



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, California 94102

January 31, 2003

Mr. [REDACTED]
[REDACTED]
[REDACTED], California [REDACTED]

(In reply, please refer to Docket Number 09-02-1022.)

Dear Mr. [REDACTED]:

This letter is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its resolution of the complaint referenced above. You alleged that the District discriminated against your son (Student), based on his disability, Attention Deficit Disorder (ADD), by denying him a free appropriate public education (FAPE). You stated that the District scheduled two placement team meetings to determine the services and placement the Student needed based on his disability. However, on both dates (October 2 and 23, 2001) the District failed to convene a group of persons knowledgeable about the Student, his disability, or the meaning of the evaluation data concerning the Student.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a Public Education System, and is subject to the requirements of Section 504 and Title II.

As explained below, OCR determined that the District failed to provide the Student a FAPE when it failed to implement appropriate evaluation and placement procedures under Section 504 and failed to take sufficient steps to ensure your opportunity to examine all relevant records related to the evaluation process. However, the attached Resolution Agreement signed by the District on January 24, 2003 has resolved the issues raised by this complaint. The District entered into this agreement without admission of a violation of law. Contingent on implementation of the terms of the agreement, OCR determined the District is in compliance with Section 504 and Title II with respect to the issues raised by this complaint.

The complaint resolution process included a review of documents provided by the District and you (hereinafter complainant) and interviews with District personnel and the complainant. The following is a summary of the applicable legal standards, relevant facts, and resolution of the complaint.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33(a) requires that a public elementary or secondary education program must provide a FAPE to each qualified disabled person within its jurisdiction regardless of the nature or severity of the person's disability.

An appropriate education is defined at 34 C.F.R. § 104.33(b) as one which includes provision of regular or special education and related aids and services which have been designed to meet the individual needs of students with disabilities as adequately as the needs of nondisabled students are met, and which has been developed in accordance with process requirements of 34 C.F.R. §§ 104.34 through 104.36, which pertain to educational setting, evaluation, placement, and procedural rights. OCR interprets the Title II regulation, at 28 C.F.R. § 35.130(b), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

Section §104.35(a) of the Section 504 regulation requires that, where there is reason to believe that, due to a disability, a student needs special education or related services, an evaluation of the student must be conducted prior to the initial placement of the student, and prior to any significant change in placement. Under 34 C.F.R. § 104.35(c) the services must be formulated by a group of persons knowledgeable about the student, the meaning of the evaluation data and the placement options, and be based on information from a variety of sources, with information from all sources being carefully considered and documented in the student's file.

Under 34 C.F.R. 104.36, recipients are required to provide a system of procedural safeguards that includes written notice to parents and guardians of all decision regarding the identification, evaluation, and placement of students with disabilities, the right to examine relevant records, and the right to an impartial hearing.

Fact Summary and Resolution

The Student is 13 years old and currently enrolled at the Lone Hill Middle School (School) in the District. School registration documents completed and signed by the Student's mother in August 2000, indicated that she had legal custody and that the complainant did not.

Prior to enrolling in the District, the Student received special education services for an attention disorder through an individualized education program (IEP). In November 2000, after an interim placement in the District, an IEP team determined that it would "[c]ontinue to monitor [the Student's] progress in the general ed[ucation] classes until the end of the 1st semester at which time he will be dismissed." The mother signed the IEP document. However, the information collected by OCR showed that she did not understand that she had consented to withdrawing ("exiting") the Student from "special ed[ucation]"

The complainant stated to OCR that, after filing for divorce, his wife made a unilateral decision to move and enroll the Student in the District. A court order signed on August 24, 2000, provided that the complainant and the Student's mother would make joint medical and educational decisions regarding their children. The final divorce agreement, dated July 6, 2001, granted the complainant joint legal custody of the children.

Beginning in March 2001, the complainant began making written requests to the School principal for the Student's education records and also indicated he had joint legal custody of the Student and that the mother would not provide the documents to him. At that time the complainant did not provide the District with a copy of court papers establishing that he shared educational custody of the Student. Neither did the District inform the complaint of what information he needed to provide in order for the District to accord him participation in District decisions concerning the Student.

