



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

February 14, 2019

Frank Wells
Superintendent
Albany City Unified School District
XXXXXXXXXXXXXXXX

(In reply, please refer to OCR Docket Number 09-19-1544.)

Dear Superintendent Wells:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint, received on July 31, 2019, against Albany City Unified School District (District). The Complainant alleged that the District discriminated against a student (Student) on the basis of disability.¹ Specifically, OCR investigated whether the District failed to provide the Student with a free appropriate public education by failing to provide accommodations necessary for her to fully participate in physical education (PE).

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

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and the Complainant and a statement provided in the District's data response. OCR also interviewed the Complainant and District staff. Based on the facts gathered to date, OCR identified the following compliance concerns: that the District may have failed to timely convene and subsequently reconvene a Section 504 meeting; that the District may not have convened a group of persons knowledgeable about the evaluation data and the placement options; and, that the District may not have appropriate Section 504 procedural safeguards. The applicable legal standards, facts gathered, and resolution of this matter are summarized below.

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

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. 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.

Section 104.35(a) of the 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. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must 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, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Facts Gathered to Date

The Student was enrolled in XXXX grade during the 2018-2019 school year. The District held an annual Section 504 meeting on September XX, 2018. The Student's Section 504 Plan lists her impairment as XXXXXXXX XXXXXXXX and contained a variety of accommodations, including that for PE, the Student was allowed to observe the lesson or demonstration before the Student was asked to perform. The Section 504 Plan did not include any accommodations or modifications related to earning makeup points by running a mile.

According to School staff and records, the Student did not participate in a number of PE classes, particularly beginning in the second part of the fall semester through the spring semester, which significantly impacted her grade. The PE department has a policy that students can earn makeup points by running the mile (“makeup mile”) during the advisory period on Wednesdays and Fridays.

On January XX, 2019, the Complainant emailed the Counselor and other staff that the Student had been depressed for months and that the Student planned to run makeup miles to earn makeup points for PE. The Counselor replied that they could meet to develop a plan moving forward, and the Complainant responded that she would like to do that. Subsequently, on March X, 2019, the Complainant wrote to the Counselor requesting a Section 504 meeting.

On March XX, 2019, the Complainant emailed the Teacher that the Student had difficulty running alone and asked if there were alternatives to the makeup mile to earn makeup points. The Teacher suggested that one of the Student’s friends join her for the makeup mile and also offered that the Student could use the elliptical machine in the weight room during lunch to earn makeup points.

On March XX, 2019, the Complainant emailed the Counselor again requesting a 504 meeting. A Section 504 meeting was held on April X, 2019, which included the Counselor, the Assistant Principal, the Complainant, and the Student. The Student’s teachers submitted feedback forms in advance of the meeting. The Teacher’s form noted that the Student struggled with dressing for class, making up missing assignments, with anxiety, and doing things independently (as she needed a peer to do things with). According to the Complainant, the Student expressed during the meeting that she wanted to be able to use the stationary bike (in the gym) during advisory period to earn makeup points for PE as this would be less stressful for her. The Complainant told OCR that the Counselor and the Assistant Principal responded that the Teacher would have to approve of such an accommodation and therefore it was not included in the Section 504 Plan. According to the Counselor, she subsequently checked with the Teacher regarding use of the stationary bike and the Teacher replied that it would not be allowed unless it were included in the Student’s Section 504 Plan, in which case, she says she would have implemented it. The Counselor, however, was unsure whether including the stationary bike in the Section 504 Plan would be a modification of the PE curriculum, and therefore ultimately sought support from administrators.

On April XX, 2019, the Complainant emailed the Counselor asking her to inquire with the Teacher about use of the stationary bike whenever the Student “is not able to cope with her anxiety.” On April XX, 2019, the Complainant again emailed the Counselor requesting to schedule a meeting with the Teacher and the Counselor to discuss ideas to improve the Student’s grade. The Counselor replied that she spoke with the Teacher who said the stationary bike was not an option for makeup points, and that the only available alternative to the makeup mile was using the elliptical machine during advisory or lunch. The Counselor wrote that she would be happy to meet and suggested that the Complainant coordinate the meeting time with the Teacher.

