



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

April 21, 2017

Ed Manansala, Ed.D.
Superintendent
El Dorado County Office of Education
6767 Green Valley Road
Placerville, California 95667-8984

(In reply, please refer to case no. 09-17-1026.)

Dear Superintendent Manansala:

The U.S. Department of Education, Office for Civil Rights (OCR), investigated the above-referenced complaint against the El Dorado County Office of Education (“Recipient” or “EDCOE”). The issues OCR investigated were:

1. Whether the Recipient failed to provide Student with a free, appropriate public education (FAPE) by:
 - a. not implementing the Student’s Individualized Education Program (IEP).
 - b. failing to provide the Student with access to her assistive technology device.
2. Whether Student was subjected to harassment and a hostile environment by:
 - a. turning off her assistive technology device so that she could not participate in her educational program;
 - b. subjecting her to transportation without air conditioning that exasperated her medical condition;
 - c. utilizing a candy reward system that she could not partake; and,
 - d. forcing the Complainant to remove the Student from the program due to the unsafe conditions.¹

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in education programs and activities operated 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 and its implementing regulations over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The Recipient receives funds from the Department and is subject to Section 504 and Title II.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the Recipient. Prior to OCR completing its investigation of allegation 1, the Recipient voluntarily agreed to address the areas of concern identified by OCR with regard to the FAPE issues investigated. With respect to allegation 2,

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

after careful review of the information gathered in the investigation, OCR concluded that the Recipient did not violate Section 504 and Title II with regard to the harassment and a hostile environment issues investigated. The applicable legal standards, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Issue 1: Whether the Recipient failed to provide the Student with FAPE by:

- a. not implementing the Student's IEP;**
- b. failing to provide the Student with access to her assistive technology device.**

Legal Standard

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 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.

When a district knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, they have an affirmative obligation to provide effective communication under Title II. As noted in joint guidance issued by OCR, the Office for Special Education and Rehabilitative Services and the U.S. Department of Justice, this obligation is in addition to the requirement that school districts make FAPE available if the student is eligible. Under Title II, districts must provide appropriate "auxiliary aids and services" where necessary to provide effective communication; that is, schools must provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district. Title II requires covered entities, including public schools, to give "primary consideration" to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.

The Title II regulations require that when a public school is providing auxiliary aids and services that are necessary to ensure equally effective communication, they must be provided in "accessible formats, in a timely manner, and in such a way as to protect the privacy and independence" of a student with a disability. The auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. For the auxiliary aid to be provided in a timely manner, it means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. If the student is waiting for the auxiliary aid or service, districts should keep the student (and parent) informed of when the

auxiliary aid or service will be provided. This requirement is separate from the provision of special education and related services under the IDEA. Where the student or his or her parent requests auxiliary aids and services for the student under Title II, the appropriate aids and services must be provided as soon as possible, even if the IDEA's evaluation and IEP processes are still pending.

School districts should provide auxiliary aids and services that would allow the student to go through the material independently, at his own pace, and with the ability to revisit passages as needed. A district must ensure that it meets both its FAPE obligations as well as its obligation to provide effective communication under Title II and that none of the student's rights under either law are diminished or ignored. If the special education and related services provided as part of FAPE are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met.

Facts Gathered to Date

- The Student resides in the Mother Lode Union School District (District) and was placed in the Multiple Abilities program at XXXXXXXX Elementary School (School), an EDCOE public day school program, for the 2015-16 and 2016-17 school years.
- The Student is diagnosed with XXXXXXXX XXXXXXXXXXXX XXXXXXXX XXXX X and qualified for special education services and related services under the primary disability category of Orthopedic Impairment and secondary disability category of Multiple Disability. She is being served under an IEP and an Individual School Health Plan. Student is nonverbal and needs the use of an Augmentative and Alternative Communication (AAC) device (e.g., eye gaze communication system, iPad, picture cards, low tech visuals/icons, computer).
- At an IEP meeting in June 2015, the IEP team approved an AAC assessment to be conducted in August 2015, when the school year begins. However, the assessment was not completed until January 2016 due to the Complainant not signing the assessment plan and miscommunication regarding who would conduct the assessment.
- At the start of the 2015-16 school year, the Student was bringing her own personal AAC device to use at the School. In fall 2015, the AAC device frequently malfunctioned. From December XX, 2015 until sometime in April 2016, California Community Services (CCS), a county contracted service provider, had physical possession of the Student's personal AAC device for testing and repairs. Without her personal AAC device, the Student used the classroom iPad with the Touch Chat application (app) and subsequently used an iPad mini with the Touch Chat app for the remainder of the 2015-16 school year. The Complainant stated that Touch Chat is not eye gaze technology and did not work.
- Also in December 2015, the Student used a Tobii Dynavox AAC unit for a four week trial period.
- Based on the AAC assessment conducted in January 2016, the District Director of Special Education approved the purchase of a Tobii Dynavox dedicated AAC device for the Student on February X, 2016. He forwarded his approval to the Special Education Local Plan Area (SELPA) to purchase the device. The SELPA had approved it but due to a change in policy, it would not purchase low incidence equipment for districts any

longer. The SELPA stated that the District or EDCOE should purchase it and then the costs, if approved by the low incidence committee, would be reimbursed by the SELPA.

