



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 31, 2016

Mr. Marvin L. Martin
Superintendent
P.O. Box 55
Hondo, New Mexico 88336

Re: Hondo Valley School District
OCR Case Numbers 08-16-1162 and 08-16-1163

Dear Superintendent Martin:

We have completed our investigation of the above-referenced complaints filed on February 4, 2016, alleging that the District discriminated against the Complainant's daughter (Student A) and son (Student B) on the basis of disability. Specifically, the Complainant alleged that the District failed to provide the Students with a free appropriate public education (FAPE) by:

1. not responding to the Complainant's request to re-evaluate her daughter (Student A) for her Individualized Education Program (IEP);
2. failing to implement Student A's IEP (by not providing adaptive physical education, intensive speech therapy, report cards, and progress reports);
3. failing to respond to the disability discrimination complaint that the Complainant raised with the Superintendent in January 2016;
4. not timely evaluating the Complainant's son (Student B) for a disability and the possible need for special education services during the period of August to December 2015; and
5. retaliating against the Complainant after she advocated for Student B by reporting her to the Children, Youth, and Families Department.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134, respectively. The District is a recipient of Department funds and a public entity, and thus subject to these laws.

During the course of our investigation, we carefully reviewed documentation submitted by the Complainant and the District. We also interviewed the Complainant. We find that the District is in violation of Section 504 and Title II, in part. . The District has agreed to resolve the allegations through a Resolution Agreement (Agreement) with our office.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Background & Case Summary

Student A is a student with a disability (XX XXX). At the start of school year 2015-2016, the District held an IEP meeting to discuss Student A's placement. The IEP team decided to adopt Student A's IEP from the previous school district that she attended. The Complainant contends that she requested meetings and evaluations for the Student from the start of school year 2015-2016 to January 2016 due to her concern that adaptive physical education and intensive speech therapy was not provided in accordance with Student A's IEP; and that she had not received report cards or progress reports. The Complainant also stated that on January 30, 2016, she withdrew Student A from the District, she was informed by District staff that an IEP meeting notification letter was mailed to her; however, the Complainant decided to withdraw Student A from the District. The District provided OCR with copies of emails addressed to the Complainant dated as late as February 4, 2016, informing her that an IEP meeting would take place if the Student returned to the District. The Complainant also alleged that she did not receive an adequate response to the disability discrimination complaint that she filed with the Superintendent in January 2016, in which she raised her concerns about Student A.

Student B is a student suspected of having a disability. Prior to Student B enrolling in the District, he was in foster care for a year. When Student B was enrolled in the District, the Superintendent reviewed Student B's records and had concerns about his academics and contacted the Complainant on August 17, 2015 requesting to meet. The Superintendent and the Complainant met on August 18, 2015 to discuss the Student's placement. The Superintendent and Complainant agreed that the District would provide Response to Intervention (RTI) measures to assist the Student and to monitor the responses. According to the Complainant, she never received any information regarding the success of RTI measures. The Complainant contends that the Student cannot understand homework assignments. The Complainant said that the Student had an IEP a few years prior to enrolling in the District, but not immediately prior to his enrollment. Student B has not been evaluated for special education services or related aids, despite the Complainant's wish that this happen. The Complainant withdrew the Student from the District on January 30, 2016.

Allegation 1 - Failure to respond to a request to re-evaluate Student A

The Complainant alleged that the District failed to respond to a request to reevaluate the Student in January 2016, in violation of 34 C.F.R. §§ 104.33 and 104.35 and 28 C.F.R. § 35.130. The Complainant also alleged that the District failed to implement the Student's IEP (adaptive physical education; intensive speech therapy; and, report cards and progress reports), in violation of 34 C.F.R. §§ 104.33 and 104.35 and 28 C.F.R. § 35.130.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdiction. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 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. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

During the course of the investigation, the District contacted the Complainant to notify her that if she chose to re-enroll Student A in the District, the District will hold an IEP meeting to discuss the implementation of the Student's IEP during the 2015-16 school year and whether compensatory services are necessary. The Complainant informed the District and OCR that she did not intend to re-enroll the Student. Before OCR's investigation of this allegation was complete, the District agreed to take these corrective actions if the Complainant decides to re-enroll Student A and the Agreement includes a provision resolving this allegation where the District will convene an IEP meeting to consider whether Student A should be reevaluated for a disability, and whether Student A requires any compensatory services.

While reviewing this allegation, we reviewed the District's Section 504 policy and procedures for identifying and evaluating students for disabilities and the need for special education services. The District's Special Instructional Policy states that the District is obligated to provide services to students with disabilities under Section 504. "Special Instruction Programs and Accommodations for Disabled Students" Policy IHBA-RA is the District's procedure for the identification, evaluation, and placement for students with disabilities under Section 504. We find that Policy IHBA-RA does not meet the requirements of Section 504. Specifically, Section 504's regulations at 34 C.F.R. §§ 104.33 & 104.35 require that a group of persons knowledgeable about the student (including the parent) will determine identification, evaluation, placement, and services for a student with a disability. However, the District's Policy IHBA-RA states that such decisions will be made by the District. The District agreed to revise its policies, provide training to its staff on its new policies, and notify beneficiaries of the revised and OCR-approved policies.

