



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 9, 2023

VIA ELECTRONIC MAIL

Leticia Salinas, Assistant Superintendent of Instructional Services
Fremont Unified School District
4210 Technology Drive
Fremont, CA 94538
lsalinas@fusdk12.net

Re: OCR Complaint No. 09-22-1639

Dear Assistant Superintendent Salinas:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Fremont Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated the following issues:

1. Whether the District denied the Student a free, appropriate public education (FAPE) by failing to evaluate the Student or provide instruction in a timely manner when it had reason to believe that the Student needed special education or related services because of a disability.
2. Whether the District treated the Student differently on the basis of disability on August XX, 2022, when it excluded the Student from the classroom and placed the Student's belongings outside.
3. Whether the District treated the Student differently on the basis of disability with respect to the Student's transfer from XX XXXXXXXXXXXX school (School 1) to another XXXXXXXXXXXX school (School 2).

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 public entity and a recipient of Federal financial assistance from the Department, the District is subject to Section 504 and Title II.

¹ OCR previously provided the Recipient 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 gathered evidence by interviewing and reviewing documents provided by the Complainant, reviewing documents provided by the District, and reviewing statements provided in the District's data response. Prior to OCR completing its investigation and making a compliance determination, the District expressed an interest in voluntary resolution pursuant to Section 302 of OCR's Case Processing Manual (CPM), and OCR determined it was appropriate to do so. The legal standards, facts gathered to date, and resolution are summarized below.

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 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. 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 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.

In addition, under the Section 504 regulations, at 34 C.F.R. § 104.4(a) and (b), 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 under any program or activity that receives Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1) a 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; 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; or limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

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 treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the district's actions were based on the individual's disability.

Facts

The following facts are relevant to OCR's analysis:

The District's Board Policy 6171.11 states that the "District shall conduct an active seeking-out program of individuals who may need special education programs and services." The District's website Special Education Process-Referrals states that for new enrollment of children between the ages of birth to 5, parents should complete enrollment online and schedule an appointment with Student Support Services. Once registration is complete, parents can request an evaluation for their child, at which time they will be directed to the Special Education department for a Child Find packet to submit. The District's Parent/Guardian & Student Handbook, though, states that for new enrollment between the ages of birth to 5, Student Support Services will enroll the child and provide the parent or guardian with a Child Find questionnaire. Once enrolled, the parent's request for assessment will be processed and an assessment team assigned.

During the 2022-2023 school year, the Student initially was enrolled in a general education XXXXXXXXXXXX classroom at School 1 in the District. According to the Complainant, the Student was non-verbal and had XX XXXXX diagnosis that pre-dated his enrollment. Student's older sibling had been attending School 1 for a few years in a special education class.

According to the Complainant, in Summer 2021, Complainant notified the District of Student's disability by phone and submitted his medical diagnosis, when trying to get an IEP evaluation appointment for Student and enroll him in XXXXXX for the 2021-2022 school year at the District's XXXXX XXXXXXXXXXX XXXXXX. Complainant was told it would be 3-6 months until an IEP appointment was available, and because of the Covid shutdown and teacher shortages, there was no space at the XXXXX XXXXXXXXXXX XXXXXX. Complainant therefore did not enroll Student in the District.

According to the Complainant, when enrolling the Student in the following school year, 2022-2023, the Student's family informed the District Enrollment Specialist of the Student's disability during a Zoom intake meeting on July X, 2022. They requested an evaluation and offered medical documents but were told the District must do their own evaluation, which would take 60-90 days. They were told the Student must attend the first day of class, in a regular classroom,

or would lose his placement. They asked for a Special Day Class or a paraprofessional but were told to talk to the principal or teacher on the first day of school regarding support. According to the Complainant, he or his wife emailed the principal of School 1 on August XX or XX, 2022, to let the principal know of the Student's disability and Complainant's concerns. The Complainant also stated that his older child's special education teacher was helping them navigate and had been discussing it with them since the previous year.

