

19 IDELR 883

19 LRP 2145

Irvine (CA) Unified Sch. Dist.

**Office for Civil Rights, Western Division,
San Francisco (California)**

09-93-1043

April 28, 1993

Related Index Numbers

**10. AMERICANS WITH DISABILITIES ACT
(ADA)**

**325.010 Nonacademic Services, Other
Nonacademic Services**

**405.045 Rehabilitation Act (Section 504),
Facilities/Persons Covered by Section 504**

Judge / Administrative Officer

John E. Palomino, Regional Civil Rights Director

Case Summary

The district provided significant, indirect assistance to the local parent-teacher association (PTA) and its after-school program by not charging the PTA for the use of school facilities and by allowing the distribution of program literature in its schools. Moreover, the PTA's denial of necessary support services to a student with diabetes mellitus effectively denied him participation in the after-school program. Accordingly, the district violated 34 CFR 104.4(b)(1)(v) and 28 CFR 35.130(b)(1)(v) by failing to either provide the necessary services to the student or cease providing the significant assistance to the PTA program.

The parent of a student with insulin-dependent diabetes mellitus alleged that the district discriminated against her son when the local parent-teacher association (PTA), a private organization, refused to provide the student with necessary support services to enable him to participate in the PTA's after-school program.

HELD: for the parent.

OCR determined that the district provided

significant, indirect assistance to the PTA and its after-school program by not charging the PTA for the use of school facilities and by allowing the distribution of program literature in its schools. Moreover, the PTA's refusal to provide the student with the services of a trained individual to monitor his medical status during the program effectively denied him participation in the program. OCR concluded, therefore, that the district violated 34 CFR 104.4(b)(1)(v) and 28 CFR 35.130(b)(1)(v) by failing to either provide the necessary services to the student or cease providing the significant assistance to the PTA program.

Full Text

On December 2, 1992, you were advised by the San Francisco Regional Office for Civil Rights (OCR), U.S. Department of Education (Department), that it would investigate a complaint filed with OCR on November 19, 1992, against the Irvine Unified School District (District). You (complainant) alleged that the District discriminated against your son, Andrew, (A), a student with a disability, by denying him services to enable him to participate in an after-school program operated by the Parent Teacher Association (PTA).

OCR has the responsibility under Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing Regulation, 34 C.F.R. Part 104, to ensure that recipients of Federal financial assistance through the Department do not discriminate on the basis of disability. The District receives Federal funds through the Department; OCR, therefore, has jurisdiction to investigate this complaint under Section 504. OCR also investigated this complaint pursuant to its jurisdiction as a designated agency, under Title II of the Americans with Disabilities Act of 1990, (Title II), over complaints alleging discrimination on the basis of disability which are filed against certain public entities, including public elementary and secondary education systems. The District is a public entity.

In investigating this complaint, OCR reviewed documents submitted by both the complainant and the District, and interviewed the complainant, the District 504 Coordinator, and PTA staff persons. OCR has completed its investigation and found that the evidence shows that the District is providing significant assistance to an organization that operates a program from which the complainant's son has been excluded based on his disability. Therefore, OCR found the District in violation of Section 104.4(b)(1)(v) of the Section 504 regulation and 28 C.F.R. ? 35.130(b)(1)(v) of the Title II regulation. The anticipated findings were communicated to the District on April 15, 1993, and it agreed to take voluntary action to resolve the area of noncompliance. The District submitted a corrective action plan on April 16, 1993, that, when implemented fully, is sufficient to remedy the violation.

This Letter of Findings (LOF) represents a summary of the facts gathered during the investigation, the applicable legal standard(s), and the compliance determinations made regarding the allegation raised in this case, and the corrective action agreed upon.

Legal Standards

Section 504 and Title II protect any student who has a physical or mental impairment which substantially limits a major life activity, who has a record of such an impairment, or who is regarded as having an impairment.

The regulation implementing Section 504 at 34 C.F.R. ? 104.4(a) states that no qualified [disabled] person shall, on the basis of [disability], be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. 34 C.F.R. ? 104.4(b)(1)(i)-(ii) requires that a recipient in providing any aid, benefit, or service, may not deny a qualified [disabled] person the opportunity to participate in or benefit from the aid, benefit, or service or afford an opportunity that is not equal to

that afforded others.

