



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

915 2ND AVE., SUITE 3310
SEATTLE, WA 98174-1099

REGION X
ALASKA
AMERICAN SAMOA
GUAM
HAWAII
IDAHO
MONTANA
NEVADA
NORTHERN MARIANA
ISLANDS
OREGON
WASHINGTON

August 9, 2017

Dr. Gaylen Smyer
Superintendent
Cassia County Joint School District 151
3650 Overland Avenue
Burley, Idaho 83318

Re: Cassia County Joint School District 151
OCR Reference No. 10161154

Dear Superintendent Smyer:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against the Cassia County Joint School District 151 (the District). The complaint alleged that the District discriminated against a student on the basis of disability by:

1. Denying the student a free appropriate public education (FAPE), during the 2015-2016 school year, by not fully implementing his Individual Education Program with respect to discrete trial teaching in the areas of behavior and developmental skills.
2. Denying the student a FAPE by having a bus schedule that resulted in a shortened school day for the student during the 2014-2015 school year and part of the 2015-2016 school year and failing to remedy the denial of FAPE with an offer of appropriate compensatory education once the student moved out of the district.
3. Retaliating against the student's parents for advocating on behalf of the student's disability-related needs by responding to the parents' public records request with an estimate of fees that was excessive for the items being requested.
4. Discriminating against students with disabilities by prohibiting non-resident students eligible for special education from participating in an open enrollment process that is available to all other non-resident students.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). The regulations implementing Section 504 at 34 C.F.R. Part 104 prohibit retaliation and discrimination on the basis of disability in programs and activities that receive federal financial assistance from the Department. The regulations that implement Title II at 28 C.F.R. Part 35 prohibit retaliation and discrimination on the basis of disability by public entities. The District

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

www.ed.gov

receives federal financial assistance from this Department, and is a public entity and, therefore, subject to these federal civil rights laws.

OCR's findings of fact and conclusions, set forth below, are based upon information and documents provided by the complainant and the District. With respect to Allegation Nos. 1 and 3, OCR determined that the evidence did not support a conclusion that the District failed to comply with Section 504 or Title II. With respect to Allegation Nos. 2 and 4, OCR determined that there was sufficient evidence to support a conclusion that the District failed to comply with Section 504 and Title II. After notifying the District of the identified violations, OCR entered into discussions with the District regarding a Settlement Agreement (Agreement) that would serve to voluntarily resolve these violations.

Findings of Fact-Allegation No. 1: Implementation of the Student's Individual Education Program (IEP)

During the 2015-2016 school year, the student was enrolled in the XXXXX grade at XXXXXXXXXXXXXXX and was identified as a student with a disability. During the previous school year, the student received specialized instruction and related aids and services in a special education classroom under an IEP dated September 19, 2014. The IEP included goals in behavior, daily living skills, fine motor, gross motor, mathematics, reading and speech/language therapy.

On August 26 and September 17, 2015, IEP meetings were held to discuss the student's services for the 2015-2016 school year. A proposed IEP for the 2015-2016 school year was dated September 17, 2015, and included specialized instruction and related aids and services in the special education classroom. The proposed IEP included goals in behavior, daily living skills, developmental skills, gross motor, speech/language therapy and occupational therapy.

By letter dated September 28, 2015, an attorney for the student's parents formally objected to three areas of services listed on the proposed IEP. Specifically, the components of the IEP that the parents raised objection to were the frequency of speech/language therapy, gross motor skills development, and occupational therapy. On October 7, 2015, the District filed a due process hearing request with the Idaho State Department of Education to make a determination regarding the appropriateness of the proposed IEP.

By letter dated October 5, 2015, the student's parents were provided with written notice of "stay put." The notice stated that the District would not implement the proposed September 2015 IEP in the areas of speech/language therapy, gross motor skill development, and fine motor skill development. Rather, the District would utilize the student's previous school year's IEP for just those identified areas. The proposed September 2015 IEP would be in effect for the other identified areas of behavior, daily living skills and developmental skills.

The student's September 2015 IEP listed the frequency and duration of specialized instruction in each of the areas described in the IEP. With respect to the area of behavior, the student was to receive 350 minutes each week of direct services by the special education teacher in the special education classroom. With respect to the area of developmental skills, the student was to receive 500 minutes each week of direct services by the special education teacher in the special education classroom. With respect to the area of daily living skills, the student was to receive 200 minutes each week of direct services by the special education teacher in the special education classroom.

