



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 16, 2022

VIA ELECTRONIC MAIL

Dave Fehte
XXXXXXXXXXXXXXXXXX
Executive Director
Clayton Valley Charter High School
1101 Alberta Way
Concord, CA 94521

Re: OCR Complaint No. 09-22-1325

Dear Director Fehte:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Clayton Valley Charter High School (School). The Complainant alleged that the School failed to provide the Student with a free, appropriate, public education (FAPE).¹ Specifically, OCR investigated the following issues:

- 1) Whether the School denied the Student a FAPE by not implementing the Student's Section 504 plan by not allowing the Student to: use the restroom as needed, access their cell phone, and rest or stop as needed during physical education class;
- 2) Whether the School denied the Student a FAPE by failing to follow adequate procedures for evaluation and placement of the Student; and
- 3) Whether the School responded promptly and equitably to complaints, made on behalf of the Student, of discrimination based on 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, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving 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. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department, the School is subject to Section 504 and Title II.

¹ OCR previously provided the School with the identity of the Complainant and Student. 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.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the School. Specifically, OCR interviewed and reviewed documents provided by the Complainant, and reviewed the School's July 21, 2022 and July 29, 2022 data responses. Prior to OCR completing its investigation and making a compliance determination, the School expressed an interest in voluntary resolution pursuant to section 302 of OCR's *Case Processing Manual (CPM)*², and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Issue 1: Whether the School denied the Student a FAPE by not implementing the Student's Section 504 plan by not allowing the Student to: use the restroom as needed, access their cell phone, and rest or stop as needed during physical education class.

Legal Standards:

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 students without disabilities 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. Districts may implement a Section 504 plan developed in accordance with these requirements, or an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) to meet 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.

Facts:

The Student's Section 504 Plan

At the time of the OCR complaint, the Student was a XXXXXXXXX at the School. The Student receives special education services and accommodations through a Section 504 plan for XXX-redacted content-XXX. The Student's Section 504 accommodations that are relevant to this matter include: 1) they will be allowed to access to their cell phone when using the restroom for medical issues; 2) they will not be penalized for absences or lateness related to their medical conditions; 3) they will be allowed to drink water and use the restroom as needed without penalty; and 4) teachers will not penalize the Student in physical education when the Student needs to rest or stop.

Relevant District Policies and Procedures

² *Case Processing Manual* (July 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

The District's *Section 504: Policies, Procedures, and Parent Rights Regarding Identification, Evaluation, and Education* state that students' Section 504 plans will specify how special education and/or related services will be provided and identify the person responsible for ensuring that all components of the Section 504 plan will be implemented. According to relevant policies, school staff who will provide services will be informed of the services, trained on implementation of the services, and provided a copy of the Section 504 Plan. The School will provide a copy of the Section 504 plan to any substitute teacher or other secondary teacher who may be responsible for implementing the Section 504 Plan on a temporary basis.

Implementation of the Student's Section 504 Plan

The Complainant alleged that the School did not effectively implement the Student's Section 504 plan during the 2020-2021 and 2021-2022 school years when the School failed to distribute the Section 504 plan to the Student's teachers in a timely manner, and when School staff interfered with the Student using their accommodations. The Complainant stated that she sent the School a copy of the Student's XXXXX school Section 504 plan when the Student matriculated to the School in August 2020. According to the Complainant, the Section 504 plan was not distributed to the Student's teachers for approximately the first two months of the 2020-2021 school year, and during this period the Student had no access to special education services or accommodations.

According to the School's 2020-2021 academic calendar, the school year began on August XX, 2020. On August XX, 2020, School healthcare staff requested that the Complainant provide current medical information to update the Student's Section 504 plan. The same day, the Complainant shared a description of the Student's medical conditions and stated that accommodations, such as, use of restrooms at any time, drinking water in class, and self-limiting in physical education class were necessary. On October X, 2020, the School informed the Complainant that the Student was failing physical education. On or around October XX, 2020, the School convened the Section 504 team, attendees included the School Counselor, School Nurse, the Student, the Complainant, and four of the Student's core teachers, but not the Student's primary physical education teacher. The Section 504 team agreed to, among other things, accommodations including the Student would not be penalized for absences related to their medical conditions, immediate use of the restroom and access to water as needed, and no penalization for self-limiting in physical education.

The Complainant told OCR that prior to the October 2020 Section 504 team meeting, the Student's teachers were unaware that the Student had a Section 504 plan. Following this meeting, the Complainant sent the Student's primary physical education teacher a copy of their Section 504 plan. The Student, however, was penalized for self-limiting when the Student received instruction from other physical education teachers who were unaware of the Student's Section 504 plan. The Complainant stated that as a result of being penalized for self-limiting, the Student received a "C" grade in physical education in fall 2020.

