



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

March 19, 2021

Ed Baisley
Special Education Local Plan Area Director
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Lamont Jackson
Interim Superintendent
l.jackson@sandi.net

(In reply, please refer to case no. 09-18-1121.)

Dear Mr. Baisley and Mr. Jackson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has reached a determination in the above-referenced complaint against the San Diego Unified School District (District). The Complainant alleged that the District discriminated against students based on disability. OCR initiated an investigation of the following issue:

Whether the District failed, and is currently failing, to implement Para-educator services required by Individualized Education Programs (IEPs) of students at a District elementary school (School).

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 based on 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 based on 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 the implementing regulations.

OCR began investigating the complaint by reviewing documents provided by the Complainant and the District, and by interviewing the Complainant and a former School Special Education Teacher/Case Manager (SE Teacher/Case Manager). Based on this information, OCR identified several compliance concerns. The District has signed a voluntary Resolution Agreement to fully resolve these concerns without a full investigation. This letter summarizes the relevant facts, the applicable legal standards, and OCR's determination.

Facts

The District employs three types of Para-educators to support students with disabilities based on their individual needs---Special Education Assistants (SEAs), Special Education Behavior Technicians (SEBTs), and Special Education Technicians (SETs).

The District has a Special Education School Year Start Up Check List for Case Managers as well as Site Administrators. Among other duties, Case Managers are responsible for developing and providing to Site Administrators a comprehensive written schedule of Para-educator assignments to work with students as required by their IEPs. Case Managers are also responsible for ensuring that Para-educators work with students under the Case Manager's direction. The Site Administrator is responsible for assigning staff to develop these comprehensive written schedules based on the hours of service and areas of need documented in students' IEPs. The Site Administrator is also responsible for ensuring that Para-educators adhere to their written schedules with ongoing direction from the Case Manager.

The District also provided OCR a copy of a form entitled Request for Para-educator Allocation or a Supplemental Support Notification. To make a Request for Para-educator Allocation, the requester must note the level of support requested by checking the type of Para-educator needed along with the hours per day and the days per week. The requester must attach the Master Schedule of specialized academic instruction (SAI) services for all special education teachers and Para-educators and a SAI Service Delivery Model Worksheet. The form is to be submitted to a Special Education Program Manager who determines that the current site support is sufficient, approves additional Para-educator support, or authorizes a temporary substitute.

20XX-XX School Year

This OCR complaint was filed on December X, 20XX; therefore, it is timely as to events that took place from June XX, 20XX, forward. The last day of the 20XX-XX school year was June XX, 20XX.¹

The School Principal submitted a written statement to OCR saying that the only two students whose IEPs required Para-educator support in the 20XX-XX school year were Student 1 and Student 2 who were enrolled the entire school year. However, according to documentation provided by the District, additional students had IEPs requiring Para-educator support that school year and were enrolled through the end of the year (Student 3, Student 4, Student 5, Student 6, Student 7, Student 8, Student 9, and Student 10). Of the group of students requiring Para-educator support, the documents show that the School did not consistently record the need for such services on IEPs. Para-educator support was routinely articulated as SAI instead of supplemental support and many IEPs did not record the type of Para-educator support needed or whether the services should be delivered 1:1 or shared with other students. In two instances the IEPs were internally inconsistent in documenting the number of Para-educator support hours required.

The Principal also stated that both Student 1 and Student 2 received their required Para-educator support in 20XX-XX. However, there was evidence in documents provided by the District that Student 4, Student 2, Student 9, and Student 10 were enrolled through the end of the school year and may not have received the type and amount of Para-educator support required by their IEPs. In addition, the SE Teacher/Case Manager told OCR that she was informed that Student 6, also enrolled until the end of the 20XX-XX school year, did not receive his required number of Para-educator hours either. She also stated that she learned that the Special Education Teacher from the 20XX-XX school year had submitted forms to the Special Education Department requesting additional Para-educator staff nine times throughout the year without success.

¹ Information concerning events that took place before June XX, 20XX is referenced in this section to provide context even though these facts were not within the scope of OCR's investigation.

