



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

April 21, 2016

Dr. Michael Babb, Ed.D
Superintendent
Ventura Unified School District
255 W. Stanley Avenue
Ventura, California 93001

(In reply, please refer to # 09-15-1534.)

Dear Superintendent Babb:

This letter is to advise you of the resolution of the above-referenced case which was opened on September 11, 2015, in response to a complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), against the Ventura Unified School District (District), which alleged discrimination against the Student¹ on the basis of disability. Specifically, OCR investigated whether the District failed to provide the Student with a free appropriate public education (FAPE) when (1) the District did not provide real-time captioning for the Student in his High School Art class (School), and (2) the subsequent provision of communication accessible real-time translation (CART) services by an off-site servicer did not provide the Student with effective communication.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of 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 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

Under Article III, Section 302 of OCR's Case Processing Manual (CPM), a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses interest in resolving the complaint. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving the allegation through a voluntary resolution agreement (Resolution Agreement). This letter summarizes the applicable legal standards, OCR's factual findings, and how the complaint was resolved.

¹ OCR notified the District of the identity of the Student when the investigation began. We are withholding the Student's name from this letter to protect the Student's privacy.

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

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.

When school district officials know that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, they have an affirmative obligation to provide effective communication under Title II.² As noted in joint guidance issued by the OCR, Office for Special Education and Rehabilitative Services and the U.S. Department of Justice, this obligation is in addition to the requirement that school districts make FAPE available if the student is eligible.³ Under Title II, districts must provide appropriate “auxiliary aids and services” where necessary to provide effective communication;⁴ that is, schools must provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district. Title II requires covered entities, including public schools, to give “primary consideration” to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.⁵

The Title II regulations also require that when a public school is providing auxiliary aids and services that are necessary to ensure equally effective communication, they must be provided in “accessible formats, in a timely manner, and in such a way as to protect the privacy and independence” of a student with a disability.⁶ The auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. For the auxiliary aid to be provided in a timely manner, it means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. If the student is waiting for the auxiliary aid or service, districts should keep the student (and parent) informed of when the auxiliary aid or service will be provided. This requirement is separate from the provision of

² 28 C.F.R. § 35.160 (a)(1) provides “ A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”

³ For further explanation, please see “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools,” at Question 5, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

⁴ 28 C.F.R. § 35.160(b)(1).

⁵ 28 C.F.R. § 35.160(b)(2).

⁶ 28 C.F.R. § 35.160(b)(2).

special education and related services under the IDEA. Where the student or his or her parent requests auxiliary aids and services for the student under Title II, the appropriate aids and services must be provided as soon as possible, even if the IDEA's evaluation and IEP processes are still pending.⁷

School districts should provide auxiliary aids and services that would allow the student to go through the material independently, at his/her own pace, and with the ability to revisit passages as needed.⁸ A District must ensure that it meets both its FAPE obligations as well as its obligation to provide effective communication under Title II and that none of the student's rights under either law are diminished or ignored. If the special education and related services provided as part of FAPE are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met.⁹

Facts Gathered to Date

Background

- The School is the District's independent study high school. During the 2015-2016 school year, the Student was enrolled in XXXX grade at the School. The District has identified the Student as an individual with a disability under Section 504 based on his moderate to severe sensorineural hearing loss.
- The Student's most recent Section 504 Plan is dated May 11, 2015. With respect to the provision of CART services, the Student's Section 504 Plan states that his classroom accommodations will include "a method of real time speech-to-text translation that provides a continuous stream of the verbatim instruction and student comments with a reasonable level of accuracy."
- The Student meets once a week with his general education teacher at the School. The Complainant stated the Student does not need CART in one-on-one meetings with the general education teacher, but that CART services are necessary in order for the Student to understand instruction and discussion in classroom settings.

Initial Failure to Provide CART Services

- During the fall semester of the 2015-2016 school year, the Student enrolled in an elective art class which met once a week at the School. The first day of the Student's art class was September 10, 2015.
- On September 1, 2015, prior to the start of the Student's art class, the Complainant emailed the District's School Psychologist (Psychologist) and reminded him that Student would need CART services in the class. The Psychologist responded that same day and stated that he

⁷ For further explanation, please see "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools," at Question 5.

⁸ *Id.*

⁹ *Id.* at pp. 1-2 and Question 10.

would speak to School's Principal (Principal). However, the Complainant stated that when the Student arrived for his first class, no CART services had been arranged. As a result, the Student did not fully understand the art teacher's (Teacher) review of the course syllabus and his first assignment.

