



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

August 15, 2023

VIA ELECTRONIC MAIL

Denise Jaramillo, Ed.D.
Superintendent
Alhambra Unified School District
1515 West Mission Rd.
Alhambra, CA 91803-1618

(In reply, please refer to case no. 09-23-1208)

Dear Dr. Jaramillo:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Alhambra Unified School District (District). The complainant alleged that the District discriminated on the basis of disability when, during the [redacted content] event at a District elementary school (School) on December [redacted content], 2022, the complainant's son (Student), along with his classmates in his special day class (SDC), were segregated offstage while their [redacted content] classmates and peers who do not have disabilities performed onstage.¹

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. The District is a public entity that receives funds from the Department and is, therefore, subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR considered information and documentation submitted by the complainant and the District and it interviewed two of the Student's teachers. 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

¹ OCR stated the name of the complainant and Student in its notification letter to the District and is not restating them here in the interests of privacy.

standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Facts

During all pertinent times, the Student was enrolled in [redacted content] at the School and was receiving special education services through an individualized education program (IEP) based on a primary diagnosis of [redacted content]. The Student was attending [redacted content] in an SDC and there were [redacted content] other students who had disabilities in the classroom.

In the Student's most recent IEP, dated April [redacted content], 2022, the following was stated as part of his physical education goals:

[redacted content]

The complainant informed OCR that the Student is able to walk up two flights of stairs on a daily basis at home without assistance and that he takes [redacted content] lessons that require him to stand [redacted content]. Additionally, [redacted content] different assessments, performed in [redacted content] 2022, noted that the Student was able to "independently navigate stairs, a ladder, a tunnel and a slide" and he was able to "transition between different surfaces found within his classroom and on campus, such as carpet, grass, uneven concrete, and playground surface, without loss of balance."

Beginning in or about [redacted content] 2022, the School began promoting its [redacted content] (Showcase) that would occur on [redacted content], 2022. The performance consisted of the School's [redacted content] grades each performing different [redacted content] for parents, staff, and other interested members of the local community. The Showcase was to occur in the School's auditorium and each grade was given a 10-minute period of time in which to present [redacted content] with the [redacted content] grade being the first to perform. Each grade's performance would occur on the raised stage of the auditorium and the students would stand on risers that were placed on the stage.

Prior to the [redacted content] performance, beginning in [redacted content] 2022, each grade practiced [redacted content] with the [redacted content] teacher at the School who was responsible for putting on the Showcase. There were [redacted content] students in the Student's class and the class practiced its performance once a week for approximately 15 minutes each week with the [redacted content] teacher. The [redacted content] teacher worked with the entire class during each practice and did not work with individual students in the class during any of the practice sessions.

At the beginning of the practice sessions in [redacted content] 2022, a determination was made by the [redacted content] teacher, in consultation with the [redacted content] teacher, that the Student and his classmates would not be on the stage during their performance with the [redacted content] grade. Instead, they would be seated in chairs on the floor in front of the stage and would give their performance from there at the same

time that the rest of the [redacted content] grade was giving the performance from the risers on the stage.

Both teachers explained to OCR that the determination to place the Student and his classmates on the floor instead of the stage while they performed in the Showcase was made for safety reasons. It was believed that [redacted content] of the students in the class would not be able to safely use the stairs that lead up to the stage or would not be able to safely remain standing on the risers that were on the stage during the Showcase. It was also believed that there would not be sufficient staff present during the Showcase who could provide individual assistance to the [redacted content] students to ensure that they remained safe while using the stairs or while standing on the risers on the stage. Therefore, the determination was made that the only way to ensure the safety of the students was to remove them from being on stage and have them, instead, perform while seated in chairs on the floor in front of the stage.

The [redacted content] teacher told OCR that she did not observe anything about the Student's behavior or his actions that caused her to have concerns with his safety if he was required to use the stairs or stand on the risers on the stage. She also did not review his IEP to determine if there was anything about his disability or the manifestations of his disability that would have created a concern for his ability to safely use the stairs or stand on the risers on the stage during his performance in the Showcase.

