

116 LRP 52411

**Lincoln Preparatory Academy (AZ)
Office for Civil Rights, Western Division,
Denver (Arizona)**

08-16-1118

August 25, 2016

Related Index Numbers

10.028 Diabetes

265.015 Implementation of IEP

63. CHARTER SCHOOLS

514.005 Adoption of existing IEP/504 Plan

Judge / Administrative Officer

Thomas M. Rock, Supervisory General Attorney

Case Summary

Had a charter school paid closer attention to an eighth-grader's enrollment paperwork, as well as its own Section 504 obligations, it might have fully implemented the accommodations of a student with diabetes. Noting that the Arizona school's implementation of the student's home treatment plan was insufficient to satisfy its duties, OCR found that the school violated Section 504 and Title II. The student's family submitted enrollment paperwork in August 2015, but the school didn't follow up on the paperwork's reference to an existing 504 plan or begin the process for evaluating the student until December 2015, around the time the student withdrew from the school. According to the student's grandmother, the student had wild blood sugar swings and increasing academic difficulties throughout his enrollment at the school. The grandmother filed an OCR complaint alleging an implementation failure. Section 504 requires educational agencies to provide FAPE to each student with a disability. 34 CFR 104.33. Implementation of a 504 plan is one means of doing so, OCR stated. Here, while the charter school may have implemented the treatment plan, OCR observed, the school apparently wasn't aware of the 504 plan, which contained a number of additional items. For example, the 504 plan allowed the student to turn in work late if he missed work because of

diabetes-related absences. The plan also required the school to notify the parent if the student's blood sugar fell below 80 or rose above 300. OCR pointed out that the school didn't otherwise implement those additional accommodations. "Though Student's teachers and the Assistant Headmaster were in regular and frequent contact with Mother regarding Student's academic difficulties and the ways that the Academy intended to address those difficulties, topics such as Student's blood sugar levels, their potential effect on his test scores and ability to turn in work, and any accommodations needed as a result, were not addressed," OCR wrote. The school voluntarily entered into an agreement with OCR to resolve the issues.

Full Text

Appearances:

Dear Dr. Mitchell:

We are notifying you of our decision in this case. The Complainant alleged Lincoln Preparatory Academy (Academy)¹ discriminated on the basis of disability. Specifically, the Complainant alleged the Academy failed to properly implement her grandson's (Student) Section 504 Plan. Additionally, the Complainant alleged the Academy failed to timely and appropriately evaluate the Student for disability-related services.

Our investigation revealed that the Academy (1) failed to properly implement Student's Section 504 Plan (504 Plan), and (2) failed to timely and appropriately evaluate the Student for disability-related services. Upon being advised of this finding, the Academy voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed original of the agreement is enclosed with this letter. The reasons for our conclusion are set forth in this letter.

We investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104 (Section 504), 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. As a recipient of Federal financial assistance from the Department and a public entity, the Academy is subject to these laws and regulations.

During our investigation, we reviewed documentation submitted by the Complainant and the Academy. We also interviewed the Complainant and a Great Hearts Academies employee.

Factual Findings

Student is a qualified individual with a disability (diabetes). In May 2015, Student and his family submitted paperwork necessary to enroll Student in the Academy in the 8th grade for the 2015-16 school year beginning in August 2015. The enrollment paperwork indicated that Student had a 504 Plan at his current school. That plan was dated November 2013.

The Academy did not follow up on that information at that time, due to a breakdown in its process for reviewing new registrations. The Academy did not implement the existing 504 Plan, and it did not begin the process for evaluating Student for a new 504 Plan until December 2015. Student was accepted and began the school year at the Academy in August 2015. The Academy received a Diabetes Home Treatment Plan (Treatment Plan) from Student's doctor at the beginning of the school year that identified Student as having diabetes and contained some, but not nearly all, of the terms of his existing 504 Plan. Most relevantly, the Student's 504 Plan provided that Student (1) be given the option to re-test if blood sugar is too high or too low during testing time; (2) be given the ability to turn in work late if missed because of diabetes-related absences; and (3) the parents be contacted if blood sugar is below 80 or above 300. The Treatment Plan did not contain these terms.