- On April X, 2016, the Student's teacher told the Assistive Technology (AT) Specialist that the SELPA would not purchase the AAC device for the Student. She informed him that due to cost savings, the EDCOE Principal of Special Services was willing to consider purchasing a Surface tablet and eye gaze device instead of the dedicated Tobii Dynavox AAC device. In addition, they would purchase the Communication 5 language system since the Student had previously tested it and the assessment recommended it. The teacher asked for the AT Specialist's recommendations, and the AT Specialist responded that the Surface tablet with eye gaze device was a good option for the Student.
- An IEP meeting was held on April XX, 2016. The IEP team agreed that the eye gaze communication system was the most effective way for the Student to communicate. It also required that the Student receive 45 minutes monthly of Assistive Technology Services from EDCOE to help her learn how to use the AAC device. At this point, the Student still had not received an AAC device to replace her malfunctioning personal AAC device.
- After the April XX, 2016 IEP meeting, the District submitted an order to purchase an AAC device for the Student but in May 2016, it cancelled its order when CCS agreed to buy it for the Student.
- At the start of the 2016-17 school year, the Student's April XX, 2016 IEP was in effect. The Student still did not have access to an AAC eye gaze device because CCS failed to purchase it as previously agreed. The Student continued to use an iPad mini with the Touch Chat app from the previous school year at the start of the 2016-17 school year. The Complainant stated that Touch Chat is not eye gaze communication and it did not work properly. The District then installed an eye gaze app on the Complainant's Surface tablet and let the Student use that in school.
- An IEP meeting was held on September XX, 2016, and the IEP team learned then that CCS did not purchase the AAC device. The AT Specialist stated that was because there was no CCS vendored assessor available to conduct the AAC assessment, which was required by CCS before CCS purchased a device. The District agreed to purchase one immediately for the Student.
- The Complainant did not sign the September XX, 2016 IEP. The Complainant stated at the IEP meeting that she does not agree to any EDCOE placement for the Student and asked about District options. The District rejected a District placement and stated that the District's offer of FAPE was the Multiple Abilities class at the School, which is an EDCOE program. The District believed that the Student's needs were appropriately being addressed there. The Complainant stated that she was withdrawing the Student from the EDCOE program effective that day. The Complainant further stated that she would be exploring other district options and would teach her at home if necessary. The District stated that it would provide home instruction on an interim basis until a resolution could be reached.
- On September XX, 2016, the District Director of Special Education purchased the Tobii Dynavox eye mobile mini with Microsoft Surface Pro 4 computer/tablet (Surface/Tobii Dynavox mini package) with desktop mount and Communicator 5 Gold language software for the Student.

- The AT Specialist stated that at the time of purchase, he recommended the Surface/Tobii Dynavox mini package because it was sufficient to meet the Student’s educational and communication needs. He stated that “it features the same software and eye gaze technology that a dedicated eye gaze device offers. The device is mounted on a stand and is meant to provide the Student with academic and speech options and to teach her the fundamentals of eye gaze technology.” In addition, he explained that the primary differences with the Surface/Tobii Dynavox mini package and a dedicated communication device is “in the housing, the battery life, the speaker, and ability to interface with the environment (infrared to control a TV, lights, etc.). These are important for use outside the home and if she was mobile in a wheel chair.”
- The District Director of Special Education stated that the Tobii Dynavox mini eye mobile unit is not an application but a separate portable device that is attached to the Surface computer/tablet. It can be later removed and attached to another computer. It can be used both in school and at home with the student. The Surface included software (Communicator 5 Gold software) so the Student could access her academic curriculum (K-12 age appropriate academic and language skills). He stated that this technology was new and was not available at the time he approved the Tobii Dynavox dedicated eye gaze device in February 2016.
- In October 2016, the Student received the Surface/Tobii Dynavox mini package. The Complainant stated that the Surface/Tobii Dynavox mini package was ineffective because the program was not age appropriate and no instructions or assistive technology support services were provided to help the Student learn how to use them.
- The AT Specialist stated that the software can be set to include several different levels of speech support as well as academic activities. Originally, a beginner level speech system was selected to display at the request of the family on November XX, 2016. A software update caused the system to run in evaluation mode which prevented the Student from accessing higher graded material. The Complainant’s issues with the Surface/Tobii Dynavox mini package have been corrected.
- XXX--- paragraph redacted ---XXX.
- XXX--- paragraph redacted ---XXX.
- XXX--- paragraph redacted ---XXX.

