

OCR finds that ESY needs to be determined individually
A district (Tuttle, OK) ran in to a little difficulty with OCR by suggesting a standard amount of ESY hours for everyone instead of making a individualized decision.

Office for Civil Rights, Midwestern Division, Kansas City (OK)

07-09-1160

November 17, 2009

Judge / Administrative Officer

Angela M. Bennett, Director

Full Text

Dear Superintendent Coker:

On May 21, 2009, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint alleging discrimination on the basis of disability by the Tuttle Public Schools (District), Tuttle, Oklahoma. OCR has completed its investigation of the complaint. This letter details OCR's investigation and findings.

The complainant alleged that the District: (1) denied her daughter, a student with disabilities, a free appropriate public education by limiting her Extended School Year (ESY) services to two days (two and one-half hours per day) per week based on the enrollment of other students rather than an individualized decision regarding her daughter's needs; and (2) treated her daughter differently than nondisabled students by not allowing her to participate and play on the softball team at the Tuttle Middle School because of her disabilities.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) Â§ 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA).

-Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Â§ 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of FFA from the Department and a public entity, the District is subject to Section 504 and Title II.

In investigating this complaint, OCR examined information the complainant and the District submitted, including the complainant's daughter's education records, District policies regarding the evaluation and placement of students with disabilities, and information regarding student participation on District athletic teams. OCR also interviewed the complainant by telephone and interviewed the complainant, her daughter, and her husband in person on August 5, 2009. During an on-site visit to the District on August 6 and 7, 2009, OCR

interviewed the District's director of federal programs, the athletic director for the District, an occupational therapist and a speech pathologist who worked with the complainant's daughter, and the following Tuttle Middle School staff, the principal, the counselor, two special education teachers who worked with the complainant's daughter, a regular education teacher who taught the complainant's daughter, and a paraprofessional who worked with the complainant's daughter. OCR staff also met with you during the on-site visit.

OCR applies a preponderance-of-the-evidence standard to determine whether evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

Based on our investigation, OCR has concluded that the allegation that the District discriminated against the complainant's daughter on the basis of disability with regard to her participation on the Tuttle Middle School softball team, as alleged in Allegation 2 of this complaint, has been resolved. With regard to Allegation 1 of the complaint, OCR found the District denied the complainant's daughter a free appropriate public education as alleged. OCR's determination is explained in detail below.

Allegation 1 -- Denial of Free Appropriate Public Education

The complainant alleged the District denied her daughter a free appropriate public education by limiting her ESY services during summer 2009 to two days per week, for two and one-half hours per day, based on the enrollment of other students rather than an individualized decision regarding her daughter's needs.

Legal Standard

The regulation implementing Section 504 at 34 C.F.R. Â§ 104.4 states that no qualified person 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 that receives FFA. A District student is considered a qualified individual with a disability under Section 504 if the student: (1) has a physical or mental impairment that substantially limits one or more of the student's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. See 34 C.F.R. Â§ 104.30(1). As defined in the Section 504 regulation at 34 C.F.R. Â§ 104(j)(2)(ii), major life activities include, but are not limited to, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The regulation implementing Section 504 at Â§ 104.33(a) requires recipients of FFA that operate a public elementary or

secondary education program, such as the District, to provide a free appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation implementing Section 504 at 34 C.F.R. Â§ 104.33(b)(1) defines an appropriate education as regular or special education and related aides and services that: (i) are designed to meet individual educational needs of individuals with a disability as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. Â§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). As stated in the Section 504 regulation at 34 C.F.R. Â§ 104.33(b)(2), a school district may satisfy its obligation to provide an appropriate education to a student with a disability by implementing an individualized education program (IEP) developed for the student in accordance with the Individuals with Disabilities Education Act (IDEA).

Under 34 C.F.R. Â§ 104.35(b), recipients are required to establish standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education or related services. In making placement decisions, recipients are required to draw upon information from a variety of sources, ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of evaluation data, and placement options. Through this process, recipients must determine whether the student is a qualified individual with a disability and, if so, determine the student's appropriate regular or special education placement and related service needs, including the student's need for extended school year services. The regulation implementing Title II at 28 C.F.R. Â§ 35.130(a) states that a qualified individual with a disability may not be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity. The Title II regulation at 28 C.F.R. Â§ 35.130(b)(1)(i) similarly states that a public entity, in providing any aid, benefit, or service, may not deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service on the basis of the individual's disability. OCR interprets the Title II regulation to require school districts to provide a free appropriate public education to qualified individuals with a disability to the same extent required by the Section 504 regulation.

Findings of Fact

OCR investigated whether the District denied the complainant's daughter a free appropriate public education by limiting her ESY services for the summer of 2009 without making an individualized decision regarding her needs. Specifically, the complainant alleged that during a May 2009 IEP team meeting regarding her daughter, the District's director of federal programs informed her that the number of hours of ESY services for her daughter for the summer of 2009 would be

less than previous summers based on the low number of students who would be receiving ESY services during summer 2009, and did not allow her daughter's IEP team to make an individualized determination regarding the appropriate number of hours her daughter should receive ESY services. Based on the information the complainant and her family provided and on information provided by District employees and contractors, OCR made the following factual findings:

