



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

May 4, 2018

Terri Novacek
Executive Director
Dehesa Charter School
1441 Montiel Rd, Suite 143
Escondido, California 920626-2242

(In reply, please refer to case no. 09-15-1298.)

Dear Director Novacek:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Dehesa Charter School (Charter School). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated the following issues:

1. Whether Dehesa Charter School (Charter School) denied the Student a free appropriate public education (FAPE) by failing to follow adequate procedures for evaluation and placement of the Student.
2. Whether the Charter School denied the Student an equal opportunity to participate in her education program due to her disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 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 and as a public school, the Charter School is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the Charter School. After careful review of the information gathered in the investigation, OCR concluded that the Charter School was in compliance with respect to the Student in allegation 1 but did not comply with 34 C.F.R.

¹ OCR previously provided the District with the identity of the Complainant and Student. We are withholding their identities here to protect their privacy.

§104.33 by failing to adopt Section 504 policies and procedures. OCR also found that the Charter School's procedural safeguards were not fully compliant with 34 C.F.R. §104.36. In addition, OCR concluded that for allegation 2, the Charter School's policy on medication administration violated 34 C.F.R. § 104.4(a)-(b) and 28 C.F.R. § 130(a)-(b) by denying students with disabilities, who are unable to self-administer their medication, an equal opportunity to participate in the Charter School's programs. The applicable legal standard, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Issue 1: Whether the Charter School denied the Student a FAPE by failing to follow adequate procedures for evaluation and placement of the Student.

Legal Standard

FAPE Standard

The Section 504 regulations, at 34 C.F.R. §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 §§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.

Evaluation and Placement

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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. 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.

Procedural Safeguards

Section 104.36 of the 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.

Charter School

The Charter School is operated by a non-profit corporation and sponsored by the Dehesa School District. It is an independent study program where parents are the primary educator and are responsible for overseeing the day-to-day education of their child. As part of the program, parents sign a Master Agreement requiring them to meet with a credentialed teacher (Educational Facilitator) every 25 school days to inform them of their child's academic progress. The Educational Facilitator collaborates with parents and the child to develop the child's personalized learning plan by selecting the curriculum and determining the instructional methods, goals and assessments.

Although the Charter School is a non-classroom based program, the Charter School offers educational resources to supplement the child's personalized learning plan. Some of these educational resources include attending Learning Centers to participate in small group instruction, workshops, or to receive academic support. The Charter School also offers field trips, and other educational services that are taught by private vendors who contract with the Charter School.

Factual Findings

The Student was diagnosed with diabetes in 2012 and has a Section 504 Plan. During the 2014-15 school year, the Student was in the XXXX grade. As part of her independent study program, the Student attended classes at the Learning Center every Tuesday and Wednesday from 9 am to 3 pm. The Student also participated in field trips offered by the Charter School.

The Complainant told OCR that on August X, 2014, the Student's physician signed a form entitled "Parent Consent and Authorized Healthcare Provider Authorization for Management of Diabetes at School and School Sponsored Events." This document includes the physician's ordered procedures to address the Student's diabetes at school. The Complainant signed the physician's written orders consenting to it on September XX, 2014 and gave a copy of the document to the Charter School. The form states that the physician's signature provides authorization for the written orders on the form and show agreement that all ordered procedures will be implemented in accordance with state and federal laws and regulations. One of the items on the document states, "Severe Hypoglycemia: Seizure, unconscious, combative, or unable to give glucose gel. Call 911 and ensure open airway. Give glucagon injection for unconscious or seizure only 1.0mg 1M X 1 dose."

Based on the physician's written orders, the Complainant told OCR that during a Section 504 meeting on April X, 2015, the Complainant requested that the Charter School have staff members trained to give the Student a glucagon injection available at the Learning Center if she became severely hypoglycemic. The Complainant also requested that the Charter School have trained staff available to assist the Student when she took the PSAT, SAT, and CAHSEE and when she attended school field trips. The Complainant told OCR that the Student uses an insulin pump and is able to test her blood glucose levels and manage her daily insulin needs, but needs someone to give her a glucagon injection if she becomes severely hypoglycemic.