Section 104.4(b)(1)(v) prohibits a recipient from aiding or perpetuating discrimination against a qualified [disabled] person by providing significant assistance to any agency, organization, or person that discriminates on the basis of [disability] in providing any aid, benefit, or service to beneficiaries of the recipient's program.

The regulation implementing Title II, at 28 C.F.R. ? 35.130(a), and (b)(1)(i)-(ii) and (v) sets forth essentially identical requirements.

Findings of Fact and Analysis

At several school sites in the District, including the College Park Elementary School, there are programs which offer classes immediately after regular school hours for school children who wish to participate. The College Park program is called the Sunshine Club (Club). It is operated by a non-profit organization, the PTA. The Club program commenced at the school in 1989. It serves children in all elementary grades at the school. Parents pay a fee of \$25 to \$40 per eight-week session for each class taken. The Club provides "enrichment classes." These classes include recreational classes, arts and crafts classes, computer classes, and English as a Second Language classes.

OCR determined that the complainant's son, a person with insulin-dependent diabetes mellitus, is a "[disabled] person" as defined by the regulations implementing Section 504, and further that he is a "qualified [disabled] person" as defined by the regulation implementing Section 504 because he is a student enrolled in the school where the Club is offered and, therefore, meets the basic eligibility requirements. Under the Title II regulations, which use the identical standard but slightly altered language, he is a qualified individual with disabilities.

Because of his medical condition, A. has certain specialized needs including monitoring of his blood-sugar level and the availability of persons trained to administer glucagon and/or insulin on an as-needed basis. The District has developed a health

care plan to address A.'s needs during regular school hours, based on information and medical protocols provided by his physician.

The complainant's son was a participant in the Club during the 1991-92 school year. The complainant states that, during that time, a school staff member with the training necessary to respond to A.'s health needs was available on the school grounds during the after-school hours. During the 1992-93 school year, the District made a decision that the staff person would not continue to be on-campus during after-school hours while the Club was in session. The Club itself did not provide a similarly trained individual. The complainant alleges that the District discriminated against her son when it determined that it would not make available during the Club program, an individual trained to respond to A.'s health needs, resulting in A.'s inability to effectively participate in the Club.

Inasmuch as the Club is not a program of the District, but is operated by a private organization, the PTA, the District does not have a direct obligation to provide the service itself under Section 504 or Title II. The program operator, the PTA of Orange County, therefore is not a recipient of Federal financial assistance and is not a public entity. OCR has no jurisdiction over the PTA. However, the regulations implementing Section 504 and Title II prohibit the District from providing significant assistance to any agency, organization or person that discriminates on the basis of disability. OCR therefore explored whether the District was providing significant assistance to the PTA and if so, whether the failure of the Club to provide the services discriminated against A.

Significant Assistance

Departmental interpretations of 34 C.F.R. ? 104.4(b)(1)(v) indicate that the following considerations should be examined to determine whether a recipient is providing "significant assistance" to a private group: (1) direct financial support; (2) indirect financial support; (3) provision

of tangible resources such as staff and materials; (4) intangible benefits such as the lending of recognition and approval; (5) the selectivity of the recipient's provision of privileges and resources; and (6) whether the relationship is occasional and temporary or permanent and long-term. OCR examined to what extent these factors were present in the relationship between the District and the PTA Club program.

The District does not fund or subsidize any of the program's staff, and District staff do not appear to play a formal role in the operation of the program. The teachers involved are not paid for their participation in the Club by the District but rather by the organization. OCR found no direct provision of financial or staffing resources.

However, OCR did find evidence of significant indirect assistance. Based on a review of District documents and interviews with PTA and District personnel, OCR found that the Club program is located in permanent school buildings. It is not disputed that the program is housed on a District site on a permanent and long-term basis. A copy of the "Application and Permit for Use of School Facilities" shows that the provider uses "playing fields and classrooms" at the College Park Elementary School site.

The facilities-use form shows that the District has not charged the PTA a fee for the use of the facilities at the School. The PTA acknowledges that it does not pay a facilities-use fee to the District. In addition the District pays the utility and maintenance costs.

