



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
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SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

February 8, 2017

Juan Garza
Superintendent
Kings Canyon Joint Unified School District
1801 10th Street
Reedley, California 93654

(In reply, please refer to case no. 09-16-1585.)

Dear Superintendent Garza:

On August 4, 2016, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against Kings Canyon Joint Unified School District (Recipient). The Complainant¹ alleged discrimination on the basis of disability. OCR opened the following allegations for investigation:

1. The Recipient failed to provide the Student with a free, appropriate public education (FAPE) by:
 - a. failing to timely assess in all areas of suspected disability; and,
 - b. failing to consider a Section 504 plan when the Student was first found ineligible under the Individuals with Disability in Education Act (IDEA).
2. The Student was denied an equal opportunity to participate in academic and non-academic activities on the basis of his disability, including electives, lunch and promotional activities.
3. The Recipient failed to make reasonable modifications to its promotion policies and practices that are necessary to avoid discrimination on the basis of disability.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The Recipient receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the regulations.

¹ OCR informed the Recipient of the identities of the Complainant and Student in our letter notifying it of the complaint. We are withholding them here to protect their privacy.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 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.

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.² 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.

In the context of providing a FAPE under Section 504, the regulations, at 34 C.F.R. §104.3(j), define an individual with a disability as any person who has a physical or mental impairment which substantially limits a major life activity. Under 34 C.F.R. §104.3(j)(2)(ii), major life activities include learning. The definition of disability under the Title II regulations, at 28 C.F.R. §35.104, is substantially the same. It is important to note that a student may have a physical or mental disorder that qualifies the student as a disabled individual requiring services under Section 504 and Title II even though the disorder does not meet the eligibility criteria for services under the IDEA. The IDEA applies only to students who have specifically identified conditions. Section 504 and Title II apply to any student who has a physical or mental impairment that substantially limits a major life activity.

² For further explanation, please see the Dear Colleague Letter entitled "English Learner Students and Limited English Parents" (jointly issued by OCR & the U.S. Department of Justice) (January 17, 2015).

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, . . .

(iii) provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

(vii) limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

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.

Under both the Section 504 regulations, at 34 C.F.R. §104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. §35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Whether or not a particular modification or service would fundamentally alter the program is determined on a case-by-case basis. While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.

OCR's preliminary investigation showed the following:

- During the 2015-2016 school year, the Student was in the eighth grade at a Recipient Middle School (School). The Student's class schedule consisted of US History, Science, Math, Physical Education, English Language Arts, and an intensive intervention course.
- The Recipient provided OCR information that during the 2015-2016 school year, half of the School's eighth grade students participated in an intensive intervention course, which was targeted to a specific subject based on several factors, including a student's state and local test scores. The other half of students took an elective course, which consisted of band, keyboarding, technology, and leadership classes.
- On October XX, 2015, the Student's Parent made a written request for a special education assessment of the Student. On November X, 2015, the Recipient provided the Parent an assessment plan, which stated that the Student would be evaluated on academic achievement, intellectual development, motor development, social emotional, and review of records, interviews and observations. The Parent signed the assessment plan.
- On January XX, 2016, an IEP Meeting was held for the Student and the IEP team determined that the Student was not eligible for an IEP. The IEP Meeting notes state that the IEP team "discussed a 504 Plan in the future, but trying interventions first." The Parent signed the IEP, agreeing "to all parts of the IEP," "understand[ing] that [the Student] is not eligible for special education," and "receiv[ing] a copy of the Procedural Safeguards." In an interview with OCR, the Parent stated that she did not remember a 504 Plan being discussed at the IEP Meeting.
- The interventions that were provided to the Student consisted of "general education intervention," which took place for 20 minutes during lunch, four days/week, for a three week period. The Recipient provided documentation that this intervention was overseen by the School Principal and/or social worker, that teachers provided work for students in the intervention to complete, and that the intervention was open to all students, whether they had disabilities or not.
- The Recipient first attempted this intervention in November 2015, for a three-week period, pending the completion of the IEP assessments. At the time, the Student's cumulative grade point average (GPA) was 1.43. After the January 2016 IEP Meeting, the Recipient provided documentation that Student was given two more three-week sessions of the interventions in March and May 2016. By April 1, 2016, the Student's cumulative GPA had dropped to 1.23.
- On both November XX, 2015 and April X, 2016, the Parent received an Eighth Grade Promotion Ceremony Notice Form which advised that the Student's GPA

did not meet the Recipient's Middle School Promotion Ceremonies and Activities Policy.