It is the position of the student's parent that the student's IEP team agreed that the areas of behavior and developmental skills were to be implemented using discrete trial teaching (DTT). The parent told OCR that DTT was not consistently implemented because the student's teacher told the parent during a parent teacher conference in November 2015 that the student was only getting 30 minutes of DTT per day. DTT is not specifically listed as a service in the student's September 2015 IEP. It is the position of District members of the student's IEP team who were interviewed by OCR, including the student's special education teacher, that DTT is a specific methodology of teaching which uses repetition to teach new skills. DTT is a teaching technique that is incorporated as appropriate into a student's instruction and is not designed to be used all day long, as the parent had requested, because that would defeat the purpose of the curriculum. The IEP team members stated that specific teaching methodologies such as DTT are not generally listed in a student's IEP.

It is the position of the student's special education teacher that she and a classroom aide in the student's classroom received in-service training in DTT during the fall of the 2015-2016 school year and used this technique with the student for approximately 1-hour per day in the areas of behavior and developmental skills. The District also provided OCR with a log reflecting approximately daily entries regarding the student's progress between the student's parent and special education teacher. These log entries explained to the parent that the areas of behavior and daily living skills are worked on all day and that DTT is used as a teaching methodology, but that it is not used "all day long."

Analysis and Conclusion-Allegation No. 1

The regulation implementing Section 504 at 34 C.F.R. §104.33 states that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE to each qualified disabled person in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation defines an appropriate education as the provision of regular or special education and related aids and services that are: (1) designed to meet the individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met and (2) which are based upon an adherence to Section 504 procedures. The regulations implementing Title II at 28 C.F.R. §35.130(b)(1)(ii) and (iii) are comparable to the Section 504 regulations.

OCR found that the student had an IEP in place during the 2015-2016 school year that included a specific amount of time of direct services by a special education teacher in a variety of program areas, including behavior and developmental skills. The IEP did not include a specific provision with respect to the teaching methodology for providing these services, such as DTT.

OCR found that DTT was utilized as a teaching method in providing services to the student in this case. Although the complaint alleged that DTT was not used as a teaching strategy for all required minutes of direct services in the area of behavior and developmental skills, the evidence did not establish that the student's IEP team determined that DTT was necessary for all instructional time. Because the evidence did not establish that the District failed to implement the student's IEP, OCR concludes that the District is in compliance with Section 504 and Title II with respect to the issue investigated.

Findings of Fact-Allegation No. 2: Shortened School Day

It is uncontested that during the entire 2014-2015 school year and the first part of the 2015-2016 school year, up to October 6, 2015, the student was being put on a school bus to go home in the afternoon 15 to 20 minutes earlier than other non-disabled students. The student missed a total of 51.25 hours of

instructional time because of this busing schedule that resulted in a shortened school day. The student's IEP did not include any provision pertaining to a shortened school day.

On February 25, 2016, the district informed the student's parent that compensatory education for the student and other students impacted by the bus schedule would be provided at the district from June 6 to June 20, 2016. At that time, the parent informed the district that the family was moving out of the district and would not be able to avail itself of the school session in June 2016. The parent then inquired with the district what alternatives would be available to the student to compensate for the lost educational time. The district did not offer to provide the student with any alternative compensatory educational services other than what was being offered from June 6 to June 20, 2016.

Analysis and Conclusion-Allegation No. 2: Shortened School Day

As discussed above, under Allegation No. 1, Section 504 at 34 C.F.R. §104.33 provides that a recipient operating a public elementary or secondary education program or activity shall provide a FAPE to each qualified disabled person who is in the recipient's jurisdiction. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this requirement. The applicable Title II regulatory provision is set forth at 28 C.F.R. §35.130 and is interpreted consistent with the provisions of Section 504 mentioned above.

In this case, OCR found that the student was denied a total of 51.25 hours of instructional time because of a busing schedule which shortened the student's school day for the entire 2014-2015 school year and the first part of the 2015-2016 school year. OCR found that, although the district offered to provide additional instructional time to compensate the student and other students impacted by the bus schedule from June 6 to June 20, 2016, the student in this case was moving out of the district and would therefore not have been available to attend the sessions offered by the district. Although requested by the student's parent, the district did not provide any alternative compensatory education to the student.

