



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

April 23, 2018

Nancy Albarrán  
Superintendent of Schools  
San Jose Unified School District  
855 Lenzen Avenue  
San Jose, California 95126

(In reply, please refer to case no. 09-17-1415.)

Dear Superintendent Albarrán:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the San Jose Unified School District (District). The complainant alleged that the District discriminated against the Student on the basis of disability.<sup>1</sup> Specifically, OCR investigated whether the District denied the Student a free, appropriate public education (FAPE) by failing to evaluate him even though it had reason to believe he needed special education or related services, resulting in the loss of instructional time.

OCR investigated the complaint under the authority of 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. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504 and 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 District. After careful review of the information gathered in the investigation, OCR concluded that the District did violate Section 504 and Title II with regard to the issue investigated. The applicable legal standard, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

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<sup>1</sup> OCR informed the District of the Complainant's identity and the Student's identity in our letter notifying the District of the complaint. We are withholding their names in this letter to protect their privacy.

### Legal Standard

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. 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. 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.

### Findings of Fact

The Student is currently a ninth grader at a high school in the District. During the 2016-2017 school year, the Student was an eighth grader at a District middle school, when he began missing school because a medical condition was causing him to vomit multiple times a day. The Student was absent 25 of 41 days of school between August and the end of October 2016.

In notes dated October XX, 2016, the School Nurse (Nurse) indicated that the Complainant called to report the Student was missing multiple days of school because of a gastrointestinal condition that caused him to vomit multiple times a day. On November X, 2016, the Nurse noted that the Student remained unable to attend school. The Complainant reported to OCR that in her conversations with the Nurse, she understood that the Student could go on independent study but was not informed about the possibility of him qualifying for a Section 504 Plan or the Home and Hospital Instruction Program (HHIP).

On November XX, 2016, the Complainant submitted documentation from the Student's physician excusing the Student's absences from October XX to November XX, 2016. On or about November XX, 2016 the Complainant submitted an application for HHIP with documentation from the Student's physician about his medical condition and the need for HHIP with an initial period of twelve weeks and a possible return to school in three months.

On or about November XX and XX, 2016, the Nurse received the completed request for HHIP and forwarded it to the Manager of Health and Family Support Programs for approval. The District stated that there was internal correspondence about whether the

District could approve HHIP for a student who could otherwise attend school and that questions were raised about what type of accommodations would be required for the Student.

On November XX, 2016 and December X, 2016, the Complainant corresponded with the Nurse about the status of HHIP request and expressed concerns about the amount of time the request was taking to process and the Student's need to make up the credits.

On December X, 2016, District records show that there were internal District discussions about whether it was possible to provide the Student with an accommodation plan so that he could attend school, allowing him fast access to bathrooms, and an ability to leave the classroom at any time, among other things. The District's Manager of Health and Family Support Programs, who was the District administrator with oversight over HHIP, communicated to the Assistant Principal that if a Section 504 accommodation plan could not be implemented, she would approve the request for HHIP because the Student had been out of school for over 50 of 80 days. The Assistant Principal responded that the school might be able to put together a Section 504 plan within a few days but not immediately and suggested that the school attempt to convene a Section 504 meeting at the beginning of the second semester.

On or about December X, 2016, the Nurse informed the Complainant that HHIP had been approved until the beginning of second semester, January XX, 2017. The Complainant reported that she received written confirmation the same day, requesting that she agree to a delay of the start of HHIP to January X, 2017. However, the Complainant did not provide OCR with a copy of the letter. The Complainant told OCR that she did not agree to any extension but, she also did not communicate that to anyone in the District. The Complainant stated that on December X, 2016, the District Manager of Nurses informed her that the Student was approved for HHIP to begin on December XX, 2016. The Complainant reported that a HHIP teacher came to her house a couple of times beginning on December XX, 2016. The teacher worked well with the Student, but had to create her own curriculum, as she was not able to get any of the materials or assignments which she had requested from the Student's teachers.

At the start of the second semester, beginning on or about January XX, 2017, the Student was still unable to attend school. On the same day, the Nurse contacted the Complainant after the Student failed to attend the first day of the second semester. On January XX, 2017, the Complainant informed the Nurse that the Student was hospitalized. According to the District, the Complainant stated that she did not want to extend HHIP but instead wanted a Section 504 plan to accommodate his illness. The Complainant told the Nurse that her lawyer would be in contact with the Manager of the Health and Family Support Programs to discuss a Section 504 plan.