An Online Registration Summary form for the Student—submitted June XX, 2022, and modified by the District Enrollment Specialist on July X, 2022—lists “Speech Difficulties” and “Does not speak” as a medical or mental health condition. A handwritten note in the Student's file states “medical condition indicated interested in sped services.” In an email to the principal on August XX, 2022, the Complainant indicated he and his wife had been trying to get the Student in a special education class but could not because of delays in completing his testing, and they were told the Student had to come to the regular class before they could schedule testing with the school. In an email to the District on October X, 2022, Complainant stated, “[W]e had made it very clear from when we enrolled him to his first day that he is non-verbal and XXXXXXXX” and “we had asked multiple times to put him in a Special Needs Class as he is non-verbal and XXXXXXXX, but have not been told any details.” The District, however, stated that it had no record of the parents requesting in-person instruction with supports in the general education setting pending completion of a special education assessment and that the parents did not inform the principal that the Student might need an assessment for special education prior to the first day of school.

The Student attended the first day of school in a general education classroom on August XX, 2022. According to the Complainant, the family told the principal and a special education teacher about the need for a paraprofessional but was told the Student needed an IEP first. Complainant stated that his wife told the classroom teacher that the Student was non-verbal, XXXXXXXX, and had clothes for a XXXXXXXX XXXXXXXX; according to the Complainant's wife, the Teacher was visibly annoyed and said they did not do that. Complainant stated he received conflicting information regarding what happened on August XX – that the Teacher put or kicked the Student out, or that the Student refused to come inside so the Principal and a paraprofessional stayed outside with him. The Student's bag also was placed outside. Complainant stated he did not know how long the Student was outside, and there was no incident report. According to the Complainant, the Student did not return to School 1 the next day because Complainant did not want him to return without supports, and the principal had stated that without an assessment, he could not be in a special needs class and would be back in that XXXXXXXXXXXX class, without a paraprofessional. The principal proposed home instruction, and the family agreed.

Regarding the August XX incident, according to the District, the Student's class went to recess around X:XX. When the Student refused to return, the teacher contacted the principal, who came to the play structure to stay with the Student. The teacher placed the Student's backpack at the front of the classroom door, which she does when a student leaves and there is a potential that the student will not return to class. The principal stayed with the Student until X:XX, at which time he asked his secretary to contact the Student's parents to pick him up. A paraprofessional then stayed with the Student until his mother arrived. The Student's parents wanted to keep the Student home after this incident.

On August XX, 2022, a space opened at the Student's home school, School 2, and he was called back to it. According to the Complainant, he did not agree with this placement and contested the transfer during a Zoom meeting on August XX but was told to wait until the Student's IEP because the District could not just place the Student in a Special Day Class. Complainant was told it is District policy that the Student must go to the home school, but Complainant believed children without special needs, including his XXXXXXXXXXXX XXXXXXX, have been able to stop a transfer to the home school when they requested it. The Student's file shows the Student was enrolled "XX to [School 1]." It shows a "Regular callback to [School 2]" on 8/XX/2022 and start date there as a "Returning Overload." District documents state that call-backs to a home school on or before September XX must return to their home school. They state that if a child is not offered a space at the home school by the end of September, they may stay at the overload school for the remainder of the year. The documents OCR reviewed do not discuss the process for contesting a call-back to the home school—for example, whether the Overload Complaint Form should be used, or whether the issue should be raised directly to the home school or overload school principal, as Complainant indicated he did on August XX—or the effect, if any, of having a sibling in the overload school.

