



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

May 18, 2016

Ms. Janice Adams
Superintendent
Benicia Unified School District
350 East K Street
Benicia, California 94510-3437

(In reply, please refer to case no. 09-16-1039.)

Dear Superintendent Adams:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Benicia Unified School District (District). The complainant alleged that the District discriminated against the student on the basis of disability¹. Specifically, OCR investigated the following issues:

1. Whether the Recipient failed to provide the Student with a free, appropriate public education (FAPE) by not providing a chemistry tutor for Student in the 2014-15 school year.
2. Whether the District discriminated against the Student when the Student's Chemistry teacher gave him a grade of D on part of his chemistry final and refused to allow him to retake that portion of the test with the questions read to him and giving oral responses.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in education 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 regulations over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives funds from the Department, is a public school district, and is subject to Section 504 and Title II and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR concluded that the District was not in

¹ OCR previously provided the District with the identity of the complainant, the student, and the parents. We are withholding their names from this letter to protect their privacy.

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

compliance with Section 504 and Title II with regard to the issue 1 but was in compliance with regard to issue 2. The applicable legal standard, the facts gathered by OCR, and the reasons for OCR's conclusions 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.

Section 104.35(c) of the 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.

When a District knows 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 and its implementing regulation at 28 C.F.R. § 35.160. 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.

Under Title II, districts must provide appropriate "auxiliary aids and services" where necessary to provide effective communication; 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.

Issue 1: *Whether the Recipient failed to provide the Student with a FAPE by not providing a chemistry tutor for the Student during the 2014-15 school year?*

Findings of Fact

- The Student has been identified as eligible for a Section 504 Plan (504 Plan) based on Attention Deficit Disorder, Dyslexia, and Dysgraphia.
- The Student's 2014-2015 504 Plan identified "Chem. Tutor to help [Student's] understanding..." but the Plan did not identify who was responsible for providing tutoring services or paying for it.
- A document entitled "Home Activities to Support the Individualized Section 504 Plan," which is attached to the 504 Plan, states, "parents to look for a Chem. Tutor."
- The Student's Chemistry Teacher provided the parent with the name of a chemistry teacher in a neighboring school district who would tutor the Student for a fee.
- The District asserted in a statement provided to OCR that "parents to look for a Chem. Tutor" was intended to mean that the parents of the Student would identify and pay for such a tutor.
- The District's Section 504 Coordinator and the teacher who attended the Section 504 meeting in question no longer work for the District and were unavailable for an interview; the District attempted to contact them and they did not respond to inquiries.
- The Complainant told OCR that the Section 504 team determined that the Student needed a tutor in chemistry based on his disability and that she understood that the School would pay for such a tutor after identification. The Complainant was present at the Section 504 meeting where the Student's 2014-15 504 Plan was created.
- The Parents paid the tutor identified by the Chemistry Teacher a total of \$900 and an additional tutor \$360 for a total of \$1260 for tutoring for the Student's Chemistry Class.

Analysis & Conclusions of Law

Pursuant to Section 504, the provision of a free education is the provision of educational and related services without cost to the person with a disability or to his or her parents. While the Section 504 plan as written is not clear as to the location, duration or frequency of services to be provided, it does identify a specific need for a chemistry tutor based on the Student's unique needs related to his disability. Based on the plain

language of the plan and the undisputed fact that instead of identifying a person in the District to provide such services, the District referred the parents to an outside service provider, OCR found that the District was obligated under Section 504 to pay for the tutoring services and could not assign the duty to pay to the parents. For these reasons, OCR found the District out of compliance with Section 504 and Title II and their implementing regulations. To address the violation, the 303(b) resolution agreement attached hereto requires the District to reimburse the parents for payments made to the chemistry tutor in the 2014-2015 school year.

As a matter of technical assistance, OCR strongly recommends that the District ensure that all staff receive training and guidance on how to ensure clear documentation of the placement, related services, accommodations, and modifications agreed upon during a team meeting process, including the District staff responsible for ensuring implementation and providing services.

Issue 2: Whether the District discriminated against the Student when the Student's Chemistry teacher gave him a grade of D on part of his chemistry final and refused to allow him to retake that portion of the test with the questions read to him and giving oral responses.

Findings of Fact

- The Student's Section 504 Plan for 2014-2015 does not include a provision that the Student is allowed to take or retake written tests in an oral format.
- Other testing accommodations, including with respect to extra time on tests and using an open notebook for the final/alternative site for the Student's Spanish class, are written in the Section 504 plan.
- The relevant provision in the 2006 "Recommendations" section of the Assessment conducted by an outside assessor related to oral testing provides that the Student must be "given all tests orally. He should be allowed to dictate his answers orally."
- The District told OCR that only those accommodations specifically written in the Section 504 Plan were agreed upon for the Student. The Section 504 Coordinator and Chemistry teacher who participated in the relevant meeting are no longer with the District and unavailable to be interviewed.
- No provision in the Student's 2014-2015 504 Plan or the "Recommendations" section of the 2006 assessment allows the student to retake a test that was taken in written format.

Analysis and Conclusions of Law

OCR found that the applicable Section 504 Plan did not include a provision that the Student be allowed to take or retake written tests in an oral format. While the complainant asserted that the Section 504 team had agreed that the plan should incorporate all of the outside assessor's recommendations from a 2006 evaluation, OCR did not find support for this assertion in the evidence reviewed.

In this regard, while the plan included specific accommodations, such as extra time on tests, the accommodation of being allowed to take or retake a written test in oral format was not included for any class. OCR notes that if such a testing accommodation was needed to address the Student's identified needs related to his disability, including ensuring effective communication under Title II, 34 C.F.R. §104.35(c) of the Section 504 regulations provides that the process for reaching such a decision in the secondary education context must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options and not by an individual teacher.

In addition, if the complainant did not agree with the District's exclusion of the particular accommodation as part of the 504 plan, 34 C.F.R. § 104.36 provides for an impartial hearing to address disagreements with an opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

As a matter of technical assistance, OCR notes that it appears that the District has never conducted its own evaluation of the Student's needs and recommends that such an evaluation be conducted to ensure that all of the Student's needs are being addressed.

This concludes the investigation of this complaint. To address the compliance issues alleged in the complaint, the District entered into the enclosed resolution agreement, which provides that the District will reimburse the parents of the Student for out-of-pocket costs incurred in obtaining Chemistry tutoring services for the Student during the 2014-2015 school year and provide documentation to OCR showing the costs determined and paid to the parents for such services.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the Recipient is in compliance with the resolution agreement.

OCR's determination in this matter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact David LaDue, Civil Rights Attorney, at 415-486-5528.

Sincerely,

/s/

James Wood
Team Leader

Cc. Dr. Carolyn Patton, Director of Special Services

Enclosure