Under Section 504 and Title II, compensatory education affords students with disabilities an opportunity to receive special education and related aids and services to which they are entitled under Section 504 and Title II to "compensate" the student for missed learning opportunities after a determination that a student has been deprived of a FAPE. Because compensatory education is an equitable remedy that is designed to compensate a student for services that were denied by the District, an out-of-district move does not render claims for compensatory education moot. Rather, a district remains responsible for remedying the denial of past special education or related aids and services even when a district is no longer responsible for educating the student because the student moved out of the district. Although courts have dismissed cases due to residency issues when the requested relief is unavailable or impossible to receive, the District in this case could provide such services by contracting with the student's new resident district or a private entity near the student in order to fulfill its obligation under Section 504 and Title II.

Based on the above, OCR concludes that the District violated Section 504 and Title II by providing the student a shortened school day. The district has agreed to correct this violation by reviewing and revising its Section 504 policies and procedures to affirmatively state that a student's residence in the district is not a barrier to the provision of compensatory education as a remedy for students who are no longer residents of or otherwise enrolled in the district. The district will also offer to provide the student who was the subject of this investigation with compensatory education that was previously determined to be necessary.

Findings of Fact-Allegation No. 3: Retaliation

The District has school board policies and procedures regarding access to public records. The procedures state that the District may provide the requestor information to help the requestor narrow the scope of the request or to help the requestor make the request more specific when the response to the request is likely to be voluminous or require payment.

With respect to the cost for providing public records, Section 200 states that no fee shall be charged for the first 2 hours of labor or for copying of the first one hundred (100) pages of paper records that are requested. The District may charge the actual labor cost associated with locating and copying documents when: (1) the request is for more than one hundred (100) pages of paper records; or (2) the request includes records from which non-public information must be deleted; or (3) the actual labor, as defined above, associated with locating and copying documents for a request exceeds two (2) person hours. The procedures state that labor fees will not exceed reasonable labor costs necessarily incurred in responding to a public records request. Fees, if charged, will reflect the personnel and quality of time that are reasonably necessary to process a request. Fees for labor costs will be charged at the per hour pay rate of the lowest paid administrative staff employee who is necessary and qualified to process the request. If a request requires redactions to be made by an attorney, the rate charged will be no more than the usual and customary rate of the attorney who is retained by the District for that purpose.

On October 7, 2015, the District filed a due process hearing request with the Idaho SDE to make a determination regarding the appropriateness of the proposed IEP. The name of the individual requesting the hearing on the due process hearing request form was the District's director of student services. By letter dated October 7, 2015, to the District's director of student services, the student's parent requested "any e-mails written by or addressed to any school or district staff members that mention (the student's name) or the names of either of his parents, or refer to him or his parents in any identifiable way."

It is undisputed that the director of student services was aware of the parent's disagreement with the student's IEP provisions and the parent's filing of a counter request in response to the District's due process hearing request.

By e-mail dated October 12, 2015, the director of student services informed the parent that the District would conduct an e-mail search from August 1, 2014, forward and will disclose the e-mails that are not privileged. The e-mail informed the parent that the search terms would include the e-mail addresses of both parents, and the first and last name of the student. The e-mail stated that, if first names are used, it may take longer to produce the information since there are numerous students and/or staff that share the same first name. The e-mail also stated that the parent's request asked for e-mails written by or addressed to any school or district staff member and that, as e-mail requests need to be an "all or nothing," it will also generate any e-mails to or from the parents. The e-mail stated that these will need to be included as part of the requests. Finally, the e-mail stated that all related e-mails will be sent to the District's attorney for review of privileged information and that copies of the e-mails will be made by the attorney's office and sent along with appropriate charges.

