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April 8, 2016

Dr. A. Denise Birdwell, Interim Superintendent
Scottsdale Unified School District
3811 North 44th Street
Phoenix, Arizona 85018

Re: Scottsdale Unified School District
OCR Case Number: 08-16-1008

Dear Dr. Birdwell:

We have completed our investigation of the above-referenced complaint filed on October 13, 2015, against Scottsdale Unified School District (the District), alleging discrimination on the basis of disability.

Specifically, the complainant alleged that (1) the District failed to implement the student's Individualized Education Program (IEP) and thus denied the student a free appropriate public education by failing to allow the student's private nurse to arrive at the family home 15 minutes prior to the arrival of the school bus, failing to provide individual nursing services on the school bus, and failing to adhere to the medication schedule provided in the student's care plan; and (2) the District required the complainant to sign an indemnity agreement in order for the student to receive services from a nursing agency, in retaliation for the complainant's advocacy for the student's needs.

We conducted an investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U. S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is subject to these laws and regulations because it is a recipient of Federal financial assistance from the Department and a public entity.

During the investigation, we reviewed documentation provided by the District and the complainant. We also interviewed the complainant and District staff. We find that the preponderance of the evidence supports that the District violated Section 504 and Title II with regard to a portion of Allegation 1, by failing to allow the student's nurse to arrive 15 minutes prior to the arrival of the bus. With regard to the remaining portions of Allegation 1 and Allegation 2, we find that there is insufficient evidence to establish that the District discriminated as alleged. This letter explains our findings. We thank the District for entering into a Resolution Agreement, which when fully executed, will resolve our compliance concern.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Background Information

The student currently attends XX grade at a District XX school. The student previously attended a District XX school. The student receives nursing services pursuant to an IEP. During previous school years, the District contracted with a health care agency to provide nursing services on the bus and at school. However, the District is transitioning away from using contracted nurses, and moving toward using District-employed nurses. The District attempted to use a District-employed nurse to provide the student's care for the 2015-16 school year. The parents have objected to the District's choice of nurses, and prefer the District to continue to use the same contracted health care agency.

At the beginning of the 2015-16 school year, the student received services pursuant to an IEP that was dated November 6, 2014. The District and the parents entered into a mediation agreement on August 31, 2015, which modified the November 6, 2014, IEP. As relevant to the current allegations, the District agreed the bus would pause for up to four minutes to allow a proper nursing hand off in the morning and afternoon.

A new IEP was developed on October 27, 2015. As relevant to the present complaint, the October 27, 2015, IEP does not address a specific amount of time to be provided for hand-off conversations between the nurse and parent or respite provider. The IEP also specifies in the related services section that nursing services on the bus is a group service, rather than individual.

Beginning November 19, 2015, and continuing to the present, the District has contracted with the parents' health care agency to provide services to the student on the bus and at home, although the current IEP does not require this. The District also continues to employ the nurse who was intended to care for the student.

Allegation 1 – FAPE

Nurse arrival time

The student receives special education transportation pursuant to her IEP. The District also provides a nurse for the student while riding the bus. Prior to the 2015-16 school year, the nurse would arrive at the student's home 15 minutes before the bus arrived and ride to school with the student. The 15-minute early arrival allowed time for the nurse to receive a report from the parents regarding the student's medical status. The reverse process occurred in the afternoon, where the nurse would report the student's medical status to the parents.

During the previous school year, the student was the only student at her XX school who received nursing services on the bus. However, during the current school year, one other student attending the student's XX school received nursing services on the bus. Based on the location of the students' homes relative to the school, the District devised a route that started at the other student's home. As a result, the nurse would arrive to the other student's home, board the bus with that student, travel to this student's home, pick her up, and then ride with them both to school. The complainant alleges that this arrangement violates the IEP and fails to provide adequate time for communication with the nurse regarding the student's medical status.

The IEP dated November 5, 2014, addresses this issue in the “present levels” section under “functional skills.” It mentions the need for special education transportation ten times a week with wheelchair capabilities, private nurse, and temperature control. It goes on to say, “[t]he private nurse who is to assist [the student] at school is to arrive at the home 15 minutes before bus arrives to pick up [the student].”

The District asserts that the statement about the nurse arriving 15 minutes early was a description of what was happening during the 2014-15 school year, not a part of the services in the IEP. It was a request from the parents, not a decision of the IEP team. As support, the District points out that this is not on the “Services” page of the IEP, but part of the “present levels” section.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires 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.