The Executive Director of the Charter School told OCR that the Complainant requested a number of accommodations for the Student and the Charter School agreed to provide every accommodation except to have their staff members administer the glucagon injection to the Student. According to the Executive Director, the Charter School did not agree to this accommodation because the Complainant had previously given the school a letter dated December X, 2014 stating that the Student has never needed a glucagon injection because she uses an insulin pump. Based on this letter, the Charter School did not identify this accommodation as one that the Student needed.

On April XX, 2015, the Complainant signed the Section 504 Plan consenting to it. The Complainant told OCR that she signed the Plan, even though the Charter School refused to administer the glucagon injection to the Student, so that the other provisions in the Plan could be implemented. The Complainant further stated that she went to the Learning Center with the Student and waited in her car while the Student was in class because she was concerned that if the Student became unconscious or had a seizure no one would give the Student her glucagon injection.

The Charter School told OCR that a copy of the procedural safeguards was given to the Complainant at the time of the Section 504 meeting, however, the Plan does not include any notations confirming that this was done. The Charter school also told OCR that it gave the Complainant a copy of her safeguards prior to the meeting. As evidence, the Charter School gave OCR a copy of an email dated December XX, 2014, showing that the Director of Special Education sent a copy of the safeguards to her on that day. The Complainant could not recall if she received a copy of the safeguards in April of 2015 but confirmed receiving it by email sometime before the Section 504 meeting.

The Charter School's procedural safeguards is a one page document entitled "Your Right Under Section 504." It states that a parent or guardian may request mediation or an impartial due process hearing if they disagree with the Charter School's decision regarding identification, evaluation, educational program, or placement under Section 504. The procedural safeguards, however, do not include a review procedure as required by 34 C.F.R. §104.36 of the regulations. The Charter School also informed OCR that it has Uniform Complaint Procedures to address discrimination complaints, but that it has not adopted Section 504 policies and procedures for the identification, evaluation and placement of students with disabilities under Section 504.

Analysis and Legal Conclusion

OCR does not review the results of individual placement and other educational decisions, except in extraordinary circumstances, so long as the school complies with the process requirements of the Section 504 regulations at 34 C.F.R. section 104 concerning identification and location, evaluation, and due process procedures. In this case, the Charter School complied with the process requirements of Section 504 by holding the Section 504 meeting for the Student, developing a Section 504 Plan for her, and notifying the Complainant of her procedural safeguards. Thus, the appropriate forum to resolve any disagreements about the Student's accommodations or services would have been the Section 504 impartial due process hearing. For this reason, OCR concluded that the Charter School is in compliance with Section 504, Title II and their implementing regulations because it followed adequate procedures for the evaluation and placement of the Student.

As to the systemic issue, in order to provide FAPE to students with disabilities under Section 504, the regulations at 34 C.F.R. §104.33 require a school district to have procedures pertaining to the educational setting, evaluation, placement, and due process protections. The Charter School does not have Section 504 policies and procedures (administrative regulations) and is therefore out of compliance with 34 C.F.R. §104.33. OCR also determined that the Charter School's notice of procedural safeguards does not comply with 34 C.F.R. §104.36 because it does not state that the parent or guardian has a right to a review procedure regarding the outcome of the hearing or otherwise. As a matter of technical assistance, OCR also notes that the notice of nondiscrimination notice includes an incorrect mailing address for filing an OCR complaint.

In order to address this noncompliance, the Charter School agreed to develop administrative regulations that will establish procedures for the identification, evaluation, and placement of students with disabilities under Section 504. The Charter School also agreed to revise its procedural safeguards so that it complies with 34 C.F.R. §104.36. The Charter School further agreed to provide training on the new administrative regulations to all Charter School staff members who have or may have responsibility for developing and coordinating the implementation of Section 504 plans. In addition, the Charter School agreed to give parents and guardians, who have children with Section 504 Plans, a copy of the new administrative regulations and the revised procedural safeguards. Lastly, the Charter School agreed to post the new administrative regulations on its website and include the link to it in the Parent Handbook.

