

116 LRP 1185

**Hesperia (CA) Unified School District
Office for Civil Rights, Western Division,
San Francisco (California)**

09-15-1127

September 14, 2015

Judge / Administrative Officer

Zachary Pelchat, Team Leader

Full Text

Appearances:

Dear Superintendent McLaughlin:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Hesperia Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of his disability when it failed to follow adequate evaluation procedures after the School repeatedly sent him home due to health-related issues related to his disability, which resulted in a substantial loss of instructional time.¹

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in 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, as amended, (Title II) and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the regulations. The applicable legal standards, the facts OCR gathered, and the reasons for our determination are summarized below.

Under the Section 504 regulations, 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.² The Title II regulations create the same prohibition against disability-based discrimination by public entities.³ A public school district that receives federal funding may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(1) deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service;

(2) provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or,

(3) limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.⁴

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

The Section 504 regulations require that school districts conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability.⁵ Moreover, the school district must evaluate any such student before taking any action with respect to the

student's initial placement and before any subsequent significant change in placement. Tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.⁶ Placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options.⁷ Placement decisions must also be based on information from a variety of sources, with information from all sources being carefully considered and documented. In addition, School districts must establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

OCR concluded that there was sufficient evidence to support a conclusion of noncompliance with respect to the issue investigated. On August 19, 2015, the School signed a Resolution Agreement which, when fully implemented, will remedy the issues of noncompliance in this matter. The applicable legal standards, the facts gathered during the investigation, and the reasons for our determination are provided below.

OCR's investigation consisted of interviews with the Complainant, Student, and District staff. OCR also reviewed the District's response to our data request, other documents and correspondence from the Complainant and District, and publically available information.

OCR's investigation showed the following:

- The Student was enrolled in the eighth grade at a school in the District (School) during the 2014-2015 school year. He is diagnosed with Type I diabetes (diabetes) and Attention Deficit Hyperactivity Disorder (ADHD).

- According to the Student's "Diabetic Guidelines" (DG), dated September 24, 2014, his

blood sugar and ketones must be monitored throughout the day.

- According to the Student's DG, he is permitted to self-monitor his blood sugar while at school and self-administer insulin when needed. Adult supervision is required when the student self-administers insulin, but he may self-monitor his blood sugar without supervision and without going to the nurse's office.

- On September 12, 2014, the School distributed information to the Student's teachers, informing them of his condition and notifying them that he is permitted (but not required) to test his blood sugar outside of the classroom if he felt it was necessary (no more than once per class period). The Student must show the reading to his teacher, who then determines whether he must go to the nurse's office for further medical intervention. Per the Student's DG, the nurse must call the Student's parent if the Student's blood sugar reading exceeds a certain level. The nurse may also exercise her professional discretion and call the Student's parent if she feels the Student is ill or requires parental attention.

- During the 2013-2014 school year, the School called the Student's mother or family member 15 times to pick up the Student from school due to symptoms related to his diabetes.

- On May 5, 2014, the Complainant wrote a letter to the District requesting that the Student be evaluated to determine his eligibility for services under IDEA and/or Section 504. She described her concerns about the care he received at school, and requested that he be provided accommodations for his diabetes and his ADHD.

- On July 23, 2014, Student was referred for a psychoeducational evaluation by the District Psychologist. The psychologist concluded that "[biased on the accumulated information from a variety of sources as well as psycho-educational testing, [the Student] does not exhibit a processing deficit and therefore does not meet the criteria for special education services at this time."

- On September 10, 2014, the District convened an IEP team meeting. The Student and the Complainant were present. The team concluded that the Student did not meet the eligibility criteria under IDEA and did not qualify for special education and related services under an IEP.

- During the 2014-2015 school year, the School called the Student's mother or family member 13 times to pick up the Student from school due to symptoms related to his diabetes.

- On December 11, 2014, the District sent a Student Attendance Review Board (SARB) letter to Complainant regarding the Student's excessive excused absences. The District stated that it "requests that any further absences for illness be verified by a physician."

- On January 7, 2015, the student had a blood sugar of 441 and large ketones, and the school called home. The Complainant told school that she did not want the Student picked up from school.

- On January 30, 2015, the District held a Section 504 meeting for the Student. The Student was determined eligible for accommodations under a Section 504 plan. The Section 504 plan included the following accommodations for the Student:

- 1) Staff will adhere to the Student's diabetic care plan;
- 2) The Student will perform regular blood sugar testing and be referred to the office when appropriate;
- 3) The Student will drink plenty of water and carry a water bottle with him; and
- 4) The District will suppress SARB letters when absences/tardies are excused due to complications with Student's health.

