



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

January 2, 2014

Mr. Bill Kowba  
Superintendent  
San Diego Unified School District  
4100 Normal Street  
San Diego, California 92103-2682

(In reply, please refer to case no. 09-12-1479.)

Dear Superintendent Kowba:

On September 20, 2012, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against the San Diego Unified School District. The Complainant alleged that the District discriminated against students with moderate to severe disabilities at a District high school by failing to implement their individualized education programs (IEPs) and by locating them in classrooms lacking the amenities needed to meet their toileting needs. OCR investigated three issues:

1. Whether the District denies a FAPE to students with moderate to severe disabilities at the School by failing to provide laundry machines necessary to implement their IEP life skills goals.
2. Whether the District denied certain students a FAPE by not providing a space for staff to change students' diapers sanitarily and in privacy.
3. Whether the barriers to physical accessibility at the School resulted in discrimination against students and other individuals with mobility-related disabilities.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

As part of its investigation of the complaint, OCR received and considered documentation and information provided by both the Complainant and the District. OCR also conducted interviews of District witnesses and visited the school site. As explained in more detail below, after carefully reviewing all the evidence, OCR concluded that there was insufficient evidence to establish non-compliance with Section 504 and Title II

with regard Issue 2, and sufficient evidence to establish non-compliance with regard to Issues 1 and 3. The facts gathered during the investigation, the applicable legal standards, and the reasons for our determination 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 non-disabled students 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.

Under 34 C.F.R. §104.34(c), if a school district operates a facility that is identifiable as being for disabled students, it must ensure that the facility, as well as the services and activities provided at the facility, are comparable to other facilities, services and activities in the district.

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. Under §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.

*Issue 1: Whether the District denies a FAPE to students with moderate to severe disabilities at the School by failing to provide laundry machines necessary to implement their IEP life skills goals.*

#### A. Facts

The Complainant alleged that students in the moderate-to-severe special education classrooms required laundry machines and kitchen facilities in order to meet their life

skills goals. During the 2012-2013 school year, there were five classrooms at the School, with a total of 55 students with moderate to severe physical, developmental and other disabilities, including students with moderate to severe mobility impairments. Many of these students' IEPs contain goals for acquiring basic life skills. Such skills could include sorting and arranging materials and objects, and using household equipment.

The School site is built on three levels. The upper level of the school is a significant distance from the lower level. The School has laundry facilities in buildings on both the upper and lower levels. At the upper end of the school, the laundry facilities are located in a Parent Center room. In the lower level of the school, the laundry facilities are currently solely for use for the medically fragile students. After the Complaint was filed, the Principal requested that the coordinator of the Parent Center room circulate an email so that all the moderate-to-severe classrooms could benefit from the use of the Parent Center room.

OCR reviewed the IEPs of each of the students assigned to all five moderate-to-severe classrooms. Although many IEPs included life skills goals generally, none of the IEPs specifically indicated that a student required the use of laundry facilities to complete an IEP life skills goal. Several of the teachers of the students with moderate to severe disabilities told OCR that they believed use of laundry facilities would be a very useful part of teaching life skills to the students such as sorting. However, some witnesses stated to OCR that decisions about whether to include the use of the School's laundry facilities or sorting as a life skills resource for some students was not based on an individualized educational determination regarding the student. Those witnesses stated that the lack of laundry related life skills in the IEPs was sometimes based on the perception that the moderate-to-severe special education students and teachers were not permitted to access the laundry facilities that exist at the School. Some teachers stated that even if they could use the Parent Center's laundry facilities, it is too far and inaccessible to reach for the classrooms on the lower end of the School. During OCR's site visit, OCR staff experienced that the distance from the lower end of the School to the upper end is quite significant, and that, for individuals with mobility impairments, reaching the other end requires access to an elevator which was locked.

#### B. Analysis

OCR does not make determinations about the appropriateness of an educational placement for an individual disabled student. However, OCR does examine whether the District followed an appropriate process for making placement decisions that comply with Section 504 regulatory requirements and made determinations that are individualized and based on the student's needs to ensure that he or she is provided a FAPE.

OCR did not find that the District failed to implement students' existing IEPs with regard to life skills related to the laundry facilities since the evidence showed that no students' IEP specified a requirement for use of such facilities. However, some teachers told OCR that they believed they did not have access to laundry facilities and therefore they

intentionally did not propose to include sorting and laundry as part of life skills goals in the IEPs of certain students for whom use of the facilities would be appropriate. Accordingly, OCR finds sufficient evidence that some decisions concerning certain life skills goals were not based on the individualized needs of students, but rather on a perception of available resources and the difficulties in reaching the existing facilities given the complexity of some of the students' disabilities. For those reasons, OCR concluded that the District did not comply with Section 504 regulatory requirements at 34. C.F.R. §104.35.<sup>1</sup>

*Issue 2: Whether the District denied certain students a FAPE by not providing a space for staff to change students' diapers sanitarily and in privacy.*

#### A. Facts

The Complainant alleged that there was no sanitary space for staff to change the diapers of students who needed diapering services. She raised concerns about one classroom with soiled flooring, and the lack of access to water and sanitary changing space for students needing diapering.

