing regulations at 34 C.F.R. §§ 104.33-104.36, when the District did not conduct a timely evaluation of the Student to address her behavior challenges, and continued to remove her from school – resulting in a significant change in placement – without reevaluating the student, including to determine whether her behavior was caused by or directly and substantially related to her disability, and affording due process procedures.

Regarding the allegation that the School failed to implement the Student's IEP by not sending unfinished classwork home, OCR found that the IEPs in effect did not require that classwork be sent home for completion. Nevertheless, OCR also found that the Student's ELA Teacher and Math and Science Teacher sent work home on multiple occasions, but that it was never returned completed. OCR determined that there was insufficient evidence to find the District out of compliance with Section 504 and Title II with respect to the allegation that the District failed to implement the IEP.

Issue 2: Whether the District sought to intimidate the Complainant for advocating on behalf of the Student's rights as a student with a disability by calling the local sheriff's office who visited the Complainant's home.

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 materially 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 intimidation.

Facts

On the morning of May XX, 2016, School staff told OCR that the Complainant told the ELA Teacher not to "antagonize" the Student. The Complainant made the statement in the relation to concerns she had that the ELA teacher did not know how to properly teacher students with autism and that her interactions with the Student were triggering her disruptive behaviors. The ELA teacher told OCR that she felt intimidated by the manner in which the Complainant spoke to her.

That same afternoon at 3:15pm, the Complainant was parked at the School for approximately 40 minutes. School staff believed the Complainant was going to initiate another confrontation with the ELA teacher, and called the Superintendent to notify him that they felt threatened.

The Complainant told OCR she had no intention of confronting the ELA Teacher. Rather, she was waiting for the Student to get out of school and retrieve her lunchbox from the school bus.

On the same day, after she learned that the Complainant was at School to retrieve a lunchbox, she told the Principal/Superintendent that she no longer felt unsafe when she learned. The ELA Teacher and Principal/Superintendent both confirmed to OCR that the bus driver corroborated that the Student picked up a lunch box from the bus that afternoon, and was not waiting to initiate a confrontation.

The former Superintendent called the Principal to notify him that he had called the Sheriff, and was preparing a letter directing the Complainant to contact the Principal/Superintendent prior to meeting with staff, and to use the School's sign-in sheet as required by the School Handbook, which states that "all visitors during the school day are required to sign in at the office." The Principal told OCR that during this conversation he told the former Superintendent and the Sheriff that the Complainant was waiting in her car so that the Student could retrieve her lunchbox (not to confront the ELA Teacher), and that the ELA Teacher did not want to press charges.

On May XX, 2016, the Sheriff went to the Complainant's home. Not finding the Complainant at home, the Sheriff found the Complainant downtown and told her to sign in when visiting the School. The Complainant stated to OCR that she was not aware the ELA Teacher had felt threatened when she told her to stop antagonizing the Student the prior morning. The Complainant told OCR she apologized for any misunderstanding.

The Complainant's younger child is currently in the ELA Teacher's class without incident. The ELA Teacher told OCR that she and the Complainant have a friendly, cordial relationship.

Analysis

The Complainant engaged in multiple activities that constituted protected activity for her child when she advocated for the Student, including on May XX, 2016. The Complainant had a good faith belief that she was opposing unlawful discrimination by reducing interactions that caused the Student's disability related behavior challenges. The Complainant was subject to a materially adverse action when the former Superintendent contacted the Sheriff, who then went to her home, and not finding her there, found her downtown and approached her about her actions when visiting the School. Calling the Sheriff would dissuade a reasonable person from engaging in discussions with teachers on behalf of students with disabilities. There is a nexus between the protected activity and the adverse actions because the adverse action occurred the day after, with knowledge of, the protected activity.

The District stated its legitimate non-discriminatory reason for calling the Sheriff was that the Complainant confronted the Student's ELA teacher in a manner the teacher found intimidating, and was subsequently observed waiting in her car for 40 minutes outside the School. Other teachers reported to the Principal that they thought the Complainant was waiting for the ELA Teacher in order to initiate another confrontation. While a threat is, in many circumstances, a legitimate non-discriminatory reason to summon law enforcement, in this case, the School learned, that same day that the Complainant was waiting in her car so that the Student could retrieve a lunchbox she left on the bus, and not to confront the ELA Teacher. Both the ELA Teacher and the Principal told OCR that the same afternoon, the bus driver confirmed that the Student had left her lunch box, and that the ELA Teacher was no longer concerned.

Nevertheless, the former Superintendent called the Sheriff. The Principal told OCR that prior to the Sheriff visiting the Complainant's home, he told the former Superintendent that there had been a misunderstanding, but that it was resolved. However, the Superintendent did not take further action and the Sheriff went to the Complainant's home anyway. Because the District knew that the perceived threat was a misunderstanding prior to the adverse action, OCR determined that the District's legitimate non-discriminatory reason could be a pretext for intimidation. Therefore, OCR was concerned that the District's actions violated the regulations implementing Section 504 and Title II by intimidating the Complainant by involving the local Sheriff, in retaliation for engaging in a protected activity. To find a violation, additional investigation would be needed, including speaking with the former Superintendent and Sheriff to determine why the action was taken despite the clarification. However, prior to completing these steps in the investigation, the District expressed an interest in voluntary resolution, and OCR agreed it was appropriate to do so.

Summary and Resolution

Prior to concluding its investigation and to address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegations and the information obtained by OCR during its investigation.

Under the agreement, the District will: 1) write and send the Complainant a letter reaffirming its commitment to provide an environment free from discrimination, retaliation and intimidation for all students, and parents; 2) provide the Student compensatory education for missed instruction time due to being sent home for disability-related behavior as determined by the Complainant and the District; 3) write and distribute a memorandum to all administrators, teachers and staff at the School reminding them of the District's obligations to prevent retaliation and intimidation; and 4) provide training for all administrators, teachers and staff at the School on a) its obligations under Section 504 and Title II to provide FAPE, performing evaluations and convening IEP meetings when a student's disability-related needs have changed, or there is a significant change in placement, and b) prevent retaliation and intimidation.

Conclusion

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's deficiencies identified in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with the regulations which were at issue in the case.

This concludes the investigation of this complaint. OCR's determination in this matter 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 may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 Complainant 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Civil Rights Attorney, Rhonda Ngom at (415) 486-5540.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

Enclosure