



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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

April 21, 2107

Marcy Guthrie, Ed.D.
Superintendent
Mother Lode Union School District
3783 Forni Road
Placerville, California 95667

(In reply, please refer to case no. 09-17-1215.)

Dear Superintendent Guthrie:

The U.S. Department of Education, Office for Civil Rights (OCR), investigated the above-referenced complaint against the Mother Lode Union School District (District). The issue OCR investigated was whether the District and El Dorado County Office of Education (EDCOE) discriminated against the Student on the basis of disability when it failed to provide the Student with a free appropriate public education (FAPE) by not implementing the Student's Individualized Education Program (IEP) with respect to the provision of an eye gaze device.¹

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 and is subject to Section 504 and Title II.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. Prior to OCR completing its investigation, the District voluntarily agreed to address the areas of concern identified by OCR with respect to the issues investigated. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

Issue: Whether the District and EDCOE discriminated against the Student on the basis of disability when it failed to provide the Student with FAPE by not implementing the Student's IEP with respect to the provision of an eye gaze device.

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

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education 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 developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). 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 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. As noted in joint guidance issued by OCR, the 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.

The Title II regulations 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. 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 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.

School districts should provide auxiliary aids and services that would allow the student to go through the material independently, at his own pace, and with the ability to revisit passages as needed. 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.

Facts Gathered to Date

- The Student resides in the District and was placed in the Multiple Abilities program at XXXXXXXX Elementary School (School), an EDCOE public day school program, for the 2015-16 and 2016-17 school years.
- The Student is diagnosed with XXXXXXXX XXXXXXXXXXX XXXXXXXX XXXX X and qualified for special education services and related services under the primary disability category of Orthopedic Impairment and secondary disability category of Multiple Disability. She is being served under an IEP and an Individual School Health Plan. Student is nonverbal and needs the use of an Augmentative and Alternative Communication (AAC) device (e.g. eye gaze communication system, iPad, picture cards, low tech visuals/icons, computer).
- At an IEP meeting in June 2015, the IEP team approved an AAC assessment to be conducted in August 2015, when the school year begins. However, the assessment was not completed until January 2016 due to the Complainant not signing the assessment plan and miscommunication regarding who would conduct the assessment.
- At the start of the 2015-16 school year, the Student was bringing her own personal AAC device to use at the School. In fall 2015, the AAC device frequently malfunctioned. From December XX, 2015 until sometime in April 2016, California Community Services (CCS), a county contracted service provider, had physical possession of the Student's personal AAC device for testing and repairs. Without her personal AAC device, the Student used the classroom iPad with the Touch Chat application (app) and subsequently used an iPad mini with the Touch Chat app for the remainder of the 2015-16 school year. The Complainant stated that Touch Chat is not eye gaze technology and did not work.
- Also in December 2015, the Student used a Tobii Dynavox AAC unit for a four week trial period.
- Based on the AAC assessment conducted in January 2016, the District Director of Special Education approved the purchase of a Tobii Dynavox dedicated AAC device for the Student on February X, 2016. He forwarded his approval to the Special Education Local Plan Area (SELPA) to purchase the device. The SELPA had approved it but due to a change in policy, it would not purchase low incidence equipment for districts any longer. The SELPA stated that the District or EDCOE should purchase it and then the costs, if approved by the low incidence committee, would be reimbursed by the SELPA.
- On April X, 2016, the Student's teacher told the Assistive Technology (AT) Specialist that the SELPA would not purchase the AAC device for the Student. She informed him that due to cost savings, the EDCOE Principal of Special Services was willing to consider purchasing a Surface tablet and eye gaze device instead of the dedicated Tobii Dynavox AAC device. In addition, they would purchase the Communication 5 language system since the Student had previously tested it and the assessment recommended it. The teacher asked for the AT Specialist's recommendations, and the AT Specialist responded that the Surface tablet with eye gaze device was a good option for the Student.

- An IEP meeting was held on April XX, 2016. The IEP team agreed that the eye gaze communication system was the most effective way for the Student to communicate. It also required that the Student receive 45 minutes monthly of Assistive Technology Services from EDCOE to help her learn how to use the AAC device. At this point, the Student still had not received an AAC device to replace her malfunctioning personal AAC device.
- After the April XX, 2016 IEP meeting, the District submitted an order to purchase an AAC device for the Student but in May 2016, it cancelled its order when CCS agreed to buy it for the Student.
- At the start of the 2016-17 school year, the Student's April XX, 2016 IEP was in effect. The Student still did not have access to an AAC eye gaze device because CCS failed to purchase it as previously agreed. The Student continued to use an iPad mini with the Touch Chat application from the previous school year at the start of the 2016-17 school year. The Complainant stated that Touch Chat is not eye gaze communication and it did not work properly. The District then installed an eye gaze app on the Complainant's Surface tablet and let the Student use that in school.
- An IEP meeting was held on September XX, 2016, and the IEP team learned then that CCS did not purchase the AAC device. The AT Specialist stated that was because there was no CCS vendored assessor available to conduct the AAC assessment, which was required by CCS before CCS purchased a device. The District agreed to purchase one immediately for the Student.
- The Complainant did not sign the September XX, 2016 IEP. The Complainant stated at the IEP meeting that she does not agree to any EDCOE placement for the Student and asked about District options. The District rejected a District placement and stated that the District's offer of FAPE was the Multiple Abilities class at the School, which is a EDCOE program. The District believed that the Student's needs were appropriately being addressed there. The Complainant stated that she was withdrawing the Student from the E program effective that day. The Complainant further stated that she would be exploring other district options and would teach her at home if necessary. The District stated that it would provide home instruction on an interim basis until a resolution could be reached.
- On September XX, 2016, the District Director of Special Education purchased the Tobii Dynavox eye mobile mini with Microsoft Surface Pro 4 computer/tablet (Surface/Tobii Dynavox mini package) with desktop mount and Communicator 5 Gold language software for the Student.
- The AT Specialist stated that at the time of purchase, he recommended the Surface/Tobii Dynavox mini package because it was sufficient to meet the Student's educational and communication needs. He stated that "it features the same software and eye gaze technology that a dedicated eye gaze device offers. The device is mounted on a stand and is meant to provide the Student with academic and speech options and to teach her the fundamentals of eye gaze technology." In addition, he explained that the primary differences with the Surface/Tobii Dynavox mini package and a dedicated communication device is "in the housing, the battery life, the speaker, and ability to interface with the environment (infrared to control a TV, lights, etc.). These are important for use outside the home and if she was mobile in a wheel chair."

