UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

August 26, 2015

Dr. Alex Cherniss
Superintendent
San Marino Unified School District
1665 West Drive
San Marino, California 91108-2594

(In reply, please refer to case no. 09-15-1204.)

Dear Superintendent Cherniss:

On February 27, 2015, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against San Marino Unified School District (District). The complainant alleged discrimination on the basis of disability.[1] Specifically, OCR investigated whether the District:

1. denied the Student a free appropriate public education (FAPE) by changing the Student's speech and language services without following proper evaluation and placement procedures; and,

2. retaliated against the Student after his parents filed a California Office of Administrative Hearings (OAH) special education due process complaint, by limiting outside professionals obtained by the Parents in communicating with staff and/or adequately observing the Student.

OCR investigated these allegations under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), and their implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination based on disability by public education entities. The District receives funds from the Department and is a public education entity, and therefore is subject to Section 504 and Title II and their implementing regulations.

OCR gathered evidence through interviews with the parents and District staff, and through a review of documents provided by the complainant and the District. For the reasons explained here, OCR determined that there was sufficient evidence to support a conclusion of noncompliance with the regulations implementing Section 504 and Title II, with respect to issue number one. However,

[1] OCR notified the District of the complainant and Student's identity when the investigation began. OCR is withholding their names from this letter to protect their privacy.

OCR found insufficient evidence of noncompliance with respect to the second issue. Without admitting any violation of the law, the District has agreed to enter into a Resolution Agreement (Agreement), to address OCR's findings of noncompliance.

Issue 1: Whether the District denied the Student a free, appropriate public education (FAPE) by changing the Student's speech and language services without following proper evaluation and placement procedures.

Legal Standards

The regulations implementing Section 504 at 34 C.F.R. § 104.33, require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of 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) plan 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 Section 504 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.

Section 104.35(c) of the Section 504 regulations requires that placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Findings

Background

The Student attends school in the District, was in elementary school during the 2014-2015 school year, and is an individual with a disability. The Student has an IEP plan. On or about March XX, 2014, counsel for the Student filed a special education due process complaint against the District with California's OAH. The complaint included allegations that the District denied the Student needed disability related services. On or about May X, 2014, the parties reached a mediated settlement.

Placement & Services

The May X, 2014 settlement between the District and the Student's parents included the IEP services the Student would receive, and was in place at the start of the 2014-2015 school year. The IEP for the Student included the following services:

- 60 minutes per week of group speech and language;
- 60 minutes per week of individual speech and language;
- 30 minutes per week of consultation speech and language;
- aide support from approximately 10:00am to 12:30pm each day; and,
- other services and collaboration, including monthly meetings between services providers and the Student's parents.

These services were the Student's placement for the beginning of the 2014-2015 school year. School staff tasked with implementing these services received a copy of the services they needed to implement at the beginning of the 2014-2015 school year. However, from the beginning of the year until approximately January XX, 2015 (21 weeks), the Student did not receive all of the services, pursuant to this placement.

According to the speech and language therapist, the Student received 30 minutes of individual speech and language services per week, rather than 60 minutes per week, and he did not receive the 30 minutes of consultation speech and language services per week until late January 2015. However, according to a January XX, 2015, letter from an attorney representing the District, the Student was provided consultative services, but was not provided any individual services from the beginning of the year to the date of the letter. The letter explained that "the school district speech pathologist has been providing group and consultative language and speech services to [the Student] in her office and on the playground. I was just notified this evening that the speech and language pathologist forgot the settlement included individual services. She will start providing individual services this week including individual make-up sessions . . . . The District calculates that [the Student] is owed 21 individual language and speech make-up sessions." According to the District, when this discrepancy came to its attention, it began providing the Student with 60 minutes of individual speech and language services on or about January XX, 2015, and provided the other speech and language services to the Student (30 minutes of consultative services a week, as well as 60 minutes of group speech and language services). However, the District did not provide make-up speech and language services for the Student, and the IEP team did not address this issue to determine and schedule appropriate make-up services.

In total, according to the attorney for the District's January XX, 2015, letter, the Student was not provided approximately 1,260 minutes (21 hours) of individual speech and language services, as called for in the May X, 2014, settlement. Service logs provided by the District to OCR provided limited information, and do not indicate whether sessions for the Student were individual or group, where they took place, or how long they lasted. The service logs do not list consultation discussions or meetings between the teacher and speech therapist until February X, 2015. The service logs include consultation services five times during the 2014-2015 school year: February X, and XX, March XX, and April XX, and XX, 2015.

