



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA  
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SAN FRANCISCO, CA 94102

REGION IX  
CALIFORNIA

February 23, 2018

**SENT VIA EMAIL**

Sue Park  
Head of School  
Yu Ming Charter School  
1086 Alcatraz Avenue  
Oakland, California 94608

(In reply, please refer to case no. 09-18-1043.)

Dear Ms. Park:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Yu Ming Charter School (School). The Complainant alleged that the School discriminated against the Student on the basis of disability by failing to accommodate the Student's disability in the School's afterschool program.<sup>1</sup> Specifically, OCR investigated whether the School failed to ensure that the Student's blood glucose level was checked, and insulin administered to the Student as scheduled and when necessary to allow the Student an equal opportunity for safe participation in the School's afterschool program, including whether this denied the Student a free appropriate public education (FAPE).

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 part of a public education system, the 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 School. Prior to completing its investigation, the School voluntarily agreed to enter into a Resolution Agreement (Agreement) with OCR pursuant to Section 302 of OCR's Case Processing Manual.

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<sup>1</sup> OCR previously provided the School with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

OCR determined that a Section 302 Agreement was appropriate in this case. When fully implemented, the Agreement is intended to resolve the concerns raised in this case. The preliminary information gathered by OCR to date, the applicable legal standard, and the resolution of the case are summarized below.

## **Facts**

The following information was relevant to OCR's analysis:

The School was approved as a county-wide charter school by the Alameda County Board of Education and opened its doors in August, 2011. The afterschool program was run and funded by the School. All afterschool program employees are employees of, and paid by, the School. The afterschool program was located on the School campus. The afterschool program was founded during the 2016-2017 school year.

The Student attended the School during the 2017-2018 school year and has been enrolled at the School since 2012. The Student was diagnosed with diabetes, and autism. The Student attended the School's afterschool program virtually every weekday, which ran from 3:15p.m.-6:00p.m.

The Student's December XX, 2017 Individualized Education Program (IEP) Plan included annual goals and objectives relating to the Student's diabetes, as well as a provision for health and nursing services in his afterschool program.<sup>2</sup> The IEP specifically mentioned the afterschool program in several places, including in the Supplementary Aids, Services and Other Supports section which stated, twice, that a portion of the Student's diabetes management will occur during the afterschool program.<sup>3</sup> On January XX, 2018, the IEP Team designed a Behavior Intervention Plan (BIP) for the Student, which was designed to address behaviors related to his diabetes and blood sugar levels. The IEP Meeting Notes, dated January XX, 2018, stated that the Afterschool Manager was responsible for implementing the Student's IEP and BIP during the afterschool program and was focused on building rapport and collaboration with the Student.

The Student's health services were provided for the last three years by the School Nurse and Health Services Coordinator (School Nurse), who is a licensed vocational nurse (LVN). The School Nurse developed and oversaw the implementation of the Student's 2017-2018 eight page Health Care Protocol (Protocol) as provided by the Student's IEP, which was directed to all teachers and caregivers who may have primary responsibility for the Student. The Protocol provided a detailed description of the

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<sup>2</sup> Previous IEPs (May 8, 2017) included comments about the Student's behavior, which was connected to his diabetes. When the Student's blood glucose level fluctuated out of the healthy range, had been out of range for an extended period of time, or fluctuated rapidly, it contributed to the Student's behavior challenges. In a September XX, 2017 Addendum to the IEP, the IEP team agreed the previous behavior plan would no longer be implemented. During a January XX, 2018 IEP meeting, a new BIP was added to the Student's December XX, 2017 IEP.

<sup>3</sup> Although OCR addressed this as FAPE in this letter, equal access would also require the School to provide the Student with disability related accommodations to participate in the afterschool program.

Student's diabetes management program during school and during the afterschool program. The Protocol included a daily schedule of check-ins with the Student, which were documented in a written log maintained by both School and afterschool staff. The School provided OCR with copies of the log from 72 days, dated August X, 2017-December XX, 2017, showing log entries from 8:25 a.m. to 5:30p.m. The Protocol also required designated staff to become trained diabetes personnel (TDP) for the purpose of implementing the Protocol. In addition to the Protocol, the School followed the Student's Diabetes Medical Management Plan (Diabetes Management Plan), dated August, 2017, provided by the Student's doctor.