The Complainant stated that at the beginning of the 2021-2022 school year there was approximately a one-month delay in distributing the Student's Section 504 plan to their teachers. According to the Complainant, the Section 504 team met on September XX, 2021, and agreed to

add, in addition to the accommodations enumerated above, a provision allowing the Student to use their cell phone for medical issues. The notes section of the Student's Section 504 plan stated that the Student needs access to their cell phone frequently and the Section 504 team planned to meet to create a plan for restroom access during the school day and to check restroom availability. On September XX, 2021, the Counselor emailed the Student's teachers informing them that the Student must have access to their cell phone at all times for medical purposes, so the Student should be allowed to leave the classroom with their phone.

The Complainant stated that during the 2021-2022 school year, the School did not develop a plan for restroom access during the school day. The Student had problems promptly locating available restrooms on campus because the administration locked several student restroom facilities due to concerns of students using vape pens in restrooms. The Complainant also stated that because the School did not circulate the Student's Section 504 plan to substitute teachers, the Student could not always use their accommodations when needed or was left to explain their accommodations to substitute teachers on their own.

The Complainant further stated that the Student was unable to use the restroom as provided in the Section 504 plan because School staff interrupted the Student while they were in a stall on at least three occasions when School staff unlocked or entered a stall occupied by the Student. This caused the Student a great deal of embarrassment and exacerbated their mental health conditions. According to the Complainant, the prospect of School staff interrupting the Student during a restroom break made the Student reluctant to use their accommodations as needed.

Analysis:

OCR identified compliance concerns that the School may have failed to implement the Student's Section 504 plan during the 2020-2021 and 2021-2022 school years. First, the School's failure to distribute the Section 504 plan to the Student's teachers during the first few months of both school years and its repeated failure to distribute the Section 504 plan to substitute and other secondary teachers who were in contact with the Student impacted the implementation of any accommodations for the Student. Second, the Student's Section 504 plan was not implemented when the self-limiting accommodation was not provided on several occasions as the Student was penalized for self-limiting in physical education, which may have contributed to the "C" grade for the course in fall 2022. Furthermore, while the Section 504 plan noted that the team would create a plan for restroom access during the school day and to check restroom availability, it appears that the plan was not developed as the Student was interrupted by School staff while using the restroom on several occasions. In order to complete the investigation to determine whether these instances constituted a denial of a FAPE, OCR would need to conduct further interviews with School witnesses to determine, for example, whether any special education services were provided during the early months of the 2020-2021 and 2021-2022 school years, the number of occasions substitute or other secondary teachers were not provided the Section 504 plan, the extent the Student was penalized for self-limiting during physical education, and the number of specific instances when the Student was unable to use their restroom accommodation. However, prior to completing the investigation, the School expressed an interest in voluntary resolution through a section 302 Resolution Agreement as described below, and OCR determined that it is appropriate to do so in this case.

Issue 2: Whether the School denied the Student a FAPE by failing to follow adequate procedures for evaluation and placement of the Student.

Legal Standards:

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 section 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:

District Evaluation and Placement Policies and Procedures

The District's *Section 504: Policies, Procedures, and Parent Rights Regarding Identification, Evaluation, and Education* state that a student may be referred by anyone, including a parent/guardian, teacher, other school employee or community agency, for evaluation under Section 504. If a request for evaluation is denied, the Section 504 Team shall inform the parents/guardians in writing of this decision and of their procedural rights.

Complainant's Request for Evaluation

According to the Complainant, on April XX, 2022, she emailed the School's Director of Academic Programs (Director) requesting a Section 504 meeting to evaluate the Student's need for new accommodations regarding their ability to use their cell phone and the restroom as needed. The next day, the Director responded in an email to the Complainant that he discussed her requests with School administrators and there was no need to add new "policies" to the

Student's Section 504 plan because "they [policies] would be standard/universal for all students." The Complainant did not receive information pertaining to her procedural safeguards following the Director's response to her request for an evaluation for the Student.

Analysis:

OCR identified a compliance concern that the School did not comply with Section 504 when it failed to provide the Complainant with procedural safeguards following the Director's determination that the Student did not need new accommodations and therefore, a Section 504 meeting was not necessary. In order to make a final determination, OCR would need to review all of the communications related to the Complainant's request for an evaluation of the Student, including reviewing emails, any meeting notes, or other written documents, as well as interviewing the Director and any other School staff members likely to have relevant information. Prior to the conclusion of OCR's investigation, the School expressed interest in resolving this issue through a section 302 Resolution Agreement as described below and OCR determined it is appropriate to do so.

Issue 3: Whether the School responded promptly and equitably to complaints, made on behalf of the Student, of discrimination based on disability.

Legal Standards:

OCR evaluates the appropriateness of a school's response to notice of disability discrimination by examining reasonableness, timeliness, and effectiveness. What constitutes a reasonable response will differ depending upon the circumstances. However, in all cases the school must conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, remedy the effects of the discrimination, and take steps to prevent the discrimination from recurring.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the school does not tolerate discrimination and will be responsive to any student reports of discrimination. The school also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Facts:

On or about March XX, 2022, the Complainant met with the Director following an incident when School staff unlocked a restroom facility that was occupied by the Student. According to the Director, during this meeting the Complainant reported one prior incident when staff attempted to enter a restroom stall occupied by the Student. The Complainant also stated that there were issues with the Student's Section 504 plan not being rolled out to all staff members, specifically, substitute teachers were not aware of the Student's Section 504 plan. The Complainant also stated that the Section 504 plan was not distributed to the Student's teachers in a timely manner at the beginning of the prior school year. The Complainant further explained to

the Director that the Student felt uncomfortable using their restroom accommodation knowing that they could be interrupted by school staff.