Background Information

- The complainant's daughter is a 13-year-old student who has been diagnosed with attention-deficit hyperactivity disorder (ADHD) and epilepsy. A 2007 evaluation by the District identified the complainant's daughter as having a Specific Learning Disability in the areas of basic reading skills, reading comprehension, written expression, math calculation, and math reasoning and found that her intellectual functioning was in the Extremely Low classification range.
- The complainant's daughter has attended school in the District since first grade, and is currently a seventh grade student at the Tuttle Middle School.
- The complainant's daughter has had an IEP since she was four-years-old. The District acknowledges that the complainant's daughter is a student with a disability and has classified her as Other Health Impaired based on her ADHD and history of seizures.
- The complainant's daughter has received ESY services in the District for as long as she has attended school in the District. The complainant stated that her daughter received ESY services four days per week, for two and one-half hours per day, every summer until summer 2009, when she only received ESY services two days per week. The District provided OCR documentation confirming that during summer 2006, summer 2007, and summer 2008, the complainant's daughter received ESY services four days a week for six weeks. The documentation did not specify the number of hours of ESY services she received per day, but District personnel did not dispute that she received approximately two and one-half hours of ESY services on the days she attended the ESY program. The documentation the District provided OCR for summers prior to 2005 did not specify the number of days or hours of ESY services the complainant's daughter received per week.

District Policies Regarding Discrimination on the Basis of Disability and ESY Services

- The District's notice of nondiscrimination states that the District does not discriminate on the basis of race, color, sex, age, national origin, alienage, disability, or veteran status.
- The District does not have any grievance procedures in place for the resolution of complaints alleging disability discrimination.
- The District has a policy and guidelines in place regarding ESY services for children and youth with disabilities. The

District's Extended School Year Policy for Students with Disabilities (ESY Policy) defines ESY as "special education programming in excess of 180 days per year as recommended by a multidisciplinary team." The ESY Policy states that the purpose of the District's ESY program is "to prevent regression and to maintain skills which would otherwise be lost due to severe regression and inability to recoup."

- The District's ESY Policy states that the factors the District will consider in determining whether a student needs ESY services include: (1) the degree of regression and the time necessary for a student to recoup lost skills; (2) the ability of the student's parents to provide educational structure at home; (3) the nature and degree of the student's disability; (4) the student's rate of progress; (5) the student's behavioral and physical problems; (6) the availability of alternative resources; (7) the ability of the student to interact with non-disabled children; (8) the areas of the student's curriculum that need continuous attention; (9) the child's vocational needs; (10) is the area of service(s) under consideration "extraordinary" to the student's disabling condition; and (11) is the area of service(s) under consideration an integral part of a special education program designed for children with the same disability.

- The District's ESY Policy identifies several potential sources of information for the District to use in determining a student's eligibility for ESY services, including criterion referenced and standardized tests, functional assessments, an analysis of data collected on a regular basis, interviews with teachers and parents regarding the success or potential success of ESY services, and an analysis of student performance on IEP objectives across time.

- The District's ESY Policy specifies that the District will provide ESY services for six weeks during the summer and that eligibility for ESY services "will be considered on an individual basis each year, for each student." In accordance with its ESY Policy, a multidisciplinary team, generally a student's IEP team, develops an ESY IEP that sets out the ESY services a student will receive during a given summer.

- The director of federal programs oversees the District's ESY program.

May 20, 2009 IEP Meeting

- The District held an IEP meeting on May 20, 2009 regarding the complainant's daughter. The complainant and the director of federal programs attended the IEP meeting along with an occupational therapist contracted by the District, a District speech pathologist, and the following Tuttle Middle School employees: the counselor, a paraprofessional who assisted the complainant's daughter, the complainant's daughter's special education teacher, and a regular education teacher who taught the complainant's daughter. The Tuttle Middle School principal participated in part of the IEP meeting, but was not present for the entire meeting.

- The complainant told OCR that she and the director of federal programs discussed her daughter's ESY services for summer 2009 during the IEP meeting and that the director of federal programs

stated that her daughter would receive two days of ESY services per week. The complainant asked why, since in the past, her daughter had received ESY services four days per week. The complainant told OCR that the director responded, "Honestly, we just didn't have enough kids sign up." The complainant told OCR that was the extent of the IEP team's discussion regarding ESY services for her daughter.

- The District provided OCR a completed Consideration for Extended School Year (ESY) Services form for the complainant's daughter dated May 20, 2009. The form lists 13 factors IEP teams may consider in determining whether a student needs ESY services to receive a free appropriate public education. The form has yes and no boxes next to each factor and instructs the individual completing the form to indicate, by checking the applicable box, which factors the IEP team considered to be relevant to the student. The completed form for the complainant's daughter indicated that the IEP team considered the following factors: (1) her degree of impairment; (2) her regression and the time necessary for recoupment of skills; (3) the ability of her parents to provide educational structure at home; (4) her rate of progress; (5) the ability of the complainant's daughter to interact with nondisabled children; (6) areas of the complainant's daughter's curriculum requiring continuous attention; and (7) the Least Restrictive Environment for the complainant's daughter. Under the area of regression and recoupment, the form states: "[The complainant's daughter] loses what she learns very quickly. We work on skills daily and review often on task already covered." The form shows that the IEP team determined ESY services were necessary for the complainant's daughter to receive a free appropriate public education. The spaces on the form for IEP team members to sign showing they participated in the review of existing data for the ESY determination were left blank.