On April XX, 2019, the Complainant emailed a school psychologist (Psychologist) asking if they could meet to brainstorm how to support the Student’s anxiety regarding PE and for “alternative options for PE.” The Psychologist forwarded the email to the Counselor and the Assistant Principal and responded that she would be happy to attend a Section 504 meeting. The Complainant responded that she would reach out to the Teacher “so we can all brainstorm together,” which she did, but the

Teacher was going on leave later that week. On May X, 2019, the Complainant emailed the Counselor asking to meet and to invite the Psychologist. On May X, 2019, the Counselor responded that they could meet with the Assistant Principal in the following weeks and suggested including the Student's XXXX XXXXXX counselor or outside provider rather than the Psychologist since the Student did not have a relationship with the Psychologist. The Complainant replied with her schedule and that she wanted the Psychologist's involvement. No meeting was held.

On May XX, 2019, the Complainant emailed the Counselor, the Psychologist and the Assistant Principal asking that they reconsider including the stationary bike option in the Student's Section 504 Plan. The Counselor emailed the Principal on May XX, 2019, that she was unsure whether the Complainant's request would be an appropriate accommodation and asked for guidance, and the Principal suggested scheduling a Section 504 meeting. The Counselor told OCR that she ultimately did not receive guidance on whether including accommodations for makeup miles to a Section 504 Plan was possible, and no Section 504 meeting was scheduled.

On May XX, 2019, the Complainant emailed the Principal and copied the Counselor requesting as alternatives to the mile: stationary bike; running half a mile instead of a full mile; and/or stationary bike or half mile during advisory period to earn makeup points. According to the Complainant, on May XX, 2019, the Principal called her suggesting that the Student walk the mile, but the Complainant explained that this would not work as the Student's concern was the length of time she would be alone, and walking a mile would take longer. On June X, 2019, the Principal emailed the Complainant suggesting that the Student meet with the new PE teacher to confirm what to do to help bring up her grade. The new PE teacher wrote that the Student would need to complete a full mile (either by walking under 15 minutes or by running), but that based on the Student's grade, he did not see a way for the Student to pass PE. The Student ultimately failed PE.

Analysis

As the District requested to resolve the complaint pursuant to Section 302, OCR did not conclude its investigation. However, based on the investigation thus far, OCR has initial, preliminary compliance concerns. With regard to the April 2019 Section 504 meeting, the District may not have convened a group of persons knowledgeable about the evaluation data and the placement options. Specifically, while the Teacher submitted a feedback form, no one in the meeting had knowledge regarding options for earning makeup points. As such, the Counselor had to reach out to the Teacher subsequently regarding the stationary bike option, and this was communicated back to the Complainant outside of the Section 504 meeting process. In addition, it may have been appropriate to have the Psychologist at the meeting as someone knowledgeable regarding the Student's disabilities to be able to provide insight into what accommodations may be appropriate both to earn makeup points, but also to ensure that the Student was able to fully access PE class.

Additionally, OCR notes that it took more than 2.5 months from when the Counselor initially offered to schedule a meeting for a Section 504 meeting to be held (although OCR also notes that it is unclear whether the Counselor's offer was for a Section 504 meeting or for a different type of meeting). In addition, subsequent to the April 2019 meeting, the Complainant requested further meetings, to include the Psychologist and the Teacher, but School staff did not schedule that meeting.

Finally, the District's procedural safeguards are specific to the IDEA, and do not make reference to Section 504, including describing some requirements for IEP meetings that are not requirements for Section 504 meetings. In addition, the procedural safeguards reference some avenues for disputing placement decisions that do not apply to students who go through a Section 504 process, for example the ability to file for due process with the Office of Administrative Hearings. OCR is concerned that parents and guardians of students going through a Section 504 process will have inaccurate information as it relates to their rights and avenues available for addressing their concerns.

Prior to OCR finishing the investigation, including interviewing the Principal and the new PE teacher, the District requested to resolve the complaint.

Overall Conclusion

This concludes the investigation of this complaint. To address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the allegation and the information obtained by OCR during its investigation. Pursuant to the resolution agreement, the District will: conduct a Section 504 meeting to determine what accommodations, if any, the Student should have received for her PE class, and if so, to determine whether the Student needs compensatory and/or remedial services as a result; establish and implement Section 504 procedural safeguards; and, conduct training to District and School staff on the District's Section 504 and Title II obligations to provide students with a FAPE, the new procedural safeguards, and the evaluation and placement process.

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, 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 regarding this letter, please contact Shana Heller, Attorney, at (415) 486-XXXX or at Shana.Heller@ed.gov.

Sincerely,

/s/

James Wood
Team Leader

Enclosure

cc: Marie Williams
Assistant Superintendent, Educational Services