



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 21, 2017

Linda L. Hale, Superintendent
Hatch Valley Public Schools
Post Office Box 790
204 Hill Street
Hatch, New Mexico 87937

Re: Hatch Valley Public Schools
Case Number: 08-17-1051

Dear Superintendent Hale:

We write to advise you of the resolution of a complaint that was filed with our office against Hatch Valley Public Schools (“the District”). The complaint alleged that the District discriminated against the Complainant’s son (“the Student”) on the basis of disability. Specifically, the Complainant alleged that the District denied the Student a free appropriate public education (FAPE) by failing to evaluate the Student and by failing to provide the Complainant with notice of procedural safeguards.

We investigated the complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (“Section 504”), and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education (“the Department”); and Title II of the Americans with Disabilities Act of 1990 (“Title II”), and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

Our investigation established that the District did not properly evaluate the Student. Our investigation did not establish, by a preponderance of the evidence, that the District failed to provide the Complainant with notice of procedural safeguards. Upon being advised of this finding, the District voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed copy of the agreement is enclosed with this letter. The reasons for our conclusions are set forth in this letter.

I. Legal Standards

The Section 504 regulations, at 34 C.F.R. Section 104.33, require public school districts to provide a 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 Sections 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations, at 28 C.F.R. Sections 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.

A. Evaluation

Section 104.35(a) of the Section 504 regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under Section 104.35(b), 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. Under subsection (c), 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. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. When determining if a person has a disability, a school cannot consider the ameliorative effects of mitigating measures when determining how the impairment impacts the major life activities under consideration. If an impairment only occurs periodically (that is, it is episodic) or is in remission, it is a disability if, when in an active phase, it would substantially limit a major life activity.¹

B. Procedural Safeguards

Section 104.36 of the Section 504 regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation, or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure. If the school does not agree to evaluate the student, the school must inform the parent of his or her right to challenge the school's decision. School districts must provide notice to parents explaining any evaluation and placement decisions affecting their children, and explain the parents' right to review relevant records and contest any decision regarding evaluation and placement through an impartial hearing.

¹ The ADA Amendments Act of 2008 (P.L. 110-325, effective January 1, 2009) (ADAAA) requires the definition of "disability" to be construed broadly. The ADAAA further clarified that in determining whether a person has a substantially limiting impairment so as to qualify as a person with a disability, the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, should not be considered. Mitigating measures include, but are not limited to, medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of impairment. Additionally, the ADAAA established that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. ADAAA § 4(a) (amending 42 U.S.C. § 12102).

II. Investigation

Our investigation focused on obtaining the evidence necessary to determine whether the District complied with these legal standards, or whether the District engaged in disability discrimination as alleged. Specifically, our investigation consisted of: interviewing the Complainant; interviewing the Principal, the Nurse, and the School Worker at the Student's school ("the School"); interviewing the District's Superintendent ("the Superintendent"); reviewing extensive documents submitted by the Complainant and by the District; and reviewing narrative responses submitted by the District.

III. Evidentiary Standard

OCR applies a preponderance of the evidence standard to determine whether the 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 as alleged.

IV. Findings of Fact

The Complainant is XXXX. The Student is a XXXX grade student who has asthma. He attends XXXX School ("the School") in the District.

Medical records provided to OCR by the Complainant show that, from XXXX to XXXX, the Student was hospitalized as a result of his asthma. The Complainant emailed the School's secretary ("the Secretary") on XXXX and XXXX to notify her that the Student was taken to the emergency room and then hospitalized. Then, on XXXX, the Complainant emailed the Nurse: "[The Student] was hospitalized 8/31-9/4 at the XXXX Children's Hospital. He was diagnosed with Asthma, Pleural Effusion, Pneumomediastinum. He has an albuterol inhaler that he has to do every 4 hours. So do we need a 504? I also have a bunch of paperwork from the hospital. Please tell me what we need to do." In subsequent emails, the Nurse agreed to pick up the records at the Complainant's school.

