



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

MAY 25 2012

[REDACTED]

(In reply, please refer to case no. 09-12-1101.)

Dear Ms. [REDACTED]:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Etiwanda Elementary School District alleging discrimination based on disability. The issue OCR investigated was whether the District discriminated against the Student based on her disability by failing to provide her with a free appropriate public education (FAPE). In this matter, this question encompassed three component questions:

1. Did the District fail to implement the Student's Section 504 plan with respect to the provision that states any food or drinks consumed in the classroom will be milk-free, parent approved food items?
2. Did the District follow adequate procedures to evaluate whether the Student needed a milk-free classroom as a related service for her disability?
3. Did the District provide the Student's parents with adequate notice of procedural safeguards when it made the decision that the Student did not need a milk-free classroom?

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, and their implementing regulations. Section 504 and Title II prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance and by public entities, respectively. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

OCR gathered evidence through interviews with the complainant and with District administrators and school staff. OCR also reviewed documents provided by the District and the complainant.

As concerns issue one, OCR concluded that the issue is moot because the District took steps to address the initial deficiencies in the Section 504 plan. Regarding issues two and three, OCR concluded that the evidence established a violation of Section 504, Title II and their regulations but the issues are now moot because the District recently

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implemented and trained school staff District-wide on a new 504 Policy which specifies the need to document Section 504 placement decisions and when to provide procedural safeguards to parents. OCR therefore concludes that the District is now in compliance with Section 504 and Title II with respect to issues one, two and three.

The applicable legal standards, the facts gathered during the investigation, the reasons for our determination and the resolution of the compliance issue is summarized below.

Our investigation showed the following:

- The Student is 9-years-old, and was enrolled in the fourth grade at Carleton P. Lightfoot Elementary School during the 2011-12 school year.
- On April 1, 2010, the District convened a Section 504 meeting, and found the Student eligible for related aids and services due to her severe, life-threatening, anaphylactic allergy to milk, and the need to prevent exposure to the allergen and have emergency procedures in place in the event of exposure. The District developed a Section 504 plan, which provided for a milk-controlled or milk-restricted classroom. The provisions of this plan changed throughout the years. The plan did not provide for a completely milk-free classroom.
- The most recent Section 504 plan, drafted in May 2011, included the following provisions, among others, to not allow students to eat items containing milk in the classroom unless medically required by another student or adult; send a letter to other parents suggesting foods for classroom events; hand wash after snacks and lunch; use a separate cleaning rag for the Student's desk; and ensure all classroom activities, curriculum or field trips are safe and allow the Student to be included. The school nurse also trained all school staff on the Student's Health Care Plan, and regularly provided demonstrations to school staff on how to use the Student's epinephrine injection in the event of an accidental exposure. In addition, after the last 504 meeting in August 2011, the School created a sign to post on the classroom door requesting volunteers to refrain from bringing food or beverages into the classroom and to wash their hands before working with the students.
- In August 2011, during the first two weeks of school, there were instances when the Student's teacher and her daughter had food containing milk in the classroom, and the teacher gave milk chocolates to students on the first day as they left school, with the exception of the Student. In response to the complainant's concerns, the principal discussed it with the teacher, who agreed not to have food containing milk in the classroom or provide it to the students in her class.
- During the May 2011 Section 504 meeting, the Student's parents requested that the District provide a milk-free classroom as a related service for the Student's disability, and subsequently provided a note from the Student's allergist stating that a milk-free

classroom was needed. During the August 2011 Section 504 meeting, the District informed the parents that the School would not provide a milk-free classroom for the Student. But the District did not further state or explain to the parents that it had made a determination of educational and legal consequence under Section 504, a decision that was then timely for review or challenge under Section 504 procedural safeguards.

- OCR learned during the investigation that at the school site in question, as well as at other schools in the District, the District's practice did not reliably give parents notice of the procedural safeguards when the schools made an identification, evaluation, or placement decision under Section 504.
- Based on interviews with the school and District staff and administrators, when considering whether the Student's placement needed to include a milk-free classroom, the School reviewed the Student's doctor's note stating her need for a milk-free classroom, consulted with the school nurse, health coordinator, and District Section 504 coordinator, and considered other information the Student's parents provided and leading allergists recommended at conferences on this topic. In an interview with the health services coordinator, she stated to OCR that other prominent allergists did not recommend that schools become free of an allergen because it is not possible to guarantee. Instead, the allergists recommended that the schools take measures to avoid the student's exposure to the allergen, and be aware of symptoms and ready to administer medication. While the District carefully considered information from a variety of sources in making this placement decision, the District did not make a record of any of the information gathered. The District did not memorialize the information considered from the School nurse, health services coordinator, or District 504 coordinator. The District also did not have any notes from the Section 504 meeting when there was a discussion about these issues.
- Since August 30, 2011, the Student no longer attends school in the District. The Student's parents have placed her in home school, independent of any district, and do not wish to have her return to any school under any circumstances.

Issue 1. Did the District fail to implement the Student's Section 504 plan with respect to the provision that states any food or drinks consumed in the classroom will be milk free, parent approved food items?

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.