The School stated to OCR that the School Nurse provided on-going training for the Student's TDP. During the afterschool program, the TDP was the afterschool program manager (Afterschool Manager). The Afterschool Manager received initial training on August X, 2017 from an outside agency, XXXXXX XXXXXXXX, and subsequent ongoing training from the School Nurse. The School stated to OCR that they were in the process of providing training to two additional afterschool staff who will serve as backup to the Afterschool Manager in the event he is unavailable. The Complainant stated to OCR that as of January XX, 2018, the Afterschool Manager was the only TDP, and there was no backup in the event the Afterschool Manager was unavailable.

The School stated to OCR that the School Nurse and Afterschool Manager have been in communication with one another, other School administrators, and with the Complainant, since the beginning of the 2017-2018 school year regarding the Student's diabetes management as evidenced by emails from September 2017- November 2017. On September X, 2017, the Afterschool Manager emailed the Complainant to invite her to a meeting so he could better learn how to support the Student in ensuring that he received his insulin doses on-time. Subsequently, the Complainant and School administrators and staff exchanged 25 emails under the subject: "Transition Support Strategies." The Complainant stated to OCR that she understood fully trained to mean: 1) an initial training from a professional outside agency; 2) follow-up training from the School's LVN; 3) communication with parents about the Student; and, 4) knowledge and implementation of Student's BIP.

The Complainant told OCR that on October XX, 2017 the Afterschool Manager failed to provide the Student with a needed dose of insulin. The Complainant administered the insulin dose to the Student herself. The Complainant stated to OCR that on October XX, 2017, she was electronically notified that a needed blood check was not completed. The Complainant emailed the Afterschool Manager to inform him that the blood check was not done. The Complainant stated to OCR that it took the Afterschool Manager three hours to respond. On October XX, 2017, the Complainant sent an email to the School Nurse regarding strengthening the Student's diabetes management during the afterschool program.<sup>4</sup> Follow-up to this email was provided by the School via text. An

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<sup>4</sup> With regard to the concerns the Complainant emailed to the School, the School told OCR that the School community would benefit from a reminder about how to file disability discrimination complaints, and for teachers and staff, what to do when such concerns or complaints arise. She told OCR that if the

additional seven emails were sent among School administrators and staff regarding Diabetes Training from November XX, 2017 to December X, 2017.

On January XX, 2018, the Complainant stated to OCR that the Student was not comfortable, and did not feel safe, with the Afterschool Manager. The Complainant told OCR that the Student stated to her that he does not know what the Afterschool Manager is thinking because he cannot read his expressions, which may be related to the Student's autism. The School stated to OCR that the Student was sometimes uncooperative with regard to his diabetes management.

The Complainant's emailed concerns to the School were not treated as a complaint of disability discrimination, and the grievance process was not used. OCR reviewed the School's website but did not locate a description of, or link to, the School's anti-discrimination grievance process. A School administrator told OCR that teachers and parents, as a best practice, would benefit from a reminder regarding grievance procedures as required by Section 504 and Title II.

## **Legal Standards**

### *Elementary and Secondary Education – Modifications*

Under both the Section 504 regulations, at 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. § 35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

In addition, the Title II regulations, at 28 C.F.R. § 35.130(b)(7), require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Whether or not a particular modification or service would fundamentally alter the program is determined on a case-by-case basis. While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.

### *Free Appropriate Public Education (FAPE)*

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

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School's internal procedures had been utilized when the Complainant raised concerns, there may not have been a need for the OCR complaint.

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. IEPs developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2). 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.