Teachers began expressing concern about Student's academic performance by late August 2015. Student's teachers and the Assistant Headmaster were in regular and frequent contact with Student's mother (Mother) regarding Student's academic difficulties and the ways that the Academy intended to address those difficulties. For example, as early as August 29 and periodically thereafter, teachers expressed concern over the fact that Student was missing or behind on work and was receiving low grades for class participation and on quizzes. The teachers also recommended improvements on Student's note-taking and home study; recommended or required tutoring, and provided their individual tutoring hours; and, in several instances, offered or required re-takes on quizzes or tests (without mention of whether such retakes might be necessary because of high blood sugar or otherwise diabetes-related), but Student appears not to have re-taken or not to have done well on those re-takes. However, topics such as Student's blood sugar levels' potential effect on his test scores and ability to turn in work, and any accommodations needed as a result, were not addressed in these contacts. In addition, on numerous occasions between August and December 2015, Student's blood sugar levels were below 80 or above 300 and he was also administered corrective insulin doses, without parental notification or authorization.

As the semester progressed, Student's academic performance continued to decline and his blood sugar levels began to fluctuate more and more drastically. Between late November and mid-December 2015, Student's blood sugar was over 300 on at least eight of 14 school days he attended. After communications with Mother relating to these high levels, on December 15, the Academy requested a copy of his previous 504 Plan and initiated the process to develop a new Section 504 Plan. Student withdrew from the Academy on December 16, after he was suspended for alleged behavioral incidents that could have been related to his disability. The Academy did not evaluate Student for disability-related services at any point between August and his withdrawal on

December 16.

Throughout this time period, the Academy lacked a Notice of Non-Discrimination and a Title II Coordinator or Title II grievance procedures for students. The Academy had identified a Section 504 Coordinator and had developed Section 504 grievance procedures, but that information was not publically available or otherwise effectively published.

Analysis

Failure to Properly Implement the Student's Section 504 Plan

The regulation implementing Section 504 at 34 C.F.R. § 104.33 requires recipients that operate a public elementary or secondary education program or activity to provide a free appropriate public education to each student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the student's disability. Section 504 defines a student with a disability as a student who has a physical or mental impairment that substantially limits a major life activity. Section 504 defines "appropriate education" as the provision of regular or special education and related aid and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students. Implementation of a Section 504 Plan developed in accordance Section 504 is one means of meeting this regulatory requirement. 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.

The Complainant alleged that the Academy failed to properly implement the Student's existing Section 504 Plan, because the Academy never implemented any of the terms and claimed that it did not know about the Plan until mid-December 2015. The Academy concedes that the Complainant indicated that Student had a 504 plan in the enrollment paperwork submitted to the Academy in May 2015, but the Academy did not follow up on that information until mid-December 2015.

The Academy contends that it received and implemented a Diabetes Home Treatment Plan (Treatment Plan) from Student's doctor at the start of the school year, which satisfied the Academy's obligations under Section 504. We compared the terms of the existing 504 Plan with the terms of the Treatment Plan, and we determined that the existing 504 Plan contained a number of terms that were not included in, or otherwise addressed by, the Treatment Plan. For example, the Student's 504 Plan provided (1) the option to re-test if blood sugar is too high or too low during testing time; (2) permission to turn in work late if missed because of diabetes-related absences; and (3) for parental notification if Student's blood sugar is below 80 or above 300. The Treatment Plan did not contain these terms. Moreover, the Academy did not otherwise ensure that these accommodations were provided. Though Student's teachers and the Assistant Headmaster were in regular and frequent contact with Mother regarding Student's academic difficulties and the ways that the Academy intended to address those difficulties, topics such as Student's blood sugar levels, their potential effect on his test scores and ability to turn in work, and any accommodations needed as a result, were not addressed in these contacts. Additionally, the Academy did not notify Mother each time Student's blood sugars were under 80 or over 300, which occurred on numerous occasions between August and December 2015.

Therefore, the preponderance of the evidence establishes that Academy had notice of Student's existing 504 Plan in May 2015. That 504 Plan, dated November 2013, was current and the Academy should have provided the accommodations in it until such time as the Academy reevaluated Student for a new 504 Plan. However, the Academy did not request a copy of the existing 504 Plan until December 2015, and its other actions with regard to the Student between August and December 2015, including any implementation of the Treatment Plan, did not result in the provision of the accommodations in the existing 504 Plan. Accordingly, we conclude, by the

preponderance of the evidence that the Academy failed to properly implement the Student's existing Section 504 Plan.

