



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

April 5, 2018

Craig Rydquist
Interim Superintendent
Modesto City School District
426 Locust Street
Modesto, CA 95351-2631

(In reply, please refer to case no. 09-17-1709.)

Dear Superintendent Rydquist:

This letter is to inform you that the U.S. Department of Education (the Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Modesto City School District (District). The investigation of this complaint addressed the following issues:¹

- 1) The District has misclassified the Student as an English language learner because the District failed to adequately address the Student's disability-related needs through the IEP and Section 504 process; and
- 2) The District disciplined the Student on the basis of his disability, failed to hold manifestation determination hearings, and pushed the Student out of a District middle school by threatening him with expulsion.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin by recipients of Federal financial assistance. OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is similarly responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

¹ OCR identified the Student in its initial notification letter to the District and is withholding his name from this letter to protect his privacy.

To investigate this complaint, OCR interviewed the Student's mother, and District employees. OCR also reviewed documents and other information provided by the District. Prior to the completion of the investigation, the District agreed to enter into a Resolution Agreement (Agreement) to address the concerns identified by OCR in the investigation of those issues to date. The legal standards, facts gathered, analysis, and the terms of the Agreement reached with the District are summarized below.

Legal Standards

The Title VI implementing regulations, at 34 C.F.R. §100.3(a) and (b), provide that a recipient of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others. Section 100.3(b)(2) provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

On May 25, 1970, pursuant to its authority under Title VI, the Department of Education issued a memorandum entitled , "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (hereinafter May 25th memorandum). The May 25th memorandum clarified OCR policy under Title VI on issues concerning the responsibility of school agencies to provide equal educational opportunity to limited English proficient national origin minority students. The May 25th memorandum states that school districts must take affirmative steps to address the language needs of limited English proficient students (English learners or EL students).

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.

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 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. Under Section 504, OCR's determination of whether a series of exclusions creates a pattern of removal is made on a case-by-case basis, and may include consideration of several factors including the length of each removal, the proximity of the removals to each other, and the total amount of time the child is excluded from school. 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

OCR's investigation concerned actions which took place at the middle school in fall of 2016. At the time, the Student was an XXX grader, and had been diagnosed with ADHD. He received services under a Section 504 plan up through spring 2016. During the fall of 2017, he was assessed for an Individualized Education Plan (IEP).

The complaint argues that the Student was misclassified as an English learner (EL) because of his disability and because of his national origin (surname). Based on documentation provided, OCR found that the Student was administered the California English Language Development Test (CELDT) when he enrolled in the District, based on his parents' response to the home language survey, which indicated that he spoke Spanish at home. He has been identified as EL since kindergarten, based on the results of CELDT testing. In his XXX grade year, he tested Early Advanced on the CELDT but was flunking all his classes so the District determined that he had not met District criteria for reclassification as fluent English proficient (FEP).

For his XXX grade year, the Student had a history of defiance, using threatening language with adults and leaving class. The documents describe him as disruptive in class, by refusing to take out ear buds or do work. The relevant 504 plan is from February X, 2016. It identifies him as having ADHD and includes accommodations around behavior (provide frequent praise, allow student to remove desk away from other students, repetition of instruction, extra time). The Section 504 team (including the Student's mother) described the Student as being very defiant. For the 2015-16 school year, the Student received 9 referrals to the school's intervention center and 2 suspensions (for a total of 8 days).

On August XX, 2016, the District conducted psycho-educational testing; testing was initiated based on parent referral because of behavior and educational progress. Once school reconvened,

the Student began to experience numerous behavior incidents. On August XX, 2016, the Student was suspended for five days for leaving the school intervention center without permission and, upon returning, throwing a drink at a staff person. On August XX, 2016, the Student was suspended for two days for using derogatory language toward a staff person. On August XX, 2016 and the Student received a referral to the intervention center for cursing a teacher, and leaving class. On August XX, 2016, he was suspended for two days for banging on classroom doors with his feet and fists, and then cursing a staff member who tried to get him to stop. The Student's suspension record was later amended to remove all three August suspensions, based on a decision made at an IEP meeting on October X, 2016. On September XX, 2016, the Student was referred to the intervention class on two separate occasions for destruction of class materials and arriving late to class.

On October X, 2016, the School convened an IEP meeting, and found the Student eligible for services under the IDEA for autism. The IEP meeting notes show that the team discussed possible changes in placement. The Student's mother said that the Student struggles to make it through the school day and asked about all-day special education placement for students with emotional disturbance (ED) but District representatives stated that the Student did not meet eligibility for an ED placement. They discussed placement in an all-day program for students with learning disabilities but the mother was not agreeable, stating that placing the Student in an all-day special education program would cause him to act out more. The notes showed that the team agreed to 1 hour of push in RSP and 1 hour of push out RSP daily. The team also requested that an inclusion specialist assess him for services, and that the school psychologist develop a behavior intervention plan (BIP). The IEP notes did not address the question of whether the misbehavior for which the Student had been suspended was a manifestation of his disability. The documents showed that the BIP was completed on October XX, 2016 and included identification of a site mentor for the Student when he felt overwhelmed.

From the date of the IEP meeting until early November, the Student continued to accumulate behavior referrals. The Student received three additional referrals to the intervention center for refusing to cooperate with teachers, and leaving class early or arriving late. On November X, 2016, he was suspended for three days for threatening a staff person.