On XXXX, the Nurse emailed the Complainant: "I was out yesterday, but I was able to review the documents you left with [the Secretary] and the doctor's note ... At this time, [the Student] doesn't qualify for a 504 plan. We can re-evaluate the situation after his appointment with the pulmonologist."

On the following dates, the Complainant emailed the Secretary to inform her that the Student would be absent due to his asthma or related medical appointments: September Xth, Xth, Xth, and Xth; and October Xth, Xth, and Xth. Medical records provided to OCR by the Complainant show that the Student was seen at XXXX on XXXX, 2016 and on XXXX, 2016.

On XXXX, 2016, the Complainant emailed the School's social worker ("the Social Worker"), who is also the School's Section 504 coordinator:

As you can see [the Student] has missed a lot of school due to his illness. This shows in his grades also and you know as well as I do he cannot afford to fail any classes. Our goal is to get him graduated and it seems some teachers are not so understanding. He is seeing a Pediatric Pulmanologist due to diminished lung capacity. He is at 40% and they are trying to build it back up. I am requesting again he be put on a 504 plan. He is on an inhaler every 4 hours and another inhaler every 6 hours he is on Singular daily and an allergy pill daily. If his inhaler does not relieve his pressure he has to be on the nebulizer treatment. I turned in the paper for him to carry his inhalers with him at school. The nurse already said she didn't see that he required a 504 but I believe he does. What steps do I need to do to insure my son is taken care of?

In response to the Complainant's email, the Social Worker emailed the School's nurse ("the Nurse") and the School's principal ("the Principal"): "I think we need to get together to discuss this before I respond. He is not eligible for a 504 plan with the documentation we were provided."

The School held a Section 504 meeting for the Student on XXXX, 2016. The Complainant, the Social Worker, and Principal were present at the meeting. The Nurse did not attend because she was out of town. The group determined that the Student had a physical or mental impairment ("Asthma") and that the impairment affected one or more major life activities ("Breathing. [The Student] gets light headed and fatigued. Occurs weekly."). However, it was determined that the Student was not eligible under Section 504 because his impairment substantially limited a major life activity only "sometimes." The "Section 504 Identification Determination Summary" form reads: "[The Student's] breathing problems are maintained when he takes his medications regularly. Episodes can occur that may need accommodations outside of the regular classroom setting."

Nevertheless, the School also found that the Student needed accommodations and created a "Section 504 Accommodation Plan." The Plan stated, "[The Student] experiences weekly asthma attacks. Smells can trigger the on-set. [The Student] experiences headaches, fatigue, and shortness of breath." The Plan called for: (a) having a nebulizer and extra inhalers at the school; (b) making arrangements with the nurse; (c) allowing the Student to come to the office if he was experiencing breathing difficulties, where he could rest in the nurse's office or work in the office hall; (d) notifying the Student's teachers of the Student's condition; and (d) allowing the Student three days to make up assignments missed due to asthma.

On XXXX, 2016, the Complainant emailed the Superintendent:

I'm done trying to work with the Nurse and the Social Worker. These are the emails that have sent between them and myself. My son was in the hospital for 4 days due to his asthma and pneumothorax, I provided them with that information. ... He continues to miss school due to his asthma so he needs a 504 for accommodations. ... My son is on 5 different medications daily to try to control his illness. Doctors are amazed that he is not on a 504 with the severity of his asthma at this time. They keep saying is doesn't substantially limit a life activity,

I have done my research and my son is being discriminated against. I don't want to file a complaint with the US Dept of Education but it seems like that is my only choice, this is why I'm reaching out to you. I just want what is fair. He didn't ask to get sick and I'm just asking what is fair. Attached you will find some case study on 504 for asthma students. If you would like to contact his doctor Dr. [Name Redacted] [Phone Number Redacted] or his pulmonologist Dr. [Name Redacted] [Phone Number Redacted].