By e-mail dated October 13, 2015, the director of student services informed the parent that, under the Idaho Public Records Act, governmental entities can charge for fees and costs if the actual time spent producing the documents exceeds 2 hours and 100 pages, and that the hourly rate depends upon the hourly rate of the person performing the task. The e-mail stated that, using the search term of the

student's first name and last name, the District's information technology (IT) staff person downloaded 1,425 megabytes of zipped information. When information is unzipped, the megabytes increase about 36%, making it approximately 1,938 megabytes of information. The e-mail stated that two files had approximately 723 files that would need to be extracted, converted and saved so that the e-mails could then be reviewed prior to sending them to the attorney to ensure that none of them pertained to an unrelated person. The e-mail informed the parent that the IT staff person demonstrated the process of unzipping one of the 723 files. That one file had 53 megabytes of information when zipped, which expanded to 83 megabytes when unzipped. When two files were unzipped, there were approximately 3.5 e-mails per megabyte of information. Thus, for the search terms of the first and last name of the student in this case, there would be approximately 6,783 e-mails produced. Those e-mails would then need to be reviewed by an administrative assistant and any unrelated e-mails would then be deleted.

The October 13, 2015, e-mail to the student's parent stated that the extraction, converting and saving of 10 files per hour would equal 72.3 hours, totaling approximately \$2,010.40 at \$28.72 per hour of IT salary. The e-mail stated that this would produce an estimated 6,783 e-mails to be reviewed at 100 e-mails per hour, which would total \$1,210.02 for an administrative assistant's salary. Copying fees were estimated at \$250 based on .05 per copy. The e-mail informed the parent that the two parent e-mail addresses could be removed as search terms, but doing so would not likely eliminate many of the e-mails as they would fall under the other search terms being requested. The e-mail requested that the parent inform the District if they wanted the District to move forward with the request and, if so, what search terms the District should use.

By e-mail dated October 13, 2015, the parents informed the District that they would need to discuss whether to proceed, and asked the District to "please hold off for now."

It is the position of the student's parents that the District's director of student services responded to the parents' public records request with an estimate of fees that was excessive for the items being requested to retaliate against them for advocating on behalf of the student's disability-related needs.

The District's director of student services informed OCR that she communicated with the parents when the initial request came in and asked the parents if they could narrow the search parameters. The director stated that the parents did not narrow the request at that time, and thus the parents were informed of the estimated cost and were again asked what search terms the District should use. The director told OCR that the parents did not respond to the District's e-mail asking if they wanted to pursue the request and no further action was taken.

From September 1, 2015 to May 1, 2016, the District received 14 public records requests from entities and/or individuals in addition to the parent of the student who is the subject of this complaint. The requests were as follows:

- a. Seven (7) requests were from the same procurement company requesting electronic records of purchase orders between specified dates. The company was charged \$64.50 for the first request because there was an initial set-up charge to run the report with vendor information in the requested format. No charges were necessary for the remaining six requests because the formatting was already established and the reports could be run without cost.
- b. Four (4) requests were from the same individual requesting information on: (a) the sale of construction bonds; (b) cutting funds for certain projects; (c) design/cost analysis of proposed

projects; and (d) funds for legal services. No charges were incurred in responding to these requests because all information was either available in board minutes, on the District's website or in a report that took less than 30 minutes to compile.

- c. Two (2) requests were from a news organization requesting the total spent on legal publication fees and teacher salaries/contracts. No charges were incurred in responding to these two requests because the report took less than 20 minutes to compile and/or the information was already published on the District's website.
- d. One (1) request was from an education association requesting teacher salaries/contracts. No charges were incurred. The District did not provide a reason as to why charges were not incurred in this instance.

The District's director of special services told OCR that she was not involved in responding to any of the above public records requests as those would have been processed by the District's business manager or other staff who would have access to those records. The director stated that she responded to the parents' request for records consistent with the District's established procedures, and specifically denied that any action was taken to retaliate against the student's parents for advocating on behalf of the student's disability-related needs.

Analysis and Conclusion-Allegation No. 3: Retaliation

The issue OCR investigated was whether the District retaliated against the student's parents for advocating on behalf of the student's disability-related needs by responding to the parents' public records request with an estimate of fees that was excessive for the items being requested.

The Section 504 regulation at 34 C.F.R. §104.61 incorporates by reference the prohibition against retaliation found at 34 C.F.R. §100.7(e), which states that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 504 or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The Title II regulation contains a similar prohibition against retaliation at 28 C.F.R. §35.134.

To establish a prima facie case of retaliation under Section 504 and Title II, the evidence must show that: (1) the parents experienced an adverse action caused by the district; (2) the district knew that the parents engaged in a protected activity or believed the parents might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If a prima facie case of retaliation is established, OCR will then determine if the district has identified a facially legitimate, non-retaliatory reason for the adverse action that is not pretextual.