The Student's mother states that after the last incident, the school's vice principal threatened to expel the Student. The District denies this claim. According to the mother, the vice principal told her that he recommended that she consider placement in the county's XXXXXXXX XXXXXXXX school. He said that if there was another incident like the November XXX incident (in which the student threatened staff and refused to go to class), he would have no option but to recommend expulsion; he therefore recommended that she consider the XXXXXXXX XXXXXXXX school. The Student's mother informed OCR that, from her perspective, she had no choice but to consider this placement because, if the Student got expelled, he would have nowhere to go. Because OCR did not complete its investigation, it did not interview the vice principal about this alleged statement.

The documents provided to OCR by the District do not demonstrate whether the School was in the process of implementing the Student's BIP during the period from late October and early November. The Student's parents removed him from the District on November X, 2016 and placed the Student in the XXXXXXXX XXXXXXXX school for the remainder of the 2016-17

school year. The Student currently is enrolled in a District high school and the mother and District are in discussion about an appropriate placement for the Student that meets his needs. The District completed an updated behavioral assessment and BIP prior to the current school year.

Over the period of the fall 2016 semester, OCR confirmed that the Student was suspended for 12 days, even though the record had been administratively amended retroactively to remove the suspensions from his record for all but the November XXX incident. The District acknowledges that the number of days he was suspended should have triggered a manifestation determination meeting and that one was not convened. During the same period, District staff were actively engaged in evaluating the Student and convening an IEP and discussing several supports specific to behavior. On December XX, 2017, the District provided written documentation that the November X, 2016 suspension has been removed from the Student's record.

In a follow-up interview, the Student's mother stated that the Student was suspended more times than it shows because the vice-principal would send him home on days the school said he was referred to the intervention center. OCR reviewed the Student's attendance records for this period, which showed that he attended intervention for one or more periods on each of the days for which intervention was assigned.

OCR asked the District to respond to the assertion about the Student being sent home informally without a documented suspension. The vice-principal stated that in October 2016, there were days when the Student's mother would call to remove the Student from school, or keep him home after a tough night. He denied that the Student was ever sent home on a day he was sent to the intervention center. OCR review of attendance records confirms that the Student attended school on the days he was sent to the intervention center, although the records indicated erratic attendance in terms of him arriving late, leaving class early or leaving campus on the last day for the last two periods. There is no indication that the Student was allowed to leave campus or not attend the intervention center.

In a statement created for OCR, the vice-principal stated that the school had attempted to work with the Student, but that on some days he was defiant and uncooperative, refused to go to class, and cursed at staff, and that "unfortunately at times he had to be suspended per the conduct code." As part of its data response, the District provided a copy of an Individual Program Plan conducted by the XXXXXX XXXXXXXXXX XXXXXXXXXX XXXXXX, dated October XX, 2016. The Plan states that, as of that date, the Student was "doing some Independent Study due to some behaviors at school which lead to several suspensions and lack of completing assignments."

Analysis

The complainant alleged first that the District failed to address the Student's disability through the Section 504 process, and instead inappropriately identified him as an English learner. OCR confirmed that, throughout the relevant period, the Student was receiving services under a Section 504 plan and was being evaluated under the IDEA. OCR found insufficient evidence to establish that the District identified the Student as EL because of his disability, and/or his national origin. School districts are required to identify students whose proficiency in English is

limited, and to provide them services until they are able to participate equally in the regular program without such services. The District provided information showing that the Student was identified as EL because of his limited proficiency in English when he entered the District. The data indicates that he was showing growth in English proficiency, but that he had not yet met other proficiency criteria required for reclassification as FEP, specifically sufficient grades. Therefore, there is insufficient evidence that the Student was misclassified as an EL based on national origin alone, or based on disability status.

With respect to the second issue, the Section 504 and Title II regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a student with a disability without reevaluating the student and affording due process protections. Excluding a student with a disability from his or her program for more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion constitutes a significant change in placement. In such cases, 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. In addition, placement decisions for individuals with a disability must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options.

Here, the evidence raised concerns that the Student was suspended for more than ten days without a determination as to whether his misconduct was a manifestation of his disability. OCR confirmed that, at the time the District was engaged in an evaluation and placement discussion through an IEP process, the Student received 12 days of suspension, which he served. The Student may also have been placed on Independent Study for some period of time, without a determination through the Section 504 or IEP process that this placement was appropriate for him. Although the Student's suspensions were removed from his record, OCR is concerned that he missed instructional time. Further, the vice principal's statement to OCR that the Student "had to be suspended" for his misbehavior, along with the allegation that he told the Student's mother that he would be expelled if he continued to misbehave, raise concerns that school administrators may not have fully understood the safeguards required before a student with disabilities is repeatedly suspended or expelled.

Prior to the completion of OCR's investigation, the District expressed an interest in resolving the complaint. The District has indicated a willingness to provide the Student compensatory services to address the lost instructional time and to provide training to staff on Section 504 protections. On April 2, 2018, the District signed the enclosed Resolution Agreement committing to taking these actions.

OCR determined that the Agreement, when implemented, will resolve the compliance concerns raised during the investigation of the complaint.

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 Student's mother concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with its terms. Upon completion of the obligations under the Agreement, OCR will close 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 Student's mother 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 Student's mother 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 about this letter, please call (415) 486-5555.

Sincerely,

/s/

Katherine Riggs
Acting Team Leader

Enclosure