In response to the Complainant's email, the Superintendent emailed the Social Worker and Principal: "What is going with her son? 504 shouldn't be this difficult, I trust there is more to the story."² According to the Superintendent, the Social Worker and Principal did not reply to the email; instead, the Superintendent went to the School to meet with them.

On XXXX, 2016, the Complainant emailed the Social Worker:

Attached are the reports that show that [the Student] clearly qualifies for a 504 plan. He requires accommodations. Dr [Name Redacted]'s office faxed a letter to you on XXXX and there were no action taken to put a 504 in motion. He continues to miss school due to his illness. I'm still waiting to hear the outcome from our last meeting. The doctor is very concerned that there has been nothing put in place due to his severe asthma. Please advise as soon as possible what your 504 Committee has decided so I can move on with my next action.

On XXXX, 2016, the Complainant emailed the School's Secretary notes from the Student's doctor. The first note, dated XXXX, 2016, read:

Based on history, x-ray review and pulmonary function testing it is apparent that he has at least moderately severe chronic asthma with a strong allergic component. His airways are very sensitive to not only pollen but also smoke, strong odors and weather changes. This sensitivity will likely improve with prescribed treatment regimen however he should be enrolled in 504 or similar program.

The second note, dated XXXX, 2016, read: "Patient seen today for asthma/allergy follow up. [The Student] clearly qualifies for 504 program and appropriate accommodations. Allergy testing ordered today. Call for questions."³

On XXXX, 2016, the Superintendent emailed the Complainant to, in effect, affirm the decision of the School to find the Student ineligible, but provide him with accommodations. According to the Superintendent, she reasoned that the Student's asthma was not a "life changing" or "inhibiting" condition, and that the Student plays baseball.

² OCR did not receive documentation showing a reply to the Superintendent.

³ The Complainant alleged to OCR that the doctor faxed to the District the first note on XXXX, 2016 and the second note on XXXX, 2016. The District denies having received them until XXXX, 2016.

V. Analyses and Conclusions

In reviewing the documentation, information, and facts that we uncovered in our investigation, OCR determined that the weight of the evidence supports the Complainant's allegation that the District did not properly evaluate the Student, but does not support the Complainant's allegation that she did not receive a copy of her procedural safeguards from the District.

A. Evaluation

We conclude that the Student needed or was believed to need special education or related aids and services because of disability. This is evidenced by: (a) the Student's medical records, which the School possessed, and which showed that he had moderate to severe asthma and had at least one multi-day hospitalization; and (b) the communications between the Complainant and School staff, in which the Complainant repeatedly requested a Section 504 plan and described the Student's medical issues. Additionally, we conclude that the XXXX, 2016 meeting was an "evaluation" for purposes of Section 504 and Title II.

However, we find, by a preponderance of the evidence, that the District violated Section 504 and Title II in two respects related to the evaluation process. First, the Nurse made a unilateral eligibility determination for the Student based solely on medical records. Specifically, she wrote in an email to the Complainant on XXXX, 2016, "I was out yesterday, but I was able to review the documents you left with [a staff member] and the doctor's note with [another staff member]. At this time, *[the Student] doesn't qualify for a 504 plan. We can re-evaluate the situation after his appointment with his pulmonologist.*" (Emphasis added). During an interview with OCR, the Nurse answered "no" to a question about whether she had made an eligibility determination for the Student prior to the meeting on XXXX, 2016. After we read the email to her, she stated that the Student was not eligible at the time she sent the email because, after his hospitalization in XXXX 2016, the Student did not have "life-changing restrictions." She added that there were no "true accommodations to be made" – just "short-term limitations." The nurse characterized the Student's health issues as a "temporary illness."

Second, when determining if the Student had a qualifying disability, the District considered the ameliorative effects of the Student's asthma medication. Additionally, the District effectively ruled out the Student's disability because it is only episodic.