At the end of the Spring 2001 semester, the complainant learned that the Student had been exited from special education without his consent. By letter dated September 24, 2001, addressed to the School principal, he requested that the District either restore the prior IEP or conduct an assessment within 15 days of the receipt of the letter.

On October 2, 2000, the complainant met with the School principal and the School psychologist for what he thought would be an IEP team meeting. On October 23, 2000, the complainant met with the School principal, special education teacher, regular education teachers and a counselor. The parties disagree about the purpose of the two meetings. However, the evidence showed that at the second meeting the School principal offered to provide the Student a Section 504 plan, but the complainant wanted reinstatement of the prior IEP and rejected the offer to develop a Section 504 Plan. (The District did not document the meetings or provide the complainant notice of his procedural safeguards regarding decisions about his son's placement.)

The District maintained that it did not receive sufficient documentation of the complainant's parental rights until October 24, 2001. The Special Education Director explained that where there is an issue of legal custody and educational signing rights, and it is unclear who holds legal and/or physical custody of a student, the District will request a copy of the court minute order that documents the legal, physical, and educational signing rights of each parent.

OCR reviewed two letters from the complainant to the School principal dated March 6 and June 11, 2001 in which he explained that the mother had signed the stipulation and order that he and his wife should make joint educational decisions about the Student. During negotiations with OCR, the District stated that the School principal did not receive these letters. In any event, by a letter dated November 2, 2001, the District's counsel responded to a request by the complainant to assess the Student for special education and provided the complainant an assessment plan. The letter noted that on October 24, 2001, the District had received copies of the August 24, 2000, and July 6, 2001, court documents establishing his joint legal custody and that this information was contrary to the information the Student's mother provided on the registration forms.

By letter dated November 6, 2001, to the Special Education Coordinator and copied to the District's counsel, the complainant requested information regarding testing instruments as a prerequisite to his agreement to the assessment plan. By letter dated December 12, 2001, the Coordinator informed the complainant that she never received the letter and first learned about the letter during a December 7, 2001, conversation with the District counsel. On March 1, 2002, an IEP team determined the Student did not meet eligibility criteria for special education. The meeting notes indicate the team determined that a Section 504 Plan could address Student's ADD issues.

The complainant alleged that during the IEP meeting, he was informed that some of the assessment information had been shredded and, as a result, he was denied access to examine all relevant records regarding the Student. The District maintained that the shredded documents were testing protocols. However, OCR's review of the audio record of the meeting suggested that at least some of the shredded information was observational commentary completed by the mother and teacher.

On March 11, 2002, the District held a Section 504 meeting for the Student. His Section 504 "Student Accommodation Plan" listed ADD inattentive type as the basis for the determination of disability. The plan contained a list of prior interventions/accommodations developed and implemented. In the section labeled "Reasonable accommodations that are necessary," the plan refers to the section

containing the prior accommodations and stated, "all accommodations will be utilized as appropriate." OCR found no documentation of what the team considered, how the Student was determined eligible, how the program was designed to address his individual educational needs, whether the full range of options were considered, how the services would be implemented, or how the plan would be monitored.

OCR found that the District was not in compliance with the regulation at 34 C.F.R. § 104.35 because it failed to implement adequate evaluation and placement procedures during the March 11, 2002, Section 504 team meeting. The evidence reviewed by OCR showed that the evaluation documentation was not sufficient to describe the nature and extent of the Student's disabilities, his special needs, and what regular or special education and/or related aids and services were appropriate to ensure that the student received a FAPE designed address his individual educational needs. Rather, the team identified interventions or accommodations that had been previously implemented but did not adequately describe how these accommodations would address the Student's educational needs or how they would be implemented. OCR found no evidence to suggest that the team considered the full range of available placement options.