- The Recipient's Middle School Promotion Ceremonies and Activities Policy provides that a student is eligible to participate in the eighth grade promotion ceremony if they meet the following requirements:
 1. A minimum score of "Basic" on CST in English/Language Arts (ELA) and Mathematics on the 7th grade STAR test or score "Basic" on an alternate district-approved assessment in 8th grade.
 2. GPA of 2.0 in 8th grade year.
 3. Students must have a "C" or better in ELA, Math, Science, and Social Studies or complete an intervention plan
 4. Excused or Unexcused Absences: 15 days or less (including suspensions) for 8th grade. The school site Promotion Committee will meet with parents/guardians to decide whether extenuating medical circumstances caused the absences. If absences exceed the allowable number, the student may petition the school site Promotion Committee to request an approved plan.
 5. Suspensions Allowed: Students must have no more than 10 days of suspension for the year or no more than three days of suspension in the third trimester.
 6. All financial obligations must be cleared prior to participation in the ceremony.

Any student who does not complete one of the aforementioned competencies may request a hearing before the Promotion Ceremony Review Panel. This panel will review the advisability of differential standards based on assessed need. Students identified as Resource Specialist Program or Special Day Class will met standards as established through their Individual Learning Plan. English Learners must demonstrate adequate yearly progress through multiple assessment measures; i.e. California English Learning Development Tax, textbook assessments, and writing samples.

- On May XX, 2016, the Student's Sister, on behalf of the Parent, met with the School Principal to discuss how the Student's academic performance was not improving with the interventions. The Recipient offered a Student Success Team Meeting and possible 504 Plan, but the Parent preferred another IEP evaluation.
- On May XX, 2016, the Recipient provided the Parent a letter stating that "due to concerns regarding inattention and [the Student's] history with Attention Deficit and Hyperactivity Disorder (ADHD), the District would like to obtain more information to determine if [the Student] might qualify for special education and related services under [a different eligibility category than Specific Learning Disability]. In addition, the District will also use the information to determine if [the Student] would qualify for classroom accommodations through a Section 504 Plan." The Recipient then provided the Parent with a new assessment plan.

- Also on May XX, 2016, the Student's Sister emailed the Principal requesting that the Student be allowed to participate in the Promotion Ceremony because "its not his fault that they didnt help him, also it not his fault that they didn't gave him credit for some work that he turned in and they couldn't find them. If they don't let him walk look like you are discriminating him."
- On May XX, 2016, the Principal sent a letter notifying the Parent that the Student had not met the Promotion Ceremony requirements, and that the Parent and Student had the right to request a hearing before the Promotion Ceremony Review Panel.
- On June X, 2016, the Parent attended the Promotion Ceremony Review Panel meeting, consisting of the Principal and three teachers. The Panel meeting notes include the Parent's statement that the Student "has a problem that was not diagnosed" and that "it isn't that [the Student] doesn't want to learn but he can't learn." The Parent also thought it would be good motivation for the Student to participate in the Ceremony.
- The Promotion Appeal Panel voted not to allow the Student to participate in the Eighth Grade Promotion Ceremony. The Recipient provided information that the denial was based on the Student failing to meet promotion requirements and concerns about his lack of motivation and effort towards improving.
- Also on June X, 2016, an IEP meeting was held for the Student, and the IEP team found the Student eligible for an IEP under the Other Health Impairment disability category. The IEP shows that the Student's Promotion Criteria is to be decided by the Recipient.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. The Recipient in this case expressed an interest in resolving the complaint to resolve OCR's concerns regarding whether a 504 Plan was considered when the IEP Team determined the Student was not eligible for an IEP in January 2016, the repeated use of interventions on the Student when they did not appear to be effective, and that modifications to the Recipient's Middle School Promotion Ceremonies and Activities Policy are limited to students with disabilities served by the Resource Specialist Program or in a Special Day class. In order to complete the investigation, it would be necessary to interview members of the Student's IEP Team to determine whether a 504 Plan was considered, as well as the Student's teacher and School staff about whether and how the interventions attempted on the Student were being implemented and evaluated. Additionally, it would be necessary to review more information about the use of the intervention courses and general education intervention school-wide on students with and without disabilities.

On January 31, 2017, the Recipient signed an agreement with OCR. When fully implemented, the resolution agreement is intended to address all of OCR's compliance

concerns in this investigation. Because the Recipient voluntarily resolved this complaint, OCR did not complete its investigation or reach conclusions as to whether the Recipient failed to comply with Section 504 or Title II. OCR will monitor the Recipient's implementation of the agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Recipient'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.

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

Please be advised that the Recipient 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.

If you have any questions please contact Alvaro Soria at (415) 486-5580 or alvaro.soria@ed.gov.

Sincerely,

/s/

Kendra Fox-Davis
Team Leader

Enclosures

Cc: Counsel for the District