Additionally, the PTA advertises its program to parents by furnishing leaflets to students at the school site; the students then distribute them to parents. The *College Park Press*, a school newsletter advertises the Sunshine Club program. While the District does not operate the Club program, the Club program is closely identified with the District and benefits from that identification.

OCR finds that the District provides significant assistance to the PTA Sunshine Club program at the

College Park Elementary School. The District has a substantial relationship with the program. While the District does not provide direct financial support or staff, it provides indirect financial support as well as assistance to the programs in a number of other ways. The facts meet the standards for finding significant assistance.

Failure to Provide Modification

As explained above, under the Section 504 and Title II regulations the District may not continue to provide significant assistance to the PTA and its program, if A. is being subjected to discrimination in the program. OCR therefore sought to determine whether the failure of the PTA to provide A. with a person trained to respond to his health needs, after the school personnel were no longer available, resulted in discrimination. While the PTA, as a private organization, is not directly subject to Section 504 or Title II, OCR used the standards of the Section 504 and Title II regulations to determine if discrimination has occurred.

Qualified students with disabilities may not be denied equal opportunity to participate. The requirement to provide equal opportunity includes a requirement to make such modifications in a program as are necessary to enable the individual with disabilities to participate effectively. The modifications must be provided unless they would fundamentally alter the nature of the program or create an undue hardship on the program.

As mentioned above, the complainant made a request to the District for the provision of an appropriately trained person as necessary for A. to participate safely and effectively in the Club program during the 1992-93 school year. Specifically, in October 1992, the complainant requested that there be someone at the school site, during the Club hour, who was trained to ensure the accuracy of blood-sugar readings and understand how and when to follow the protocols including, if necessary, the administration of glucagon or insulin to A. The District declined to provide the service.

On or about October 27, 1992, the complainant spoke with the school PTA Sunshine Club president. In that conversation the complainant related that she had recently requested of the District the provision of a trained person to be available to administer, as needed, A.'s medical protocol during the Club program time. The response was that the PTA regretted that A. would not be able to participate in the Club. The PTA was thus aware of the complainant's request for provision of a trained person to be available to administer A.'s medical protocol during the Club program, but failed to offer the means to allow him to participate.

OCR examined whether the availability of trained personnel was medically necessary for A. during the one hour after school (2:30-3:30 p.m.) that the Club program is in session. To make this determination, OCR reviewed the medical protocol and the letters sent to the District in calendar years 1992 and 1993 from A.'s endocrinologist who has been his attending physician since 1986, and from a registered nurse who has knowledge of A.'s condition and health needs. OCR also reviewed the health care program developed by the District to address A.'s needs during the regular school day. The program included following the protocol and the provision of a trained person and a back-up person to administer glucagon or insulin to A. on an as-needed basis. OCR noted that neither the protocol nor the letters to the District indicate whether, when written, they were intended to apply to the hour after school, during the PTA Club.

The District in its letter of October 26, 1992 to the complainant proposed that in order to address A.'s needs for the Club program time, a blood-sugar count could be taken at the end of the school day. The letter did not state, but clearly implied that, if the blood-sugar level readings required action at that time, District staff would then follow the procedures in A.'s health-care program. The letter further proposed that, if problems arose during the Club program, paramedics would be called. The District asserted to OCR that this proposal would have been

medically adequate to allow A. to participate in the Club program.

OCR asked for a response to the District proposal from A.'s physician. The physician's letter of response, dated April 2, 1993, and the medical logs sent to OCR by the parent clearly illustrate that drastic blood-sugar changes can take place within as little time as one-half hour, which is less than the time period of the Club program. These drastic blood-sugar level changes may result in loss of coordination and of the ability to reason. A. is not capable of administering to his own health needs under those conditions. Because A.'s health status can change dramatically within a very short period of time and the consequences of delay in treatment are severe, the physician's position is that the full protocols for A. are to be in place at all times including throughout the Club program time period. While the District believes that its proposal is an adequate substitute, it did not provide OCR with a professional medical opinion to support this position.