20XX-XX School Year

The School Principal's written statement said that the only two students requiring Para-educator support in the 20XX-XX school year were Student 1 (six hours per day) and Student 10 (one hour per day). However, according to documentation provided by the District, additional students had IEPs requiring Para-educator support that school year (Student 3, Student 4, Student 6, Student 5, Student 7, Student 8, and Student 11). In addition, the weekly block schedules of Para-educator assignments the District provided to OCR had Para-educators assigned to work with the following other students: Student 12, Student 13, Student 14, Student 15, Student 16, Student 17, Student 18, Student 19, Student 20, Student 21, Student 22, Student 23, and Student 24. District documents also showed that Student 10 was to receive 28 hours of Para-educator support per week, not five hours per week.

Of the students listed above for whom OCR received IEPs, the documents showed that the School did not record the need for Para-educator services on IEPs in a consistent manner, Para-educator support was routinely articulated as SAI instead of supplementary support, and IEPs did not always record the type of Para-educator support needed, the specific number of support hours required, or whether the support was 1:1 or shared with other students. In addition, there were examples of students whose Para-educator support hours were reduced or eliminated without explanation or educational justification.

The Principal also reported to OCR that Student 1 and Student 10 received their required Para-educator support during 20XX-XX. However, District documents and information provided by the SE Teacher/Case Manager showed that Student 1 and another student, Student 6, did not receive the 1:1 Para-educator services required by their IEPs because their Para-educators were also assigned to support other students.

The SE Teacher/Case Manager told OCR that, based on her experience XX XXX XXXXXX XXXXXX XXX XXXXXX XXXXXX XXXX, IEPs did not generally specify that Para-educator support was required, what type of Para-educator was required, or whether the services should be delivered 1:1 or shared among students. She said IEPs routinely referred to Para-educator services as hours of SAI provided in the general education setting.

The SE Teacher/Case Manager also stated that IEP teams were generally not allowed by the District Special Education Department to determine that a student should receive 1:1 Para-educator services. The few students that she knew of with this type of support only got it into their IEPs because their parents fought for it. The SE Teacher/Case Manager told OCR that in practice the School clustered all special education students needing Para-educator services into one class per grade level and assigned one Para-educator to each of those classes to provide shared support to those students, regardless of the number of students in class needing this service. She stated that the District Special Education Department advised the School to cluster the students in this way.

The SE Teacher/Case Manager told OCR that in the 20XX-XX school year the School did not have enough Para-educator staff to cover all the hours in students' IEPs. In terms of requesting additional Para-educators, the SE Teacher/Case Manager remembered asking District-level personnel for more Para-educators, and their response would be for her to fill out this or that form. She had difficulty filling out the forms and getting an effective response from the District Special Education Department. The SE Teacher/Case Manager stated that students who did not receive their required Para-educator services during 20XX-XX did not progress as they should have.

20XX-XX School Year

The Principal reported to OCR that the only two students requiring Para-educator support in the 20XX-XX school year were Student 1 and Student 10. However, IEP documents provided by the District and information provided by the SE Teacher/Case Manager indicated that the following additional students had IEPs assigning them Para-educator support that school year: Student 4, Student 6, Student 7, and Student 11.

The documents showed that the School did not record the need for Para-educator services on IEPs in a consistent manner, Para-educator support was routinely articulated as SAI, and IEPs did not always record the type of Para-educator support needed, the specific number of support hours required, or whether the support was 1:1 or shared with other students. In addition, there were examples of students whose Para-educator support hours were reduced or increased without explanation.

The Principal also reported in her written statement that Student 1 and Student 10 received their required Para-educator services in 20XX-XX. However, District documents and information provided by the SE Teacher/Case Manager showed that these two students likely did not receive their required 1:1 Para-educator support because their Para-educators were also assigned to support other students.

The SE Teacher/Case Manager also told OCR that during the 20XX-XX school year there was still an insufficient number of Para-educators to meet the requirements of students' IEPs. She stated that there were no makeup services for students who did not receive the required number of hours of Para-educator services in 20XX-XX; students lost the hours because the School had no staff to provide make-up services. The SE Teacher/Case Manager said that XXX XXXXXXXX XX XXX XXX of the 20XX-XX school year and the Para-educator staffing issue at the School had not been resolved.

