



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

October 25, 2023

VIA ELECTRONIC MAIL

Mark W. McLaughlin, Ed.D.
Superintendent
Conejo Valley Unified School District
750 Mitchell Road
Newbury Park, CA 91320

(In reply, please refer to case no. 09-21-1077)

Dear Dr. McLaughlin:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has resolved its investigation of the above-referenced complaint against the Conejo Valley Unified School District (District). The Complainant alleged that the District discriminated against her son (Student) based on his disability when it denied his interdistrict transfer request in the 2020-21 school year.¹ OCR opened its investigation under 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 also opened the investigation under Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, 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 public recipient of federal financial assistance, the District is subject to Section 504, Title II, and their implementing regulations.

During its investigation, OCR received information and documentation from the Complainant and the District and interviewed the Complainant and relevant District staff. As detailed below, the District sought to justify its denial of the Student's interdistrict transfer request on the grounds that it lacked the staff needed to provide the speech and language services required by the Student's individualized education program (IEP) in the home district because the District could not provide such services to 99 of its own students when the Student applied for a transfer. Though OCR's investigation did not initially include the issue of whether the District denied its own students a free appropriate public education (FAPE) by failing to provide them with speech and language services required by their IEPs during the 2020-21 school year, this letter addresses that issue as well based on the District's raising it during the investigation.

¹ OCR stated the names of the Complainant and her son in its notification letter to the District and is not restating them here in the interests of privacy.

Based on the evidence obtained to date, OCR has concluded that the District violated Section 504 and Title II by denying FAPE to 99 District students by failing to provide them with speech and language services required by their IEPs in the 2020-21 school year and by not remedying all of these denials with the provision of compensatory services. Prior to OCR completing its investigation of the District's allegedly discriminatory denial of the Student's interdistrict transfer request and making a compliance determination, the District expressed an interest in voluntary resolution of this allegation under Section 302 of OCR's *Case Processing Manual* (CPM).² OCR determined that a 302 resolution was appropriate, and the District signed the enclosed Resolution Agreement (Agreement). The Agreement resolves OCR's compliance concerns about the interdistrict transfer allegation under Section 504 and Title II and the District's denial of FAPE to 99 of its students in 2021 discussed below.

Facts

At all pertinent times, the Student was a resident of the [redacted content] School District (home district) and was eligible for and receiving special education services under the Other Health Impairment category through an IEP created by the home district. During the 2020-21 school year, the Student was enrolled in [redacted content] in the home district.

In December 2020, the Complainant began communicating with District staff about the possibility of transferring the Student to the District for his educational services. Thereafter, on December [redacted content], 2020, the Complainant submitted an interdistrict transfer request to the District through its prescribed form. The form is titled "Interdistrict Transfer Agreement For School Districts in Ventura County" because these districts have a Memorandum of Understanding (MOU) permitting interdistrict transfers among them under certain terms.³ The form requires the signed approval of the home district, and the Student's home district signed the form.

The form required the Complainant to provide basic information about the Student and herself. The form also asked what "special services" the student had received and offered these four choices: Gifted (GATE), Section 504, Special Education, and English Language Learner. Immediately following this inquiry, the form asked for the "current placement" of the student and if the student was receiving special education services, offering four choices from which to select: special day (SDC), resource (RSP), non-public school (NPS), and pending assessment. The Complainant indicated that the Student was receiving special education services and that his current placement was resource (RSP).

On December [redacted content], 2020, the District requested from the Complainant a copy of the Student's current IEP. After the Complainant sent the IEP to the District, its director of special education (director) reviewed the IEP.

² OCR's CPM (July 18, 2022) may be found at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

³ California Education Code Section 46600(a) permits school districts to reach agreements with other districts to accept interdistrict transfer applications and is silent as to whether and how districts may take a student's disability or services required by an IEP or 504 Plan into account.

On January [redacted content], 2021, the Complainant called multiple District administrative staff members and requested to speak with the individual who was evaluating the transfer request for the Student. Her attempts were unsuccessful. On January [redacted content], 2021, the District notified the Complainant that it had denied the transfer request due to “program impact.” On the same date, the District informed the Complainant that the District assistant superintendent made the decision. The Complainant communicated with him about the decision both telephonically and through email. During these communications, the assistant superintendent maintained that the denial was based on program impact and incorrectly told the Complainant that there was no appeal of his determination.