Charging an excessive fee for documents that is more than customarily charged for such items may be considered an adverse action under Section 504. In this case, the parents raised concerns with the District about the educational program of the student. As such, the parents were engaged in a protected activity under Section 504 and Title II and the District's director of special services was aware of the parents' protected activity. OCR found some evidence of a potential causal connection between the adverse action and the protected activity because the purported adverse action occurred at or near the time in which the parents were engaged in a protected activity.

OCR found, however, that the District had a legitimate, non-discriminatory reason for providing the estimate of fees in response to the parents' public records request. That is, the District has policies and procedures that allow for the charging of fees incurred in responding to public records requests. OCR found that the estimate of fees provided to the parents by the District was consistent with the established policies and procedures for public records requests. OCR also found that the District inquired with the parents after the fee estimate to determine whether they wanted to pursue their request or modify the search terms to narrow the request, but the parents asked that the request be put on hold and did not pursue the request thereafter. In addition, OCR found another instance in which fees were imposed on a public records request from another entity within a year timeframe based on the District's established policies and procedures. OCR found that the other public records requests were processed without fees because the nature of the requested information was readily available without the need for staff resources.

Because the District provided a legitimate, non-discriminatory reason for the fee estimate and there was no evidence of pretext, the evidence does not support a conclusion that the District failed to comply with Section 504 or Title II with respect to this allegation.

Findings of Fact-Allegation No. 4: Open Enrollment

The District is the ninth largest district in the state with a total enrollment of approximately 5,000 students. The District is comprised of eight elementary schools, two junior high schools, one junior/senior high school, four high schools and a regional technical center.

The District has policies governing students who live outside of the District's boundaries but who want to attend a district school, and also students who live within the District but who want to attend a school outside of their zoned school. With respect to non-resident enrollment, District Policy 631 states that the District will receive and admit students transferring from outside of the District whose tuition is paid by the district in which the student resides, except when such transfer would constitute a hardship on the District or the receiving school within the District, including enlarged student-teacher ratios; overcapacity of any program such as special education, class, grade level, or building; or to protect the health, safety, and welfare of its existing students and/or its educational processes.

With respect to students wanting to attend another school within the District that is outside of their normal attendance area, District Policy 632 states that the student's parent/guardian must apply annually for admission to a school in this District. The policy states that the District may deny enrollment into a school outside of the student's normal attendance area for circumstances that constitute a hardship, including but not limited to enlarged student-teacher ratios; overcapacity of any program such as special education, class, grade level, or building; or to protect the health, safety, and welfare of its existing students and/or its educational processes.

Section 33-1402 of the Idaho Code governs enrollment options in the state of Idaho. Specifically, the statute states that whenever the parent or guardian of any pupil determines that it is in the best interest of the pupil to attend a school within another district, or to attend another school within the home district, such pupil may be transferred to and attend the selected school, subject to the provisions of this section and Section 33-1404 of the Idaho Code, which applies to "transfer of pupils." The code also states that the pupil's parent or guardian must apply annually for admission to a school within another district, or to another school within the home district.

Section 33-1404 of the Idaho Code states that every school district shall receive and admit pupils transferred thereto...except when any such transfer would work a hardship on the receiving district. Each receiving school district shall be governed by written policy guidelines, adopted by the board of trustees, which define hardship impact upon the district or upon an individual school within the district. The policy shall provide specific standards for acceptance and rejection of applications for accepting out of district pupils. Standards may include the capacity of a program, class, grade level or school building. The code states that standards may not include previous academic achievement, athletic or other extracurricular ability, disabling conditions, or proficiency in the English language.

The District provided OCR with a District document titled “Declaration of Hardship for Special Education Students” which accompanies the open enrollment policy. Specifically, the declaration states that the District has determined that a hardship exists in the District’s special education programs. The declaration states that “this determination is based on the number of special education classes that exceed the recommended ratios and other extenuating circumstances, including: (a) inability to locate and employ a minimal number of properly certified special education teachers; (2) an annual one percent increase in the number of special education students during the last 5 years which has put extreme pressure on the special education program; and (3) a need for additional classroom facilities for special education students.” The declaration states that because of this hardship, students who are eligible for special education and/or related services will not be approved for open enrollment. The declaration further states that during the 2016-2017 school year, a request for renewal of previously approved open enrollment for students who are eligible for special education will be denied. The declaration also states that if parents refuse to give permission for the District to evaluate a student who is considered to be potentially eligible for special education, the student’s open enrollment will be immediately rescinded upon receipt of the parents’ written denial. A student who becomes eligible for special education during the school year will be allowed to complete the school year as an open enrollment student.