- The IEP team completed an ESY IEP for the complainant's daughter at the May 20, 2009 IEP meeting. The ESY IEP showed the skill areas the District was supposed to address with her during summer 2009 were reading, math, and speech/language. Under "Amount of Service(s) Necessary," the ESY IEP said: "4 days a week X 6 weeks" -- with the "4" crossed out and replaced by a handwritten "2" -- for reading and math, and "30 min X 2 weekly" for speech/language. The IEP also showed 8:30 a.m. to 11:00 a.m. as the time period for the provision of services. The ESY IEP showed May 2009 as the beginning date for ESY services and June 2009 as the ending date for ESY services. The ESY IEP also contained the following comment: "Due to severe regression, all subject areas need to be addressed." All of the IEP team members except for the complainant and the principal signed and dated the ESY IEP.

- The written position statement the District submitted to OCR stated that while in previous years, the complainant's daughter's IEP team recommended the complainant's daughter receive four days per week of ESY services for a total of six weeks, due to her "level of functioning and slow rate of progress," the IEP team recommended that for summer 2009, she should only receive ESY services two days per week for six weeks.

- The director of federal programs told OCR the discussion during the May 20 IEP meeting regarding ESY services for the complainant's daughter was brief. He said the IEP team recommended that she receive two days per week of ESY services during summer 2009 rather

than four days per week as she had in the past. He recalled the complainant responding to the recommendation by saying something to the effect of, "Well, is that it?" The director told OCR he did not recall saying in the IEP meeting that the number of days of ESY services for the complainant's daughter was being reduced because not enough students had signed up for ESY services. The director denied that he, or the District, reduced the number of days of ESY services for the complainant's daughter based on the enrollment of other students and denied that there were any restrictions on the number of students to whom the District could provide ESY services, or on the amount of money the District could spend on ESY services, for summer 2009.

- One IEP team member also told OCR the discussion during the May 20, 2009 IEP meeting regarding ESY services was brief. She recalled a member of the IEP team stating in the IEP meeting that the number of days per week of ESY services for the complainant's daughter for the summer of 2009 had been reduced to two days per week. The complainant asked why it had changed, and the director of federal programs responded that the entire ESY program had been reduced from five days per week to two days per week due to a policy change or a District change. The IEP team member told OCR there was no discussion during the IEP meeting regarding how many days of ESY services per week the complainant's daughter needed because the director of federal programs basically said, "This is the way we are running the ESY program this year."

- A second IEP team member told OCR the decision to reduce the number of days per week of ESY services for the complainant's daughter to two days for summer 2009 was an administrative decision that applied to all students receiving ESY services for summer 2009, not just the complainant's daughter. This team member said she had no input in the decision and that the reduction was applicable to all students whose parents wanted their children to receive ESY services. She indicated to OCR that she thought the ESY program had been operated that way for as long as she had worked in the District.

- A third IEP team member told OCR she recalled the director of federal programs telling the complainant during the May 20 IEP meeting that the District was not going to have as many ESY services. When the complainant asked what he meant, the director of federal programs said something to the effect of, "We don't have enough." The team member did not know what the director was referring to when he said, "We don't have enough."

- Two other IEP team members told OCR they recalled the complainant asking, during the May 20 IEP meeting, why the number of days of ESY services for her daughter was being reduced to two days per week. One of these IEP team members could not recall the director of federal program's response to the complainant's question, and the other member thought the director responded that some students received two, three, or four days of ESY services based on need.

- One IEP team member told OCR she recalled ESY services coming up during the May 20 IEP meeting but did not remember the team discussing how many days per week the complainant's daughter would receive ESY services during summer 2009.

Additional Information

- The director of federal programs told OCR he oversees the District's ESY program "to an extent," but that the ESY services provided during the summer extend beyond his contract period. He indicated that he relies on the staff members hired to provide ESY services for a given summer to ensure that the services are provided. During summer 2009, the District had three teachers as well as an occupational therapist, physical therapist, and speech pathologist providing ESY services to students.
- The director of federal programs told OCR that during summer 2009, the District provided ESY services to students younger than fourth grade at one location and provided ESY services to students in fourth, fifth, and sixth grade at a second location. The District did not have any students in seventh grade or higher receive ESY services during summer 2009. The director told OCR approximately 25 District students younger than fourth grade received ESY services during summer 2009, and approximately three students in the fourth, fifth, and sixth grades combined, including the complainant's daughter, received ESY services during summer 2009. No student received more than two days per week of ESY services during summer 2009.
- The speech therapist realized during her on-site interview with OCR that she was supposed to have provided the complainant's daughter 30 minutes of individualized ESY speech/language services two times per week during summer 2009 but did not provide her any of those services. The speech therapist told OCR she received a schedule from the director of federal program's secretary with the names of students she was supposed to serve during summer 2009 and did not recall seeing the complainant's daughter's name on the list. The speech therapist acknowledged that she had signed the ESY IEP for the complainant's daughter on May 20, 2009 and should have known she was supposed to provide her speech/language services during summer 2009.
- The director of federal programs explained to OCR that the schedule his secretary provided the speech therapist for summer 2009 listed the children younger than grade four who were supposed to receive ESY speech/language services during summer 2009 by name because there were so many of them, and did not identify the older students who were supposed to receive ESY speech/language services by name because there were only a few of them.

