



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

January 31, 2018

Terry Walker
Superintendent
Irvine Unified School District
5050 Barranca Parkway
Irvine, California 92604-4652

(In reply, please refer to case no. 09-17-1564.)

Dear Superintendent Walker:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its resolution of the above-referenced complaint against the Irvine Unified District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether students with disabilities are denied an opportunity to participate in electives or enroll in Zero Period (in order to take Extended Day Physical Education (EDPE)) at a middle school in the District (School).

OCR initiated the investigation of this complaint pursuant to its authority under 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.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. Prior to OCR completing its investigation, the District voluntarily entered into a Resolution Agreement (Agreement) with OCR to address the Section 504 and Title II compliance concerns raised in this case. The legal standards, facts gathered, and analysis are summarized below.

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.

Legal Standards:

Under the Section 504 regulations, at 34 C.F.R. § 104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service; or 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 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.

Issue: *Whether Students with disabilities are denied an opportunity to participate in electives or enroll in Zero Period (in order to take EDPE) at the School.*

The following information is relevant to OCR's analysis.

The Student was a XXXXXXXX XXXXXX, during the 2017-2018 school year, attending the School, which is part of the District. The Student was diagnosed with a Specific Learning Disability and Generalized Anxiety, and had an Individualized Education Program (IEP) Plan as a general education student with supports for reading and math. The Complainant stated to OCR that the Student was not provided the same choice of electives as her non-disabled peers, such as art, music, drama, technology, and media literacy.

On April XX, 2017, the XXX XXXXX students at the elementary school (Elementary School) the Student attended prior to attending the School, were given a tour of the School. The students were given a packet to bring home containing a Course Catalogue and an Elective Registration Card. The students were instructed to fill out the card, prioritizing their year-long or trimester elective selection. Both the Course Catalogue and the Elective Registration Card list an option for Zero Period Physical Education, also called EDPE, which occurs prior to first period. The Complainant stated to OCR that most regular education students take two electives. For all students, due to scheduling conflicts, taking two electives is only an option for students who are enrolled in EDPE.

According to the Complainant, on April XX, 2017, at an information session for parents of special education students, the Special Education Teacher stated that program placement and services were based on each student's unique instructional and curricular needs. However, the Complainant stated to

OCR that the Special Education Teacher stated that all special education students were required to take the Directed Studies course in place of an elective. According to the Complainant, the Special Education Teacher also stated that it was not recommended for special education students to take EDPE as it is only available to students enrolled in year-long electives and is not available to special education students taking Directed Studies.

Directed Studies is a class that focuses on study and organizational skills. At the time of the filing of this complaint, there was no written description of this course, according to the Complainant. Unlike general education classes described in the School's Course Catalogue, there is no description of classes special education students are expected to take.

On May XX, 2017, the first part of the Student's IEP meeting was held. On May XX, 2017 the Complainant toured the School with the School Psychologist. The Complainant told OCR that the School Psychologist stated that special education students are required to take Directed Studies instead of an elective. According to the Complainant, the School Psychologist also told her that the School does not recommend special education students take EDPE.

On June X, 2017 the second part of the Student's IEP meeting was held. The Complainant stated to OCR that she told the IEP team that she was concerned about the Student not being given the same opportunity to take electives as other students. The Complainant stated that the School Psychologist told her during the IEP meeting that the Student did not have a need for the study and organizational skills developed in Directed Studies, but continued to insist that the Student be enrolled in the course. OCR reviewed the Student's IEP and confirmed that it does not include goals related to study and organizational skills and therefore does not indicate that taking the Directed Studies course was necessary for a FAPE for the Student.

The Complainant presented evidence to the IEP team that an educational psychologist stated in a report regarding the Student that an elective, specifically a music class, would help the Student with auditory processing issues. The Student's therapist also provided support that the Student's anxiety would be reduced by creative outlets. The Student was permitted to opt out of Directed Studies and instead, to enroll in music and other electives.

According to the District, it offers both yearlong and trimester electives. In 2016-2017, yearlong electives included Chorus, String Orchestra, Concert Band, Symphonic Orchestra, and Yearbook, as well as additional classes for eighth graders. The District explained that Directed Studies is a "yearlong course providing specialized academic instruction to support special education students," the course "occupies an elective," and enrollment is determined by an individualized, IEP team decision. The District explained that all students with or without disabilities, complete a registration card to enroll in electives, and EDPE. EDPE is scheduled before or after school when no electives are scheduled. In addition, the District also told OCR that EDPE is open to all students, including students with disabilities. However, the registration cards provided to OCR by the District state that EDPE will only be approved for students enrolled in the following specific yearlong electives: Concert Band, String Orchestra, Symphonic Orchestra, and Yearbook. Directed Studies is not listed as an elective that would allow a student to take EDPE. According to the District, the School does not have a zero period or elective Coordinator. Concerns involving zero period and elective selection are resolved by the Principal.