- The Complainant told OCR that since the Student's Section 504 plan had been developed, the Student was no longer being sent to the office for diabetes-related symptoms/events, and had had more success in keeping his blood sugar down. But she expressed concern that the Student's academic progress had been lagging and that he had been

behind in school/his peers for a long time. The District also notified OCR that it is no longer sending the Student SARB letters, and lifted the requirement that he provide doctor's notes to substantiate excused absences.

- The Student told OCR that, generally, his teachers seemed to know what to do when he notified them that he had high blood sugar, but there were some teachers who would continually forget what his blood sugar readings meant and would ask him for an explanation. The Student also noted that he had particular difficulty keeping up in math class.

- The District's administrative regulations for Section 504, AR 6164.6, provide that "a disabled individual is one who (a) has a physical or mental impairment that substantially limits one or more major life activities, including learning; (b) has a record of such impairment; or (c) is regarded as having such impairment."

- At the time of the investigation, the District's regulations did not contain language regarding the identification of individuals with disabilities or of major life activities consistent with the legal standards under the Americans with Disabilities Amendments Act of 2008 (ADAAA), and the guidance set forth in the January 19, 2012 Dear Colleague Letter from the U.S. Department of Education, Office for Civil Rights.

Analysis

An appropriate education under Section 504 is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. Whether a

student has a Section 504 plan or IEP or is being considered for either, OCR will apply Section 504 standards to determine if a recipient has met its obligation to provide a FAPE to students with disabilities.

The District conducted a psychoeducational assessment of the Student on July 23, 2014 pursuant to the complainant's written request for an evaluation of the Student on May 5, 2014 for special education services under the IDEA and/or Section 504 due to the complainant's concerns related to the Student's diabetes and the ADHD. The District found the Student ineligible for special education services at a September 10, 2014 IEP meeting. The justifications for this determination as articulated by the school psychologist are inconsistent with Section 504 standards.

Under the Section 504 regulations, school districts must consider a variety of sources of information about the student when making placement and service determinations. According to the school psychologist, the Student's ineligibility for special education and related aids and services was based on the psychologist's assessment that the Student did not exhibit a processing deficit and was thus ineligible for special education services. However, this assessment failed to consider the Student's eligibility for all areas of suspected disability. The Complainant's letter requesting an IEP or Section 504 meeting specifically identified the Student's diabetes as impacting his education; yet the District only considered the Student's ADHD in its assessment. At the time of the Complainant's request for an assessment, the Student had been sent home 15 times because of his symptoms related to his diabetes. Therefore, even if the Complainant's letter had not identified the Student's diabetes as a concern, the District should have suspected that his diabetes was a qualifying disability and evaluated him to determine his eligibility for special education or related aids and services. Furthermore, even in its consideration of the Student's ADHD, the District disregarded information provided by the Complainant and teachers regarding

the Student's hyperactivity, attention, and poor communication skills, including clinically significant ratings in several areas. Consequently, OCR concludes that the District's disability evaluation did not meet the minimum procedural requirements of Section 504.

In addition, given the chronic nature of the Student's diabetes and the resulting loss of instructional time, OCR finds that the District had sufficient information to warrant evaluating the Student for special education and related aids and services related to his diabetes as early as May 31, 2013. During May 2013 alone, the Student was sent to the office eleven times due to diabetic symptoms/events related to his diabetes. Therefore, OCR finds that the preponderance of the evidence supports a conclusion of noncompliance with Section 504 and Title II.

Conclusion

To address OCR's compliance concerns, 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 will, within specified timeframes: (1) revise its policies and procedures; (2) hold an IEP meeting for the Student to discuss evaluation and placement; and (3) develop written guidance and provide training to District staff. Based on the commitments made in the attached resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. OCR will monitor the District's implementation of the Resolution Agreement.

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. The Complainant may have the right to file a private suit

in federal court whether or not OCR finds a violation.

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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR wishes to thank the District, the Director of Special Services, Matthew Fedders, and the District's counsel, Siobhan Cullen, for their cooperation and courtesy during this investigation. OCR very much appreciates their assistance during the investigation. If you have any questions about this letter, please contact Civil Rights Attorneys Abony Alexander at abony.alexander@ed.gov and (415) 486-5590, or Shilpa Ram at shilpa.ram@ed.gov and (415) 486-5565.

Resolution Agreement

Hesperia Unified School District

The Hesperia Unified School District (District), without admitting to any violation of law, agrees to implement the following provisions in this Resolution Agreement (Agreement) to resolve the issues investigated by the Office for Civil Rights, U.S. Department of Education (OCR), under the Title II of the Americans with Disabilities Act (Title II) and Section 504 of the Rehabilitation Act (Section 504), in the above-referenced complaint.