On August XX, 2022, the District convened a Student Study Team meeting for the Student. At this meeting, the Complainant was told the District would provide home instruction for the Student until his IEP could be done. According to the Complainant, two teachers contacted the family but neither showed up or called further. District emails show that between September X-X, the District was trying to find a Special Education teacher for Home Health Instruction (HHI). On September X, the Student's information was sent to that teacher. However, Complainant stated this teacher would only do a Zoom call at 5:30 p.m., and on September XX, Complainant requested that the Student return to school. On September XX, 2022, Complainant confirmed he wanted the Student in school, and the principal of School 2 cancelled HHI and scheduled the Student to start in person the following day. On September XX, 2022, the Student, his mother, and other school staff observed the Student's assigned general education classroom at School 2. The District stated that the Student's mother then expressed her desire to keep the Student home pending completion of his special education assessment and did not request the Student remain in the class with aide support.

On September XX, 2022, the District proposed an assessment plan to the parents, and the parents signed consent on the same day. The District completed the IEP process on September XX, 2022, and the parents consented to the IEP on September XX, 2022. On October X, the Student was placed in a Special Day Class at a third XXXXXXXXXXX school.

Analysis

As the District expressed an interest in resolving the complaint, OCR did not conclude its investigation. Based on the investigation thus far, however, OCR identified a compliance concern with respect to Allegation 1, whether the District failed to evaluate the Student or provide instruction in a timely manner. The evidence indicated the Complainant notified the District of the Student's disability as early as Summer 2021 but was told it would be 3-6 months until an IEP evaluation appointment was available, and there was no space in the XXXXX XXXXXXXXXXX program. The Complainant again indicated the Student had a disability in a

form submitted to the District on June XX, 2022, and in an enrollment meeting on July X, 2022. Further, the Complainant's family was known to the District and School 1, as the Student's older sibling was in a Special Day Class at School 1 and Complainant stated that the older sibling's special education teacher had been helping them navigate and discussing the process with them since the previous year. The Complainant's emails to the principal of School 1 and the District also indicate they had been trying to get special education services for the Student prior to the first day of school. The evidence therefore indicated the District had reason to suspect the Student was a student with a disability and may need special education or related services prior to the Student's August XX, 2022, start date at School 1. The evidence obtained thus far does not indicate that a Child Find questionnaire was provided or assessment process was started prior to this.

With respect to Allegation 2, whether the District treated the Student differently on the basis of disability on August XX, 2022, when it excluded the Student from the classroom and placed the Student's belongings outside, OCR would need to gather additional information, including interviews with School 1 witnesses regarding the circumstances of the Student being outside and his treatment by the teacher.

With respect to Allegation 3, whether the District treated the Student differently on the basis of disability with respect to the Student's transfer from School 1 to School 2, OCR would need to gather additional information, including interviews with District employees regarding call-backs to a home school, contesting such call-backs, and whether the Complainant contested the transfer during a meeting.

Prior to the conclusion of OCR's investigation, the District agreed to enter into a Resolution Agreement to resolve the issues raised in the complaint. In particular, the District agreed to convene the Student's IEP team to determine whether compensatory and/or remedial services and/or reimbursement for services privately obtained are appropriate; review and revise its Special Education Referral process to clarify the process when a child is referred for special education programs or services, including during the enrollment process; disseminate a guidance memorandum regarding the District's Child Find responsibilities; provide training on these revised policies and guidance memorandum; issue guidance to School 1 reaffirming its commitment to providing an educational environment free from discrimination on the basis of disability; and issue guidance regarding contesting a call-back to a home school.

Overall Conclusion

This concludes the investigation of this complaint.

To address the complaint allegations and OCR's concerns identified in the investigation, the District, without admitting to any violation of law, entered into the enclosed resolution agreement.

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 evidence obtained and all of the allegations investigated. OCR will monitor the implementation

of the resolution agreement until the District is in compliance with the terms of the resolution agreement and the statutes and regulations at issue in 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 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, the individual may file a separate retaliation complaint with OCR.

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

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Sara Mahdavi at sara.mahdavi@ed.gov or at (415) 486-XXXX.

Sincerely,

/s/

James Wood
Team Leader

Enclosure

cc: Alejandra Leon, XXXXXX@f3law.com