On or about January XX, 2017, the Complainant contacted the Nurse and asked that HHIP be extended, as the Student was experiencing ongoing medical complications. The Nurse contacted the District and asked that the HHIP request be reopened. The District agreed to extend HHIP one more month (to February XXXX), unless another Doctor's note was received to extend the time period.

On January XX, 2017, the Student's physician completed a second application, requesting HHIP for the Student, which the Complainant submitted to the District. In the application the physician provided information regarding a working diagnosis of the Student, stated that the Student needed 12-weeks of HHIP and expected the Student to return to school in the fall 2017. The Complainant reported that she submitted a letter with this information on January XX, 2017 while the District reported receiving this application on February XX, 2017.

The District reported that on February XX, 2017, the Complainant communicated with the District and stated that the Student had received no home instruction since the end of the first semester. The District's head of Learning Options, who schedules HHIP instructors, responded that there was confusion about whether the school had been "accommodating the HH request." She indicated that an instructor would be located immediately.

The Complainant received a letter dated March X, 2017, wherein the District confirmed that the Student was approved for five hours of HHIP commencing on March X, 2017. On March X, 2017, the Complainant wrote to the Principal and the Nurse updating them about the Student's condition and complaining about the inconsistent instruction to the Student and the negative impact of that on the Student's ability to promote from 8th grade. The Complainant told OCR that she received no response to her email but on March X, 2017, a HHIP instructor came to her home and provided instruction to the Student.

Beginning on March X, 2017, the Student was provided with HHIP for five hours each week for the following six weeks after which the Complainant was required to submit a new HHIP request. As a result of being required to submit a new request, there was a two-week break during which the student received no instruction and then resumed and continued through the end of the school year at five hours per week.

The District asserted that prior to the Complainant's request for accommodations, District personnel were discussing and were prepared to create a Section 504 plan for the Student as early as mid-December but that the Student did not come to school. The District stated that it was again ready to do so in January when the Student was scheduled to return from his first HHIP request. However, since the Student was unable to return to school, no accommodation meeting was held.

According to the Director of Student Services, the Student had not been subjected to District attendance policies under SARB as an accommodation for his disability, and therefore all of his absences had been excused. The Director of Student Services also reported to OCR during his interview that the Student had not been at school on concurrent days and that a Section 504 Plan could not be put in place if the Student was not at school.

In August 2017, the Student began ninth grade at a District high school. At that time, the Assistant Principal developed and placed the Student on a "Tentative 504 Plan" based on his disability. According to the Assistant Principal, a "504 meeting" was held on October XX, 2017 when he and the Complainant discussed concerns about the Student including fatigue and dehydration. The document entitled "SJUSD Section 504 Plan,"

provided that the Student have access to fluids throughout the day and that the high school monitor his long periods of standing, allow for access to snacks and liquids, and have a health pass from the nurse for bathroom breaks when needed outside of the regular class passing period.

The "Meeting Notes" stated that the Complainant agreed to the Section 504 Plan and confirmed that a meeting with the entire team (e.g. teachers) was not necessary. The Complainant asked if the Student could rest in the mornings in the Assistant Principal's office because he is really tired on some mornings. These notes also state that attendance issues for the current year were discussed.

None of the accommodations, or the October XX, 2017 discussion, addressed any educational gaps sustained by the Student from the previous school year, or any need for additional instructional support. When OCR asked the Assistant Principal whether compensatory services were considered in the development of the Student's Section 504 Plan, the Assistant Principal responded that, no other resources were needed because the Complainant was happy with the plan.

On February XX, 2018, a "504 meeting" was convened and included the Complainant, four of the Student's teachers, and the Assistant Principal. According to the "Meeting Notes" and OCR's interview with Complainant, the discussion did not address any need for compensatory services as a result of the 2016-2017 school year.

During the Student's eighth grade year, the Student was absent from school for 55 of the 84 days during the fall semester and each one of the 96 days of the spring semester. He was absent for over 40 days during the fall semester before the Complainant submitted the first application for HHIP.

