



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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REGION XV
MICHIGAN
OHIO

January 26, 2015

Robert A. Dietzel, Esq.
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, MI 48826

Re: OCR Docket #15-14-1284

Dear Mr. Dietzel:

This is to notify you of the disposition of the above-referenced complaint that was filed on July 30, 2014, with the U.S. Department of Education, Office for Civil Rights (OCR), against the South Lyon Community Schools (the District). The complaint alleged that the District discriminated against students on the basis of disability. Specifically, the complaint alleged that, during the 2013-2014 school year, the District required parents/guardians of students with disabilities who needed physical therapy and/or occupational therapy to provide the District with a physician's prescription before the District would provide such services.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, 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 Federal financial assistance from the Department and as a public school district, the District is subject to these laws; thus, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegation, OCR opened an investigation into the legal issues of whether the District failed to conduct an appropriate evaluation and placement process for students who need or might need regular or special education and related aids and services because of disability, as required by the regulation implementing Section 504 at 34 C.F.R. § 104.35, and whether the District failed to provide a free appropriate education to students with disabilities, as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33(a), when parents/guardians did not provide a physical therapy and/or occupational therapy prescription.

Background

XXXXs XXXXXXXXXXXX XXX XXXXXXXX XX the parent of a student with a disability who attends school in the District. XXX XXXXXXXXXXXX alleged that the District requires parents/guardians (parents) to provide a physical therapy or an occupational therapy prescription before it will begin providing a student with such services. She stated that the District sends parents a document, "South Lyon Community Schools Physical and Occupational Therapy [PT and OT] Prescription 2013-14 School Year," that states:

It is against the law for PT services to be provided without a current prescription on file and against "school policy" for OT services to begin without a current prescription. The PT or OTR working with the student may need to contact the physician under certain circumstances. A complete form is most appreciated.

XXX XXXXXXXXXXXX stated that she and all other parents whose child has a documented OT/PT service in an Individualized Education Program (IEP) received a letter from the District requesting a prescription to begin these related services. The letter documents the need for a prescription "annually" and states that this is "school district policy." XXX XXXXXXXXXXXX stated that the District would provide OT services to her child because she provided the necessary prescription but that the District was denying a free appropriate public education to every child who was supposed to receive PT or OT services but whose parent did not provide a prescription, including those who receive extended school year services.

Applicable Legal and Policy Standards

The Section 504 implementing regulation, at 34 C.F.R. §§ 104.33(a) and (b), requires recipient school districts to provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities 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 procedural safeguards; related services may include developmental, corrective, and other supportive services (including psychological, counseling and medical diagnostic services). *See* Appendix A to 34 C.F.R. Part 104, note 23. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II implementing regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require recipients to provide a FAPE to at least the same extent required under the Section 504 implementing regulation.

To be eligible to receive a FAPE under Section 504, a student must have a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j). Pursuant to Section 504 and Title II, as amended by the ADA Amendments Act of 2008 (ADAAA), 42 U.S.C. § 12101 *et seq.*, major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily system, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Thus, under Section 504, a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance or ability to attend class. *See* 34 C.F.R. § 104.3(j) and the ADAAA. Pursuant to the ADA Amendments Act of 2008, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires recipient school districts to conduct an evaluation, in accordance with the requirements of the Section 504 implementing regulation at 34 C.F.R. § 104.35(b), of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Subsection (b) requires a recipient school district to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services.

A school district cannot require a parent or student to provide a medical statement if the district suspects that the student has a disability that would necessitate the provision of regular or special education and related aids and services under Section 504. If a school district determines, based on the facts and circumstances of an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. §§ 104.35(a) and (b), the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, these methods may be used in lieu of a medical assessment. *See Letter to Veir*, 20 IDELR 864 (OCR 12/1/1993).

Summary of OCR's Investigation to Date

OCR reviewed the District's website a number of times between the date the complaint was filed and November 17, 2014. On each occasion, OCR staff members located a form linked to the District's Special Education Department's website tab, entitled "Physical and Occupational Therapy Prescription." *See* http://www.slcs.us/departments/special_education_department.php for the current link to the Adobe formatted form. The form contains a number of blank areas to be filled in, along with a space at the bottom of the form designated for a physician's signature. The areas include the student's name, diagnosis, checklist areas for specific types of PT/OT

services needed, a checkbox for “Physician’s Recommendations to Evaluate and Treat,” an area for the physician’s contact information and stamp, and a statement that the prescription is valid for a twelve-month period.

In response to OCR’s data request, the District’s legal counsel provided a copy of the prescription form referenced above. Counsel also provided a copy of another form that appears to accompany the prescription form. It lacks a specific title but identifies the District’s Special Education Office and its Director at the top. The form provides spaces to fill in for “DIAGNOSIS” and “PRECAUTIONS,” as well as two lines to check off for school-based physical therapy or school-based occupational therapy. It also provides lines for a physician’s signature, name, and address, as well as boilerplate language at the bottom that states:

This prescription will be valid for one school year, 2013-2014. The form may be faxed to the special education office [phone number provided], mailed or returned with student at the beginning of the year. The prescription is required for services to begin but this form does not have to be used. A complete physical is not necessary, just a signature from the physician most familiar with the student.