Analysis and Conclusion

In analyzing the complainant's allegation that the District denied her daughter a free appropriate education by limiting her ESY services for summer 2009 to two days per week based on the enrollment of other students rather than an individualized decision regarding her daughter's needs, OCR looked first at whether the complainant's daughter was a qualified individual with a disability entitled to receive ESY services. In order for the complainant's daughter to be protected under Section 504 and Title II as an individual with a disability, she must have a physical or mental impairment that substantially limits one or more of her major life activities, have a

record of such an impairment, or be regarded as having such an impairment. See 34 C.F.R. Â§ 104.30(1) and 28 C.F.R. Â§ 35.104. OCR concluded that the District identified the complainant's daughter as a qualified individual with a disability prior to summer 2009, and that a multidisciplinary team knowledgeable about her, the meaning of evaluation data, and placement options, determined she needed ESY services during summer 2009 in order to receive a free appropriate public education.

Next, OCR examined whether the District made an individualized determination regarding the amount of ESY services the complainant's daughter needed during summer 2009 in order to receive a free appropriate public education, or limited the amount of ESY services for her daughter based on a uniform reduction in ESY services for all students who qualified for ESY services. Based on our investigation, OCR concluded that the preponderance of the evidence established that the District reduced the complainant's daughter's ESY services to two days per week based on a uniform, District-wide decision regarding the amount of ESY services it would provide during summer 2009, not based on an individualized determination regarding her educational needs. Although OCR could not confirm that the District reduced ESY services to two days per week for summer 2009 based on low student enrollment, the preponderance of the evidence showed the director of federal programs, who runs the District's ESY program, stated in the complainant's daughter's May 20, 2009 IEP meeting that the complainant's daughter would only receive two days per week of ESY services due to a policy change or change in the way the District ran the ESY program. Several IEP team members confirmed that the director of federal programs made this or a similar statement, and the fact that no student in the District received more than two days of ESY services during summer 2009 supports OCR's finding that the District limited its provision of ESY services during summer 2009 for all students, including the complainant's daughter.

OCR has concluded that the District violated Section 504 and Title II by failing to make an individualized determination regarding the amount of ESY services the complainant's daughter needed during summer 2009 to receive a free appropriate public education. OCR has also concluded that the District failed to provide her the speech/language services required by her ESY IEP for summer 2009. Under the complainant's daughter's ESY IEP, the speech pathologist was supposed to provide her individualized speech/language services for 30 minutes, two times a week for six weeks during May and June 2009. The speech pathologist acknowledged to OCR that she did not provide the complainant's daughter these ESY speech/language services due to an oversight. This failure to provide 360 minutes of ESY speech/language services that the complainant's daughter's IEP team determined were necessary for her to receive a free appropriate public education also raises Section 504 and Title II compliance concerns.

Although the complainant did not allege in her OCR complaint that the District's grievance procedures for complaints of disability discrimination were inadequate, the evidence obtained during OCR's investigation of her complaint also raised compliance concerns about the District's Section 504/Title II grievance procedures.

Specifically, OCR is concerned that the District does not have grievance procedures in place for complaints of disability discrimination that do

not have to do with the identification, evaluation, or placement of student with a disability under the IDEA. The Section 504 regulation at 34 C.F.R. Â§ 104.7(b) requires recipients that employ 15 or more individuals, such as the District, to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The Title II implementing regulation at 28 C.F.R. Â§ 35.107(b) contains a similar requirement for public entities such as the District that employ 50 or more individuals.

The District has voluntarily entered into a Resolution Agreement (Agreement) with OCR to resolve Allegation 1 of this complaint and address the Section 504 and Title II compliance concerns OCR identified regarding the District's failure to provide the complainant's daughter ESY speech/language services during summer 2009 and lack of adequate grievance procedures for the prompt and equitable resolution of disability discrimination complaints. The District executed the Agreement, a copy of which is enclosed, on November 3, 2009. When fully implemented, the Resolution Agreement will resolve the Section 504/Title II violations identified by OCR. Therefore, OCR considers Allegation 1 of this complaint resolved as of the date of this letter. OCR will monitor the District's compliance with the Agreement.

Allegation 2 -- Different Treatment Based on Disability

The complainant alleged that the District treated her daughter differently than nondisabled students by not allowing her to participate and play on the softball team at the Tuttle Middle School because of her disabilities. More specifically, the complainant alleged that during a May 20, 2009 IEP meeting regarding her daughter, IEP team members told her, or implied, that her daughter would not be allowed to practice or play on the softball team during the 2009-10 school year because of her disabilities. At the time the complainant filed her complaint with OCR, the 2009-10 school year had not yet begun.

Legal Standard

Under the Section 504 regulations at 34 C.F.R. Â§Â§ 104.4(a) and 104.4(b)(1), no qualified person 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 that receives FFA. More specifically, a recipient of FFA may not, on the basis of disability, deny a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits, or services it provides and may not provide different or separate aids, benefits, or services to individuals with a disabilities unless such action is necessary to provide qualified disabled persons with aids, benefits, or services that are as effective as those provided to others. In addition, a recipient may not limit a qualified individual with a disability in the enjoyment of any right, privilege,

advantage, or opportunity enjoyed by others receiving an aid, benefit, or service from the recipient.

The Title II regulation at 28 C.F.R. Â§ 35.130(a)

similarly prohibits public entities from subjecting qualified individuals with disabilities to discrimination and from excluding, on the basis of disability, qualified individuals from participating in and receiving the benefits of the public entities' services, programs, and activities. OCR has construed Title II's general discrimination provisions to cover discriminatory conduct that is specifically prohibited under Section 504.

In order for a District student to be protected under Section 504 and Title II as an individual with a disability, the student must have a physical or mental impairment that substantially limits one or more of his or her major life activities, have a record of such an impairment, or be regarded as having such an impairment. See 34 C.F.R. Â§ 104.30(1) and 28 C.F.R. Â§ 35.104.