Not all of the moderate-to-severe classrooms involve toileting and diapering of students. The District acknowledged that there was a concern regarding hygiene in one of the classrooms that had soiled carpeting. The District replaced the carpet in that room with vinyl linoleum. The School has designated bathrooms for changing students privately. These bathrooms have changing tables, diaper genies, and hand sanitizer. The medically fragile students have their own changing area inside the classroom.

#### B. Analysis

The Complainant alleged that the classrooms for the moderate-to-severe students lacked the amenities to allow toileting of disabled students in a private and sanitary manner. OCR does not enforce regulations related to occupational health and safety standards. OCR examined whether disabled students needing diapering were denied a FAPE by not being provided appropriate diapering when it was called for in the IEP. OCR found that at the time the complaint was initially filed, there was a concern that one of the carpets in one of the moderate-to-severe classrooms had been significantly soiled and was not sanitary. The Complainant was also concerned that there were not sinks with hot water in each of the moderate-to-severe classrooms. By the time of OCR's site visit, the soiled carpet in the room identified by the Complainant had been replaced with vinyl linoleum. During the site visit, OCR found that there are designated

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<sup>1</sup> In making this determination, OCR is not deciding whether sorting and laundry are appropriate life skills goals for students at the School. Such decisions are to be made by an IEP or Section 504 team using the evaluation and placement procedures required by the §104.35-104.36 of the Section 504 regulations. OCR analyzed the District's obligation to ensure that the decisions must be made based on the individualized disability-related needs of each student and designed to meet those individual needs, and concluded that the District did not follow that process with regard to certain life skills related to laundry facilities.

bathrooms for changing disabled students in the moderate-to-severe classrooms and that these bathrooms provide changing tables, diaper genies, and hand sanitizer.

While the bathroom facilities that are provided are not exactly what the Complainant sought, OCR did not find any evidence that, at the time of OCR's site visit, they were inadequate to meet the toileting/diapering needs of the Students called for in their IEPs. Therefore, OCR found insufficient evidence that the District violated the requirements of Section 504 as to this issue.

*Issue 3: Whether the barriers to physical accessibility at the School resulted in discrimination against students and other individuals with mobility-related disabilities.*

#### A. Facts

The School campus has four buildings that comprise the majority of the classrooms for students. Two of the buildings are located on the upper level. Two of the buildings are located on the lower level of the School. These buildings are significant distances away from each other.

The path of travel between the upper end of the School campus to the center area where the theater and gym are located, includes walkways, stairs, and a ramp. However, there is no ramp between the lower level of the campus and the central or upper levels of the campus. To get to the upper or center area of the School campus from the lower end, a student can only take walkways and stairs. If the student has a mobility impairment and cannot use the stairs, there is an elevator from center area to the lower level of the campus, but that elevator was kept locked at the time of OCR's site visit. Therefore, students with mobility impairments did not have an accessible path from the lower level of the campus to the center or upper levels.<sup>2</sup>

#### B. Analysis

In OCR's prior case addressing accessibility of the School campus, OCR determined that the District could comply with Section 504 accessibility requirements with respect to the various levels of the campus if the elevator remained unlocked. In the current investigation, it was evident that the District has not kept the elevator unlocked, or maintained an accessible route through campus since it resolved the prior OCR case in 2009. Accordingly, OCR found sufficient evidence of non-compliance with regard to the School's obligation to ensure an independent accessible route of travel for mobility impaired individuals.

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<sup>2</sup> In a previous case, OCR found that the District failed to provide individuals with mobility related disabilities access to the School campus because the method of travel from the center or upper level of the School to the lower level buildings required that a mobility-impaired person have the assistance of specific staff persons (Case number 09-08-1113). As part of the resolution agreement in that case, the District agreed to provide an accessible path of travel for mobility impaired individuals that would not require the assistance from others. On April 17, 2009, OCR notified the District that its plan to maintain the access to the elevator unlocked brought the District into compliance with regard to this issue. However, as noted, during the site visit in this case, OCR found that the elevator was locked.

## Conclusion

OCR notified the District of its conclusions. On December 6, 2013, the District, without admitting to any violation of law, agreed to implement corrective actions and signed an agreement that, when fully implemented, will resolve the issues investigated by OCR in this case. A copy of the agreement is attached to this letter.

This concludes the investigation portion of this complaint. OCR will monitor the implementation of the resolution agreement. The Complainant is being notified concurrently of these findings.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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

OCR wishes to thank the District, and especially XXXXXXXX XXXXXX, for its assistance and cooperation during the course of this investigation. If you have any questions, please contact OCR Attorneys Anamaria Loya at (415) 486-5404 or Yohance Edwards at (415) 486-5585.

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosure