



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

March 10, 2020

Jan Gonzales
Superintendent
Victor Elementary School District
12219 2nd Avenue
Victorville, California 92395

(In reply, please refer to case no. 09-19-1622.)

Dear Superintendent Gonzales:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has reached a determination in the above-referenced complaint against the Victor Elementary School District (District) that OCR received on September 11, 2019. The Complainant alleged that the District discriminated against his daughter (Student) based on disability.¹ OCR initiated an investigation of the following issues:

1. Whether a District school (School) did not follow adequate procedures to evaluate and place the Student after receiving notice that she had, or was suspected to have, a disability (food allergy) and needed special education or related services.
2. Whether the School denied the Student an equal opportunity to participate in its programs and activities when it conditioned her receipt of disability-related services, modifications, aids, and/or accommodations on limited participation in its Kindergarten program.

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 based on disability in programs and activities operated 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 based on disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and the implementing regulations.

¹ OCR previously identified the Complainant and the Student to the District. We are withholding their names from this letter to protect their privacy.

OCR began investigating the complaint by reviewing documents provided by the Complainant and the District, and by interviewing the Complainant. OCR identified compliance concerns; however, OCR concluded that the District took action during the investigation to partially resolve the first issue and fully resolve the second issue. The District has signed a Resolution Agreement to fully resolve the first issue. This letter summarizes the relevant facts, the applicable legal standards, and OCR's conclusions.

Facts

The Student has a serious nut allergy. She was X years old at the beginning of the 2019-20 school year when her parents enrolled her in Kindergarten at the School. During the 2019-20 school year, the School had several Kindergarten classes. Students were primarily assigned to one of these classes. However, for a portion of the school day students had "choice time" during which they had the opportunity to participate in an activity of their choice in any Kindergarten class. In terms of meals, Kindergarten and Pre-Kindergarten students ate together in the cafeteria at a separate time than other grade-levels; for breakfast, all grade levels ate in the cafeteria at the same time.

The District's 2019-20 Section 504 Policies and Procedures (Procedures) state in part that site administrator responsibilities include ensuring that parents are given notice of procedural safeguards at Section 504 team meetings. The Procedures do not specify that the District must also provide notice of procedural safeguards any time it takes action regarding the identification, evaluation, or educational placement of a student who, because of disability, needs or is believed to need special instruction or related services. The Procedures list examples of students who may be considered for a possible Section 504 Plan, including "when a student exhibits a chronic health condition (i.e. diabetes)." Students with food allergies do not appear on the list. The Procedures do not describe any distinction between a Section 504 Plan and an individual healthcare plan (IHP) and do not explain that a student's disability need not have academic impact for the student to be eligible for a Section 504 Plan. Finally, the District uses a Section 504 Plan form with a check-off list of "accommodations" for the Section 504 team to consider in the following categories: physical arrangement of the room; lesson presentation; assignment/worksheets; test taking; organization; behaviors; positive interventions; parent involvement; and student responsibility. Common services, modifications, aids, and supports for students with food allergies are not represented on the check-off list. However, the form does provide a space to write in "additional accommodations."

According to the Complainant, sometime in June 2019 the Student's mother (Mother) spoke with the School secretary and requested a Section 504 Plan to address the Student's nut allergy at school; he stated that the secretary told the Mother that the School nurse would contact her but she never did.

On August X, 2019, the Mother attended an event at the School and personnel told her that students with nut allergies would be seated at a nut-free table in the cafeteria. Before school

started, the Student's parents provided the School with medical documents explaining the Student's nut allergy and related needs, including not ingesting or being exposed to nuts.

The District reported that at the beginning of the 2019-20 school year the School ensured that the Student's Kindergarten class was nut-free and provided a nut-free table for her to sit at with other students in the cafeteria.