To determine whether a recipient or public entity discriminated against a student on the basis of disability by treating the student differently than non-disabled students, OCR applies a different treatment analysis. First, OCR examines whether a prima facie case of discrimination exists. To establish a prima facie case of discrimination in this case, OCR must find that the District identified or regarded the complainant's daughter as an individual with a disability, a District official or representative treated her differently than one or more similarly situated non-disabled students in a way that interfered with or limited her ability to participate in or benefit from the District's educational program, and the different treatment occurred in the course of the District official's or representative's authorized or assigned duties and responsibilities. If OCR finds a prima facie case of discrimination exists, it must then determine whether the District has articulated a legitimate, nondiscriminatory reason for treating the complainant's daughter differently. If the District has articulated a legitimate, nondiscriminatory reason for treating her differently than a similarly situated student without a disability, OCR cannot find the District discriminated against her on the basis of disability unless OCR determines that the reason the District provided for the different treatment is merely a pretext, or a cover-up, for unlawful discrimination.

The Section 504 regulation at 34 C.F.R. Â§ 104.37

requires recipients of FFA from the Department to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity to participate in the services and activities as students without disabilities. With regard to physical education courses and athletics, the regulation specifically requires, at 34 C.F.R. Â§ 104.37(c)(1), recipients that offer physical education courses or operate or sponsor interscholastic, club, or intramural athletics to provide qualified students with disabilities an equal opportunity for participation. The Title II regulation at 28 C.F.R. Â§ 35.130(b)(1)(ii) similarly provides that public entities must afford qualified individuals with disabilities an equal opportunity to participate in or benefit from its aids, benefits, and services as that afforded to individuals without disabilities. Accordingly, to determine whether the District

discriminated against the complainant's daughter on the basis of disability, OCR considered whether the District offered her an equal opportunity to participate on the Tuttle Middle School softball team as students without disabilities.

OCR Findings

OCR investigated whether the District discriminated against the complainant's daughter on the basis of disability by prohibiting her from participating on the Tuttle Middle School softball team as the complainant alleged.

Based on the information the complainant and her family provided, as well as information provided by District employees and contractors, OCR made the following factual findings:

Background Information -- Regarding Student Participation on the Tuttle Middle School Softball Team

- The Tuttle Middle School serves students in grades six through eight. The District has mandatory physical education (P.E.) for sixth graders, but does not offer a general P.E. class for seventh or eighth grade students.
- Seventh and eighth grade students who want to participate in athletics at the Tuttle Middle School may sign up for one or more of the school's athletic teams. The athletic teams practice during the school day, during the Athletics class. Students who are in the Athletics class during the off-season for their sport(s) participate in an off-season program, which consists of activities like lifting weights, running, and doing conditioning drills.
- Students do not have to try out for the Tuttle Middle School softball team. All female students who meet the scholastic eligibility requirements set by the Oklahoma Secondary School Activities Association (OSSAA) are eligible to join the team. The complainant's daughter met the OSSA eligibility requirements. Students join the team by selecting softball, or having their parents select softball, on a school enrollment form as one of their elective classes. There is no limit on the number of students who may join the Tuttle Middle School softball team, and the team is divided into a varsity team and a junior varsity team.
- All students who sign up for softball may participate in team practices and receive a team uniform. Players are not cut from the Tuttle Middle School softball team based on their ability level. However, the softball coach selects players for specific field positions and determines who will play in softball games based on student skill levels.
- The District's athletic director held an informational meeting at the Tuttle Middle School in May 2009 for students interested in playing softball. The complainant's daughter attended the meeting with the paraprofessional assigned to assist her during the school day. The athletic director provided the students who

attended the meeting, including the complainant's daughter, a copy of the softball schedule for the 2009-10 school year. The athletic director assumed the complainant's daughter took the schedule home to the complainant but did not know if she actually provided the complainant the schedule. The complainant indicated to OCR that she did not receive the schedule.

- The Tuttle Middle School softball team plays fast pitch softball and has competed successfully for several years against teams from other schools. During the 2007-08 school year, the Tuttle Middle School softball team did not lose any games, and during the 2008-09 school year, the team lost only one game.
- In April 2009, the complainant submitted an enrollment form to the Tuttle Middle School with softball selected as an elective class for her daughter. The complainant told OCR she chose softball for her daughter because she played on a Little League softball team when she was in first grade and because she felt it would help her daughter's coordination, upper body strength, physical fitness, and social skills.

May 20, 2009 IEP Meeting

- During the May 20, 2009 IEP meeting regarding the complainant's daughter, the counselor raised a concern about her participating on the Tuttle Middle School softball team during the 2009-10 school year. The counselor knew the complainant, or her daughter, had selected softball as an elective course for the 2009-10 school year because the counselor processed the enrollment forms students and their parents filled out in April and was responsible for creating student schedules for the upcoming school year. The counselor, who has daughters who played softball in the District, stated in the IEP meeting that she was concerned the complainant's daughter would get hurt if she was on the softball team. The counselor emphasized in the meeting that the softball team played competitive softball, not recreational softball. When the complainant suggested her daughter could play catcher, where she would be wearing protective gear, the counselor responded that her daughter could still be hurt by a swinging bat or injured by the ball. The counselor reiterated in the IEP meeting that the complainant's daughter could get seriously hurt playing softball, including during softball practice, and informed the complainant that her own daughters had been playing softball since they were four-years old which, according to the counselor, was the case for many of the players on the Tuttle Middle School softball team. The counselor suggested in the meeting that the complainant's daughter take an elective course like vocal (choir) instead of softball. The complainant was not receptive to that suggestion and stated that her daughter did not like choir.