The District informed OCR that the assistant superintendent’s determination was based on information given to him by the director. The District further stated that if a student requires “related services” (e.g., speech/language, occupational therapy, physical therapy, vision services, deaf/hard of hearing services, adapted physical education), the director reviews the caseloads of the District’s qualified special education staff and current vacancies. If there is a shortage of these staff and the District is unable to serve its currently enrolled students due to the staff shortage, the director will determine there is a “program impact” that precludes granting the interdistrict transfer request.

After the director reviewed the Student’s IEP and determined that he required the services of a speech and language pathologist, the director concluded there was a program impact because the District was unable to serve 99 of its own students in two different schools due to an extreme shortage of speech and language pathologists. The District reported that this shortage was caused by multiple staff members and contractors resigning or taking extended personal leave. The District told OCR that it had been unable to fill the positions or contract for additional services despite four job postings that ran for five months, and despite fifteen interviews with non-public agencies. The District informed OCR that for the months of October 2020 through December 2020, when the Student sought to transfer and during the COVID pandemic, the District had approximately 99 students who did not receive any of their IEP speech/language services and, that from January [redacted content], 2021, to January [redacted content], 2021, the District had approximately 44 students who did not receive any of their IEP speech/language services. The District later provided OCR with limited information indicating that some, but not all, of these students had been provided with compensatory speech/language services as a result of this gap in services.

The director told OCR that in making her determination and recommendation to the assistant superintendent to deny the Student’s transfer, she did not consult with the Student’s parent, the Student’s home district, any member of the IEP team at the Student’s home district, the District’s Special Education Local Plan Area (SELPA), any of the District speech and language pathologists, or anyone else about the Student’s disability or the services required by the home district’s IEP. She also did not review or have any evaluations, assessments, reports, past IEPs, or any other document related to the Student’s disability or the IEP-required services. Her determination was based solely on what was stated in the Student’s IEP.

The director also told OCR that she did not consider possible alternative means of providing the speech and language services to the Student such as requesting that the Student's home district continue to provide the speech and language services to the Student after his enrollment in the District in exchange for payment, a reciprocal provision of services, or any other form of compensation. She indicated that she did not know if such an arrangement was permitted but also acknowledged that she was not aware of anything that prohibited it.

As a result of the District's denial of the transfer request, on January [redacted content], 2021, the Complainant revoked consent for the Student's home district to provide him with special education services, resulting in the Student becoming a general education student. On January [redacted content], 2021, the Complainant submitted a new interdistrict transfer request to the District with the Student being classified as a general education student only and without any IEP or receipt of special education services. On January [redacted content], 2021, the District granted the transfer request and the Student enrolled in the District as a general education student. The Student subsequently was again evaluated for special education services and the District developed an IEP for him. The Student later left the District.

The District maintains a board policy (BP) and an administrative regulation (AR) that address interdistrict transfers. BP 5117, titled "Interdistrict Attendance," provides, in pertinent part:

Upon receiving a permit for transfer into the district that has been approved as by the student's district of residence, or upon a written request by students' parents/guardians, the Superintendent or designee shall review the request and may approve or deny the permit subject to the terms and conditions of the interdistrict attendance agreement.

* * * * *

The Superintendent or designee may deny the granting of an interdistrict attendance permit because of overcrowding within district schools or limited district resources.

AR 5117, titled "Interdistrict Attendance Permits," states, in pertinent part:

The Superintendent or designee may deny initial requests for interdistrict attendance permits due to limited district resources, overcrowding of school facilities at the relevant grade level or based on other considerations that are not arbitrary. However, once a student is admitted, the district shall not deny continued attendance at the approved school because of overcrowded facilities at the relevant grade level.

While the above excerpts notify parents that interdistrict transfer requests may be denied, AR 5117 and BP 5117 are silent with respect to nondiscrimination in the denial process.

The District maintained a page at its website that gives information about the interdistrict transfer program, including a link to the fillable application form and directions to submit

a copy of the student's Section 504 Plan or IEP with the application. Neither the form nor the webpage stated or explained how a student's receipt of special education services and Section 504 plans/IEPs affect an interdistrict transfer request or how they will be considered in the determination of whether to grant or deny a request. The form and website also were silent with respect to nondiscrimination and how the District would consider the special education services required by the Student's IEP or Section 504 Plan when evaluating an interdistrict transfer request.

