



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

September 28, 2015

Dr. Deborah A. Flores, PhD  
Superintendent  
Gilroy Unified School District  
7810 Arroyo Circle  
Gilroy, California 95020

(In reply, please refer to case no. 09-15-1279.)

Dear Superintendent Flores:

The U.S. Department of Education, Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint against the Gilroy Unified School District. The complainant<sup>1</sup> alleged that the District discriminated against her daughter (Student) based on disability (diabetes). The specific allegations OCR opened for investigation were whether the District:

1. failed to provide the Student with a free appropriate public education when her high school (School) failed to implement her Section 504 plan. As a result, she was unable to earn course credits which has impacted her ability to meet graduation requirements;
2. failed to convene Section 504 meetings on behalf of the Student before placing her on home-hospital instruction, and prior to that, upon evidence that her current placement was not working; and
3. retaliated against the complainant because of her advocacy on behalf of the Student by filing a complaint with child protective services.<sup>2</sup>

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination on the

---

<sup>1</sup> OCR informed the District of the identities of the complainant and Student in our letter notifying the District of the complaint. We are withholding them here to protect their privacy.

<sup>2</sup> OCR initially also opened the retaliation allegation on the basis that the District reported the Student as truant; however, the complainant indicated this issue was resolved prior to OCR completing its investigation.

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

basis of disability by public educational entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the implementing regulations.

After OCR opened this complaint for investigation, it became clear that the alleged non-implementation about which complainant made this allegation occurred during the 2012-13 school year. Regulations implementing the statutes enforced by OCR provide that a complaint must be filed no later than 180 days from the date of the alleged discrimination. Because Allegation One was not timely, OCR did not investigate it.

OCR investigated Allegations Two and Three by reviewing extensive data from the District and complainant. OCR also interviewed the complainant and representatives of the District, including staff and administrators. OCR determined the District was not in compliance with Section 504 and Title II with respect to Allegation Two only. The relevant facts gathered in OCR's investigation, the applicable legal standards, and OCR's conclusions are summarized below.

*Legal Standards.*

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 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 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.

Section 104.35(a) of the 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 §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.

Section 104.35(c) of the regulations requires that 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. School districts must also 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.

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

*Allegation Two.*

- The Student is a senior at a District high school (School). According to her September X, 2014 Section 504 plan, she has Type 1 diabetes and high blood sugar levels, which result in difficulty concentrating, headaches, blurred vision, nausea, mood swings and, on past occasions, hospitalization. The plan provides for the following accommodations: student monitoring of blood glucose in the classroom; extra time on assignments and tests; a folder for each class; and permission to eat snacks during class.
- As consistently reported by the complainant and District witnesses, during the fall 2014 semester, the Student was repeatedly sent home from school because of the School's determination that her blood sugar was too high to be safe.
- Instructions from the Student's endocrinologist dated August 13, 2013 reads, "If glucose greater than 300, and she feels ill, then she should go home or be given medical attention. However, if she does not feel ill she can stay at school and dose her insulin as routine." Instructions dated May 1, 2014 read, "Based upon discussion with school and school comfort, previous instructions are revised. New instructions: [Student] should be sent home if blood glucose greater than 400." Instructions dated September 22, 2014 read, "In terms of discharge home from school...school may use the Stanford protocol."
- The District Nurse told OCR she consulted with the Student's doctor many times, and often disagreed with his instructions. She said his instructions regarding when the Student should go home during the 2013-14 school year were hard to implement, and she instead wanted to use what she described as widely-accepted standard protocols issued by Stanford Medical Center. As noted above, the doctor approved use of these protocols in September 2014. The Nurse said she used these to assess the Student's fitness to stay at school during the fall 2014 semester.

- The complainant told OCR that she frequently disagreed with the School's decision to send the Student home, because she believed the Student could safely remain at school.
- Under what circumstances the Student would be sent home for high blood sugar was never memorialized in her Section 504 plan.
- The complainant said the Student did not consistently receive makeup work for time she missed in class due to being sent home. Whether and how the Student would receive such work was not addressed in her Section 504 plan.
- At the beginning of the 2014-15 school year, the Student was attending school on a full time basis. However, early in the school year, she changed to a partial day schedule (attending from 10:00 to 2:30), because her high blood sugar often occurred in the morning. In December 2014 was placed on home hospital, which remains her placement.
- The then-Principal said that, throughout the fall 2014 semester, she and other school staff discussed with the complainant different placement options that might work for the Student. These discussions included different combinations of relevant individuals at different times; however, at no time did all of the relevant members of the Student's Section 504 team meet to discuss these options and which of them would work best for the Student.
- In December 2014, the complainant submitted a form to the District requesting the Student be placed on home hospital. She said she did this because the Student leaving school early multiple times a week was untenable. The District granted the complainant's request. It did not convene a meeting of the Student's Section 504 team.
- As a cumulative result of her time in high school, the Student is significantly behind on credits to graduate. She is, however, working to correct the deficiency and, according to the complainant and the District, making progress on this front.