- The director of federal programs, who had a daughter on the Tuttle High School softball team, also expressed concern during the IEP meeting about the complainant's daughter participating on the softball team. The director stressed that the Tuttle Middle School softball team played competitive softball, not recreational softball. He told OCR he knows the complainant's daughter well and was

concerned she would get hurt on the softball team because of her tendency to wander off and be inattentive. He also told OCR that most of the girls who play on the softball team have been playing softball since they were little and have advanced softball skills. The director told OCR he was concerned about the complainant's daughter participating on the softball team, including at softball practices, because he feared for her health and safety, not because she was a student with a disability. The director suggested in the IEP meeting that basketball or track might be more appropriate for the complainant's daughter than softball. The complainant was not receptive to those suggestions because she wanted her daughter to play softball.

- One of the complainant's daughter's teachers, who had a daughter on the Tuttle High School softball team, also expressed concern during the May 20, 2009 IEP meeting about the complainant's daughter participating in softball. The teacher told the complainant her daughter was very impulsive and could get hurt. The teacher suggested the complainant's daughter sign up for track, which would be safer, instead of softball for the 2009-10 school year. The complainant was not receptive to that suggestion. The teacher also mentioned in the IEP meeting that many of the girls who play on the District softball teams receive or strive to earn softball scholarships for college.

- During the IEP meeting, members of the IEP team suggested that perhaps the complainant's daughter could serve as an assistant to the team without actually playing on the team. The complainant was not happy with that suggestion and said she wanted her daughter to play softball. The complainant felt her daughter should be given the opportunity to practice with the team and play in games even if she had some limitations due to her lack of softball experience or disabilities. One or more IEP team members told the complainant that even if her daughter was on the softball team, they could not guarantee she would get to play in games because that is a decision made by the coaching staff. The complainant commented to the IEP team that all they cared about was winning and that in the District, "It is all about sports."

- Although members of the IEP team did not expressly state that the complainant's daughter would be prohibited from participating on the Tuttle Middle School softball team during the 2009-10 school year, the complainant left the May 20 IEP meeting with the impression that her daughter would not be allowed to participate on the team. The director of federal programs told OCR he could understand why she left the meeting with that impression. Before leaving the IEP meeting, the complainant told the director of federal programs to find a sport her daughter could play, or figure out what her daughter would be allowed to do, and get back to her. Several IEP team members confirmed to OCR that things were left up in the air with regard to the complainant's daughter's participation in softball.

Complainant's Daughter's Participation on the Tuttle Middle School Softball Team

- On May 20, 2009, following the IEP meeting regarding the complainant's daughter, the director of federal programs

asked the athletic director if the complainant's daughter could participate on the Tuttle Middle School softball team. The director identified the complainant's daughter to the athletic director as a student with a disability. The athletic director told the director she could participate on the team and recommended that she wear a helmet with a facemask at all times when on the softball field and start out practicing with a rag ball instead of a regulation softball. (A rag ball is softer than a regulation softball.) The athletic director also told the director he would be happy to meet with the complainant and her husband to talk about their daughter's participation on the softball team.

- The athletic director told OCR no student has been cut from the Tuttle Middle School softball team for any reason during his tenure with the District and that the complainant's daughter was welcome to participate on the team. He told OCR students with disabilities are not prohibited from participating on the softball team and stated that one of the former star players on the Tuttle High School softball team was a student with a disability (prosthetic leg). The athletic director told OCR he and the Tuttle Middle School softball coach would not put the complainant's daughter in situations where she would be hurt but would ensure she was able to participate in practices and, as appropriate, in games. The athletic director said the girls on the softball team are taught by levels, with the more experienced players playing catch together at practice, and the less experienced players playing catch together. He said if there were other students on the team without prior softball experience, they would also start out the season practicing with a rag ball instead of a regulation softball.

- The counselor told OCR that following the May 20, 2009 IEP meeting, she enrolled the complainant's daughter in softball for the 2009-10 school year and also enrolled her in track, which takes place later in the school year than softball. The counselor said it would be easier to take her out of track if she decided she did not want to participate on the track team than to add track to her schedule at a later time. During OCR's August 2009 on-site to the District, the counselor provided OCR a copy of the complainant's daughter's class schedule for the 2009-10 school year, which showed she was enrolled in softball. The counselor also provided OCR a copy of the class roll for softball for the 2009-10 school year. The complainant's daughter's name was on the class roll along with the names of 32 other seventh and eighth grade students.

- Shortly after the May 20, 2009 IEP meeting, the complainant contacted the Oklahoma Special Education Resolution Center (OSER Center) in Tulsa, Oklahoma, with concerns about the amount of ESY services the District was planning to provide her daughter and her daughter's participation on the Tuttle Middle School softball team. The director of the OSER Center talked to the complainant about the Center's mediation process and contacted the District's director of federal programs on May 20, 2009 about participating in mediation with the complainant. According to the director of federal programs, he informed the director of the OSER Center that the District was interested in participating in mediation with the complainant. The complainant contacted OCR and filed her OCR complaint against the District before learning from the OSER Center that the District was interested in participating in mediation. The complainant decided to pursue her OCR

complaint instead of the OSER Center's mediation process.