### *Grievance Procedures*

The Section 504 regulations, at 34 C.F.R. § 104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. § 35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

### **Analysis**

OCR evaluated whether the School failed to ensure that the Student's diabetes was monitored and managed to allow the Student an equal opportunity for safe participation in the School's afterschool program. Section 504 at 34 C.F.R. § 104.33 requires the School to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students, in providing the Student a FAPE. Here, the Student was diagnosed with diabetes and autism. He had an IEP, a Diabetes Management Plan and a BIP, which applied to the school day as well as the afterschool program. The Afterschool Manager was designated with the primary responsibility for managing the Student's diabetes, and implementing his IEP and BIP during the afterschool program. The Complainant stated to OCR that the Afterschool Manager was the only afterschool employee trained to check and administer the Student's blood sugar levels and insulin in the afterschool program; there was no backup if he was unavailable. The School told OCR that they were in the process of training two additional afterschool staff to serve as backup should the Afterschool Manager be unavailable. The Complainant stated to OCR that on two occasions the Student's blood sugar levels were not checked at the appropriate times. The School stated to OCR that the Student was, at times, uncooperative with his diabetes management protocol. The Complainant told OCR the lack of cooperation stemmed from the Student feeling uncomfortable with the Afterschool Manager, which may be related to the Student's autism.

Because the diabetes related services for the Student during the afterschool program are discussed in his IEP, OCR treated these services as part of the Student's FAPE, as described above. However, even if these services were not part of the Student's IEP and FAPE, Section 504 at 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. § 35.130(b)(1)(i), (ii) and (iii) require the School to provide an equal opportunity for qualified individuals with disabilities to participate in programs and

services, such as the afterschool program. In addition, the Title II regulations, at 28 C.F.R. § 35.130(b)(7), require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

As discussed above, Section 504 and Title II require recipients (employing 15 and 50 employees, respectively) to provide prompt and equitable grievance procedures. Here, the Complainant raised concerns with School staff regarding the implementation of the Student's IEP, BIP, and Diabetes Management Plan. However, these written concerns were not treated as a complaint of disability discrimination, and the grievance process was not utilized. A School administrator told OCR that teachers and parents would benefit from a reminder regarding grievance procedures as required by Section 504 and Title II.

OCR's investigation to date raised concerns that the School may not have adequately implemented the Student's diabetes related supports, so that he could participate equally in the afterschool program. Specifically, OCR was concerned that the School did not have anyone other than the Afterschool Manager to implement these supports, if he was unavailable, which could cause behavior and health concerns for the Student, and prevent an equal opportunity for the Student to participate in the afterschool program, as provided for in 34 C.F.R §§ 104.4(b)(1) and 35.130(b)(7). OCR was also concerned that the failure to implement such services may have denied the Student a FAPE, as required by 34 C.F.R. §§ 104.33-104.36, as well as Title II at 28 C.F.R. §§ 35.130(b)(1). And, the information gathered thus far suggested that the School would benefit from a reminder regarding its grievances to parents, and staff regarding its Section 504 and Title II grievance procedures pursuant to 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b). Prior to OCR completing this investigation, the School expressed an interest in voluntarily resolving the issue raised, and based on the concerns identified, OCR determined that such a resolution was appropriate.

## **Conclusion**

OCR has not yet completed its investigation. To do so, OCR would need to interview additional School administrators, teachers and other staff, and review additional data and information. Prior to completion of the investigation, the School voluntarily agreed to the enclosed Agreement. The Agreement is aligned with the complaint allegations and the concerns raised during the investigation. The Agreement provisions include that the School will: 1) work with the Complainant to ensure that the Student and afterschool individual with responsibility for the Student's Diabetes Management Plan and BIP implementation can work effectively together to implement these plans; 2) ensure that the afterschool employee with primary responsibility to implement the Student's Diabetes Management is adequately trained and is familiar with, and will implement the Student's BIP; 3) train at least two additional afterschool staff to serve as backups to the individual with primary responsibility to implement the Student's

Diabetes Management care; and, 4) disseminate a memorandum to administrators, staff, teachers, parents and guardians regarding the School's policies and procedures regarding disability discrimination complaints.

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. OCR will monitor the implementation of the Agreement until the School is in compliance with Section 504, and Title II, and their implementing regulations which were at issue in the case.

OCR's resolution of this matter should not be interpreted to address the 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 resolution of 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 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 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could 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 contact Civil Rights Attorney Rhonda Ngom at rhonda.ngom@ed.gov.

Sincerely,

/s/

Brian Lambert  
Acting Team Leader

Enclosure