



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

September 20, 2018

Robert G. Nelson
Superintendent
Fresno Unified School District
2309 Tulare St.
Fresno, California 93721

Re: OCR Docket #09-18-1271

Dear Superintendent Nelson:

This letter is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Fresno Unified School District (District). Specifically, the complaint alleged that the District discriminated against the Student¹ on the basis of disability when it failed to provide the Student with a free, appropriate public education (FAPE) when it failed to implement the Student's Section 504 plan and behavior support plan during the 2017-18 school year.

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.

During its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant. The facts gathered to date, legal standards, and description of OCR's resolution of this case are summarized below.

¹ OCR previously notified the District of the names of the Complainant and the Student. The Complainant's and the Student's names are not included here for privacy reasons.

Facts

During the 2017-18 school year, the Student was enrolled in the XXXX grade at a high school (School) in the District. The School has a large campus and student population. Students are divided into five “university” offices (Office 1, Office 2, Office 3, Office 4, Office 5) depending on their grade, alphabet of their last name, and/or academy/program (AVID, Doctor’s Academy, Men’s Alliance, etc.). Each university office has its own vice principal, counselor and administrative staff that services its’ assigned students. The university vice principals report to the School principal. The Student was initially placed under the authority of Office 1 and Vice Principal 1 during fall 2017.

The Student was diagnosed with Oppositional Defiance Disorder and unspecified Episode Mood Disorder and received services under a Section 504 Plan. The Section 504 Plan signed on May XX, 2017 was in effect at the beginning of the 2017-18 school year.

The Student’s approved disability accommodations included the following:

- 1) Teachers to avoid speaking to Student in a loud voice. Use soft but firm tones.
- 2) Student is accountable for violating cellphone policy. If phone is out, ask Student for the phone. If Student refuses, send Student to office. Further violations will result in Student suspension.
- 3) When giving Student a directive use phrases such as “please stop talking” or “please get to work”. Use physical proximity to speak with Student. In the event Student needs more extensive correction, Student is to wait outside the classroom until issue can be addressed.
- 4) Teachers are requested to be flexible and understanding. When Student feels overwhelmed, he is to ask privately (or establish a signal with the individual teacher) to be released to his home office. Student may not use phone while in the office or on the way to the office during class period. Student has 5 minutes to arrive at destination. Student is to walk to either the RP room or his office and remain there until instructed otherwise.
- 5) Preferential seating – [Student] prefers to sit at the rear of the class. However, there are concerns when he is not acknowledged or when he has questions that are not answered in a timely fashion. The recommendation is that the teacher will use proximity when appropriate to reduce the likelihood of Student being ignored.
- 6) Diminish Power Struggles – Provide [Student] simple directives and choices. State pre-determined consequences clearly before problems occur (each teacher should have a plan for when [Student] can use his cellphone if at all). Listen to the Student before reacting. Give brief and direct instructions in a calm tone. Discuss the problem privately with the Student. Walk away before the situation gets too “hot”.

The Complainant alleged that the vice principals and the Student’s teachers failed to interact with the Student as described under accommodations 1, 3, and 6, which

triggers the Student's negative behavioral responses. The Complainant stated that in late September 2017, the Student's XXXXXXXX teacher failed to provide the Student with his preferred seating in accordance with accommodation 5. The Complainant also described an incident when the Student was getting ready for a class test in XXXXXXXX. She said that the Student was permitted to use materials during the test and was going through his backpack for the materials. Instead of speaking to the Student in the manner described in accommodation 3, the XXXXXXXX teacher told him that he was not successful in the class because he was so disorganized. The Complainant said that the Student was embarrassed and upset because other students could hear the XXXXXXXX teacher's comment.

The Student was suspended over 13 days during the 2017-18 school year for behavior, such as defiance, arguing with an adult, refusing to follow directions, being disrespectful to an adult, using profanity/vulgarity towards an adult, cell phone use, and leaving class and school grounds without permission. From the start of the school year to December X, 2017, the Student was suspended for 12.5 days. The 504 team determined during a manifestation determination meeting held on December X, 2017, that the Student's behaviors were a manifestation of his disability. That team failed to discuss and make a determination as to whether the Student's 504 plan had been implemented. The Complainant asserted during the meeting and to OCR that the Student's 504 plan was not being implemented. Specifically, she stated that the Student's 504 plan accommodations pertaining to "power struggles" were not being followed by the vice principals.

Legal Standards

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.

Resolution

Based on the information gathered thus far, OCR had concerns regarding the School's implementation of the Student's 504 Plan, which resulted in the Student's multiple suspensions during fall 2017. OCR also had concerns that the School administrators, teachers and other staff, who have contact with the Student, may not completely understand the nature of the Student's disabilities and how to effectively interact with

him in a manner consistent with the accommodations in the Section 504 plan so that they don't trigger a negative response.

Prior to OCR making a final determination, the District expressed an interest in voluntarily resolving the allegation pursuant to section 302 of OCR's Case Processing Manual², and OCR agreed it was appropriate to do so. On September 17, 2018, without admitting to any violation of law, the District signed the enclosed Resolution Agreement, which, when fully implemented, is intended to address the allegation in the complaint. 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. OCR will monitor the implementation of the resolution agreement until the District is in compliance with its terms. 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 issues other than those 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 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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

OCR thanks Ms. Diandra Netto Vantrease, General Counsel, for the courtesy and cooperation extended to OCR during its investigation. If you have any questions,

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>

please contact Danette Ng, OCR Investigator, at (415) 486-XXXX or by email at Danette.Ng@ed.gov.

Sincerely,

/s/

for Zachary Pelchat
Team Leader

Enclosure

cc: Brian Beck, Assistant Superintendent of Special Education and Health Services
Diandra Netto Vantrease, General Counsel