



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

May 16, 2017

Dr. John Nickerson, Ed.D.
Superintendent
Acalanes Union High School District
1212 Pleasant Hill Road
Lafayette, CA 94549

(In reply, please refer to case no. 09-16-1557)

Dear Dr. Nickerson:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Acalanes Union High School District (District). The Complainant alleged that the District discriminated against her daughter (Student) on the basis of disability.¹ Specifically, OCR investigated whether:

1. the District failed to provide the Student with a free, appropriate public education (FAPE) by failing to timely follow adequate procedures for evaluation and placement of the Student; and
2. the District denied the Student an equal opportunity to participate in her educational program when it failed to consider the complainant's multiple requests to assess for special education and related services.

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 which 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, which also prohibits disability-based discrimination by public educational entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the Complainant and the District and by interviewing the Complainant. Before the investigation was concluded, the District expressed an interest in resolving the allegations, and OCR determined

¹ OCR informed the District of the Complainant's and Student's identities at the beginning of the investigation. Their identities are withheld in this letter in order to protect their privacy.

that it was appropriate to resolve them under section 302 of OCR's Case Processing Manual with a Resolution Agreement (Agreement) reached during the course of an investigation. Accordingly, OCR did not make a compliance determination. This letter summarizes the applicable legal standards, relevant facts obtained during the investigation to date, and resolution of the complaint.

Legal Standard

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. 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 104.36 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.

Factual Findings

Background

The Student was in her junior year of high school when she suffered a concussion playing for the high school XXXXXX team on December XX, 2015. The Student was diagnosed with

concussion-related symptoms including headaches, fatigue, sensitivity to light, sensitivity to noise, difficulty concentrating, and problems remembering. As a result of the concussion, she was absent from school for four days, prior to the District closing for the holiday break from December XX, 2016-January X, 2017.

Prior to the Student returning to school, on or about January X, 2017, the Complainant provided the school nurse with the “Acute Concussion Evaluation (ACE) Care Plan,” prepared by the Student’s physician. The ACE Care Plan identified the following recommended supports:

- 1) Shortened day;
- 2) Extra time for homework and assignments;
- 3) Lessening homework load by 80% with the maximum length of night homework curtailed at 30 minutes;
- 4) No significant classroom or standardized testing at this time;
- 5) Breaks during the day as needed;
- and 6) Request meeting of 504 or School Management Team to discuss this plan and needed supports.

On January X, 2016, the day after the Student returned to school, the school nurse reviewed the ACE Care Plan and evaluated the Student to assess her needs. The school nurse also consulted with the Complainant, the Student, and the Student’s counselor and developed an Individual Health Plan (IHP) for the Student that included many of the supports identified in the ACE Care Plan as temporary accommodations, namely: an abbreviated daily class schedule; no PE/team sport participation; reduced make up work, including no or lesser homework; no testing during the concussion recovery period; and extended time for the Student to complete assignments. The IHP did not include a recommendation or a requirement that a 504 meeting be convened. Based on the evaluation of the Student and consultation with the Complainant and the Student’s counselor, the school nurse determined that the Student “was not ready for cognitive work,” and informed the Student’s teachers of her injury and limitations and accommodations by email. Neither the Complainant nor the Student ever complained to the District that the IHP or the accommodations it provided were insufficient.

On January XX, 2016, the Student’s physician re-evaluated her and cleared her to return to full-time school activities and provided her with a new updated ACE Care Plan which identified the persistence of two post-concussion symptoms: headaches and nominal sensitivity to light. The updated ACE Care Plan stated that the Student could resume full activities at school, and in the recommended supports section the following boxes were checked: “1) Take rest breaks during the day as needed; 2) Request meeting of 504 or School Management Team to discuss this plan and needed supports.” On February X, 2017 the Student emailed the school nurse that she had been fully cleared by her doctor, felt great, and wished to meet with the nurse to “finalize everything.” On February X, 2016 the school nurse re-evaluated the Student and the Student returned to classes full-time.

The Complainant told OCR that in January and February 2016 she made an oral request to the school nurse and other District staff for a Section 504 evaluation for the Student, and that she received no response from the District. The District did not respond to OCR's request to clarify whether the Complainant requested a Section 504 meeting in January and February 2016 and whether the District responded.

The District told OCR that the academic modifications in the IHP continued to be available to the Student after her physician cleared her to resume full activities, but that the Student was responsible for individually arranging them with her teachers. The Complainant told OCR that from January to May 2016 the Student was experiencing post-concussion symptoms but that the Student's teachers did not provide her with sufficient academic accommodations, including that some teachers denied the Student extra time on homework and tests.²

On May XX, 2016, the Complainant emailed the school nurse and requested clarification as to whether the Student was on a Section 504 plan. The nurse emailed in response, "No. [The Student] was steadily improving and remember we put things on hold?" On May XX, 2016, the Complainant emailed the school nurse and requested a 504 evaluation for the Student. The District responded by requesting updated medical documentation and holding a Student Review Team meeting on May XX, 2016.

On May XX, 2016, the Complainant emailed one of the Student's teachers a request for extra credit opportunities. The Complainant told OCR that she requested the extra work to help the Student improve her grade, which the Complainant believed had been negatively impacted by post-concussion symptoms and the lack of accommodations in the class. However, the email does not mention the Student's concussion or that the request was being made because the teacher had not provided accommodations. The Complainant did not tell OCR if she received a response from the teacher. The Complainant told OCR that she herself was unaware that the Student was not receiving sufficient academic accommodations until May 2016 when the Student's grades and test scores were negatively impacted.