Legal Standards

Under the Section 504 and Title II regulations, no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in a program of the recipient.⁴ Further, under these regulations, a school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service or afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.

In addition, under the Title II regulations, a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities from equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8). Under the Title II regulations, a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i).

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR assesses whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the different treatment has resulted in the denial or limitation of services, benefits, or opportunities to the individual with a disability. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for disability discrimination. For OCR to find disability discrimination in the interdistrict transfer context based on the facts of this case, the preponderance of the evidence must establish that the school district's denial of the interdistrict transfer request was based on the student's disability and was discriminatory because the different treatment was not justified by a nondiscriminatory reason like the fundamental alteration defense available to public school districts under Title II and Section 504.

⁴ 34 C.F.R. §§ 104.4(a) and (b) and 28 C.F.R. §§ 35.130(a) and (b).

The Department's Section 504 regulations require public school districts to provide a FAPE to all students with disabilities in their jurisdictions.⁵ A student with a disability attending a public school district (the home district) with an IEP created by the home district who applies to transfer into another public school district (the receiving district) is not "in the jurisdiction" of the receiving district at the time of the application and thus the receiving district has no FAPE obligation to the student at the time of the application. The Department's Section 504 regulations define a FAPE 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 students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation, and placement, and due process protections. Districts may implement a Section 504 plan developed in accordance with these requirements or an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) to meet these FAPE requirements. Generally, violations of Section 504, including the Department's implementing regulations, also constitute violations of Title II because it provides no less protection than Section 504.⁶

Legal Analysis

The nondiscrimination mandates of Section 504 and Title II apply to interdistrict transfer programs that public school districts offer to students residing in other districts. These nondiscrimination mandates require districts participating in interdistrict transfer programs to give students with and without disabilities the opportunity to transfer and prohibit the receiving districts from denying an interdistrict transfer because of the student's disability and/or special education services required by the student's IEP or Section 504 Plan in the home district except in rare circumstances, like where the receiving district can demonstrate that providing such services would result in a fundamental alteration of the receiving district's interdistrict transfer program.

In this matter, the Complainant sought a transfer of the Student from the Student's home district to the District. The District's interdistrict transfer program required the Complainant to (1) complete and submit its "Interdistrict Transfer Agreement," which required the Complainant to identify the Student as receiving special education services, and (2) to submit a copy of the Student's IEP. The Title II regulations prohibit public entities like the District from imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities from equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8). Here, the District needed to know if the special education services had to be provided in a SDC, a RSP, or a NPS to determine if there were space in the classroom(s) that the Student needed.⁷

⁵ 34 C.F.R. § 104.33.

⁶ See 28 C.F.R. §§ 35.103(a) ("Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.").

⁷ If, for example, the Student's IEP required placement in a special education program that did not exist in the District, the District would need to know this and assess if creating the new program would constitute a fundamental alteration of its interdistrict transfer program.

The District's director reviewed the Student's IEP and recommended to the assistant superintendent that the District deny the Student's request to transfer because of the "program impact" of the request. The assistant superintendent endorsed the director's recommendation and informed the Complainant of the determination to deny the transfer request because of "program impact." The District informed OCR that the "program impact" was a shortage of speech and language pathologists that had resulted in 99 of its currently enrolled students with disability not receiving their required speech and language services from October 2020 through December 2020. In other words, because the Student's IEP required speech and language services, permitting the Student's transfer into the District would have resulted in a denial of such services and added to the existing backlog of required services for the 99 District students.

The District's admitted failure to provide these 99 students with the services required by their IEPs between October and December 2020 denied them a FAPE in violation of the Section 504 regulation obligating the District to provide a FAPE to students in its jurisdiction. OCR determined that this violation persisted for 44 of these 99 students between January [redacted content], 2021, after the District denied the Student's interdistrict transfer request on January [redacted content], 2021. At OCR's request, the District later provided information indicating that it provided compensatory services to some of these students, but it could not provide documentation that all of the FAPE denials had been remedied.