Issue 2: Whether the Charter School denied the Student an equal opportunity to participate in her education program due to her disability.

Legal Standard

Different Treatment

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), 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. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.

Finding of Facts

The Executive Director told OCR that the Charter School does not have a health aide or nurse on staff because it is a home schooling program. For this reason, parents are required to sign the Medical Treatment Parent Acknowledgment and Consent Form (Consent Form), which states that a student may carry and self-administer prescribed necessary medications during the school day if written consent is provided from the parent or guardian and physician. The consent form further states that medical treatment is the responsibility of the parent, guardian and the attending physician and that the Charter School is not responsible for administering medications. In situations where administration of medication requires nursing assessment, interpretation, or decision-making, the child's participation in Learning Center classes is conditional based on the parent or guardian remaining on site. The consent form also states that school staff, instructors and students are not permitted to provide treatment outside of calling 911 in an emergency.

The Complainant alleged to OCR that the policy described in the Consent Form discriminates against students with disabilities. According to the Complainant, a student with a disability, who cannot administer their own medication, will not be able to take classes at the Learning Center unless their parent or guardian is able to accompany them. The Complainant also stated that it was a hardship to go to the Learning Center twice a week from 9 a.m. to 3 p.m. and that parents of disabled students should not have to stay at the Learning Center to administer their child's medication.

The Executive Director told OCR that it is the Charter School's policy to not allow staff at the Learning Centers to give any medications to their students, and it does not contract with anyone who can provide such services. In addition, the Executive Director told OCR that participation in the Learning Center classes is optional. Students do not have to attend classes at the Learning Centers because the class offered there are enrichment courses that are not graded. The Executive Director further stated that the Student was afforded the same opportunities available to students without disabilities, and that the Charter School's denial of the Complainant's request for a trained staff person to administer her medication at the Learning Center did not prevent her from participating in any part of her educational program.

The Complainant told OCR that the Student was only able to attend the Learning Center classes because she went with her to ensure that if she became unconscious or had other diabetes related emergencies, she was there to administer her medication. The Complainant also stated that attending the Learning Center was an important part of the Student's education and the classes offered her an opportunity to socialize with other students, receive small group instruction in her core courses, and to experience enrichment courses like cooking classes.

With regards to field trips, the Complainant alleged that the Charter School discriminated against the Student based on her disability by not allowing the Student to participate unless the Complainant was also present. The Executive Director told OCR that the Charter School did not treat the Student differently because every parent, as the primary educator, is required to attend field trips with their child. The Charter School's Parent Handbooks from 2014 through 2017 states "[p]arents are required to attend [field trips] with their child and monitor his/her behavior, or assign another adult to do so. This excludes the ... Educational Facilitator that is in charge of the activity."

The Complainant further alleged that the Student was not given an equal opportunity to take the PSAT exam. The Complainant told OCR that the Student took the PSAT exam in late October of 2014. According the Complainant, the Student developed hyperglycemia during the PSAT exam and was unable to complete the test because there was no one at the testing site who could assist her with her diabetic needs. The Complainant also told OCR that the Student took the PSAT at a church, and she does not know if the Charter School leased the space because there were students from other charter schools taking the exam.

The Executive Director told OCR that the PSAT, SAT and ACT are not taken at any of the Charter School's sites and are administered through the local high school. As a result, the Charter School does not have authority to provide testing accommodations for these exams. For this reason, parents must request testing accommodations for these exams through the school district. The Executive Director also stated that testing accommodations are provided to students for the CASHEE and any other tests that are taken at the Learning Centers based on their individual needs.

The Complainant stated to OCR that this was the first time the Student took an exam at a non-Charter School site, and the Complainant did not know that she needed to request testing accommodations beforehand in order to have her Section 504 accommodations implemented. According to the Complainant, the Charter School did not inform her as to what she needed to do to have the Student's testing accommodations implemented until she told the school that the Student did not complete the PSAT because of her disability. The Complainant further stated to OCR that if the Charter School had told her that she needed to request the Student's testing accommodations before the exam, she would have done so to ensure that her Section 504 accommodations were put in place. OCR also reviewed the Charter School's Parent Handbook from 2014 to 2017 and found that it does not include any information as to how a parent or guardian can request testing accommodations for exams taken at the Learning Centers or at other locations.

