



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

March 5, 2020

SENT VIA ELECTRONIC MAIL

Mr. Brad Mason, Ed.D.
Superintendent
Brea Olinda Unified School District
1 Civic Center Circle, Level 2
Brea, CA 92821
bmason@bousd.us

(In reply, please refer to OCR Complaint No. 09-18-1183.)

Dear Superintendent Mason:

On January 25, 2018, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against Brea Olinda Unified School District (District). The Complainant alleged discrimination against her son (Student)¹ on the basis of disability. Specifically, OCR investigated whether the District failed to provide the Student with a free, appropriate public education (FAPE) when it failed to evaluate the Student in a timely manner even though it had reason to believe that he needed special education or related services because of a disability.

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 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 entity, 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 and making a compliance determination, the District expressed an interest in voluntarily resolving this matter pursuant to section 302 of OCR's Case Processing Manual (CPM), and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

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

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Legal Standards

FAPE

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. 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.

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.

Evaluation and Placement

Section 104.35(a) of the Section 504 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. 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.

In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

Factual Findings to Date

According to the Complainant, the Student has blurry vision in the outer part of his visual field (peripheral) and he has a blind spot in the center of the vision field. The Complainant informed OCR that the Student's glasses help with his blurry vision but there is no way to correct the blind spot.

The District's records for the Student include a November 2015 student health survey which indicated that the Student has vision blindness, resulting in blindness in his vertical field of vision and the inability to play most sports.

According to the Complainant, on March XX, 2016, she informed the Student's XXX grade teacher that the Student was unable to see the whiteboard while wearing glasses because he only has use of his peripheral vision, which is hampered by a black patch of visual field when he stares straight ahead.

On September X, 2016, the Complainant emailed the Student's XXXXXXXX teacher. The Complainant informed the Student's XXXXXXXX teacher that the Student has a visual field defect.

District records dated November X, 2016, state that the Student has vision blindness, which resulted in blindness in his vertical vision of field. Records dated November XX, 2016, state that the Student's visual field defect creates a telescope like vision and he is not able to see above his eyes and below his mouth.

According to the District, the Student's grades were average or above average and there were no indications that the Student's vision impairment impacted his ability to access educational programs or activities. The District informed OCR that on January XX, 2018, the Student wore his glasses during the District's vision screening. The results from the screening indicated that with corrective lenses, the Student's vision was 20/30 in each eye.

According to the Complainant, the Student's visual impairment causes him anxiety because he is not able to distinguish between people and objects.

On January XX, 2018, the Complainant emailed the School Principal (Principal) and Director of Special Education (Director), to request an IEP for the Student to address his visual disability. The Complainant's email stated that the Student's visual disability caused him anxiety which had manifested in a behavioral incident and further expressed concern that the District failed to take his disability into account when it disciplined him.

The District informed OCR that prior to January XX, 2018, there had been no communication from the Complainant or School staff regarding the Student's disability.

On January XX, 2018, the Director responded to the Complainant's email. The Director stated that the District was unaware of concerns regarding the Student's vision or resulting anxiety and that he is a good student who performs well in school related activities. The Director also stated that the District would provide the Complainant a proposed assessment plan for the Student and would convene an IEP meeting after the Student was assessed.

On February X, 2018, the District emailed the Complainant an Assessment Plan for the Student in the areas of Academic Achievement, Health, Intellectual Disability, and Social Emotional/Behavior and Adaptive Behavior and provided her with procedural safeguards.

On February XX, 2018, after reviewing the Assessment Plan, the Complainant emailed the Director and the Principal to clarify that the Student has a visual impairment. She explained that he cannot see above his eyes and below his nose, that there is a blind spot in the middle of his visual field and that his vision impairment affects him educationally, physically, and socially. The Complainant also explained that the Student wears glasses to correct some blurriness and included two pictures of the Student's visual perspective. The Director responded with an updated Assessment Plan which included an ophthalmologist assessment.

On February XX, 2018, the Complainant signed and emailed the Assessment Plan to the District.

The Student was examined by an ophthalmologist on March X and XX, 2018.

On May X, 2018, the District convened an IEP meeting to review the Student's assessment results and to determine his eligibility. The IEP team consisted of the School Psychologist, ophthalmologist, Special Education Teacher, District Administrator and the Student's Teacher, the Complainant, and the Student's stepfather. During the meeting, the ophthalmologist shared that the Student has reduced vision and visual field loss, a history of an eye disease which causes abnormal blood vessels to grow in his retina, and can lead to blindness, retinal detachments, and his peripheral vision is impacted. The ophthalmologist stated that the Student may have trouble seeing the board in class but he can compensate by moving his head around. The ophthalmologist explained that the Student did not meet the Special Education Local Plan Area (SELPA) threshold for a disability based on his vision impairment and was not eligible for special education services or aids. During the meeting, the Complainant shared that the Student takes longer to complete his schoolwork at home and experiences anxiety due to his visual impairment and compensates for his poor vision by standing close to people and moving his head around.

The Complainant told OCR that it was difficult for the Student to access his education due to his vision impairment because he missed problems he could not see and compensated for his difficulty completing reading requirements by listening to audio books.

The Student currently attends another district (District 2).

Analysis

Section 104.35(a) of the regulations requires a school district to conduct a timely evaluation when it is aware of a student's disability or has reason to suspect a student has a disability. In this case, there are entries in the Student's records that could have led the District to suspect the Student had a disability as early as November 2015.

On January XX, 2018, the Complainant requested an IEP for the Student due to his visual impairment and related anxiety. Although the District informed OCR that prior to January XX, 2018 there had been no communication from the Complainant or School staff regarding the Student's disability, the Student's records indicate that the District had notice as early as November 2015 of the Student's vision blindness, including that it prevented him from being able to participate in most sports. Records from September and November 2016 further show that the District was aware that the Student's visual field defect created a telescope like vision and that he

was not able to see above his eyes and below his mouth. Thus, OCR is concerned that the District may have had reason to believe that the Student had a disability for years without conducting an assessment.

According to the District, the Student's grades were average or above average and he did not qualify for special education and related services because there were no indications that his vision impairment affected his ability to access his education. OCR is concerned that the District did not use the appropriate standard—whether the student has a physical or mental impairment that substantially limits a major life activity—in determining whether to evaluate the Student for special education related services or aids.

Because the Student's records regarding his vision could have given the District reason to suspect the Student had a disability as early as November 2015, OCR is concerned that the District's failure to conduct an assessment until March 2018 and convene an IEP meeting until April XX, 2018 may have denied the Student a FAPE.

Conclusion

Prior to completing its investigation, the District informed OCR that it was interested in voluntarily resolving this matter.

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 allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution 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 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 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, OCR will seek to protect, to the extent provided by the law, personally identifiable information, which,

if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR would like to thank Ms. Kerrie Torres for her assistance and collaboration in this matter. If you have any questions about this letter, please contact Civil Rights Attorney Nezhia Burkes at (415) 486-XXXX or at Nezhia.Burkes@ed.gov.

Sincerely,

/s/

Joseph Wheeler
Team Leader

cc: Kerrie Torres, Assistant Superintendent, Educational Services (email only)