OCR discussed these deficiencies with the District and proposed a resolution agreement. Under the terms of the attached agreement, the District agreed to convene a Section 504 team to determine an appropriate program for the Student. During the course of the negotiation process, OCR learned that since filing for a State due process hearing, the complainant entered into settlement discussions with the District, which could resolve the evaluation and placement issue. Therefore, as described in the agreement, the District's assurances regarding the Section 504 team meeting may be contingent upon the outcome of those discussions.

The District also agreed to revise its Section 504 Board Policy and Regulation to ensure that qualified students with disabilities are offered the full range of options under FAPE. As a matter of technical assistance with regard to the District's commitment to revise the above Policy and Regulation, OCR offers the following guidance. The "reasonable accommodation" standard found in the published parent notice and Section 504 procedures of the District does not apply to decisions regarding FAPE. The term "reasonable accommodation" is used in subpart B, Employment Practices, of the Section 504 regulation. Subpart B, at 34 C.F.R. § 104.12(a) allows an employer to limit reasonable accommodations for a disabled employee if "the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity." However, "reasonable accommodation" is not a term used in the Section 504 regulation to determine FAPE for disabled students in elementary or secondary school settings.

Further, the “reasonable accommodation” standard has never been used by OCR in determining a school district’s obligation to provide FAPE.

Because OCR determined that the District did not provide appropriate evaluation and placement procedures under Section 504 during the March 2001 Section 504 team meeting and obtained a remedy as described above, OCR did not find it necessary to resolve the factual dispute regarding the nature of the October 2 and 23, 2001, meetings or to make a compliance determination regarding the evaluation issues raised by the allegations concerning these two meetings.

OCR also determined that the District was not in compliance with the requirement under section 104.36 that recipients provide parents the opportunity to examine relevant records with respect to actions regarding to the identification, evaluation, and placement of students with disabilities. The evidence suggested that certain information was not made available to the complainant because the District did not retain all relevant documentation from the assessment process. OCR notes that the District did provide assessment summary information to the complainant. OCR also acknowledges that District’s are not required to provide testing protocols or copyrighted information. However, the evidence reviewed by OCR suggested that at least some of the information that was destroyed did not fall within those categories of information and that additional guidance to staff is needed to ensure consistency in the retention of relevant documents. To resolve this issue, the District agreed to develop and distribute a memorandum apprising District administrators and relevant staff of the types of information that must be retained.

Section 104.36 also requires that parents and guardians be provided notice of all decisions with respect to actions regarding the identification, evaluation, and educational placement of their children, who because of disability, need, or are believed to need special education or related services. It is not OCR’s position that the District had an obligation under section 104.36, to question the mother’s statement on the registration form concerning her exclusive custody over the Student. OCR sought to determine the reason the District did not request legal documentation of the complainant’s legal custody rights in response to his September 2001 written request for an assessment for the Student in order to ensure timely implementation of evaluation and placement procedures and the provision of procedural safeguards. As discussed above, the District denied receiving the complainant’s September 2001 request, noting that it took steps to conduct an assessment when it received legal documentation of custody. However, without admitting liability, the District agreed to issue a memorandum to District administrators to ensure timely implementation of the District process for obtaining appropriate legal documentation when a question or dispute about legal custody arises. Based on the remedy obtained, OCR did not find it necessary to resolve the

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factual dispute concerning notice and the timeliness of the District's response to the complainant.

Based upon the commitments of the District contained in the attached Agreement, OCR is closing the resolution phase of this case as of the date of this letter. OCR is concurrently advising the District of its decision. OCR will monitor the Agreement until all agreed-upon actions have been completed. OCR may reopen the investigation and/or take other enforcement action if the District fails to implement the provisions of the Agreement.

Federal regulations prohibit the District from retaliating against you or from intimidating, threatening, coercing, or harassing you or anyone else because you filed a complaint with OCR or because you or anyone else take part in the complaint resolution process. Contact OCR if you believe such actions occur.

If you have any questions, please contact Mr. Alphas B. Scoggins, Team Leader, at (415) 556-4150.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles R. Love", with a long horizontal flourish extending to the right.

Charles R. Love
Program Manager

Enclosure