- The Complainant immediately emailed the Psychologist and asked why the CART services were not set up. The Psychologist forwarded the Complainant's email to the Special Education Director (Director), who requested additional information from the Psychologist and Principal regarding the class size and structure. The email correspondence suggested that the Director was unaware that the School offered elective classes on its campus. The Director instructed District staff contact vendors to arrange remote CART services, and provide a paraprofessional to sit in the class with the Student until the CART services were in place.
- On September 16, 2015, the Psychologist notified the Complainant by email that a paraprofessional would sit in class with Student until CART services were arranged. The Psychologist also stated that since the class did not require the Student to take notes or participate in class discussions, a temporary aide should be sufficient in meeting the Student's needs. The Complainant disagreed with the Psychologist's description of the class and the sufficiency of the paraprofessional, and stated that the Student had already missed instruction as a result of not having his accommodations in place.
- The District provided OCR with a copy of its contract with Total Recall Captioning, dated September 17, 2015, which states that remote CART services will be provided during the Student's art class. The date of the provision of CART services is from October 1, 2015 through June 9, 2016.
- The District acknowledged that CART services were not provided during the first month of the Student's art class. In addition, the District stated that due to the School's enrollment process for electives, it was not aware that the Student had enrolled in the class until the Complainant's September 1, 2015 email. The District stated that the Student's Section 504 Plan only requires CART in a classroom setting, and that the Student does not utilize CART in one-on-one meetings with his independent study general education teacher. The District stated that after the Complainant's September 1, 2015 email, it needed to gather information on the nature of the elective class, including whether the teacher provided individual or group instruction, to determine whether the CART provision of the Student's Section 504 Plan applied.
- The District stated that as a result of the Student's experience, it has instructed the Principal to review the student enrollment in elective courses at the School prior to the first day of class and identify whether any students have Section 504 Plans or IEPs to ensure their services are appropriately implemented.

Effective Communication

- The Complainant stated that after the CART services began to be implemented in the Student's October 8, 2015 class, the Student was denied effective communication because of problems with the off-site CART service provider.
- Specifically, the Complainant stated that the transcription was made from of speech heard through a microphone worn by the Teacher. The Complainant stated that the Teacher did not always use the microphone before beginning the class, causing the Student to miss portions of the Teacher's instructions. In addition, the Complainant stated that the transcriber did not hear questions and comments made by students who were not located close to the Teacher.
- In addition, the Complainant stated the District laptop provided to the Student frequently locked its screen, requiring the Student to log in frequently. The Complainant stated that during the log in process the Student missed instruction or comments because he could not read the transcription.
- The District acknowledged that the Complainant raised concerns about the quality of CART services in the Student's art class. In response, the District stated it has instructed the Teacher not to begin class discussion until all the CART equipment, including the microphone, was in place and operational. The District also stated it changed the security settings on the laptop so that it will not lock its screen after the Student has logged in at the beginning of class.
- The Complainant stated that she had previously raised concerns about the quality of transcription with an off-site provider to the District during a June 2, 2015 IEP meeting. The Complainant told OCR that District staff said that an on-site provider may have logistical problems that do not occur for off-site providers, such as difficulty getting to the Student's School on time because of traffic congestion. The District's counsel told OCR that the District may also have difficulties securing an on-site provider because the Student's elective is only once a week for an hour, as opposed working with a student for a full school day. The Complainant told OCR that to date the Student's IEP has not been finalized due to her disagreement with the District's offer of off-site CART services.

Analysis

OCR found that the Student was not provided with CART services for four classes, from September 10 to October 1, 2015, and that a paraprofessional was provided for three of the four classes in which there were no CART services. In addition, OCR found that there were problems with the implementation of Student's CART services, including that the teacher sometimes began instruction before the microphone was turned on, and that the microphone did not pick up all student comments. These facts raise concerns that the Student's Section 504 Plan was not implemented from September 10 to at least October 1, 2015, and that in subsequent classes, problems with the delivery and implementation of CART services prevented the Student from receiving equally effective communication. In order to complete its investigation, OCR would need to conduct staff interviews to assess whether services were provided in accordance with the

Student's Section 504 plan and assess the extent to which the Student received effective communication after CART services were provided.

Resolution

Prior to the conclusion of OCR's investigation, the District, without admitting any violation of federal law, voluntarily agreed to enter into the enclosed Resolution Agreement with OCR to resolve the concerns raised in the complaint. Under the terms of the Resolution Agreement, the District will convene a Section 504 or IEP team meeting to consider and reach a determination on the Complainant's request for on-site CART services, including applying the appropriate Section 504 and Title II legal standards, and to assess whether any compensatory education services are needed to address any identified concerns with implementation and/or provision of effective communication. The District will also develop written guidance regarding the implementation of Section 504 Plans and IEPs in elective courses at the School, and distribute such guidance to relevant staff, students, and parents/guardians at the School.

When fully implemented, the Resolution Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Resolution Agreement until the District is in compliance with Section 504, Title II, and their implementing regulations.

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 closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. 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, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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.

OCR would like to thank the District, and in particular the District's General Counsel Anthony M. Ramos, for your assistance in resolving this complaint. If you have any questions regarding this letter, please contact Kendra Fox-Davis at (415) 486-5418 or kendra.fox-davis@ed.gov.

//

Sincerely,

/s/

Kendra Fox-Davis
Team Leader

Enclosure