The Student's teacher noted that she was not at work during the week prior to the Showcase and at the time of the Showcase. Thus, she was not able to observe the Student or any of his classmates during the final practice sessions [redacted content] for the Showcase or during their participation in the Showcase. The teacher, however, noted to OCR some concerns that she had about the Student's ability to remain on the risers on the stage during the Showcase based on his actions and behavior during a previous activity that occurred in the same location as the Showcase. She stated that during [redacted content] in [redacted content] of 2022, the Student was required to stand on a small box on the stage so that [redacted content]. She explained that the Student appeared uncomfortable when he stood on the box including that he would not stand up fully straight, he made grunting noises, and he was hunching down. She categorized his behavior as "sensory overload" but she was unable to state any particular cause for it. She also acknowledged that his behavior could have been a reaction to any of the particular circumstances associated with the activity including the individualized nature of it, the presence of the [redacted content], the knowledge that [redacted content], or any other reason. Aside from the [redacted content], she did not remember any other instances that caused her any concern for whether the Student could safely be on the risers on the stage during the Showcase. She also did not perform any individualized assessment of the Student to determine whether he would be able to safely use the stage stairs or remain on the risers on the stage during the Showcase.

Prior to the Showcase, no one at the School ever notified the complainant about any concerns that may have existed about the Student's ability to safely use the stairs to get on the stage or to remain on the risers on the stage during the Showcase. Additionally, no one ever notified the complainant that the Student would be seated in a chair on the

floor in front of the stage with his classmates when he performed in the Showcase while the rest of the [redacted content] grade performed in the Showcase while on the stage. The complainant only learned of this arrangement when she attended the Showcase presentation and saw the Student and his classmates sitting in chairs in a circle on the floor in front of the stage and separate from the rest of the [redacted content] grade who were performing on the stage.

On [redacted content], 2022, after she attended the Showcase and saw from where the Student participated in it, the complainant communicated with the District's superintendent about the Student's participation in the Showcase. In her letter and email to the superintendent, the complainant asked the reason(s) why the Student and his classmates were not on the stage with the rest of the [redacted content] grade during its performance and she questioned the District's commitment to principles of inclusion and equity for students with disabilities. On the same date, the superintendent responded and told the complainant that she supports the inclusion efforts of the School and that the District's Director of Special Education (Director) would respond to her after she has had an opportunity to speak with individuals at the School.

On [redacted content], 2022, the School's principal communicated with the Director about the complainant's concerns with the Showcase and told the Director that the students were placed on the floor because of safety concerns due to the School staff's fears that the students could be harmed trying to get on the risers or getting off stage. She also stated that the Student missed [redacted content] class and the rehearsal for the Showcase because he leaves early each day.

On [redacted content], 2022, the Director sent an email message to the complainant and told her that she did not believe that the Student participated in the practices leading up to the Showcase because he leaves early every day. She also stated that "most of the SDC [redacted content] students were included on the stage" and those who were not on the stage were placed in chairs on the floor because they could not safely stand on the risers on the stage. She stated that "[d]ecisions were made not to exclude students from performing, but simultaneously, ensure that they were safe, but to keep them safe." She concluded her email by stating that for future performances it would be helpful if the Student was "able to practice with the students so that he is comfortable with the setting and expectations."

The complainant responded to the Director on the same date and disputed that the Student missed any of the practices or [redacted content] class. She also disputed that most of the SDC students were on the stage since the Student's entire SDC was sitting in chairs on the floor during the Showcase. Additionally, she clarified that she was not inquiring about why the students were not permitted to be on the risers on the stage and was, instead, inquiring about why the students were not permitted to be on the stage at all and she questioned whether the entire class would be unsafe if they were on the stage. Finally, she questioned the thoroughness of the District's investigation, attributed the incident to the District's failure to follow principles of inclusion, and requested information about the training that is provided to District staff on the topic of inclusion. The complainant did not receive a response.

Legal Standards

The Section 504 regulations provide that no qualified person 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 which receives federal financial assistance.² Section 104.4(b) provides that in providing any aid, benefit, or service, a recipient school district may not engage in disability discrimination directly or through contractual, licensing, or other arrangements. The Title II regulations create the same prohibition against disability-based discrimination by public entities.³

Under both the Section 504 regulations⁴ and the Title II regulations,⁵ a school district, in providing any aid, benefit or service, may not: deny a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service; afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded to others; or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

The Title II regulations require public entities to administer services, programs, and activities to individuals with disabilities in the most integrated setting appropriate to their needs.⁶ The most integrated setting is one that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.⁷

The Section 504 regulations have a similar integration mandate specifically for schools that requires them to provide nonacademic and extracurricular services and activities, including meals, recess periods, and other services and activities, in a manner so that they ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.⁸

In addition, the Title II regulations require a public school district to 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.⁹ Whether or not a particular modification or service would fundamentally alter the program is determined on a case-by-case basis. While cost may

² 34 C.F.R. § 104.4(a).

³ 28 C.F.R. § 35.130(a) and (b).

⁴ 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iii).

⁵ 28 C.F.R. § 35.130(b)(1)(i), (ii) and (iii).

⁶ 28 C.F.R. § 35.130(d).

⁷ 28 C.F.R. pt. 35, app. B at 711.