On June X, 2016, the District held a Section 504 team meeting. Present at the meeting were the Student; the Complainant; the Associate Principal; the Student's counselor; the school nurse; and the Student's English and Biology teachers. Four of the Student's six teachers submitted teacher input forms for the 504 evaluation meeting; the input forms specifically asked whether the Student had used any accommodations such as extra time or the ability to retake tests in the class. Two teachers indicated that the Student had used extra time (English and Pre-Calculus), and two stated that she had not (U.S. History and Sports Medicine) but that she was receiving

² OCR attempted to interview the Student directly about the impact of her ongoing symptoms and examples of when she had asked and her teachers had denied her requests for extra time as an accommodation, but the Student declined to participate in the OCR investigation.

A's in these classes. Two instructors did not respond (Biology and Spanish). The Student Grade report dated June X, 2016 shows that the Student's grades went down slightly during the time period immediately after her concussion, but that in five of six classes the Student's final grade was the same or better than her pre-concussion grade.

X---paragraph redacted---X

The District determined that the Student did not qualify for a 504 plan because the Student "presents in a similar manner after concussion as she did pre-concussion." The District provided the Complainant with procedural safeguards when it decided not to provide the Student with a Section 504 plan.

Analysis

A district must evaluate a student if it has reason to believe the student has a disability and the student needs special education or related services as a result of that disability. A district is also obligated to respond to a parent's request for special education evaluation and, if it decides to deny a request for evaluation, it must provide the parent with procedural safeguards. 34 C.F.R. §104.36. In determining whether a district has timely conducted an evaluation of a student, OCR takes into consideration information such as the 60-day timeframe provided by the IDEA regulations and the district's own procedures.

In this case, the Complainant asserts that the District first had an obligation to conduct a Section 504 evaluation when she presented the ACE Care Plan to the school nurse in early January 2016 following the Student's injury. The District responded by developing an IHP and providing the Student with academic accommodations and the Complainant does not assert that the accommodations provided to the Student via the IHP while the Student was on medical restriction were insufficient. The Complainant also asserts that the District had an obligation to conduct a Section 504 evaluation after she provided the school nurse with the revised ACE Care Plan at the end of January 2016, at the time that the Student was cleared to return to full time activities. After the Student was cleared, the District advised the Student that she could continue to request the accommodations from her teachers on an as-needed basis. OCR determined that the District's response to the Student's concussion was reasonably calculated to meet the needs of the Student in light of her injury and recovery, and that no separate obligation to evaluate the Student under Section 504 was triggered, unless the Complainant specifically requested an evaluation or if the Student demonstrated academic or other needs. Based on the Student's grades and teacher input forms, the Student did not demonstrate ongoing academic needs; the Student also e-mailed the school nurse on February X, 2016 expressing enthusiasm to return to school full time and stating that she felt great.

The Complainant further asserts that she made oral requests to the school nurse and other District officials for a Section 504 evaluation on more than one occasion in January and February 2016. The District did not respond to OCR's request to confirm or deny whether this request was made. An e-mail exchange between the Complainant and the school nurse on May XX, 2016, suggests that the two had previously discussed a need for continued accommodations after the Student was released from medical restriction following her concussion. OCR has a concern that the District was on notice of the Complainant's request prior to May XX, 2016 and, in effect, determined not to provide an evaluation but without providing procedural safeguards.

On May 12, 2016, after the Complainant made a formal written request for a Section 504 evaluation of the Student, the District followed through consistent with Section 504 evaluation procedural requirements. To determine whether the District failed to timely evaluate the Student in violation of Section 504 prior to May of 2016, OCR would need to interview the school nurse and other staff to determine whether a request for evaluation was made, whether the District denied the request, and whether procedural safeguards were provided.

In addition, based on interviews conducted with the Complainant and records provided by the District, OCR found that the Student attended school regularly and in some classes, actually improved her grades in the semester that followed her concussion. OCR also found that at least two teachers provided her with accommodations upon request, and that neither the Complainant nor the Student raised a complaint about the accommodations provided through the IHP. Accordingly, OCR found that even if the District had delayed in evaluating the Student and assuming that the Student had a disability as defined in the regulations and a need for accommodations during the time period in question, there is no evidence that the District's delay resulted in the Student being denied an appropriate education or an equal opportunity to participate in her education.³

Conclusion

On May 8, 2017, the District entered into the enclosed Agreement with OCR that is aligned with the information obtained by OCR and concerns raised during the investigation. The Agreement requires the District to issue a guidance memorandum to all relevant staff at the Student's high school, including site administrators, counselors, and general education teachers, concerning the school's responsibility to respond to a request for evaluation under Section 504. The guidance will clarify that if a parent requests evaluation, or requests a Section 504 plan, the District must respond by convening a Section 504 meeting to discuss the request and determine next steps, including gathering relevant information, developing accommodations for a Section 504 plan and/or providing the parent with notice of procedural safeguards.

³ The Complainant asserts that the Student experienced ongoing symptoms related to her concussion and therefore her medical condition represented a disabling condition that interfered with her receipt of an education.

When fully implemented, the Agreement is intended to address the compliance concern identified in this investigation. OCR will monitor implementation of the Agreement until the District is in compliance with Section 504, Title II, and the implementing regulations, which were at issue in this matter.

OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. 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, 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 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.

If you have any questions please contact OCR attorney Matthew Wood at 415-486-5591 or Matthew.Wood@ed.gov.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

Enclosure