On April XX, 2022, the Complainant emailed the Director expressing concerns that School staff lacked knowledge of the Student's Section 504 accommodations specific to cell phone and restroom use and this made the Student uncomfortable being at school. The Complainant requested a Section 504 meeting to resolve her concerns, develop new accommodations in the Section 504 plan, and create a plan for distributing the Section 504 plan to applicable staff. The following day, the Director told the Complainant that she spoke with the Executive Director and other administrators to address the Complainant's concerns that 1) substitute teachers were unaware of the Student's Section 504 accommodations; 2) a plan be developed for the Student to have access to restrooms; and 3) a policy be created for knocking before entry of a locked restroom stall. The Director informed the Complainant that because these "policies" would be universal for all students, they would not be added to the Student's Section 504 plan.

On May XX, 2022, the Student reported to the Director that someone attempted to open a restroom door while they were using the facility. On May XX, 2022, the Director stated that she was working with the facilities department to determine whether new signage could be added to the restroom doors.

After receiving technical assistance from OCR, on or about June XX, 2022, the Section 504 team met and determined that during summer instruction, the Student would have access to all restrooms without limitation and School staff would knock three times before attempting to enter a locked restroom stall. The team further agreed that for the 2022-2023 school year, teachers would acknowledge before the beginning of the school year that they received and reviewed all Section 504 plans and would make substitute teachers aware of such.

In July 2022, the Complainant told OCR that during summer school, there was again delay in distributing the Student's Section 504 plan to instructors. Specifically, the Student's instructors were unaware of their accommodations until the Student made them aware. Furthermore, the Complainant stated that during summer instruction, substitute teachers did not receive the Section 504 plan on one or two occasions. The Complainant also stated that the Student felt very behind because of their accommodations were not implemented during the 2020-2021 and 2021-2022 school years. The Student received three failing grades during the 2021-2022 school year.

Analysis:

OCR identified a concern that the School may not have responded appropriately to the Complainant's internal complaints of disability based discrimination. To determine whether a school's response is appropriate, OCR looks to the reasonableness, promptness, and effectiveness of the response. Specifically, in March 2022, the Complainant expressed concerns to the Director that School staff were interfering with the Student's ability to use their approved restroom accommodation and that the Student's Section 504 plan was not distributed in a timely manner to their teachers. In April 2022, the Complainant further informed the Director in writing that the Student was having difficulty using their restroom accommodation and substitute teachers were generally unaware of the Student's accommodations. The Complainant also

requested a Section 504 meeting to address her concerns. The Director, instead of responding to the Complainant's concerns and request for the Section 504 meeting, denied the Complainant's request and determined that such a meeting was not needed.

Additionally, it appears that after receiving technical assistance from OCR, convening a Section 504 team meeting, and developing a plan to ensure timely distribution of the Section 504 plan to the Student's teacher, there was still a delay in the distribution of the Section 504 to substitute teachers. Therefore, OCR has concern regarding the promptness and effectiveness of the School's response to the Complainant's concerns.

In order to make a final determination, OCR would need to review relevant correspondence regarding the School's internal handling of the Complainant's concerns and interview the Director and any other School staff members likely to have relevant information. However, prior to the conclusion of OCR's investigation, the School expressed interest in resolving this issue through a section 302 Resolution Agreement as described below.

Overall Conclusion:

Prior to OCR completing its investigation and making a compliance determination, the School expressed an interest in voluntary resolution pursuant to section 302 of OCR's CPM and OCR determined it was appropriate to do so.

This concludes the investigation of this complaint.

To address the complaint allegations and OCR's concerns identified in the investigation, the School, without admitting to any violation of law, entered into the enclosed Resolution Agreement. The terms of the Resolution Agreement aim to rectify the compliance issues that OCR identified and to bring the School into compliance with Section 504 and Title II. Under the Resolution Agreement, the School will provide Section 504 training to relevant staff and administrators on the School's obligations under Section 504, including the evaluation and placement of students with disabilities and the implementation of approved accommodations under Section 504. The training will also discuss the School's responsibility to effectively respond to notice of disability discrimination. The Resolution Agreement further requires the School to convene a Section 504 meeting to determine individual remedies for the Student, such as, compensatory education and the development of a plan to inform all staff responsible for implementing their approved accommodations.

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 School 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 School'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 School must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because they filed a complaint or participated in the complaint resolution process. If this happens, an individual may file another complaint alleging retaliation.

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, personally identifiable 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 Lele Yutzy at Lele.Yutzy@ed.gov.

Sincerely,

/s/

Kana Yang
Team Leader

Enclosure

cc: Lisa A. Corr (by email only XXXXXXXXXXXXX)