Based upon the preponderance of the evidence gathered, OCR concluded that the provision of an appropriately trained person as requested by the complainant is medically necessary for A. to participate effectively in the Club after-school program. The PTA Sunshine Club was provided with notice that A. could not participate without this service, but failed to offer to provide it. During the investigation, OCR asked a PTA representative whether a trained person could be provided. The representative stated that she did not know and that the PTA would have to confer further. OCR recognizes that the PTA may not have been aware that it could not continue to receive significant assistance from the District unless it complied with the nondiscriminatory requirements of Section 504 and Title II. Nevertheless, the fact that neither the District nor the PTA offered to provide the necessary modifications had the effect of excluding A. from the Club program based on his disability.

Conclusions

Based on the evidence summarized above, OCR concluded that the District provides significant assistance to the PTA Club program and that A. was denied the opportunity to effectively participate in the program based on his disability. Under these circumstances, pursuant to 34 C.F.R. Section 104.4(b)(1)(v) and 28 C.F.R. 35.130(b)(1)(v), the District was required either to ensure provision of the necessary services or to cease providing significant assistance to the PTA program. If, prior to taking such action, the District wished to assert the position that the requested modifications were not medically necessary, it had the obligation to obtain professional medical opinion to support that position. Since the District did not take the necessary steps, OCR finds that the District violated the above-cited regulations.

Although the complainant has not alleged to OCR that the District attempted to intimidate her in the matter of her request to the District for services for A., OCR had a concern about certain correspondence from the District to the complainant.

In a letter of October 22, 1992, to the District the complainant asserted that she would take any action necessary to resolve the matter of her request for a modification for her son so that he could participate in the Club program. In its letter of response dated October 26, 1992, the District stated, ". . . we would hope that you'd provide a more supportive attitude to the efforts already made by the staff at College Park to accommodate your son. . . ." and "It is my sincere hope that your action will not jeopardize the availability of the PTA sponsored program that benefits many children both handicapped and nonhandicapped."

OCR believes that the language used by the District in its letter of October 26, 1992 is the type of response that may intimidate a parent requesting services for a child with disabilities and ultimately deter a parent from seeking services to which his or her child may be entitled. Intimidatory actions are prohibited by Section 504 and Title II. Although OCR makes no finding as to whether intimidation occurred in this case, it cautions the District against the use of

such language. An appropriate response is to set forth the District position and provide notice of the District grievance procedures for complaints of discrimination and/or due process procedures for resolution of free appropriate public education issues.

Remedial Action

During discussions on April 15, 1993, OCR informed District representatives of its anticipated findings and discussed voluntary settlement through a corrective action plan. On April 16, 1993, OCR received a remedial plan in which the District agreed to adopt and implement a policy whereby the District will not provide significant assistance to any agency, organization, or individual that discriminates on the basis of disability. The District also agreed to provide notice of this policy to agencies, organizations, and individuals to which it provides significant assistance, and will request that any such agency, organization, or individual (a) provide qualified individuals with disabilities an equal opportunity to participate, and (b) reasonably modify their programs, to include providing supplementary services and aids as necessary for individuals with disabilities to effectively participate without increased cost to the individuals with disabilities.

Additionally, the District will advise the PTA of the PTA's obligation to provide reasonable modification and services that are medically necessary for the complainant's son to participate in the PTA Sunshine Club at College Park Elementary School. If the PTA refuses to provide the services, the District will not continue to provide assistance to the PTA unless the PTA can demonstrate that providing the services would result in a fundamental change in the program or an undue burden on the PTA.

Based upon the District commitments contained in its letter to OCR, and conditional upon full implementation of the commitments, OCR finds the District currently in compliance with Section 504 and Title II concerning the issues discussed in this letter of findings. OCR will monitor the District actions in fulfilling the terms of the corrective action plan. The

investigation will be subject to reopening should the District fail to fulfill its obligation as agreed to in the corrective action plan.

This case is being closed with the issuance of this letter. The findings set forth pertain exclusively to the specific issues raised by you. They are not intended, and should not be interpreted, to express opinions as to the District's civil rights compliance with respect to any other individual or any issue not discussed in this letter, and do not preclude OCR from investigating any future allegation of discrimination.

Under the Freedom of Information Act, it may be necessary to release this document and related records on 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, could reasonably be expected to constitute an unwarranted invasion of privacy.

If you have any questions pertaining to this Letter of Findings, please contact Mr. Mack C. Hall, Director, Compliance Division II, at (415) 556-7035.

John E. Palomino

Regional Civil Rights Director

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