Analysis

The facts obtained in the investigation thus far raise concerns that EDCOE did not adequately understand and meet its responsibilities under Section 504 and Title II to provide FAPE to a qualified student with a disability. Title II regulations state that the auxiliary aid must permit the person with a disability to access information. In this case, there is a concern regarding the months in which the Student did not have an AAC device that met her needs. Without a functional and appropriate AAC device, the Student used a classroom iPad with Touch Chat, but the Complainant stated Touch Chat is not the eye gaze technology the Student needs and the XXXXXXXXXXX XXXX XXXXXXXXXXXXXXX XXXXXXX XXXXXXXXXXX XXXXXXX, XXX XXX XXX XXXXXXXXXXX XXXXXXX, XXXXX XXX XXXXXXX XXX XXXX XXXX XXXXXXX XXXXXXX XXX XXXXXXX XXXXXXX XXXX.

In addition to the concern that the provided auxiliary aid that did not meet the Student’s needs, OCR is also concerned that the approved auxiliary aid was not provided in a timely manner.

Title II regulations require that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. The AAC assessment was completed in January 2016, yet bureaucratic quagmire prevented the Student from receiving the recommended Surface/Tobii Dynavox mini package until October 2016. OCR is concerned with the confusion among the SELPA, District, EDCOE, and CCS regarding which entity is responsible for purchasing the approved AAC device. Because the Student did not receive the approved auxiliary aid in a timely manner, XXXXXXXXXXXX XXXX XXXXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXX the Student had lost skills.

Before OCR completed its investigation, EDCOE expressed interest in a Section 302 Resolution Agreement on January 10, 2017 and OCR determined that a voluntary resolution was appropriate as to this allegation. In order to complete the investigation, OCR would need to interview the Student's Multiple Abilities teacher at the School and Licensed Vocational Nurse (LVN nurse).

Issue 2: Whether Student was subjected to harassment and a hostile environment by:

- a. turning off her assistive technology device so that she could not participate in her educational program;**
- b. subjecting her to transportation without air conditioning that exasperated her medical condition;**
- c. utilizing a candy reward system that she could not partake; and,**
- d. forcing the Complainant to remove the Student from the program due to the unsafe conditions.**

Legal Standard

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of 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. 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.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to

stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious 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

Turning off the Student's assistive technology device

- The Complainant stated that in September 2016, the Student's teacher had once turned down or muted the volume of the Student's AT device, which prevented the Student from participating in class. The Complainant stated that the Student's teacher did this because the Student was talking out of turn when it was other students' turn to talk.
- EDCOE denies that the Student's teacher turned down or turned off the Student's AT device to prevent her participation in her educational program.

Nonfunctioning school bus air conditioner

- The Complainant explained that the Student's disability prevents the Student from regulating her body temperature so when the Student gets overheated and her blood pressure and heart rate increase, which puts her at health risk. Accordingly, when it is hot and the air conditioner on the school bus does not work, it poses a medical risk to the Student. Usually, the school or LVN nurse would contact the Complainant in advance so that she could make alternate transportation arrangements. However, on one occasion at the beginning of the 2016-17 school year, the School failed to give the Complainant sufficient advanced notice so the Student had to wait a long time before the Complainant could pick her up, leaving the Student at medical risk on a hot day. The Complainant did not indicate that the Student suffered any adverse medical condition resulting from that incident.
- Neither the Student's April XX, 2016 nor September XX, 2016 IEP outlines any procedures or requirements to address the school bus air conditioner not functioning on a hot day.
- EDCOE denies subjecting the Student to transportation that exasperated any of the Student's known medical conditions. During the September XX, 2016 IEP meeting, EDCOE agreed to ensure that one person in the transportation department would notify the Complainant when the school bus air conditioner is not working. EDCOE also agreed to reimburse the Complainant mileage when she had to transport the Student because the school bus air conditioner was not working. The Complainant stated that the proposed resolution was satisfactory and resolved her concern.

Candy reward system

- Based on the Student's disability, she uses a feeding pump.
- The Complainant stated that the Student's 2016-17 teacher implemented a candy reward system and did not provide an alternate reward system so that the Student could substantially participate in it. Although the Complainant raised this issue during the September XX, 2016 IEP meeting, the Complainant stated that no resolution was reached.
- EDCOE denies utilizing a reward system that the Student could not participate in.

Being forced to remove the Student due to unsafe conditions

- The Complainant attended an IEP meeting on September XX, 2016, but she did not sign the IEP because she disagreed with the District's placement of the Student in the EDCOE Multiple Abilities class at the School. The Complainant stated that she was withdrawing the Student from the EDCOE program effective that day.
- After the Complainant removed the Student on September XX, 2016, the Complainant and EDCOE engaged in discussions regarding the return of the Student to the School. One of the conditions that the Complainant requested was for the same LVN nurse, who was previously assigned full-time to the Student, to be assigned to the Student upon the Student's return to the School.
- On December X, 2016, the EDCOE Special Services Executive Director spoke to the Complainant and followed up in an email. The Executive Director said that the Student's original LVN nurse was currently assigned to another student at a different school and could not be reassigned back to the Student when she returned back to the School. However, EDCOE had assigned a different LVN nurse (male) to work with the Student and EDCOE would have a female aide take care of the Student's toileting needs.
- The Complainant stated that the Student is medically fragile and required an LVN nurse with her at all times. She stated that EDCOE creates an unsafe environment for the Student when they are not willing to provide an LVN nurse to the Student at all times.
- The Complainant did not return the Student to the EDCOE program at the School.

Analysis

OCR investigated whether the Student was subjected to harassment and a hostile environment by (1) turning off her AT device, (2) subjecting her to transportation without air conditioning, (3) utilizing a candy reward system, and (4) forcing the Complainant to remove the Student due to unsafe conditions.

OCR addresses the fourth allegation first. OCR found that the evidence gathered did not support the allegation that the Complainant was forced to remove the Student from the EDCOE program due to unsafe conditions. Instead, the evidence showed that the Complainant's allegation of unsafe conditions occurred in December 2016, after she removed the Student from the EDCOE program in September 2016 due to disagreement about placement. Thus, there is insufficient evidence that the Student was subjected to harassment and a hostile environment by forcing the Complainant to remove the Student from the EDCOE program due to unsafe conditions.

Turning to the first three allegations, to determine whether a hostile environment based on disability has been created, OCR examines the totality of the circumstances to evaluate whether or not the conduct was sufficiently severe, persistent, or pervasive to deny or limit a student's ability to participate in or benefit from the educational program. In this case, the evidence showed that, on at least one occasion, the school bus air conditioner did not work, and there was a system to notify the Complainant if the air conditioner is not working. There is conflicting evidence from the Complainant and EDCOE regarding the first and third incidents, the turning off of the Student's AT device and the use of a candy reward system. Assuming for the sake of analysis that the first and third allegations are true, without making a determination as to whether in fact they occurred, OCR does not find the three incidents created a hostile environment for the Student. Based on the preponderance of the evidence standard, there is insufficient evidence that the incidents were severe, persistent, or pervasive and denied or limited the Student's ability to participate in or benefit from the EDCOE program. The turning down of the AT device occurred once, and there was insufficient evidence that the nonfunctioning air condition or use of a candy reward system prevented the Student from benefiting from the educational program. Looking at the totality of the circumstances, OCR determines there is insufficient evidence to demonstrate that a hostile environment existed for the Student based on disability.

As a matter of technical assistance, OCR encourages EDCOE and the Complainant to discuss and resolve any concerns about the treatment and/or the provision of services and/or auxiliary aids and services to the Student at an IEP meeting.

Conclusion

As stated above, prior to OCR concluding its investigation of allegation 1 and to address allegation 1, the Recipient, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegation 1 and the information obtained by OCR during its investigation.

Under the agreement, the Recipient and the District will: convene an IEP meeting to discuss the effectiveness of the AAC device as well as the Student's other educationally related needs; develop and implement a plan to provide compensatory education for the Student; provide training to the Complainant or Student from an AT Specialist; identify an employee at the District to serve as the Complainant's point of contact; and draft and disseminate a memorandum on the obligation to ensure prompt purchase and delivery of approved auxiliary aids and services to students with disabilities when more than one entity is involved and a description of how to fulfill this obligation when more than one entity is involved.

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 compliance concerns in this investigation. OCR will monitor the implementation of agreement until the Recipient is in compliance with the Section 504, Title II, and their implementing regulations at issue in the case.

OCR's determination in this matter 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. 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 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 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 Danette Ng (Danette.Ng@ed.gov or 415-486-5539) or Annie Lee (Annie.Lee@ed.gov or 415-486-5594).

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: XXXXXXXX XXXXXXXX, Counsel (via email only)