Directed Studies & Electives Data

According to data provided by the District to date, in 2016-2017, there were XXX students enrolled at the School, of whom XXX (14.6%) were identified as students with disabilities with IEPs. While approximately 15.5% of students without IEPs were enrolled in EDPE, just 5.6% of students with IEPs were enrolled in EDPE. In other words, students without IEPs were over 2.8 times more likely to be enrolled in EDPE, than students with IEPs. Just 27.8% (XX) of students with IEPs were not enrolled in Directed Studies. And, District provided data also indicated that students without IEPs were more likely than students with IEPs to be enrolled in electives at the School.

Analysis:

The complaint alleged that students with disabilities were denied an equal opportunity to be enrolled in electives. She told OCR that students with IEPs were required to take Directed Studies and were not allowed to enroll in EDPE. In contrast, the District told OCR that students with disabilities were placed in Directed Studies based on an individualized IEP team determination, and that EDPE was open to all students, including students with disabilities.

In OCR's investigation to date, OCR found that generally, students may take one elective at a time, at the School. In order to have enough room in their schedule to take two electives, they may enroll in EDPE. Directed Studies counts as an elective for those students with IEPs who are placed in that course, based on their IEP team's decision. However, according to the School's registration forms, EDPE will only be approved for students who are enrolled in one of five different yearlong electives: Chorus, String Orchestra, Concert Band, Symphonic Orchestra, and Yearbook. Directed Studies is not among the courses listed which make students eligible for EDPE, thus suggesting that Students with IEPs in Directed Studies may not take EDPE, and therefore may not have access to a second elective, like non-disabled students who may take one of the elective prerequisites for EDPE enrollment. OCR's review of District data showed that students with disabilities were less likely to be enrolled in either an elective, or EDPE, as compared to their non-disabled peers at the School. Specifically, students with disabilities were over 2.8 times less likely to take EDPE, and were also less likely to be enrolled in an elective class, as compared to their nondisabled peers. And, the majority of students with disabilities, 72% (XX XX XXX) of students with IEPs, were enrolled in Directed Studies.

According to the Complainant, the Student in this case was permitted to enroll in both an elective and EDPE, after her IEP team determined that enrollment in Directed Studies was not necessary for the Student to receive a FAPE.

Section 504 at 34 C.F.R. § 104.4(b)(1) and Title II at 28 C.F.R. § 35.130(b)(1) prohibit a recipient public school district from denying a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service; or limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. Here, OCR did not complete its investigation because the District requested to enter into a voluntary agreement pursuant to Section 302 of OCR's Complaint Processing Manual. To complete the investigation, OCR would need to interview teachers, counselors and administrators, and analyze additional data from the District. However, based on the information gathered to date and as explained above, OCR had compliance concerns regarding whether students with disabilities at the School were provided equal access to electives and EDPE at the School. Therefore, OCR determined that a Section 302 agreement

was appropriate to ensure that the School's enrollment process in Zero Period EDPE, electives, and Directed Studies afford equal access for students with disabilities to the District's programs and activities.

Resolution:

This concludes the investigation of this complaint. To address the concerns raised by this complaint, the District, without admitting to any violation of law, entered into the enclosed Agreement. Pursuant to this Agreement the District has agreed to: 1) Create course descriptions for special education courses and activities to the same extend it creates course descriptions for regular education courses, and provide access to the same; 2) Provide advance notice of the Parent Information Night. The notice will include a description of what will be covered, including information about electives and zero period EDPE; 3) Collect and evaluate data as it relates to special education students in electives, Direct Studies, and EDPE to ensure equal access to all courses for students with disabilities; 4) issue written guidance to all counselors, special education teachers, school psychologists, Section 504 Coordinators, and IEP case carriers, explaining that students with disabilities shall have equal access to the School's programs and activities, including electives and zero period courses, and such students should not be counseled or otherwise discouraged from taking electives or Zero Period (except and unless such courses are inappropriate based on their disability related needs and as determined by their IEP or Section 504 team).

Conclusion:

Based on the commitments made in the enclosed 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 Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with the statute(s) and regulations at issue in the case.

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, 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 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 rhonda.ngom@ed.gov.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

Enclosure

cc: Courtney M. Brady, District Counsel