In an interview with OCR, the Principal stated that the Student's medication was not a factor in determining eligibility; rather, the medication was just "additional information." However, a preponderance of the evidence contradicts his assertion. In an interview with OCR, the Complainant reported that School staff told her "he has meds so it doesn't always affect his breathing." During an interview with OCR, the Social Worker was asked, "Was [the Student's] medication a factor in determining his eligibility?" Her response was, "I guess ... probably ... it's hard to say exactly." Most importantly, the "Section 504 Identification Determination Summary" reads, in part: "[The Student]'s breathing problems are maintained when he takes his medications regularly. Episodes can occur that may need accommodations outside of the regular classroom setting."

While OCR does not typically dispute the determination of a properly constituted Section 504 team, OCR finds that the Nurse's actions – despite her statement to the contrary – did represent a unilateral determination about the Student's eligibility rather than a team determination. The District did, eventually, convene a Section 504 team meeting to determine eligibility, but the Nurse's unilateral action is not consistent with the requirements of Section 504. Additionally, OCR finds that that the District, in making its eligibility determination, relied upon the use of mitigating measures to determine that the Student is not eligible. While it is possible that a student that experiences intermittent or episodic impairments may not demonstrate a significant impairment of a major life activity, OCR found evidence to indicate that the District's consideration of mitigating measures in determining the Student's eligibility was not consistent with legal interpretations of Section 504. For the foregoing reasons, OCR finds that the District failed to properly evaluate the Student for Section 504 eligibility.

Notably, the District suggested to OCR that, regardless of whether there was an evaluation and regardless of the eligibility determination, the Student was nevertheless provided with accommodations. While this fact may mitigate the remedies necessary to correct any violation that OCR finds, this fact does not impact our conclusions regarding this allegation. Moreover, while the provision of accommodations when necessary is important to compliance with Section 504, 504 eligibility also extends additional rights under the law and regulations, such as due process rights and assurances of a FAPE. These rights do not extend to a student who is not technically a qualified individual with a disability under Section 504 – even a student who the District regards as having a disability.

B. Procedural Safeguards

The Complainant alleged that the District failed to provide her with notice of procedural safeguards. During an interview with OCR, the Principal stated that he did not know whether the Complainant was given such notice. The third person at the meeting on XXXX, 2016, the School Worker and Section 504 Coordinator, told OCR during an interview that she gave the Complainant a one-page handout titled, "Section 504 Parent Rights Notice." The Coordinator emailed OCR a copy of the handout (not the exact handout she gave to the Complainant), which contains the notices required by Section 504. Finally, the following sentence appears above the Complainant's signature on the "Section 504 Identification Determination Summary": "If you disagree with the school team's decision, please contact the School's Section 504 Representative and consult the Parents Rights Notice for other options." From all of the available evidence, we cannot conclude, by a preponderance of the evidence, that the District failed to give the Complainant notice of procedural safeguards.

We thank the District for voluntarily entering into an agreement with OCR to resolve these issues. OCR is closing the investigative phase of this case effective the date of this letter.

The case is now in the monitoring phase. OCR will monitor implementation of this Agreement through periodic reports from the District demonstrating that the terms of the Agreement have been fulfilled. We will provide the District with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The monitoring phase will be completed when OCR determines that the District

has fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the District, copied to the Complainant, stating that this case is closed. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues listed previously and should not be interpreted as a determination of the District's compliance or noncompliance with Title II, Section 504, or any other federal law in any other respect.

This letter is a letter of finding(s) 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.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. 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 investigation. If this happens, the individual 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, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation that you and your staff extended to us during the investigation of this case. If you have any questions, please contact Jason Langberg, the attorney assigned to the case, at 303-XXX-XXXX or XXXX@ed.gov. You may also contact me at 303-XXX-XXXX or XXXX@ed.gov.

Sincerely,

/s/

Stephen Chen
Program Manager

Enclosure: Resolution Agreement