In addition, starting approximately February X, 2015, the speech and language therapist began providing some of the Student's individual speech services in the classroom. Such individual services can be a combination of services delivered individually to a student in the classroom, or targeted to a specific student but delivered in the general education classroom. In a student's general education classroom, these services consist of observing the student's oral and written work to see if they are meeting their goals in another environment, and providing the student with coaching and instructions. The therapist also sometimes works with students on the playground. According to service logs, in class individual services occurred on at least seven occasions from early February through April, 2015. The IEP meeting notes from multiple IEPs from fall 2014 through March 2015, do not state that individual speech and language services would be provided in the classroom or on the playground.

In letters to the District on November XX, 2014, and January XX, 2015, the attorney representing the Student expressed concern about possible proposed changes to the setting of the Student's speech and language services, including stating that "[c]lassroom-based" services were "not contemplated" in the Student's placement. The District's response, sent on January XX, 2015 and described in-part above, did not address this concern directly, but explained that the setting for such services was not changed, as individual services were simply not provided. Meeting notes from monthly Service provider meetings with the parents do reference the speech and language therapist providing services to the Student in class as "push-in" services, or on the playground, but as explained above, OCR did not find evidence that this change was a decision made by the IEP team.

Analysis

OCR's investigation showed that the Student's placement at the beginning of the 2014-2015 school year, with regard to speech and language services was: (1) 60 minutes weekly of group services; (2) 60 minutes weekly of individual services; and (3) 30 minutes weekly of consultation services. However, for 21 weeks from the beginning of the school year until approximately January XX, 2015, the District did not provide individual or consultation services. This failure to implement the Student's placement services resulted in a significant change in placement. It was not made pursuant to on an IEP or Section 504 team decision, and did not meet the evaluation and placement procedures required by 34 C.F.R. § 104.35. As a result, this change in placement violated Section 504 at 34 C.F.R. §§ 104.33-104.36.

In addition, OCR found that in February 2015 the speech and language therapist changed the Student's individual speech and language services – from delivery of individual services with the

Student in a classroom working directly with the speech and language therapist alone, to the therapist observing the student in the classroom or on the playground in the presence of his peers and providing coaching or other instruction. There is a clear and significant difference between the delivery of such services directly and individually between a Student and therapist in a classroom, and such services that are provided in a classroom or on the schoolyard in front of a student's peers. Such "push-in" services may be appropriate in many situations, including possibly this one. However, such services are substantially distinct from the direct individual services the Student previously received as his "individual" speech and language services, and such a change is a decision for an IEP or 504 team, and is not a decision that can be made unilaterally by a service provider. In addition, this change in the Student's services was made despite the family's objections to such a change, in letters from their attorney dated November XX, 2014, and January XX, 2015. Therefore, a preponderance of the evidence demonstrated that this change in services was also a significant change in placement without proper evaluation and placement procedures, in violation of Section 504 at 34 C.F.R. §§ 104.33-104.36.

Issue 2: Whether the District retaliated against the Student after his parents filed a California OAH special education due process complaint, by limiting outside professionals retained by the Parents in communicating with staff and/or adequately observing the Student.

Legal Standards

The Section 504 regulations, at 34 C.F.R. § 104.61, incorporate 34 C.F.R. § 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. § 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Findings

As mentioned above, counsel for the Student filed an OAH special education complaint against the District on or about March XX, 2014. The OAH complaint alleged violations of the Student's rights as a student with a disability. This OCR complaint alleged that in retaliation for the OAH action, the District restricted an outside psychologist (who the parents had retained) from talking with the Student's teacher, and restricted another outside professional (also retained by the parents) from visiting the school and observing the Student for more than 20-30 minutes at a time.

District Policies

District Board Policy (BP) 1312.5 "Community Relations" "prohibits retaliation in any form for the filing of a [discrimination] complaint, the reporting of instances of discrimination, or for participating in the complaint procedures." The District's other publications do not seem to discuss the prohibition on retaliation for engaging in protected activity.

Communication with the Student's Teacher

OCR's investigation found that during the semester following the OAH complaint, a psychologist retained by the parents contacted the School to talk by phone with the Student's teacher, in preparation for an upcoming IEP. After the psychologist contacted the teacher by email on October XX, 2014, the teacher and psychologist exchanged emails to schedule a time to talk. On October XX, 2014, the teacher offered to talk that day, but the psychologist wrote back that she was out of town, and proposed a call a couple days later. However, about a week later and before they had talked, the teacher emailed to say that she had spoken with the Student's support team, and the team "fe[lt] it would be better to have a discussion with one or both of them there." The teacher proposed they have a group call, but due to the various schedules involved, they were unable to schedule the call prior to the IEP meeting. Frustrated, the psychologist wrote to the teacher on November X, 2014, that she was "a little confused as to why they won't let you and I talk," explaining that "in 25 years I haven't had that happen with a school district," and thanking the teacher for trying.