Allegation 2 -Failure to implement IEP

The Complainant alleged that the District failed to implement Student A's IEP (by not providing adaptive physical education, intensive speech therapy, report cards, and progress reports).

The regulation implementing Section 504 at 34 C.F.R. §104.33, requires public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the procedural requirements cited above is one means of meeting the FAPE requirement. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

When we reached out to the District regarding this allegation the District agreed to resolve the allegation by contacting the Complainant to offer to meet with her to discuss the implementation of Student A's IEP. We verified with the Complainant that the District contacted her and that she

declined to re-enroll Student A in the District. The District also provided information from its contracted speech therapist that services were provided to Student A twice a week for thirty minutes during Student A's enrollment in the District. Before OCR's investigation of this allegation was complete, the District agreed to take corrective actions if the Complainant decides to re-enroll Student A and the Agreement includes a provision resolving this allegation where the District will convene an IEP meeting for Student A and assess whether Student A requires any compensatory services regarding any missed adaptive physical education or missed report cards and progress reports.

Allegation 3 - Failure to respond to a disability discrimination complaint

The Complainant alleged that the District failed to respond to the disability discrimination complaint that she raised with the Superintendent in January 2016.

We investigated whether the District failed to adequately respond to the Complainant's disability complaint filed with the Superintendent regarding Student A's IEP during school year 2015-2016, in accordance with 34 C.F.R. §104.7(b) and 28 C.F.R. § 35.107(b), which require the District to provide a prompt and equitable response when it is on notice of potential disability discrimination.

During efforts to resolve this complaint, the District invited the Complainant to meet with the Superintendent to clarify her complaint so it could be investigated. She declined to meet with the Superintendent and the District was unable to proceed further. We also reviewed the District's policies. The District's notice of non-discrimination is located in its Equal Educational Opportunities policy. The compliance officer information and grievance procedures are located in policy JB-R. The District's policies are located on an external website and the link on the District's website does not take a person directly to the District's policies. There is no mention of discrimination or disability discrimination on the District's website. There are no notices or grievance procedures published in the District's student handbook provided by the District. We found the following concerns with the District's grievance procedures.

- The notice of non-discrimination is incomplete because it does not include notice of the Section 504/Title II compliance officer and contact information.
- The notice of the compliance officer in District policy JB-R does not include contact information.
- The grievance procedures:
 - require complaints to be written on the District form,
 - do not describe what will be included in any investigation,
 - do not address interim measures during the investigation,
 - do not describe potential remedies beyond discipline,
 - do not provide for a written decision of the investigation,
 - do not include the legal standard for determining discrimination,
 - do not prohibit retaliation, and
 - include a separate investigation process under the timeline section of the procedure.

Therefore, we find that Policy JB-R does not meet the requirements of Section 504 and Title II of the ADA for appropriate due process and prompt and equitable resolution of disability

discrimination complaints. We also find that the notices and grievance procedures are not published in all the locations in which the District regularly publishes information, in violation of 34 C.F.R. § 104.8 and 28 C.F.R. § 35.106.

The District agreed to resolve this violation by revising its policies, publishing in a manner that makes the information accessible and provides notice of the grievance procedures and the Section 504/Title II Coordinator, and trains staff on the OCR-approved revised policies and procedures.

Allegation 4 - Failure to evaluate for a suspected disability - Student B

The Complainant alleged that the District failed to timely evaluate Student B for a disability and the possible need for special education services during the period of August to December 2015 of school year 2015-16.

The Section 504 regulation at 34 C.F.R. §§ 104.32-36 contains policies and procedures for the timely identification, referral, evaluation, and placement of students who need or are believed to need special education and related aids and services due to a disability and the subsequent implementation of those services. The provision of a free appropriate public education (FAPE) includes the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. OCR interprets the Title II implementing regulation at 28 C.F.R. § 35.130 to require public education entities to provide a FAPE to the same extent as is required under the Section 504 regulation. One of the ways in which a district can deny a student FAPE is by failing to properly identify a student as a person with a disability.

In clarifying this allegation, the Complainant alleged that the Superintendent contacted her on August 17, 2015, indicating that he had concerns about Student B's academics and wanted to return Student B to the 3d grade. She stated that she agreed to meet with the Superintendent the following day. During the meeting, the Complainant said that the Superintendent was concerned about the Student's academic progress and she believed that he had a copy of a previous IEP when he was enrolled in the District. She said that she insisted that Student B be put in the 4th grade and that an agreement was reached that he would be placed in the 4th grade with RTI measures and would be monitored to make a determination whether Student B was progressing at this grade level or if he was regressing and if Student B may need special education services. The Complainant contends that Student B never understood his homework assignments and that she never received any information indicating whether the RTI assisted Student B to succeed with his academics.