⁸ 34 C.F.R. § 104.34(b).

⁹ 28 C.F.R. § 35.130(b)(7).

be considered, the fact that providing a service to an individual with a disability would result in additional cost does not of itself constitute an undue burden on the program.

Under 34 C.F.R. § 104.37, a school district must provide non-academic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation. These services and activities may include counseling, physical recreational athletics, transportation, special interest groups or clubs, and other recreational activities.

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 school 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 school district's actions were based on the individual's disability.

Analysis

Prior to OCR concluding its investigation, the District expressed an interest in resolving this matter pursuant to section 302 of the CPM and OCR determined that it was appropriate to resolve the matter in this manner.

Although OCR did not conclude its investigation, during the course of the investigation it did note a potential compliance concern in this matter related to the treatment of the Student during his participation in the Showcase and the placement of him separate from the rest of the [redacted content] grade.

The Section 504 regulations require the District to afford to the Student an equal opportunity to participate in its programs and activities, including those that would be considered extracurricular, nonacademic, and even those that are purely voluntary. The Showcase that was presented by the Student's school is an example of the type of activity to which this requirement applies. The Student, however, was not afforded the same opportunity to participate in the Showcase as the rest of his grade since he was segregated from them when he was placed in a chair on the floor in front of the stage on which they were standing on risers.

The District stated to OCR that the Student was not permitted to perform on the stage because there were safety issues with the Student's class being able to either ascend the stairs leading to the stage or remain on the risers once on the stage. The safety issues could not be adequately addressed by School staff as they felt there was an inadequate number of staff who would be present during the presentation to monitor all of the students in the Student's class and take any measures necessary in response to any safety issue that may arise during the presentation.

While OCR recognizes and understands the District's stated issues with ensuring the safety of all students participating in the Showcase, it has concerns with the manner in which it treated the Student as a means of addressing those issues. As indicated previously, all of the evaluation information about the Student that was reviewed by OCR indicates that the Student did not have any issues with climbing stairs or remaining on an elevated platform to participate in a group presentation.

Additionally, neither of the individuals who made the decision to segregate the Student from the rest of his grade level ever performed any individualized assessment or evaluation of the Student to determine if he could safely climb the stairs or remain on the risers once on the stage. The closest observation that could possibly be considered an assessment of the Student's ability occurred a few months prior to the Showcase when the Student's teacher believed the Student showed some uncomfortableness or awkwardness while having his [redacted content] on the stage while standing on an elevated box. The teacher, however, was unable to attribute the Student's discomfort during the [redacted content] to any particular aspect of the [redacted content] experience. Moreover, the circumstances and environment surrounding the individualized nature of having a [redacted content] is not sufficiently similar to participating in a group performance to enable there to be a conclusion made that any issues from one situation are equally applicable to the other.

Because no individualized assessment of the Student was performed to determine whether he could participate in the Showcase in a safe manner with the rest of his grade, OCR has concerns that the decision to segregate him from the rest of his grade was predicated on assumptions or stereotypes of his disability, supposed limitations imposed by his disability, or speculative manifestations of his disability that had no basis in fact. It appears that the decision to segregate him was not only based on impermissible considerations, but it was also contrary to the reliable evaluation and assessment data available from his IEP, medical professionals, and his parents.

Based on the above-stated concerns with the treatment of the Student and the asserted reasons for it, OCR would have continued with its investigation in this matter to determine whether the other students in the Student's class were also impermissibly segregated. However, prior to so doing, the District expressed a desire to resolve this matter with a resolution agreement pursuant to section 302 of the CPM. OCR is satisfied that the District's willingness to resolve this matter prior to the conclusion of OCR's investigation and the resolution agreement it has accepted will adequately and properly address the areas of concern identified by OCR during the investigation.

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 (Agreement). The Agreement requires the District to create and distribute a memorandum to its administrators and staff that describes the requirement to administer its programs, services, and activities for its students with disabilities in the most integrated setting appropriate to their needs and to, thereafter, provide training on the subject matter

of the memorandum. Additionally, the Agreement requires the District to create and distribute a similar memorandum to parents of students with disabilities enrolled in the District, seek and consider parental input about the District's efforts at integration, and respond to and address any substantive feedback from parents that warrants responsive action by the District.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of it. Upon completion of the obligations under the 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, discriminate, or otherwise retaliate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual subjected to such retaliatory treatment may file a 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 and counsel for the District, Howard Fulfrost, for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Alan Konig, Civil Rights Attorney, at Alan.Konig@ed.gov or (415) 486-5527.

Sincerely,

/s/

James M. Wood
Team Leader

encl.

cc: Howard Fulfrost, Esq.