During the year prior to the onset of his medical condition, the Student's 7<sup>th</sup> grade year (2015-2016 academic year), the Student earned straight A's for the first semester, and one B and five A's for the second semester. During the summer after 7<sup>th</sup> grade and prior to the start of his 8<sup>th</sup> grade year, the Student enrolled in and completed an Algebra I course; he earned a B+ for both "semesters" of the course during the summer session. According to the Complainant, the Student, "took an advanced math class over the summer of 2016 so he could get ready for advanced classes after he completed 8<sup>th</sup> grade."

During the year that the medical condition resulted in him missing school, the Student's eighth grade year (2016-2017), he earned the following grades: two Xs, one X, one X, and two Xs in the first semester and one X, one X, and three X's in the second semester.

The Student has completed the first semester at a high school in the District and earned the following grades: one X, two XX, two X's, and oneXX-.

### Analysis and Conclusion

On October XX, 2016, the District was advised that the Student was missing school because of a medical condition that was causing the Student to experience frequent

vomiting. This medical condition was significant enough to interfere with the Student's receipt of an education. By November X, 2016, there was documented communication between the Complainant and the District regarding the possibility of HHIP and consideration of other options, such as, Independent Studies. On November XX, 2016, the District received a letter from the Student's physician regarding the Student's absences in October and November along with an HHIP application. The District reported to OCR that according to internal correspondence dated November XX-XX, 2016, certain staff members were communicating about possible accommodations that would allow the Student to remain in school; nevertheless, the District agreed to place the Student on HHIP in early December 2016.

The evidence indicates that after the District approved HHIP, it encountered numerous and ongoing difficulties to implement it such that the Student was denied instructional support in December 2016 and for several weeks in the spring 2017 semester. OCR confirmed that the District provided the Student with very limited HHIP in December 2016 and then did not provide the instruction again until March X, 2017, despite notice from the Complainant that the Student's medical condition had worsened and he was unable to attend school. For the six weeks following March X, 2017, the Student received HHIP but then, because the District required the Complainant to submit a new request for the same, there was a 2 week period of time during which the Student did not receive any HHIP. After the 2-week period, the Student again received HHIP for five hours a week until the end of the 2016-2017 school year.

The evidence shows that beginning in November of 2016 and throughout the remainder of the 2016-17 school year, the District failed to convene a Section 504 meeting or explore through an evaluation process what other accommodations or services the Student required. The evidence shows that even with home hospital support, the Student was struggling to access his educational program as evidenced by his failing grades for more than one course during the 2016-2017 school year, in contrast to the mostly A grades he received during the prior school year. The District's failure to initiate a Section 504 process, including evaluating in all areas of suspected disability, during the 2016-17 school year denied the Student a FAPE, as required by Section 504/Title II and its implementing regulations. The reason cited by the District for its failure to convene a Section 504 meeting and develop a plan, namely that the Student was not physically at school due to his disabling condition, is not a basis for not complying with its obligation to provide accommodations and complete the evaluation process for once it had notice that the Student, who remained enrolled in the District, needed or was believed to need special education or related aids and services because of his disability, including confirmation from medical practitioners of the same.

At the beginning of the 2017-2018 academic year, the District attempted to partially resolve the area of identified noncompliance by putting in place accommodations based on the Student's disability. However, OCR confirmed with the Assistant Principal that a meeting was not held with the Student's teachers, the Complainant, and other individuals who were knowledgeable about the Student's disability, to develop the Section 504 plan, which was dated and implemented in August 2017. The Assistant Principal informed OCR that on October XX, 2017 he met with the Complainant and she

agreed to the Section 504 plan. The steps taken by the District at the beginning of the 2017-2018 school year also fell short of the requirements of Section 504 and Title II, as the District failed to ensure that decisions regarding the Student's placement (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) were made by a group of persons knowledgeable about the student, carefully considering information from a variety of sources, including evaluation data, and the placement options as required by 34 C.F.R section 104.35(c). Although the February XX, 2018 meeting included four of the Student's teachers, the Complainant and the Assistant Principal, the discussion did not adequately address the need for compensatory services or tutoring for the Student, based on the loss of instruction he sustained during the 2016-17 school year, due to his medical condition and because of gaps in instructional services. For the reasons described above, OCR found that the District is not in compliance with Section 504 and Title II and their implementing regulations with regard to this allegation.

### Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Agreement until the District is in compliance with Section 504 and Title II and their implementing regulations.

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 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 individual may file another complaint alleging such treatment.

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 which, if released, would reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please call (415) 486-5555.

Sincerely,

/s/

Katherine L. Riggs  
Acting Team Leader