School and District staff denied that the teacher was restricted from talking to the psychologist. They explained that they thought it would be preferable to have more staff members present for the conversation, so they could all have input and could learn more about the Student and his needs. The teacher denied that other staff, administrators, or the District instructed her to request to have others present for the conversation about the Student. OCR's investigation did not reveal evidence to dispute this explanation for the teacher's efforts to include other services providers for the Student in the conversation.

Observation of the Student on Campus

The District's policies do not specifically address campus visitors such as outside, private service providers. The School Handbook states that all adults on campus during school hours "must register in the office," and parent classroom observations are limited to 20-30 minutes, and must be approved by the principal. School and District staff told OCR that this rule for parents also applies to other visitors, and the purpose of this rule was to limit the disruption of such observations on student learning. They explained that for most observations, 20-30 minutes was adequate. School staff told OCR that they could not make an exception to the policy. District staff told OCR that exceptions were possible, and had been granted a few times in the past. District staff told OCR they were unaware of the request in this case.

In late April 2014, just over one month after the family filed the OAH complaint, two of the Student's private service providers emailed the school psychologist working with the Student to set up times to observe the Student at School during recess, lunch, and/or class time. The school psychologist responded to these requests and explained that District policy limits such

observations to 20-30 minutes per session. She also explained that School policies require a staff member to accompany the visitor, and she requested "24 hour notice to obtain principal approval" from one of the outside requestors. Additional documents provided by the District also showed that in May of 2013, approximately one year prior to the OAH complaint, one of the Student's private service providers requested to observe the Student at the School. The Student's case manager, informed the private occupational therapist that such observations are limited to 30 minutes, and she explained she needed to schedule the visit "during a time when [the] school psychologist" could be present.

Analysis

OCR's investigation showed that the Student's parents engaged in protected activity on behalf of the Student's rights as a student with a disability, by filing the OAH special education due process complaint. In addition, prohibiting or otherwise limiting communications with, or observations by outside service providers is a potential form of adverse action that could reasonably chill a parent from engaging in such protected activity in the future. However, here, OCR did not find by a preponderance of the evidence, that any such restrictions placed on the private service providers were indeed retaliatory. Specifically, with regard to the private psychologist's attempts to talk to the Student's teacher, the teacher and other staff told OCR that they wanted the Student's support team to talk with the psychologist in order to better answer her questions and serve the Student. OCR did not find evidence that this nondiscriminatory explanation was a pretext for retaliation.

Second, with respect to the time limitations on observations by private service providers, OCR found that these limitations were based on a School policy that is applied generally across the board to parents and students, including non-disabled parents and students. OCR did not find evidence to show that this policy was applied selectively or more restrictively to the Student's observers. In addition, OCR found evidence that the same restrictions were required of the Student's private observers in May 2013, one year prior to the March 2014 protected activity of the OAH complaint. This evidence suggests that the School's limits on outside observers in 2014 were not motivated by retaliation for the 2014 OAH complaint, but were consistent with such prior requests made in 2013, and their published School policy. Therefore, OCR did not find by a preponderance of the evidence, that the School's reason for limiting the outside observations was a pretext for retaliation.

However, OCR's investigation did show that the District's published materials do not clearly explain its prohibitions on retaliation. In addition, OCR notes that although 30 minutes for observations by outsider service providers may typically be sufficient, this amount of time may not always be sufficient. Therefore, as a matter of technical assistance, OCR recommends that the District establish and publish clear policy prohibitions on retaliation for engaging in protected activity, and develop a formal process by which parents of Students with disabilities may request exceptions to the general outside observer rule, in order to ensure adequate observations and parental input in the IEP and 504 processes.

Conclusion

For the reasons explained above, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to the first issue, and insufficient evidence of noncompliance with respect to the second issue. After OCR notified the District of its conclusions, without admitting to any violation of law, the District entered into the enclosed Agreement that, when fully implemented, will resolve the issues in this complaint. Pursuant to the Agreement, the District will: 1) reimburse the Student's parents for the cost of 1,260 minutes (21 hours) of privately delivered individual speech and language services; (2) hold an IEP meeting to determine any appropriate compensatory services for the failure to provide consultation services and the change in delivery of individual speech and language services during the spring of 2015; and, (3) develop and adopt uniform service logs to clearly document and track implementation of IEP and 504 plan services. The signed Agreement is enclosed with this letter. OCR will monitor the District's implementation of the Agreement.

This concludes OCR's investigation of the complaint and 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. OCR is notifying the complainant concurrently.

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.

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 correspondence and records upon request. In the event that OCR receives such a request, it 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 privacy.

OCR would like to thank the District for its cooperation in resolving this case and specifically, we would like to thank the District's Director of Special Education, Linda White. If you have any questions, please contact OCR staff attorney Brian Lambert, at (415) 486-5524 or Brian.Lambert@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure
cc: Linda White, Director of Special Education, San Marino Unified School District (email)