OCR found that there were two incidents after school when food containing milk was eaten in the classroom by the teacher's daughter and passed out on the first day to the Student's classmates, but not the Student. There also were a couple of times the teacher had food containing milk on her desk. Based on interviews with the principal and teacher, the principal discussed these issues with the teacher, the teacher subsequently understood that she should not pass out food containing milk to other students, leave food containing milk sitting on her desk, or allow it to be consumed in the classroom. OCR did not find evidence of any other incidents and notes that none occurred once the teacher was fully aware of the multiple ways in which the Student could be placed at risk of serious harm.

With regard to issue one, OCR found that the District took extensive steps to protect the Student from harm and fulfill the objectives of the Section 504. Nonetheless, the District, initially failed to engage in the even more rigorous level of precaution actual experience suggests was necessary. However, these deficiencies were promptly addressed through further communication with the teacher and there is nothing to suggest that subsequently the Section 504 plan was not or would not be fully implemented. Consequently, we consider the question of implementation of the Section 504 plan moot.

Issue 2. Did the District follow adequate procedures to evaluate whether the Student needed a milk-free classroom as a related service for her disability?

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. When a district adheres to such procedures, only in extraordinary circumstances, will OCR second-guess the outcome of the process.

During the Section 504 meeting in August 2011, the team discussed the Student's parents' request for a milk-free classroom as a related service for the Student. Based on interviews with the School and District staff and administrators, OCR determined by a preponderance of the evidence that the District's evaluation of these issues consisted of consultations with the school nurse, health services coordinator, and District's 504 coordinator, and utilizing resources provided from the complainant and other allergists. Other allergists did not

recommend making schools free of an allergen because it cannot be guaranteed, and instead believed the focus should be on taking steps to avoid exposure to the allergen and assist the student in the event of an accidental exposure. As a result, the District determined that the Student did not need a milk-free classroom as a related service for her disability. Based on these steps OCR concluded that it should not second-guess the District's decision to provide a milk-controlled rather than a milk-free classroom environment. The proper forum for the parents to challenge this decision would be a fair hearing or due process proceeding.

Although the District made their decision after weighing information from a variety of sources, it did not document any of this information, as required by 34 C.F.R. §104.35(c)(2). The District was unable to provide OCR with any notes or memorandums regarding the information it used when making this placement decision. In addition, the District did not have any notes from the Section 504 meeting when there was a discussion about these issues. Documentation of the information the District considers when making a placement decision is an important step enumerated in the evaluation regulation, so that parents can have the opportunity to review the record and understand what information the District utilized when evaluating the Student.

Prior to the completion of OCR's investigation, the Student's parents placed the Student in home school independent of any district. Therefore, OCR is not requiring the District to try to reconstruct the documentation or provide an individual remedy for the Student such as another meeting. This month the District implemented a Section 504 Plan Handbook which outlines that the parent/guardian shall be notified in writing of the final decision concerning placement. Earlier this month the District also provided training on the new 504 Handbook to school-site staff, and plans to provide further training to school-site 504 teams at the beginning of the 2012-13 school year. Therefore OCR finds that the issue two also is moot, since the District has addressed this compliance issue, as described above.

As a matter of technical assistance, OCR noted that the complainant first requested a milk-free classroom during the 504 meeting held on May 2, 2011, and provided a doctor's note on May 5, 2011, but the District did not convene a 504 meeting to address this request until August 22, 2011, two weeks after the school year began. It would behoove the District to convene 504 meetings before the beginning of the school year so that the provisions can be in place and the new teacher is familiar with the student's needs, especially when the disability may be life-threatening. In addition, OCR understands from the investigation that there are several other students at the school site who have life-threatening food allergies and have health plans, but do not have 504 plans. OCR recommends that the District consider evaluating whether other students in its District who have identified themselves as having food allergies qualify for Section 504 related aids and services.

Issue 3. Did the District provide the Student's parents with adequate notice of procedural safeguards when it made the decision that the Student did not need a milk-free classroom?

Section 104.36 of the Section 504 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.

OCR's review of the documents and interviews reveals that the District failed to provide notice of procedural safeguards to the Student's parents when it determined that it would not provide a milk-free classroom. From these same sources, OCR learned that as a general practice, some of the school sites in the District have not been providing parents with notice of procedural safeguards when they made identification, evaluation, or placement decisions, as is required under the Section 504 regulation. The District's recently drafted Section 504 Handbook states that parent/guardians shall be provided with their procedural safeguards, including the right to an impartial hearing after the District makes a final placement decision. As stated above, the District provided training to school-site staff on the new Section 504 Handbook. Therefore, OCR found issue three is moot since the District recently took actions to correct this issue.

You may file a private suit pursuant to section 203 of the Americans with Disabilities Act, whether or not OCR finds a violation of Title II.

If you wish to appeal this decision, you may send an appeal to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's letter of finding. You must explain why you believe the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, and how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal. Your appeal should be sent to the following address:

U.S. Department of Education
Office for Civil Rights
Attention: Deputy Assistant Secretary for Enforcement
400 Maryland Avenue, SW, Room 6143
Washington, D.C. 20202-1100

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

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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 that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR is informing the District of these findings by concurrent letter. If you have any questions please contact Gemini McCasland at (415) 486-5536 or gemini.mccasland@ed.gov.

Sincerely,

A handwritten signature in black ink that reads "Sara Berman". The signature is written in a cursive, flowing style.

Sara Berman
Team Leader