- The principal told OCR that around July 20, 2009, the athletic director told him he would like the complainant's daughter to attend the first Tuttle Middle School softball practice, which was scheduled for Monday, August 10, 2009, and for the complainant to attend as well if she could. This practice was the only team practice outside of regular school hours. (The first day of school for the 2009-10 school year was August 13, 2009.) The principal told the athletic director he would have the director of federal programs inform the complainant about the practice. The principal told OCR he conveyed the message to the director of federal programs and assumed the director informed the complainant about the practice.

- The director of federal programs acknowledged to OCR that he did not tell the complainant or her husband about the August 10, 2009 softball practice. He told OCR he had not talked with the complainant about her daughter's participation on the softball team since the IEP meeting on May 20, 2009, because he was not sure if it was appropriate for him to contact her after learning about her request to engage in mediation through the OSER Center and about her OCR complaint.

- During OCR's on-site interview with the athletic director on August 6, 2009, the athletic director indicated that he thought the complainant was already aware of the softball team's first practice on August 10, 2009, and hoped the complainant would attend the practice along with her daughter so he could speak with her. The athletic director also informed OCR that the first Tuttle Middle School softball game was scheduled for August 13, 2009. He explained that because so many of the players on the team played softball during the summer, the team did not need to practice prior to its first game in order to be competitive. The athletic director provided OCR staff members his cell phone number for the complainant to call him regarding softball practice and her daughter's participation on the team. OCR provided the information to the complainant, and her husband contacted the athletic director.

- The complainant confirmed to OCR during telephone conversations on August 18 and October 13, 2009 that her daughter was placed on the Tuttle Middle School softball team and was allowed to participate on the team throughout the softball season. The complainant's daughter participated in softball practices, and the complainant and her husband worked out an arrangement with the softball coach regarding which softball games they wanted their daughter to attend. The complainant told OCR her daughter played in one game.

Additional Information

- A student with a disability (Specific Learning Disability) participated on the Tuttle Middle School softball team during the 2008-09 school year.

Analysis and Conclusion

OCR's investigation showed that although members of the complainant's daughter's IEP team expressed concerns about the complainant's daughter participating on the Tuttle Middle School softball team and questioned whether it was appropriate for her to participate on the team, the District did not actually prohibit her from enrolling in softball or participating on the softball team. The complainant confirmed to OCR that her daughter was placed on the softball team and remained on the team throughout the 2009 softball season. The complainant told OCR her daughter practiced with the softball team and played in one softball game. The complainant also informed OCR that she, her husband, and the softball coach collectively agreed the complainant's daughter would only participate in certain games. Consequently, OCR has determined that this issue has been resolved and is closing Allegation 2 of this complaint as of the date of this letter.

OCR will monitor the District's implementation of the Agreement the District entered into to resolve Allegation 1 of this complaint and address the Section 504 and Title II compliance concerns OCR identified with regard to the District's grievance procedures for disability discrimination complaints and failure to provide the complainant's daughter ESY speech/language services during summer 2009. When OCR concludes the District has fully implemented the terms of the Agreement, we will close the complaint. Failure to satisfy the terms of the Agreement will result in further action by OCR. The determinations contained in this letter are not intended, and should not be construed, to address any compliance issues under the regulations implementing Section 504 and Title II that may exist but are not specifically discussed herein. Furthermore, OCR's determinations have no bearing on the appropriateness of the District's actions under any policy, regulation, or law not discussed in this letter.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this complaint, please contact Nate Hicks, Equal Opportunity Specialist, at (816) 268-0583 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by e-mail at nate.hicks@...

Resolution Agreement

Tuttle Public Schools

The Tuttle Public Schools (District), Tuttle,

Oklahoma, submit this Resolution Agreement (Agreement) to the U.S. Department of Education, Office for Civil Rights (OCR), in order to resolve Allegation 1 of OCR Docket # 07091160 and ensure the District's compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C) Â§ 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104, and with Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Â§ 12131, and its implementing regulation, 28 C.F.R. Part 35. The District agrees to take the following actions:

Extended School Year Program Services

1. By January 15, 2010, the District develop and implement a written procedure that ensures decisions regarding the type, amount, and duration of Extended School Year (ESY) services for students with disabilities, including students with Individualized Education Programs (IEPs) and Section 504 Plans, are individualized determinations made for each student by a multidisciplinary team of individuals knowledgeable about the student, the meaning of evaluation data, and placement options.
2. By January 15, 2010, the District will provide OCR a copy of the procedure it developed to satisfy item 1 of the Agreement.
3. By January 15, 2010, the District will add language to its Extended School Year Policy for Students with Disabilities stating that determinations regarding the eligibility of students with disabilities for ESY services and the type, amount, and duration of ESY services each qualified student needs must be individualized determinations specific to each student's need, and that the type, amount, and duration of ESY services may not be unilaterally limited based on factors such as the number of students eligible for ESY services.
4. By January 15, 2010, the District will provide OCR a copy of its revised Extended School Year Policy for Students with Disabilities.
5. Prior to reducing the type, amount, and/or duration of ESY services for any student, the District will convene a meeting of a multidisciplinary team of individuals knowledgeable about the student, the meaning of evaluation data, and placement options to make an individualized determination regarding the appropriateness of the change(s) in ESY services. The District will invite the student's parent(s) or guardian(s) to participate in this meeting.
6. Prior to the end of the 2009-2010 school year, for each District student who qualifies as an individual with a disability under the Individuals with Disabilities Education Act (IDEA) or Section 504, the District will convene a multidisciplinary team of individuals knowledgeable about the student, evaluation data, and placement options. The team will make an individualized determination regarding the eligibility of the student for ESY services and, if eligible, the type, amount, and duration of ESY services the student will receive.
7. By February 1, 2010, the District will provide training to special education staff and administrators who regularly

participate in IEP or Section 504 meeting regarding the procedure established pursuant to item 1 of this Agreement.