Individual Remedies

I. Evaluation and Placement

A. The District will convene a Section 504 meeting by August 21, 2015, or at a mutually agreed-upon date between the School and the

Complainant, which is to be attended by a team of individuals knowledgeable about the Student, and about evaluation data concerning the Student. The purpose of the meeting, and subsequent meetings if necessary, is to ensure that the Student's disabilities are fully and correctly identified; to review the goals, accommodations, placement and services provided for in the Student's May 13, 2015 IEP; and to ensure that the Student's IEP provides a placement and services that are adequate to meet all of the Student's individual disability-related needs.

B. The Student's family will be given reasonable notice of the date on which the team will meet and be given opportunity to attend and to submit records or other information.

C. At the meeting, the IEP team will review whether additional evaluation of the Student is needed to fully and accurately identify the Student's disabilities. The team will review all existing records pertinent to these determinations, including the evaluation done of the Student in July 2014, in which he was determined ineligible for special education services under an IEP.

D. If the team determines that additional or more recent evaluation data are necessary to fully and correctly identify the Student's disabilities, the District will complete the necessary assessments within 30 days of parent consent to the assessment, and the date for completing the placement process may be extended for an additional 10 days. If the team determines that additional assessment is not needed, the team will document the reasons for that determination in the Student's IEP or an addendum.

E. Either (a) at the IEP team meeting referenced in paragraph I.A. if the team determines that no additional assessments are needed or (b) at a subsequent meeting held within five days of the date of completion of any additional assessments, the team will review whether the services, accommodations and modifications currently in place for the Student are appropriate and sufficient to meet his individual needs, or whether additional or alternate services, accommodations or modifications are needed. The

District will also determine appropriate compensatory educational services to account for the Student's accumulated academic deficits during the period of May 31, 2013 and January 30, 2015 in a manner and process consistent with the FAPE requirements under Section 504. This discussion will include consideration of summer academic support services and additional tutoring during the school year. All decisions concerning whether or not services, accommodations or modifications are needed, and the basis for the decisions, will be documented in the Student's IEP or an addendum.

F. The Student's family will be provided with written notice of procedural safeguards at the IEP team meeting referenced in Section I.A..

II. Individualized Support Plan

A. The District will establish a Support Team to ensure that the Student's disability-based needs, particularly those related to his diabetes, are met once he transitions to high school in fall 2015. This Support Team will:

1. include, at a minimum, the Student, the Student's parents, a medical professional, and relevant School personnel who are knowledgeable about the Student;
2. develop an individualized Support Plan (Support Plan) to ensure that all parties are apprised of the steps needed to keep the Student safe in school;
3. establish a point person or point of contact; and
4. prior to the Student's matriculation at any new school in the District, or upon the request of the Student or the Student's parents, meet to review and revise the Support Plan as necessary to ensure its continuing effectiveness for the duration of the Student's enrollment in the District. The first such meeting will be held on or before September 15, 2015. This meeting may be held in conjunction with the IEP team meeting referenced in paragraph I.A., if the IEP team, the Complainant, and the Student are agreeable.

B. The designated point of contact will meet with the Student's teachers at the beginning of the fall 2015 and spring 2015 semesters to discuss the Support Plan and provide copies to all staff.

Policies and Procedures

III. Revisions to District Policies and Procedures

A. The District will revise BP and AR 6164.6 to include the following:

1. An explanation of "substantially limits" and "major life activities" consistent with the Americans with Disabilities Amendments Act of 2008 (ADAAA) and the guidance set forth in the January 19, 2012 Dear Colleague Letter from the U.S. Department of Education Assistant Secretary for Civil Rights and its attached FAQs.

2. A statement that the determination of whether an individual has a disability should not demand extensive analysis and may not be foreclosed solely on the basis of bottom-line measures such as grades.

3. The criteria for referring students who have been exited from a program pursuant to the IDEA, or found ineligible under the IDEA to the school's Section 504 Student Study Team to determine whether the student may need special education or related services, pursuant to Section 504 of the Rehabilitation Act of 1973. This provision will be cross-referenced in the District's special education administrative regulation and procedures.

4. The following language from 34 C.F.R. 104.35(b) and (c):

- a. Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

- b. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

- c. Tests are selected and administered so as best

to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

d. In interpreting evaluation data and in making placement decisions, the District will:

i. Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

ii. Ensure that information obtained from all such sources is documented and carefully considered;

5. The time frames for evaluation and placement decisions after a referral has been made.

B. The District will develop written administrative guidance for IEP and Section 504 teams. The administrative guidance will include the following:

1. The standards set forth in AR 6164.6; and

2. A statement that if the IEP/Section 504 team identifies deficiencies in the student's IEP/Section 504 plan or placement or in their implementation, it must take immediate steps to remedy those deficiencies.