According to the Complainant, on the first day of school, August XX, 2019, a XXXXXXXX, the Student wore a button on her shirt and had a lunchbox that both read "allergic to all nuts." The Mother stated that she also explained the Student's nut allergy to her teachers. However, on that day the Student was not seated at a separate table during lunch in the cafeteria and sat next to a child who had a peanut butter and jelly sandwich. The Mother later sent an email to the School inquiring about the protocol to address the Student's nut allergy; the Student's assigned teacher (Teacher 1) responded by stating that she was working on a seating chart and would communicate with cafeteria staff.

The Complainant told OCR that on XXXXXXXX, August XX, 2019, the School principal (Principal) was present in the cafeteria during Kindergarten lunch and ensured that the Student sat at the nut-free table without incident. However, he reported that on XXXXXXXX and XXXXXXXX, August XX and XX, 2019, the Student again sat next to a child with a peanut butter sandwich in the cafeteria at lunch. The Complainant said that the Mother contacted the School nurse who apologized and stated that she would speak with Teacher 1.

The Mother also sent an email to Teacher 1 about the August XX and XX, 2019 incidents. According to the District, School personnel then sent an email to School staff directing them to remind students with nut allergies to eat at the designated nut-free table during lunch. It attached a list of all School students with nut allergies.

On August XX, 2019, the following XXXXXX, the Mother met with the Principal about managing the Student's nut allergy at school. She requested a Section 504 Plan for the Student. According to the Complainant, the Principal told the Mother that it would be a two-week process and that the Principal would have the School nurse call the Mother that day to set something up.

According to the District, the Principal believed that the Student's nut allergy-related needs could be addressed by an Individualized Healthcare Plan (IHP) and requested that staff provide the Student's parents related forms and develop an IHP for the Student.

The Complainant told OCR that the Mother called the School nurse on August XX, 2019 to inquire about the Section 504 Plan. The School nurse reportedly stated that she had not been informed of the Mother's previous request. She also asked for a period of two weeks to respond to the Mother's request.

According to the Complainant, on September X, 2019 the Mother sent an email to the School nurse inquiring about the status of convening a Section 504 team meeting. The Mother said that

the School nurse called her in response and told her that the School had denied the request for a Section 504 Plan because the Student did not have a disability that impacted her academically. The School nurse reportedly told the Mother that the School could only develop an IHP for the Student.

On September X, 2019, a child with a package of peanuts sat next to the Student at the nut-free table in the cafeteria at lunchtime. According to the Complainant, a proctor approached before the child opened the peanuts and moved the child to another table.

On or around September XX, 2019 the Complainant returned a signed IHP for the Student to the School. The Complainant told OCR that when he turned in the paperwork a School employee told him that the Student's assigned Kindergarten class was nut-free but if she wanted to participate in choice activities in other Kindergarten classrooms her parents would have to give permission because those other classrooms were not nut-free. The District reported that the Principal met with the Student's parents on this date, told them that the accommodations in the IHP were appropriate to protect the Student, and denied their request to convene a Section 504 team meeting. It confirmed that the Principal also said that the Student could have access to the other Kindergarten classrooms during choice time but that the other classrooms were not nut-free.

The District told OCR that the Student's parents still had concerns about how the School was addressing the Student's health-related needs at School, so the Principal contacted the Assistant Superintendent of Pupil Services (ASPS) for guidance. The ASPS recommended that the School ensure that all Kindergarten classes were nut-free, post signage on each classroom indicating that this was a nut-free zone and schedule a Section 504 team meeting for the Student. The School implemented these recommendations.

The Complainant stated that he called the School to follow up on September XX, 2019 and the Principal called him back. The Principal described the changes that had been made and offered to convene a Section 504 meeting on October X, 2019. The Complainant accepted the offer.

The ASPS met with the Student's parents prior to the Section 504 meeting on October X, 2019. She described the changes the School had put in place to make the entire Kindergarten wing nut-free, including related signage. The ASPS also explained the Section 504 process.

The ASPS facilitated the Section 504 meeting on October X, 2019 during which the parents shared information about the Student's food allergy and related needs. The Section 504 team included the ASPS, both parents, the Principal, and another School employee. The Section 504 team found the Student eligible for a Section 504 Plan and developed one for her. The District reported that the School provided the parents notice of procedural safeguards for the first time during this meeting.