8. By February 15, 2010, the District will provide OCR documentation showing it has completed item 7 of the Agreement. The documentation must include:

- (a) the date, time, and location of the training;
- (b) an outline, narrative description, or agenda showing the topics addressed at the training;
- (c) a copy of all handouts and other materials distributed at the training; and
- (d) the name and title of each employee who participated in the training (sign-in sheets with attendees' names and titles are sufficient).

9. By June 4, 2010, the District will provide OCR a copy of the ESY IEPs and ESY 504 Plans for all students determined eligible to receive ESY services during summer 2010 and a copy of the Consideration for Extended School Year Services form or other documentation showing how the District determined each student's eligibility for ESY services, the individuals who attended the ESY meeting, and the type, amount, and duration of services the student needed in order to receive a free appropriate public education, and who made the determination.

Compensatory Services

10. By November 20, 2010, the District will hold an IEP meeting for the complainant's daughter to determine what, if any, compensatory reading, math, and/or speech/language services are necessary to compensate for the District's failure to provide the complainant's daughter 360 minutes of individualized speech/language services, as outlined in her ESY IEP for the summer 2009, and failure to make an individualized determination regarding the amount of ESY services she was entitled to receive during the summer of 2009. The District will include the complainant and/or her husband in this IEP meeting. If the IEP determines the complainant's daughter is entitled to compensatory services, it will document in writing the factors it considered in making its determination, as well as the amount, type, and duration of services the complainant's daughter is entitled to receive, when and where the services will be provided, and who is responsible for providing the services. If the IEP team determines the complainant's daughter is not entitled to compensatory services, it will document in writing the factors the team considered in making its determination. The District's decisions and process for determining compensatory services for the complainant's daughter will be communicated to the complainant.

11. By November 30, 2010, the District will provide OCR documentation showing it has satisfied item 10 of the Agreement.

12. By November 30, 2010, the District will provide OCR a list of all students who received ESY services during summer 2009.

13. By February 26, 2010, the District will hold an IEP or Section 504 team meeting for each District student who received ESY services during summer 2009 to determine what, if any, compensatory

services are necessary to compensate for the District's failure to make an individualized determination regarding the type, amount, and or duration of ESY services the student was entitled to receive during summer 2009. If a student's IEP or Section 504 team determines the student is entitled to compensatory services, it will document in writing the factors it considered in making its determination, as well as the amount, type, and duration of services the student is entitled to receive, when and where the services will be provided, and who is responsible for providing the services. If the team determines the student is not entitled to receive compensatory services, it will document in writing the factors the team considered in making its determination. All decisions regarding compensatory services for students will be communicated to the parent(s) and/or guardians of the affected students.

14. By March 15, 2010, the District will provide OCR documentation showing it has satisfied item 13 of the Agreement.

Grievance Procedures

15. By January 15, 2010, the District will develop written grievance procedures that provide for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability, including complaints that a student with a disability was treated differently on the basis of disability compared to students without a disability. The grievance procedures must:

- (a) provide notice of the process for filing a complaint, including where and in what manner complaints may be filed;
- (b) provide for the adequate, reliable, and impartial investigation of complaints, including the opportunity for all parties involved to present witnesses and other evidence;
- (c) include set time frames for major stages of the complaint process;
- (d) give notice of the outcome of complaints to the parties involved; and
- (e) give an assurance that the District will take steps, as appropriate, to remedy the effects or and prevent the recurrence of discrimination of which it has notice.

16. By January 15, 2010, the District will publish its grievance procedures in its School Policy Manual and will post a copy of the grievance procedures on its website and in an area accessible to students, parents, and District staff. The District may consult with OCR regarding the content of its grievance procedures prior to publishing and posting the procedures.

17. By January 30, 2010, the District will provide OCR documentation showing it has satisfied items 15 and 16 of this Agreement.

18. By August 31, 2010, the District will publish its grievance procedures in its student handbooks for all grade levels and will provide OCR a copy of the handbooks.

19. By February 1, 2010, the District will provide training regarding its new grievance procedures to all individuals responsible for implement of or participation in the grievance process

outlined in the procedures, including individuals identified as contact persons. At a minimum, the training must address:

- (a) the requirements of Section 504 and Title II;
- (b) what types of complaints are covered by the grievance procedures;
- (c) the process for filing a complaint under the grievance procedures;
- (d) how the District will address complaints filed under the grievance procedures;
- (e) the set time frames for major stages of the complaint process; and
- (f) who to contact with questions about the District's process for reporting or addressing complaints of discrimination on the basis of disability.

20. The District will provide OCR documentation by February 15, 2010 showing it has completed item 18 of the Agreement. The documentation must include:

- (e) the date, time, and location of the training;
- (f) an outline, narrative description, or agenda showing the topics addressed at the training;
- (g) a copy of all handouts and other materials distributed at the training; and
- (h) the name and title of each employee who participated in the training (sign-in sheets with attendees' names and titles are sufficient).