UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

September 14, 2015

David McLaughlin
Superintendent
Hesperia Unified School District
15576 Main Street
Hesperia, California 92345-3482

(In reply, please refer to case no. 09-15-1127.)

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

[1] OCR identified the Complainant and Student in our notification letter to you and is withholding their names from this letter to protect their privacy.
[2] 34 C.F.R. §§ 104.4(a) & (b).
[3] 28 C.F.R. §§ 35.130(a) & (b).

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

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[4] 34 C.F.R. § 104.4(b)(1) and 28 C.F.R. § 35.130(b)(1).
[5] 34 C.F.R. §104.35(a).
[6] 34 C.F.R. §104.35(b).
[7] 34 C.F.R. §104.35(c).

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 the 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 "[b]ased 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 non-compliance 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.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosure

cc: Siobhan H. Cullen, Counsel
Hesperia Unified School District (by email only)