The parents later signed in agreement to the Section 504 Plan on or around October X, 2019. The Complainant confirmed to OCR that he and his wife believed that the content of the Section 504 Plan appropriately met the Student's health-related needs at school. The District reported that:

the Student's Section 504 Plan was being implemented; the Student was allowed to participate in choice activities in other Kindergarten classrooms; all Kindergarten classes were designated as nut-free zones; and all Kindergarten staff were familiar with the Student's Section 504 Plan and IHP. The Complainant confirmed on October X, 2019 that there had been no other incidents in which the Student was exposed to nuts or nut products at school since September X, 2019.

The District reported that the ASPS provided one-on-one training to the Principal on the requirements of Section 504. Based on the materials used, the training provided general information on the Section 504 process and did not specifically address the reason(s) that the Principal reportedly initially denied the parents' requests for a Section 504 Plan. For example, it did not describe the distinction between a Section 504 Plan and an IHP or clarify that a student's disability need not have an academic impact for the student to qualify for a Section 504 Plan. In addition, the training did not address the District's obligation to provide parents notice of procedural safeguards when denying a request to convene a Section 504 team meeting. Finally, the training materials included no information on addressing the needs of students with food allergies under Section 504. There was no evidence that other School personnel who responded to the parents' requests for a Section 504 Plan, such as the School nurse, received training in these areas either.

The District told OCR that in an October 2019 staff meeting a District Nurse trained all School staff on the symptoms of anaphylaxis and addressing the needs of students with food allergies at school.

Analysis

Issue 1.: Whether the School did not follow adequate procedures to evaluate and place the Student after receiving notice that she had, or was suspected to have, a disability (food allergy) and needed special education or related services.

Legal Standard

The Section 504 regulations, at 34 C.F.R. § 104.33, require 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. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school 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 34 C.F.R. § 104.35(c), placement decisions must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must also be based on information from a variety of sources that is carefully considered and documented. Finally, 34 C.F.R. § 104.36 requires school districts to 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.

Determination

Upon review of the facts gathered during the investigation, OCR identified a compliance concern because the School initially failed to follow adequate procedures to evaluate and place the Student after receiving notice at the beginning of the 2019-20 school year that she had, or was suspected to have, a disability and needed special education or related services. The evidence shows that the Student's parents requested a Section 504 Plan for the Student before and after the 2019-20 school year began. The District acknowledged that the Principal denied the parents' request and decided only to offer the Student an IHP. The Principal made this decision alone, without conducting an evaluation, and reportedly using an incorrect standard---that a disability must impact a student academically in order to qualify for a Section 504 Plan. In addition, neither the Principal nor other School personnel who communicated the decision provided the parents with notice of procedural safeguards explaining how to challenge it. Finally, the Student was exposed or potentially exposed to other students with nut products in the cafeteria on four occasions at the beginning of the 2019-20 school year.

OCR determined that the District acted during the investigation to partially resolve this compliance concern. The ASPS met with the parents and explained the Section 504 process. The District convened a Section 504 meeting with a group of knowledgeable people, considered the Student's medical information and related needs, found the Student eligible for a Section 504 Plan, and provided the parents with notice of procedural safeguards. The parents later signed the Section 504 Plan in agreement, Kindergarten staff received information about the Section 504 Plan and IHP, and the Section 504 Plan was implemented. In addition, a District nurse trained School staff on the symptoms of anaphylaxis and addressing the needs of students with food allergies.