As noted above, 34 C.F.R. Section 104.35(c) requires that the County implement a process to ensure students with disabilities receive FAPE. An appropriate education is defined as regular or special education that is designed to meet the individual educational needs of the student with disabilities. OCR interprets the Title II regulations as requiring FAPE to the same extent as the Section 504 requirements. Additionally, Districts are required 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.

There were various points at which it would have been appropriate for the District to convene the Student's Section 504 team. First, that the Student was regularly missing class due to her high blood sugar was a clear indication that her existing educational placement and services were not meeting her individual needs. The District and the complainant had differing opinions about whether it was necessary for her to miss class, and the issue was not addressed in her Section 504 plan. In an attempt to address these issues, the District (with the complainant's consent), shortened the Student's instructional day, and later placed her on home hospital. These were significant decisions that impacted the amount and manner of instruction the

Student was receiving. It was clear from their testimony that District witnesses wished to offer the Student a variety of options to try to address a difficult situation in a manner that would best meet the Student's needs. However, given the conflicting opinions of the complainant and School staff about whether it was necessary for her to miss school, the amount of instruction the Student was in fact missing, and the significance of the decisions made to try to address these concerns, the District should have convened a meeting of the Student's Section 504 team, which was in the best position to evaluate the available options in light of the information available; it was also in the best position to determine whether additional information was necessary to make an informed decision. OCR notes that though the complainant requested the home hospital placement, she explained to OCR that she felt compelled to do so because the current placement wasn't working.

*Allegation Three.*

- Early in the fall 2014 semester, employees of the School filed two complaints related to the Student with Child Protective Services (CPS). According to the complainant, CPS investigated the complaints and determined they were without merit.
- The employees who made the reports expressed that they were conflicted about doing so, because of their relationships with the complainant and the Student. However, they believed the complainant was not properly managing the Student's diabetes, which was endangering her health. The District and the reporters provided information to OCR describing the specific incidents that led them to make the CPS reports.
- The evidence examined by OCR did not reveal that the reports were connected to the complainant's advocacy on behalf of the Student, or that School staff felt frustration or animosity toward the complainant due to her advocacy.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

The complainant's advocacy on behalf of the Student constituted protected activity, and the District's reports to CPS constituted adverse action. Assuming without deciding that the proximity in time between these events is sufficient to raise the inference of a causal connection, the District's concerns about perceived mismanagement of the Student's diabetes and the potential health consequences for the Student were legitimate nondiscriminatory reasons for the District's reports. There was no evidence that the reasons proffered were pretext for what was in fact a retaliatory motive.

To resolve the compliance concerns identified by OCR with respect to Allegation Two, the District entered into the attached Resolution Agreement, which requires that the District: (1) convene a meeting of the student's Section 504 team to determine whether the placement,

services, accommodations and modifications currently in place for her are appropriate and sufficient to meet her individual needs, and whether compensatory educational services are necessary to address the District's non-compliance; and (2) that the District provide FAPE training to administrators, teachers, and other staff with responsibility for implementing IEPs and Section 504 plans at the Student's School, with a specific component on students with diabetes. OCR will monitor the District's implementation of the agreement.

OCR is closing this complaint as of the date of this letter, and notifying the complainant simultaneously. 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 whether or not OCR finds a violation.

OCR reminds the District that it is prohibited from harassing, coercing, intimidating, or discriminating against you or anyone else for filing a complaint with OCR or participating in the complaint resolution process.

Under the Freedom of Information Act, it may be necessary to release this document and related records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personal information that, if released could reasonably be expected to constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please contact Suzanne Taylor, OCR attorney, at 415-486-5561 or [suzane.taylor@ed.gov](mailto:suzane.taylor@ed.gov).

Sincerely,

/s/

Anamaria Loya  
Team Leader

Enclosure