The District utilizes an Open Enrollment Application for both out-of-district applications and in-district transfer applications. In part, the application asks prospective students to identify unique instructional programs in which the applicant student is currently enrolled or expects to enroll in the coming school year, such as vocational, foreign language, remedial, special education, and gifted/talented. The form states that this application form was prepared pursuant to Section 33-1402 of the Idaho Code. The form also states that any out-of-district student who is on an IEP will not be eligible for enrollment.

In February of each school year, the District sends a form letter to the family of students enrolled in the District and students who were accepted under open enrollment during the previous year. The form letter states that open enrollment applications are due for the upcoming school year by the middle of March. The form letter sent to such families for the 2016-2017 school year includes a copy of District Policy No. 632 and states that the District has determined that a hardship exists in the District’s special education programs due to the number of students attending special education classes, and that student-teacher ratios currently exceed the recommended class ratios. The letter states that due to the student-teacher ratios and other related, extenuating circumstances, non-resident students who are eligible for special education may not be approved for open enrollment and may want to seek services from their local education district or agency. The letter states that all applications for open enrollment will be evaluated on a case by case basis in accordance with District policy.

Upon receipt of applications from families who re-apply for open enrollment from the previous year, the assistant to the District’s superintendent creates a spreadsheet for each school with the student’s name, grade, home district, and any other pertinent information regarding the open enrollment request. The

spreadsheet is shared with the respective school’s principal, who then marks “yes” or “no” in the acceptance column of the spreadsheet and returns the information to the District’s office. The District assistant then sends out letters to parents during the first week of April with the principal’s decision.

For families interested in enrolling their child in a District school for the first time, parents are given a copy of District Policy No. 632 and the hardship statement when they come in to the District office to fill out an open enrollment application. Once the application is received, the District assistant calls the principal of the receiving school to inform them of the application and provides the principal with the following information:

- The name of the school and district in which the student currently attends.
- Whether the student has been suspended/expelled from the home school and the reason for the suspension/expulsion.
- The reason given by the parent/guardian who is requesting attendance at the receiving school.
- Unique instructional programs in which the applicant is currently enrolled (i.e., vocational, foreign language, remedial, special education, gifted/talented, etc.).
- What unique and/or instructional programs the applicant student expects to enroll in the next school year.
- Transportation arrangements for the applicant student.

The District indicated that the decision on whether to accept a student for enrollment is at the discretion of the respective school’s principal and is dependent upon class size of the receiving school, applicant student behavior, applicant student attendance, unique programs and transportation of the student. The principal then contacts the District administrative staff person to indicate whether the student is accepted for enrollment, and the District assistant then forwards that decision to the parents.

The number of open enrollment applications that were received as out-of-district attendance applications and the number of those that were denied during the previous 3 school years are as follows:

School Year	Out-of-District Applications Received	Out-of-District Applications Denied
2013-2014	144	10
2014-2015	171	4
2015-2016	134	7

The number of open enrollment applications that were received as in-district transfer applications and the number of those that were denied during the previous 3 school years are as follows:

School Year	In-District-Transfer Applications Received	In-District Transfer Applications Denied
2013-2014	148	10
2014-2015	170	15
2015-2016	155	1

The District was asked by OCR to identify whether any open enrollment applications were noted as the applicant having a disability and, if so, whether any disability-related services were noted as being needed

on the open enrollment application. The District responded that the only identifier on the application is the box marked “IEP,” and no further explanation related to the student’s needed services was given on the applications.

Testimony provided to OCR by District staff indicated that, if a student is identified as having an IEP and the school’s special education student-teacher ratio is full, then the student’s open enrollment application is denied.

The District did not maintain records pertaining to the reasons for the enrollment denials until the 2014-2015 school year. During the 2014-2015 school year, of the 19 students whose open enrollment applications were denied, 6 were denied enrollment due to class size, 7 were denied enrollment due to behavioral issues at their current school, 3 were denied enrollment because they had an IEP, 1 was denied enrollment because the student needed to stay with a sibling, and 2 were denied due to “not enough information.”