Generally, a failure to implement a provision of an IEP will constitute a failure to provide FAPE to a student. However, services that the IEP team has agreed are necessary for a student to access FAPE may be required under Section 504, even if they are not specifically enumerated in the IEP document. The portion of the IEP in dispute reads “The private nurse who is to assist [the student] at school is to arrive at the home 15 minutes before the bus arrives to pick up [the student].” The District’s argument that the 15-minute language reflected only the present practice requested by the parents is unpersuasive, given that it is included in a list of items that are obviously intended as part of the plan – transportation ten times per week on a wheelchair equipped bus. Additionally, the phrase “is to arrive” does not merely describe the current practice. The District has not provided a convincing explanation as to why this language should not be considered among the student’s individual needs, necessary for her to receive a FAPE. Although language is not included in the “Services” portion of the IEP, OCR finds that this language reflects a decision by the IEP team that the 15-minute early arrival was a part of appropriate education for the student. The violation is not that the recipient failed to fully implement the IEP document. The violation, under Section 504, is the failure to provide the services that the recipient identified, through the appropriate process, as necessary for that child. We find that the District failed to provide a service determined in accordance with Section 504 to be a part of her appropriate education from August 10-August 31, 2015.

Individual nursing on the bus

As described in the previous section, prior to the 2015-16 school year, the student was the only student receiving nursing services at her school. When her bus route changed when she entered

XX school, there was a second student receiving nursing services on the bus. The complainant alleges that the IEP requires one-on-one nursing services for the student on the bus as well as at school, and that requiring the nurse to care for a second student on the bus is a violation of the IEP.

However, the student's IEP doesn't address the provision of nursing services on the bus. The "related services" page of the November 6, 2014, IEP includes 405 daily minutes of nursing services. There is a column on the form to indicate whether a particular service is a group or individual service. In the row for nursing service, the column is marked with an "I" for individual. The related services page does not specifically address or provide a set number of minutes for nursing services on the bus.

The "Supplementary Health Related Services/Needs" page in the IEP includes the following provision for special education transportation: "The student will receive Special Education Transportation due to needs and disability. Curb to curb transportation and adult assistance to address the needs that are indicated in the IEP will be provided."

The IEP is silent as to whether the nursing services provided on the bus are group or individual services. In this situation, we will not infer what the IEP team did not include in the IEP document. While it was the previous practice that the student received individual services, we do not find evidence here (as we did in the prior allegation) that the IEP team considered this as necessary for the student to receive FAPE. As a result, we find that there is insufficient evidence of a violation.

Medication administration

The student's nursing care plan is attached to the student's IEP. The nursing care plan includes the administration of medication during the school day. The student receives her medication through a feeding tube. The first medication is scheduled to be administered at 11:00 am. The instructions state that the medication is to be given "**slowly**," (emphasis in original), and warn that if it is given too quickly, it can cause nausea and vomiting. Other medications are scheduled at 12:00 and 12:30.

The District has regularly-scheduled half-days in its calendar. On half days, school is dismissed at 11:20 am. On the half-day that occurred on August 26, 2015, records show medication was administered by a health care agency nurse beginning at 10:45 am. On the next half day, October 7, 2015, the District was transitioning from the health care agency to a District-employed nurse. There were several days of overlap where both an agency nurse and the new District-employed nurse were present to allow the new nurse to learn what was involved in the student's care.

As part of the transition to the new District-employed nurse, the nurse participated in a meeting with the student's father, the student's teacher, the school nurse, and an agency nurse to orient the new nurse to the student and her needs. During this meeting, the District asserts that the student's father stated that the medication in question can be given over a minimum of 20 minutes, but would be good to give it over 30 minutes to minimize the risk of vomiting. The

complainant disputes that the school was told that the medication should be given over 30 minutes.

Both an agency nurse and a District-employed nurse were working on October 7, 2015. The parties dispute whether the agency nurse or the District-employed nurse was in charge of the student's care. This dispute does not factor in to OCR's resolution of this matter.

The day before the scheduled half-day, the District-employed nurse wrote a message for the parents in the communication notebook used for messages between home and school. The note dated October 6, 2015, read: "Tomorrow we have early dismissal. We will be getting on the bus @ 11:20 and [the student] will be home @ 11:30. [The student's] med is due @ 11:00, and needs to be pushed over 30 minutes. Would you prefer giving it to her at home tomorrow? I will not be able to give it to her while traveling on the bus." The complainant told OCR that she saw the note the next morning before school. She wrote a response that the medication could be given at home, but she questioned how early releases had been handled previously.