However, OCR found that the compliance concern was not fully resolved because the ASPS provided Section 504 training² only to the Principal and the training did not address: the reason(s) that the Principal initially denied the parents' requests for a Section 504 Plan; School

² OCR only examined those portions of the training materials relevant to the issues raised by this complaint; OCR made no determination regarding whether the rest of the materials accurately reflect Section 504 and Title II requirements.

personnel's failure to provide the parents notice of procedural safeguards when communicating the decision to deny the requests; and common aids, services, modifications, and accommodations used to respond to the specific needs of students with food allergies under Section 504. In addition, as currently written, the Procedures may not provide District personnel with sufficient guidance to ensure that this response to requests for Section 504 Plans is not repeated at other District schools. Specifically, the Procedures³ require the provision of notice of procedural safeguards only at a Section 504 meeting, its examples of students potentially eligible for a Section 504 Plan does not include students with food allergies, it does not describe the distinction between an IHP and a Section 504 Plan, and it does not explain that a disability need not have academic impact for a student to be eligible for a Section 504 Plan. In addition, the Section 504 Plan form's list of examples of accommodations for the Section 504 team to consider does not include common services, modifications, aids, and supports for students with food allergies. Accordingly, OCR concluded that the compliance concern identified with respect to this issue has not yet been fully resolved.

Issue 2.: Whether the School denied the Student an equal opportunity to participate in its programs and activities when it conditioned her receipt of disability-related services, modifications, aids, and/or accommodations on limited participation in its Kindergarten program.

Legal Standard

Under the Section 504 regulations, at 34 C.F.R. § 104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iii), and 28 C.F.R. § 35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

Appendix A to the Section 504 regulations states that the term "equally effective" is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of individuals with disabilities to the same extent that the corresponding needs of nondisabled persons are met, adjustments to the regular program may sometimes be necessary. A school district must therefore make reasonable modifications to policies, practices, and procedures and provide aids, supports, and services necessary to ensure that an individual with a disability has an equal opportunity to participate in

³ OCR only examined those portions of the Procedures relevant to the issues raised by this complaint; OCR made no determination regarding whether other provisions of the Procedures comply with Section 504 and Title II requirements.

its programs and activities, unless it can demonstrate that doing so would be a fundamental alteration or would constitute an undue burden. The Title II regulations, at 28 C.F.R. § 35.130(b)(7), also require school districts to make reasonable modifications to policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the school district can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Determination

Based upon the evidence summarized above, OCR identified another compliance concern because the School initially denied the Student an equal opportunity to participate in its programs and activities when it conditioned her receipt of disability-related services, modifications, aids, and/or accommodations on limited participation in its Kindergarten program. The facts show that School personnel conditioned the Student's full participation in the Kindergarten program, specifically choice time in other Kindergarten classes, on her parents' acknowledgement that if she did so she would have to forego her primary disability-related modification, a nut-free environment, and put her health at risk. However, OCR found that once the ASPS got involved and provided guidance that the School took effective action to resolve this compliance concern. The School made the entire Kindergarten wing nut-free, posted related signage, and familiarized Kindergarten staff with the Student's Section 504 Plan and IHP. The District and the Complainant confirmed to OCR that there have been no further problems with the Student fully participating in the Kindergarten program with her disability-related modifications since the School took this action.

After considering these facts, OCR concluded that it had obtained credible information indicating that this compliance concern had been fully resolved through action the District took during the investigation. Accordingly, OCR finds that the District is currently compliant with Section 504 and Title II requirements with respect to this issue.

Conclusion

OCR informed the District of its determination and it agreed to fully resolve the first issue through a voluntary Resolution Agreement. The District agreed to: amend its Section 504 Policies and Procedures and Section 504 form; distribute the amended Policies and Procedures and form to credentialed District personnel as well as parents and guardians of District students; and provide training on the amended Policies and Procedures and form to certain School personnel. 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 the complaint issues. OCR will monitor the implementation of the Resolution Agreement until the District complies with the terms of the Resolution Agreement. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

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 issue other than that addressed in this letter.

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, retaliate, 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 a complaint with OCR alleging such treatment.

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

Thank you for the courtesy and cooperation extended by you and your staff during the investigation. If you have any questions regarding this letter, please contact me at (415) 486-5555.

Sincerely,

/s/

Joseph Wheeler
Team Leader

Cc: Lisa Dennis
Fagen Friedman & Fulfrost LLP