During the 2015-2016 school year, of the 8 students whose open enrollment applications were denied, 2 were denied enrollment due to behavioral issues at their current school, 5 were denied enrollment due to class size, and 1 was denied because they had an IEP.

Analysis and Conclusion-Allegation No. 4: Open Enrollment

The issue investigated was whether the District discriminated against students with disabilities by imposing eligibility criteria under its open enrollment program that screen out or tended to screen out students based solely on disability.

The regulation implementing Section 504 at 34 C.F.R. §104.4(a) provides that no qualified person shall, on the basis of disability, be excluded from participation, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives federal financial assistance. 34 C.F.R. §104.4(b)(1) prohibits districts from denying students with disabilities the opportunity to participate in or benefit from an aid, benefit or services on the basis of disability, or to provide different aids, services, or benefits to students with disabilities unless such action is necessary to ensure they are as effective as those aids, services or benefits provided to others. 34 C.F.R. §104.4(b)(4) states that a recipient shall not provide different or separate aid, benefits, or services to students with disabilities unless such action is necessary to provide such individuals with aids, benefits, or services that are as effective as those provided to others. The Title II regulation at 28 C.F.R. §35.130(b)(8) provides that a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability from fully and 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.

Open enrollment for both District residents and non-district residents is a “benefit” offered to the public and, therefore, is subject to the non-discrimination mandate of Section 504 and Title II. Under these laws, the District must ensure students with disabilities are not denied the benefit of the District’s open enrollment policy based solely on their disability.

OCR found that the District has a policy which states that, because of hardship, students who are eligible for special education and/or related services will not be approved for open enrollment. OCR found that the District based this hardship determination on the number of its special education classes that exceed the recommended ratios and other extenuating circumstances. OCR also found notification documents

to parents/guardians of students who want to attend a District school under the District's open enrollment state that, due to the hardship determination, students who are eligible for special education and/or on an IEP may not be approved for open enrollment. Thus, the District's policy and practice regarding open enrollment is applied differently to disabled students and non-disabled students.

Section 504 prohibits a recipient from providing different or separate aid, benefits, or services to students with disabilities unless such action is necessary to provide such individuals with aids, benefits, or services that are as effective as those provided to others. Thus, OCR next looked at whether the District's general denial of open enrollment for students with disabilities is necessary to provide those students with aids, benefits and services that are as effective as those provided to others. OCR did not find that the District has a policy, procedure, or practice in effect to make an individual determination regarding whether the educational needs of an open enrollment applicant with a disability can be served in the District's program prior to denying a disabled student's application.

In addition, OCR finds that the District's notice regarding open enrollment has the effect of imposing eligibility criteria that screens out or tends to screen out students with disabilities from fully and equally enjoying the District's educational services. Further, the notice effectively dissuades students with disabilities from applying by informing them that they are ineligible for open enrollment. Of particular concern is the District's rationale that disabled students are not eligible for open enrollment because its special education classes are at "full" capacity. Many students with disabilities are placed in mainstream educational environments with disability-related supportive services and various other less restrictive placements. Even if self-contained classrooms for students with significant disabilities are legitimately at full capacity, students with disabilities who could be accommodated in mainstream classrooms should not be screened out of the open enrollment program by the District's broad pronouncement that its general program for all students with disabilities is full. Because the District has not demonstrated that its policy is narrowly tailored so as not to unnecessarily exclude students with disabilities from participating in open enrollment, OCR has determined that the District is not in compliance with Section 504 or Title II with respect to the issue investigated.

The District has voluntarily agreed to resolve the above described violations as set forth in the enclosed Agreement which, when fully implemented, will resolve the identified violations. OCR will monitor the District's implementation of the Agreement and will close the complaint when OCR determines that the terms of the Agreement have been satisfied. The District's first monitoring report is due by **September 30, 2017**.

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the District's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you and your staff for your cooperation during the investigation of this complaint. If you have any questions, please contact Tania Lopez, Senior Attorney, by telephone at (206) 607-1623, or by e-mail at tania.lopez@ed.gov.

Sincerely,

Barbara Wery
Team Leader

Enclosure: Settlement Agreement

cc: Anderson, Julian & Hull, Attorneys at Law
Honorable Sherri Ybarra, Superintendent of Public Instruction