C. Professional Development and Training

1. The District will provide notice of the revised policies, procedures, and administrative guidance described in Section II.A. and Section II.B. to all District and school site administrators and staff.

2. The District will provide information to all District and school site administrators and staff on how to access technical assistance from the District on implementing the policies, procedures, and administrative guidance described in Section II.A. and Section II.B.

3. By December 18, 2015 the District will provide mandatory training for administrators and

teaching staff at the School on the policies, procedures, and administrative guidance described in Section II.A. and Section II.B.

IV. Letters to Parents/Guardians

A. Within ten days of the date of this agreement, the School will compile a list of all enrolled students for whom diabetes is identified as a medical condition on their Individual Health Plans (IHPs), Section 504 plans and IEPs.

B. Within fifteen days of the date on which this agreement is signed, the School will send a letter to the parents/guardians of those students. The letter will:

a. Inform them that the School is committed to providing a non-discriminatory educational environment for these students and following the provisions or accommodations in their IHPs, Section 504 plans or IEPs;

b. Invite any parents/guardians who have questions or concerns about any diabetes-related issues regarding their children, including attendance, illness or academic performance, to contact the School Principal, or to convene a SST, Section 504 or IEP team meeting, to discuss their questions or concerns.

V. Monitoring and Reporting

A. Within ten days of the Section 504 meeting held pursuant to Section I., the District will provide to OCR documentation from the meeting, including (1) the names and titles of the participants, (2) documentation reflecting the team's decision, and the reasons for the decision, as to whether additional evaluation/assessment of the Student's disability-related behaviors is needed, (3) a copy of the individualized Support Plan that was developed, (4) documents supporting the group's decision regarding compensatory and/or remedial services and (5) any other meeting notes that were generated. If additional assessment is conducted, the District will provide OCR with a copy of the assessment report and any revisions made to the Student's IEP by

September 15, 2015. OCR will contact the District by September 25, 2015 to review and/or approve the report.

B. By January 15, 2016, the District will provide OCR with a summary of its implementation of the individualized Support Plan, including sufficient supporting documentation to demonstrate implementation of this Agreement. The summary should include information about how the District responded to any questions or concerns raised to date, as well as any changes to the Support Plan made during fall 2015.

C. By October 15, 2015, pursuant to Section III.B., the District will provide a draft of the guidance memorandum to OCR for review and/or approval.

D. Within thirty days of receiving OCR's approval, the District will take the necessary steps to finalize the draft guidance memorandum.

E. By October 15, 2015, pursuant to Section III.C., the District will provide to OCR for review and/or approval a copy of the training agenda, including the names of the trainer(s) and the proposed date(s) of completion.

F. Within ten days of receiving OCR's approval, the District will take the necessary steps to finalize the draft training agenda.

G. Within ten days of completion, the District will provide OCR with documentation that shows that it has completed the training described in Section IV.C. This documentation is to include (a) the names and titles of the trainer(s), (b) the dates of the trainings, (c) a copy of the final agenda and materials used at each of the trainings, and (d) a list of the participants.

H. Within ten days of the date of the completion of the training, OCR will provide the District with a final copy of the guidance memorandum and distribution list pursuant to Section III.C.

I. By September 15, 2015, the District will provide a copy of its revised policies and procedures pursuant to III.A. to OCR for review and/or approval.

J. Within thirty days of OCR's approval of its policies and procedures, the District will publish the revised procedures and provide a final copy or link to the revised procedures to OCR.

K. Within five days of the date on which this agreement is signed, the District will provide a copy of the letter described in Section IV. to OCR for review and/or approval.

L. By September 1, 2015, the School will send a copy of the letter described in Section IV to the parents/guardians of any incoming students for whom diabetes is identified as a medical condition on their IHPs, Section 504 plans, or IEPs, and provide a copy to OCR.

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the District has fulfilled the terms of this agreement in compliance with Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 C.F.R. part 104, and Title II of the Americans with Disabilities Act and its implementing regulations at 28 C.F.R. part 35, which were at issue in this case.

The District understands that by signing this agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 C.F.R. part 104, and Title II of the Americans with Disabilities Act and its implementing regulations at 28 C.F.R. part 35, which were at issue in this case.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating

administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

¹OCR identified the Complainant and Student in our notification letter to you and is withholding their names from this letter to protect their privacy.

²34 C.F.R. §§ 104.4(a) & (b).

³28 C.F.R. §§ 35.130(a) & (b).

⁴34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1).

⁵34 C.F.R. § .35(a).

⁶34 C.F.R. § .35(b).

⁷34 C.F.R. § .35(c).