In July of 2015, the Complainant withdrew the Student from the Charter School. The Complainant told OCR that she could not keep going to the Learning Center with the Student and that she found another charter school with a nurse on staff who could attend to the Student's diabetic needs at their site. Although the Student is no longer enrolled in the Charter School, the Complainant requested that OCR continue to address her allegations that the Charter School's policies discriminates against diabetic and other disabled students by requiring a parent or guardian to accompany their child to the Learning Center, field trips, and to testing sites to administer their medication.

In April of 2018, the Executive Director informed OCR that the Charter School may discontinue its Learning Centers at the end of the school year. The Executive Director also told OCR that the Charter School does not have any students who are currently unable to attend the Learning Center because of medication requirements. In addition, there are no parents or guardians who are presently accompany a student to the Learning Center due to medication needs.

Analysis and Legal Conclusion

The Section 504 rights of students with disabilities who are enrolled in charter schools and those who are enrolled in a public elementary or secondary schools are the same.² In this case, OCR concluded that the Charter School's policy of requiring a parent or guardian, to remain at the Learning Center, if their child is unable to administer their own medication, violates 34 C.F.R. § 104.4(a) and (b)(1)(i)-(iii). Charter school students with disabilities must not be excluded from participation in, be denied access to or limited in, or otherwise subjected to discrimination on the basis of disability in a charter school's provision of aids, benefits, services, or opportunities. In this case, the Charter School's policy discriminates against students with disabilities because these students are denied access to the benefits and services offered at the Learning Centers if their parent or guardian cannot accompany them to administer their medication.

Although the Charter School informed OCR that the activities taking place at the Learning Centers are all optional enrichment courses that are not graded, under Section 504 and its implementing regulation at 34 C.F.R. § 104.37, charter school students with disabilities, are entitled to equal treatment and nondiscrimination in nonacademic and extracurricular services and activities. The Charter School must provide nonacademic and extracurricular services and activities in a manner that affords students with disabilities an equal opportunity for participating. If a student requires medication and wants to participate in activities held at a Learning Center or any other benefits or services offered by the Charter School, then the Charter School will need to hold a Section 504 meeting and determine how the student's individual needs can be met in order to provide this student with a FAPE. In order to address this noncompliance, the Charter School agreed, if it decides to keep its Learning Centers open,

² OCR's "Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter School under Section 504 of the Rehabilitation Act of 1973," can be found on OCR's website at <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-charter-school.pdf>.

to revise its medication administration policy to no longer require a parent or guardian to remain at the site in order for their child with a disability who requires such administration to participate in the Learning Center classes. If the Charter School discontinues its Learning Centers, it will provide OCR with documentation confirming the closure of all of its Learning Centers, including the date of when all of the Learning Centers were closed.

OCR further concluded that the Charter School is in compliance with Section 504 regarding field trips because its policy requires all parents and guardians to attend, regardless of whether their child has a disability and requires medication or not. The field trip policy also allows parents and guardians to assign another adult to accompany their child on the field trip if they are unable to attend.

With respect to the PSAT exam, OCR determined that the Charter School did not violate Section 504 because the Charter School did not administer the Student's PSAT exam in October of 2014. However, as a matter of technical assistance, OCR recommends that the Charter School include a section in the Parent Handbook describing how parents and guardians can request testing accommodations for their child and how to have these accommodations implemented for the CASHEE, PSAT, SAT, ACT and other exams.

Conclusion

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as the date of this letter and notifying the Complainant concurrently. When fully implemented, the Resolution Agreement is intended to address the complaint allegations. OCR will monitor the implementation of Resolution Agreement until the Charter School is in compliance with the Resolution Agreement. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Charter School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 Charter School may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. 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, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about this letter, please feel free to contact the case resolution team.

Sincerely,

/s/

James Wood
Team Leader

Attachment