Furthermore, the District's denial of the Student's interdistrict transfer request raises compliance concerns under Section 504 and Title II. The process utilized by the District to evaluate whether to grant the transfer request appears to be insufficient to ensure that the Student was not being denied the transfer request based on disability discrimination. Based on the facts gathered to date, OCR is concerned that the District may have denied the transfer request based on the Student's disability-related needs without justification. OCR is concerned that the District's stated legitimate non-discriminatory reason for that different treatment, a shortage of staff to provide speech and language services, may not be a legitimate non-discriminatory reason. The District asserted to OCR, among other reasons, that this reason was non-discriminatory because the District similarly denies interdistrict transfer requests for other students when a particular grade level is at capacity. OCR notes that limited staffing capacity for a particular type of special education services (like speech and language services) is not analogous to reaching capacity in a given grade level, class, or school and applying these capacity limits uniformly to students with and without disabilities.

Here, the District's denial was not based on space in a grade level, class, or school but rather on its insufficient number of speech and language pathologists to provide the speech and language services required by the IEPs of its own 99 students and the Student seeking to transfer into the District.

The evidence obtained to date indicates that prior to denying the transfer request, the District did not take any steps to obtain any information about the Student or his transfer request other than what was stated in the IEP sent by the Complainant. The District never spoke with the Complainant, the Student's home district or IEP team, the individual(s)

who were providing services to the Student, the District's SELPA, any of the District speech and language pathologists (who would be the individuals providing the services that were determined to be too impacted to permit the Student's transfer), or anyone else about the Student's disability, the nature of it, the services the Student required, or how and in what manner those services could be provided. The District also did not consider any alternative or comparable means of providing the "impacted" services to the Student, including by mutual agreement with his home district and those who were currently providing the services to him. Exploration of such alternatives may have identified a means of providing him with the required services without fundamentally altering the District's interdistrict transfer program. As noted above, prior to OCR determining whether the denial was justified based on a fundamental alteration defense, the District expressed interest in resolving the interdistrict transfer allegation under Section 302 of OCR's CPM, and OCR determined that it was appropriate to do so.

OCR also identified concerns about documents used to implement the District's interdistrict transfer program. OCR recognizes that the District needs to know the special education and related services required by an interdistrict transfer applicant's IEP or 504 Plan and their setting to determine if it can provide those services in the requisite classrooms/settings or whether providing the required special education and related services would result in a fundamental alteration of the interdistrict transfer program. However, the District's application materials do not explain to parents how the information requested about their child's special education services, including a copy of their IEP and/or Section 504 plan, will be used when evaluating applications to the interdistrict transfer program. Without this explanation and any statement of nondiscrimination, the application materials might dissuade a parent from requesting a transfer because the parent may reasonably believe that the District seeks the special education information to screen out students with disabilities in the application process.

Conclusion

Based on the above, OCR has concluded that the District's denial of speech and language services to its 99 students who required them as part of their IEPs denied those students a FAPE in violation of the Section 504 regulations, and that the District has yet to remedy all of these denials with the provision of compensatory services. Additionally, OCR has concerns that the District's denial of the Student's interdistrict transfer request may have constituted disability discrimination but has not made a compliance determination based on the District's interest in resolving the allegation prior to OCR completing its investigation.

Without admitting to any violation of law, the District entered into the enclosed Agreement. Under the Agreement, the District will revise its interdistrict transfer policy and related forms and communications to include a nondiscrimination statement, will provide training and guidance to District staff who are involved in the interdistrict transfer program, will submit its determinations for interdistrict transfer applications to OCR for review, and will conduct a review to determine what compensatory education services are still needed for the 99 students who did not receive speech/language services due to the shortage of speech/language pathologists during the 2020-21 school year.

Based on the commitments made in the 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 compliance concerns and/or identified violations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement and the statutes and regulations at issue in the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other statutory or 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, an individual may file another complaint alleging retaliation.

Under the Freedom of Information Act (FOIA), 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 law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

Thank you and counsel for the District, Howard Fulfroost, Melissa Hatch, and Lyndsy Rodgers, for your cooperation and assistance in resolving this matter. If you have any questions about this letter or the resolution of this matter, please contact Alan Konig, Civil Rights Attorney, at (415) 486-5527 or Alan.Konig@ed.gov.

Sincerely,

/s/

James M. Wood
Team Leader

Enclosure: Agreement

cc: Howard Fulfroost, Esq.
Melissa Hatch, Esq.
Lyndsy Rodgers, Esq.