- The District Director of Special Education stated that the Tobii Dynavox mini eye mobile unit is not an application but a separate portable device that is attached to the Surface computer/tablet. It can be later removed and attached to another computer. It can be used both in school and at home with the student. The Surface included software (Communicator 5 Gold software) so the Student could access her academic curriculum (K-12 age appropriate academic and language skills). He stated that this technology was new and was not available at the time he approved the Tobii Dynavox dedicated eye gaze device in February 2016.
- In October 2016, the Student received the Surface/Tobii Dynavox mini package. The Complainant stated that the Surface/Tobii Dynavox mini package was ineffective because the program was not age appropriate and no instructions or assistive technology support services were provided to help the Student learn how to use them.
- The AT Specialist stated that the software can be set to include several different levels of speech support as well as academic activities. Originally, a beginner level speech system was selected to display at the request of the family on November XX, 2016. A software update caused the system to run in evaluation mode which prevented the Student from accessing higher graded material. The Complainant's issues with the Surface/Tobii Dynavox mini package have been corrected.
- XXX---paragraph redacted---XXX.
- XXX---paragraph redacted---XXX.
- XXX---paragraph redacted---XXX.

Analysis

The facts obtained in the investigation thus far raise concerns that the District did not adequately understand and meet its responsibilities under Section 504 and Title II to provide FAPE to a qualified student with a disability. Title II regulations state that the auxiliary aid must permit the person with a disability to access information. In this case, there is a concern regarding the months in which the Student did not have an AAC device that met her needs. Without a functional and appropriate AAC device, the Student used a classroom iPad with Touch Chat, but the Complainant stated Touch Chat is not the eye gaze technology the Student needs and the XXXXXXXXXXX XXXX XXXXXXXXXXXXXXX XXXXXXX XXXXXXXXXXX XXXXXXX, XXX XXX XXX XXXXXXXXXXX XXXXXXX, XXXXX XXX XXXXXXX XXX XXXX XXXX XXXXXXX XXXXXXX XXX XXXXXXX XXXXXXX XXXXX.

In addition to the concern that the provided auxiliary aid that did not meet the Student's needs, OCR is also concerned that the approved auxiliary aid was not provided in a timely manner. Title II regulations require 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. The AAC assessment was completed in January 2016, yet bureaucratic quagmire prevented the Student from receiving the recommended Surface/Tobii Dynavox mini package until October 2016. OCR is concerned with the confusion among the SELPA, District, EDCOE, and CCS regarding which entity is responsible for purchasing the approved AAC device. Because the Student did not receive the approved auxiliary aid in a timely manner, XXX XXXXXXXXXXX XXXX XXXXXXXXXXXXXXX XXXXXXX XXXXXXXXXXX XXXXXXX XXXXXXXXXXX XXXXXXX the Student had lost skills.

Before OCR completed its investigation, the District expressed interest in a Section 302 Resolution Agreement on January 26, 2017 and OCR determined that a voluntary resolution was appropriate as to this allegation. In order to complete the investigation, OCR would need to interview the Student's Multiple Abilities teacher at the School and Licensed Vocational Nurse.

Conclusion

Prior to concluding its investigation and to address the issues alleged in the complaint, the District, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegation and the information obtained by OCR during its investigation.

Under the agreement, the District and EDCOE will: convene an IEP meeting to discuss the effectiveness of the AAC device as well as the Student's other educationally related needs; develop and implement a plan to provide compensatory education for the Student; provide training to the Complainant or Student from an AT Specialist; identify an employee at the District to serve as the Complainant's point of contact; and draft and disseminate a memorandum on the obligation to ensure prompt purchase and delivery of approved auxiliary aids and services to students with disabilities when more than one entity is involved and a description of how to fulfill this obligation when more than one entity is involved.

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 District is in compliance with the Section 504, Title II, and their implementing regulations at issue in the case.

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 Danette Ng (Danette.Ng@ed.gov or 415-486-5539) or Annie Lee (Annie.Lee@ed.gov or 415-486-5594).

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: XXXXXXXXX XXXX, Counsel (via email only)