It is against the law for PT services to be provided without a current prescription on file and against school policy for OT services to begin without a current prescription. The PT or OT working with the student may need to contact the physician under certain circumstances. A complete form is most appreciated.

The District’s data response also included a June 2014 letter from an occupational therapist, registered and licensed (OTR/L), to District parents telling them that it has been a pleasure working with the parent’s child this year and stating that the therapist has made a packet of activities to allow parents to work with their children over the summer to maintain their skills. The letter also states that:

I have also attached a new script for OT services for the next school year. As you know, [the District] requires that a new script be obtained every year. Please have the script filled out and either faxed to the special education office – [phone number provided] or returned to school with your student at the beginning of the year.

The data response also included language from another District OTRL, presumably a note or e-mail, addressed to “Parents” and containing the same paragraph quoted directly above.

The District’s counsel also stated, in the data response, that, “Although the District requests that parents bring in a prescription from a doctor before providing physical or occupational therapy to students, the District’s special education director will confirm that she gave a directive to all occupational therapists to continue providing services,

even in the absence of a prescription.” Counsel also noted specific students who had received OT services despite the absence of a prescription, noting “[t]he documents [provided in the data request] confirm that many students received occupational and physical therapy services, even in the absence of a prescription.”

OCR contacted Michigan’s Department of Licensing and Regulations (LARA) on November 12, 2014, seeking information about legal requirements for prescriptions and physical therapy. OCR was connected with a representative of the Health Professions subdivision, who stated that physical therapists in Michigan work under the direction of licensed physicians.

Voluntary Resolution Prior to Conclusion of Investigation

Before OCR completed its investigation, the District expressed interest in resolving the complaint pursuant to Section 302 of the *Manual*. The *Manual* provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient expresses an interest in resolving the complaint. This does not constitute an admission of liability on the part of a recipient such as the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and are to be consistent with applicable regulations.

The District has signed the enclosed resolution agreement, which, once implemented, will fully address the information obtained during the investigation in accordance with Section 504 and Title II. The agreement requires the District to: send a letter to the parents of each student whose IEP or Section 504 Plan called for PT or OT services and who submitted a prescription to the District in the 2013-2014 and/or 2014-2015 school year(s) regarding such services, offering to reimburse the parents for any out-of-pocket expenses billed by the physician incurred for obtaining that prescription. The agreement also requires that, if their student received PT and/or OT services but there was a delay in the parent(s) providing a prescription, the District will, by the end of the 2014-2015 school year, either provide the necessary PT and/or OT services that were missed due to said delay or will provide OCR with information documenting that it has already provided the necessary services to the student even in the absence of a prescription.

The District also agreed to send a letter to the parents of each student whose parents did not submit a prescription to the District regarding PT and/or OT services, despite the student’s IEP or Section 504 team having determined that the student needed PT and/or OT services to receive a FAPE, offering to either arrange, with the parent(s)’ consent and at no cost to the parent(s), for the student to be evaluated by an appropriately credentialed professional to determine if a prescription for PT and/or OT services is appropriate or to pay the cost of the parents’ out-of-pocket expenses to obtain such a prescription; in addition, the agreement provides that the District will, by the end of the 2014-2015 school year, either provide the necessary PT and/or OT services that were missed due to the parents’ not having obtained a prescription or give OCR information documenting that it has already provided the services to the student in the absence of a prescription.

The District further agreed to amend its Section 504 policies and procedures to ensure that they are consistent with the legal requirement that, if the District determines, based on the facts and circumstances of an individual case, that a medical assessment is necessary to complete an appropriate evaluation consistent with 34 C.F.R. §§ 104.35(a) and (b), the District must ensure that the student receives this assessment at no cost to the parents.

During the course of OCR's investigation, the District's counsel provided OCR with information documenting that the District had recently provided District staff with training on the requirements of Section 504 related to identification, evaluation, and placement of students with disabilities, as well as procedural safeguards afforded under Section 504, training that correctly described District responsibilities as to medical information related to evaluations. The agreement did not, therefore, require the District to provide such training. The agreement instead requires the District to send a written notification to parents and staff that advises them that if the District determines, based on the facts and circumstances of an individual case, that a medical assessment, including an assessment to obtain a PT or OT prescription, is necessary, the District must ensure that the student receives the assessment at no cost to the parents.

In light of this agreement, OCR considers the allegations in the complaint to be resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the agreement. Should the District fail to fully implement the agreement, OCR will reopen the case and take appropriate action to ensure the District's full compliance with Section 504 and Title II.

Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, a complainant may file another complaint alleging such treatment.

The complainant may file a private suit in federal court whether or not OCR finds a violation.

We appreciate the cooperation of District staff and legal counsel during the resolution of this complaint. We look forward to receiving the District's first monitoring report, which is due by March 31, 2015. Please send any electronic monitoring correspondence to

OCRCleMonitoringReports@ed.gov. Any monitoring reports submitted by regular mail may be addressed to XXXXXXXX XXXXXXXX, who will be monitoring the District's implementation of this agreement. Mr. XXXXXXXX may be reached at (216) 522-XXXX. If you have any questions about this letter, you may contact me at (216) 522-XXXX.

Sincerely,

/s/

Karla K. Ussery
Senior Attorney