



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 27, 2019
SENT VIA ELECTRONIC MAIL

Matt Wayne
Superintendent
Hayward Unified School District
XXXXXXXXXXXXXXXXXXXXXX

(In reply, please refer to case no. 09-18-1709)

Dear Superintendent Wayne:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Hayward Unified School District (District). The Complainant alleged that the District discriminated against the Student¹ on the basis of disability. Specifically, OCR investigated whether the District failed to provide the Student with a free, appropriate, public education (FAPE) by failing to implement the Student's Individualized Education Program (IEP), including the Student's behavior intervention plan (BIP), from March XX, 2018.

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 education system, the District is subject to Section 504, Title II, and their implementing regulations.

OCR began its investigation by gathering and reviewing documents and correspondence provided by the Complainant and the District, and by interviewing the Complainant. Prior to OCR completing its full investigation, the District voluntarily agreed to address OCR's area of concern with respect to the issue that was under investigation. This letter summarizes the applicable legal standards, the facts gathered to date during the investigation, and the terms of the resolution reached with the District.

¹ OCR notified the District of the identity of the Complainant and Student when the investigation began, and we are withholding names from this letter to protect personal 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.

Issue #1: Whether the the District failed to provide the Student with a FAPE by failing to implement the Student's IEP, including the Student's BIP, from March XX, 2018.

Legal Standard

The Section 504 regulations, at 34 C.F.R. § 104.33, require public school districts to provide a 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 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.

Facts Gathered to Date

The Student is currently a XXXXXX at a high school (School) in the District and is identified by the District as a student with a disability receiving services under an IEP. During the 2017-18 school year, when the Student was a XXXXXX at the School, the Student was placed into an independent study program for approximately the second semester of the 2017-18 school year. The Student's placement was reflected in an IEP team meeting on January XX, 2018 and the annual IEP team meeting on March XX, 2018.

Within the first month of the 2018-19 school year, the Student's IEP team met three times, placing the Student back in regular education classes, and one resource English class, as described in three amended IEPs, ending with the September XX, 2018 amendment IEP. The services in these IEPs, collectively referred to hereafter as the September XX, 2018 amendment IEP.

The Student's 2018-19 Schedule showed her in XXXXXXXX XXXXXXXXXXXXX XXXXXXXX XXXXX classes, XXX XXXXXXXX, XXXXXXXX XXXXXXXXXXXXX, XXX XXXXXXXXXXXXX XXXXXXXX.

The Complainant informed OCR that services and related aids not provided to the Student that were part of her IEP included shortened assignments, time to make up assignments, modified seating, and the BIP. The Complainant also described to OCR a delay in the BIP being completed, and that it was not in place or shared with teachers on September XX, 2018 because of a problem with the District electronic IEP management system, that lasted through approximately December, 2018, when she got a copy of the BIP. She said she signed the signature page of the amendment IEP on September XX, 2018, but the BIP was not included. The Complainant informed OCR

that the BIP was mostly not implemented in the Student's XXX classes, while it was mostly implemented in the XXX XXXXXXXX and other classes after December, 2018.

OCR reviewed the Student's IEPs for the specific services and related aids that the Complainant alleged were not provided to the Student. These items are discussed below.

#1) Shortened assignments – 2018-19 school year.

Shortened assignments are required by the September XX, 2018 amendment IEP as "reduced, shortened assignments." The Complainant informed OCR that the Student had to fight to get these shortened assignments, and alleged that for the Student's XXX, XXXXXXXX XXXXXXXXXX, and XXXXXXXXXX XXXXXXXX classes, the Student was not provided shortened assignments for every class every week. She did not provide any specific examples on particular dates for which this provision of the IEP was not implemented.

#2) Time to make up assignments – 2017-18 & 2018-19 school years.

Extra time to complete "work" and flexibility with "due dates," is a service in the Student's March XX, 2018 IEP and the September XX, 2018 amendment IEP. Both the March XX, 2018 and the September XX, 2018 amendment IEP, however provided confusing and problematic written dates for which this service was effective. For example, the March XX, 2018 IEP provided an effective date range for this service ending March X, 2018. The Complainant informed OCR that she was told by a case manager that the date issue for this service was an error by the District, and the Complainant informed OCR that the service was still to have been provided during the Student's independent study placement. However, according to the Complainant this service was not provided at all from March XX, 2018 to the end of the 2017-18 school year. The Complainant informed OCR that from September XX, 2018 through December XX, 2018, the class in which the Student was not provided time to make up assignments was XXX class. OCR did not interview the case manager or any other District employee about this service.

#3) Seating – 2018-19 school year.

Flexible seating to ensure auditory and visual access was a service listed in the Student's September XX, 2018 amendment IEP. The Complainant informed OCR that the class in which the Student was not given any flexible seating was XXX class.

#4) BIP – 2018-19 school year.

The District added a BIP to the Student's September XX, 2018 amendment IEP. The BIP for the Student, in summary, described the Student's target behavior and described and identified services to address this behavior, that included the teacher establishing

beforehand a non-verbal clue for the Student to give as a signal that allowed the Student to go to a cool off area as needed.

The District provided OCR a copy of a counseling log about the Student, and an entry dated November X, 2018, showed that on that day, an assistant principal gave the Complainant, in person, a copy of the Student's IEP, but the assistant principal noted in the log entry that the BIP was still missing. The log entry noted that the assistant principal emailed the Case Manager and the Program Specialist about the missing BIP.

Other Information

The school principal wrote in a counseling log entry for September XX, 2018 that he was going to be sure that the Student's IEP was being implemented. In addition, an assistant principal who attended the Student's IEP team meetings in September, 2018 wrote in a document provided to OCR that she was not fully aware of what IEP services had not been provided, but had done her due diligence, once she learned of IEP services, to communicate with the Student's teachers about providing them.

Analysis and Resolution

School districts must provide the services and related aids listed in an IEP that comprise an offer of FAPE. The evidence considered to date raised the concern for OCR that not all of these services, when they were included in applicable IEPs, were fully implemented by the District. For example, some IEP services may have had a typographical error indicating that the services were no longer to be provided. Also, School documents indicate that the BIP may not have been included amongst the IEP documents provided to the Student's teachers. Additionally, documents provided to OCR, such as counseling log entries, further indicate that School administrators were aware that there were implementation issues related to the Student's IEP and BIP.

To reach a determination about whether the District failed to provide the Student FAPE, OCR would need further information from the District; namely interviews with several employees for details surrounding the IEPs, and what was provided and when. However, prior to the conclusion of OCR's investigation, the District indicated its interest in voluntary resolution regarding the issue, and OCR agreed that such a resolution would be appropriate to resolve the issue. On March XX, 2019, the District entered into the attached Resolution Agreement (Agreement), which when implemented, is intended to resolve the concerns identified by OCR regarding the issue that was under investigation. Under the terms of the Agreement, the District agreed to hold a meeting to determine whether the Student needs compensatory and/or remedial services from the period of March XX, 2018 through December XX, 2018, and if so, to develop and complete a plan to deliver them.

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 the

complaint allegation. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement. Upon completion of the obligations under the Agreement, OCR will close the case.

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

Please be advised that the District may not harass, coerce, intimidate, 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about this letter, please contact the case resolution team.

Sincerely,

/s/

Kana Yang
Team Leader

Enclosure

cc: XXXXXX XXXXX
Director, Special Education and Compliance