Before OCR completed the investigation of this allegation, the District agreed to resolve this allegation by entering in to an Agreement to invite Student B to return to the District and if Student B returns, the District will hold an educational team meeting for Student B upon re-enrollment in the District, which will include consideration of whether the Student should be evaluated for a disability and special education services or disability-related accommodations, and whether Student B requires any compensatory services. For Student B, the District will ensure that the educational team includes persons knowledgeable about the Student B (including the Student's parents), the evaluation data, and the placement options to individually assess the amount of compensatory services, if any, that would be appropriate for the student and, if necessary, draft an action plan containing proposed

compensatory services or remedial measures that will be offered or taken. The District will provide Student B's parents with a meaningful opportunity to provide input into these determinations, notice of the determinations made, and notice of the procedural safeguards available to them under 34 C.F.R. § 104.36, including their right to challenge such determinations through an impartial due process hearing should they disagree.

Allegation 5-Retaliation

We investigated whether the District retaliated against the Complainant by reporting her to the Children, Youth, and Families Department (CYFD) after she advocated for Student A.

In analyzing a retaliation claim, we determine whether: the individual engaged in an activity protected by Section 504 or Title II of which the recipient had knowledge; the recipient took adverse action against the individual; a causal connection existed between the protected activity and the adverse action; and, the recipient has a legitimate, non-retaliatory, non-pretextual reason for its action.

To determine whether retaliation occurred, we first considered whether the Complainant engaged in a protected activity of which the District was aware. We find that the Complainant engaged in protected activities during November and December 2015 that are protected by Section 504 and Title II because she frequently advocated for the right to FAPE for Student A. These protected activities, of which the District was aware, are sufficient to satisfy the first element of the analysis.

We next looked at whether the Complainant was subjected to adverse actions. It is undisputed that CYFD visited the Complainant's home on February 16, 2016 as a result of the District reporting Student A for truancy.

The District stated that after a student is withdrawn from any school district and transfers to another school district or to homeschool, the new District (or the State, if the Student is homeschooled) is obligated to provide notice of the home school declaration to the previous school district. The District's legal counsel stated that in this case, the District did not receive any notification of the Student's status so this constituted truancy. The District's policy and state law requires staff to report suspected child abuse/neglect to CYFD, including truancy. On February 4, 2016, a letter to the Complainant from the District reflects that it continued to attempt to ascertain the student's status and meet with the Complainant. As of March 2016, the Complainant stated to OCR that she did not intend to meet with the District. Additionally, she confirmed that she had not enrolled the Student in another school district or submitted the required declaration to the State to Horne school the Student. The District's legal counsel noted that prior to the District's contact with CYFD, the District was aware that a court-appointed CYFD staff member was assigned to the Student. The District's understanding was that the advocate was put into place to monitor the child under the Complainant's custody.

Therefore, the District believed it was appropriate to contact CYFD. Based on the evidence, we found that the District provided a legitimate, non-retaliatory and non-pretextual reason for reporting the Complainant to CYFD. Specifically, OCR found that the District's administration had a legitimate basis to be concerned about the Student's truancy status when they received no notice of

the Student receiving instruction elsewhere after being withdrawn on January 30, 2016. The Complainant corroborated the basis for this concern when she stated to OCR that the Student had not been enrolled in another school district or appropriately identified to the State as being homeschooled at the time CYFD was contacted. We find insufficient evidence to establish that the District retaliated as alleged.

Conclusion

The District voluntarily agreed to take actions that resolve allegations regarding Students A and B and resolves the violations found in this investigation and entered into the Agreement (enclosed) on August 23, 2016. OCR will closely monitor the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively and that the District's policies and practices are administered in a nondiscriminatory manner. Once the Agreement is fully implemented, it will ensure the District's compliance with the regulations as addressed in this complaint. In addition, we have notified the Complainant that the District has entered into this Agreement. We will provide the Complainant with a copy of the Agreement and will also keep her apprised of monitoring activities related to this case.

This letter addresses only the issues listed above and should not be interpreted as a determination of the District's compliance or non-compliance with Section 504 and Title II or any other federal law in any other respect. Accordingly, we are closing the investigation of these complaints effective the date of this letter.

OCR routinely advises recipients of Federal funds and public educational entities that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR. Additionally, the Complainant has a right to file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will protect personal information to the extent provided by law.

Thank you for your cooperation and attention to this matter, and especially that the assistance of Mr. Tony Ortiz, Attorney for the District. If you have any questions regarding this letter, please feel free to contact Ms. Joyce Y. Hayward, Equal Opportunity Specialist at 303.844.6097 or by email at joyce.y.hayward@ed.gov or Ms. Rachel Phillips-Cox, Equal Opportunity Specialist at 303.844.4559 or by email at rachel.phillips-cox@ed.gov.

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Superintendent Martin

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Enclosure - Resolution Agreement

cc: Mr. Tony Ortiz
Attorney for the District & Designated Representative

Ms. Hanna Skandera
Secretary of Education