The complainant told OCR that she told the student's father about this, and they decided that the medication could be administered to the student at school. The complainant told OCR that the student's father communicated this orally to the District-employed nurse when the student was boarding the bus on October 7. The District acknowledges that the student's father told the nurse he wanted the medication to be administered as scheduled despite the early release schedule, and that he also reported that the student had vomited earlier that morning. Upon arrival at school, the nurses noted that the complainant had written in the communication notebook that the medication could be given at home.

The District explained to OCR that given the conflicting instructions from the parents, the agency nurse in charge decided to hold the medication after discussion with the District-employed nurse and the campus nurse. In both the clinical notes and orally to the respite nurse at home, the District-employed nurse reported that the medication had not been administered due to the early release schedule.

The complainant alleges that the failure to administer the medication as specified in the nursing care plan constitutes a denial of FAPE.

A unilateral decision to deviate from the student's nursing care plan with regard to medication administration may constitute a failure to implement the IEP and a denial of FAPE. However, in this situation, the nurse consulted with the parents regarding the administration of the medication on a shortened school day. One parent agreed in writing to holding the medication, and the other instructed the nurse orally to give the medication. OCR is not in a position to substitute our judgment for the judgment of the nurses involved. Under these circumstances, there is insufficient evidence to find that the District failed to provide FAPE to the student.

Allegation 2 - Retaliation

The parents stopped sending the student to school on October 19, 2015, due to concerns with nursing services. During the course of their dispute, the District and the parents have engaged in ongoing attempts to resolve their differences. At one point in the negotiations, the District's

attorney asked the parents to sign a release agreement in exchange for the District's continuing to provide the student with services through the parents' preferred health care agency.

The first written mention of the release document was in an email dated November 11, 2015, from the District's counsel to the parents' counsel. "You had previously indicated that [the parents] would sign a Waiver and Release of Claims relating to the District's use of a temporary nursing service. Would you like me to prepare that and send it over for your review and your client's signature?" On November 17, 2015, the District's counsel sent a Release and Waiver of Liability document as an email attachment to parents' counsel. However, the parents, through counsel, declined to sign the release as presented.

The student resumed school attendance on November 19, 2015. Despite the absence of a signed release agreement, the District contracted with the parents' preferred health care agency to provide nursing care, and has continued to do so. The resumption of the District's contract with the health agency may have been briefly delayed by the consideration of the release document (November 11-18, 2015; six school days). During the entire duration of the student's absence from school, the District had a District-employed nurse available to provide care for the student, should she attend. The student's absence was the result of complainant's unilateral action.

In order to make a finding of retaliation, OCR must determine whether the complainant was subject to an adverse action. An adverse action is generally an action that causes serious, lasting, and tangible harm to a person's work, education, or well-being; merely unpleasant or transient incidents usually are not considered adverse. The request for the parents to sign a release form to receive continued nursing services from their preferred health agency does not constitute an adverse action.

It is undisputed that the parents were ultimately not required to sign the release form in order for nursing services from their preferred agency to resume. Additionally, the student's IEP does not require the District to provide nursing services through the complainant's preferred health care agency. The District agreed to resume this service in order reach a resolution with the parents. During this time, the student remained out of school by the parents' unilateral decision. Even if the discussion of the release form delayed resumption of health agency services, the student's loss of school time is due to the parents' decision to remove her from school. At all times during the student's absence, the District had a nurse available to provide the services to the student required by the IEP. Because the District's action was not adverse, we find that there is insufficient evidence of retaliation.

Conclusion

This concludes our investigation of the complaints 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. We are closing the investigation of this complaint effective the date of this letter.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Additionally, the District may not harass, coerce, intimidate, 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.

This letter sets forth OCR's determination in an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. 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.

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, personal information, which if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about this letter, please contact XX XXX, Attorney Advisor, at (303) 844-XXXX, or me at (303) 844-4506.

Sincerely,

/s/
Thomas E. Ciapusci
Supervisory Team Leader

cc: Diane Douglas, State Superintendent of Public Instruction

Denise Lowell-Britt, Esq. (via email only)

Enclosure