20XX-XX School Year

The District reported to OCR that in September 20XX a Special Education Department administrator completed interviews of the School Principal, a General Education teacher, and a Special Education teacher (who had just started in the 20XX-XX school year). The Principal and the General Education Teacher reportedly stated that students had in the past and still do receive the supplementary supports and accommodations included in their IEPs. The Special Education Teacher reportedly confirmed that there were two SEBTs, 1 SEA, and one SET assigned to the School for the 20XX-XX school year. The current Special Education Teacher told the District representative that previous concerns were resolved through a new process of requesting Para-educator support. She said that they cluster students differently and Para-educators are supporting other students in classes. They provided strategies to teachers and to Para-educators and met with all teachers and asked their preferences for scheduling.

The District also reported that the supplemental support information is frequently summarized in either a formal assessment report and/or within the Special Factors section of the student's IEP. It stated that the process could often be complex, involve multiple team members, and the support was frequently misunderstood by individuals not directly involved in the assessment and IEP process. It stated that the current nomenclature among Para-educators, despite District efforts to change perceptions, was that they were assigned as 1:1 staff for specific students. The District reported that this perception created confusion around the administration of supplemental support.

OCR did not receive or review other documentation from the 20XX-XX school year concerning Para-educator support. The SE Teacher/Case Manager had no knowledge about Para-educator support at the School during the 20XX-XX school year.

Analysis

Whether the District failed, and is currently failing, to implement Para-educator services required by IEPs of students at the School.

Legal Standard

The Section 504 regulations, at 34 C.F.R. § 104.33, require 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 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 school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Determination

Upon review of the facts gathered thus far during the investigation, OCR identified several compliance concerns regarding the District's and School's systems and practices for identifying and documenting the need for Para-educator services through the IEP process and for staffing and implementing Para-educator services which likely resulted in some students not receiving the amount and type of services required based on their individualized needs.

The evidence gathered thus far showed that the School did not clearly describe the need for Para-educator services in students' IEPs. For example, the School routinely labeled Para-educator services as SAI instead of supplemental support services and did not consistently specify what type of Para-educator was required, the number of hours of service required, or whether the service should be delivered 1:1 or shared among students. In addition, several IEPs had internal inconsistencies with respect to the amount or type of Para-educator support required.

As a possible result, the School did not accurately monitor the number of students requiring Para-educator services, what services were required for each student, whether changes to services were adequately supported, and whether the services were implemented as required by students' IEPs. For example, for the 20XX-XX, 20XX-XX, and 20XX-XX school years the School reported that the IEPs of only two students had Para-educator services required when several other students also required these services in each of these school years. The School also stated that one student's IEP in effect during 20XX-XX only required five hours of Para-educator services per week when in fact it required 28 hours per week. In addition, the School informed OCR that all students' Para-educator services were implemented in accordance with IEP requirements, but the evidence showed that several students likely did not receive the number of hours required by their IEPs in the 20XX-XX, 20XX-XX, and 20XX-XX school years, due to insufficient staffing. Finally, in the 20XX-XX and 20XX-XX school years the School increased, reduced, or eliminated Para-

educator support hours for students, which could have been a significant change in placement, without assessment or explanation in their IEPs.

The facts gathered thus far also indicate that the District's procedure for responding to School requests for increased allocation of Para-educator staff was not effective in addressing staffing shortages in a timely manner. Multiple requests did not yield assignment of additional Para-educators to the School. Instead, the District reportedly discouraged assignment of 1:1 Para-educators and advised the School to cluster students in the same class and share one Para-educator among those students. This approach was likely not based on the individualized needs of each student and resulted in some students not receiving the 1:1 full day support required by their IEPs.

Conclusion

OCR informed the District of its determination and it agreed to resolve the identified compliance concerns through a voluntary Resolution Agreement without a full investigation. 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 the complaint issue. OCR will monitor the implementation of the Resolution Agreement until the District complies with the terms of the Resolution Agreement. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issue other than that addressed in this letter.

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 individual may file a complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation extended by District staff during the investigation. If you have any questions regarding this letter, please contact me at (415) 486-5555.

Sincerely,

/s/

Sara Berman
Team Leader

Enclosure

Cc: Daniel C. Lowe, Esq.