Failure to Timely and Appropriately Evaluate Student for Disability-Related Services

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires recipients to conduct an evaluation of a student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any significant change in placement. OCR interprets § 104.35 to obligate a recipient to evaluate a student under Section 504 where there is sufficient information to indicate that the student may have a disabling condition that requires special education or related services. The information that prompts this obligation may come from staff, a parent, or other persons. In addition, removing accommodations from a student's Section 504 Plan would constitute a significant change in placement, thus triggering the need for a reevaluation under this regulatory requirement.

The Complainant alleged that the Academy did not evaluate Student for disability-related services while he was enrolled at the Academy. The Academy concedes that that it did not evaluate Student for disability-related services, asserting instead that its implementation of the Treatment Plan fully addressed Student's issues related to his diabetes and he had no other disability-related needs. As described above, we conclude that the Treatment Plan did not fully address Student's issues related to his diabetes.

From August to December 2015, Student's academic performance continued to decline as his blood sugar levels began to fluctuate more and more drastically and Academy teachers and the Assistant Headmaster communicated academic concerns with the Complainant, all of which occurred despite any actions by the Academy to implement the Treatment Plan. We conclude, by the preponderance of the

evidence, that these facts provided sufficient information to the Academy to indicate that Student may have a disabling condition that required special education or related services beyond the Treatment Plan. The Academy was therefore obligated to evaluate Student under Section 504, but it did not do so. In addition, the Academy failed to provide accommodations (such as the option to re-test if blood sugar is too high or too low during testing time; and permission to turn in work late if missed because of diabetes-related absences; and parental notification if blood sugar is below 80 or above 300) that were required under the Student's existing 504 Plan. We conclude that removal of these accommodations constitutes a significant change in placement. This, too, should have triggered an evaluation by the Academy, but did not.

The Complainant also alleged that, monthly throughout the fall, Mother made verbal requests to the Assistant Headmaster that the Academy evaluate Student for disability-related services, but that the Assistant Headmaster never complied with these requests. Neither the Complainant's nor the Academy's evidence proved or disproved that such requests were made. However, OCR has concluded that it need not determine whether parental request(s) to evaluate were made, because OCR has determined that, regardless of any parental request(s), the Academy had sufficient information to indicate that Student may have a disabling condition that required special education or related services beyond the Treatment Plan, and the Academy was therefore obligated to evaluate Student under Section 504, but it did not do so.

Thus, we determine, by the preponderance of the evidence, that the Academy failed to timely and appropriately evaluate the Student for disability-related services.

Failure to Comply With Section 504 and Title II Procedural Requirements

Finally, during the course of its investigation, OCR reviewed the Academy's "Special Education

Policies Procedures," as well as its Notice of Non-Discrimination and "Notice of Rights for Disabled Students and Their Parents Under Section 504 of the Rehabilitation Act of 1973," the latter of which contains its grievance procedures. The Academy also has a handbook for parents addressing Section 504, but that handbook is not publically available or otherwise effectively published.

The Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, such as the allegations of discrimination that were at issue in this case. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. § 104.8 and 28 C.F.R. § 35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b)). The regulations also require that recipients/public entities designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 104.7(a) and 28 C.F.R. § 35.107(a)).

Throughout this time period, the Academy lacked a Notice of Non-Discrimination and a Title II Coordinator or Title II grievance procedures for students. The Academy had identified a Section 504 Coordinator and had developed Section 504 grievance procedures, but that information was not publically available. Thus, we determine that the Academy violated 34 C.F.R. § 104.8 and 28 C.F.R. § 35.106 in that it did not publish a notice of non-discrimination until June 2016, and that notice did not identify a Title II Coordinator (although it did identify a Section 504 Coordinator). We further determine that the Academy violated 28 C.F.R. § 35.107(a), because it has not identified a Title II Coordinator for students. Finally, we determine that the Academy violated 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b) in that, though it developed Section 504 grievance procedures, it did not publish them, and the procedures raise compliance concerns. Specifically

lacking is information describing (1) that even if a student is not eligible for special education services under the Individuals with Disabilities Education Act (IDEA), the Academy will consider the student for eligibility under Section 504 of the Rehabilitation Act of 1973, including the provision of "special education or related services" or other accommodations; (2) the affirmative obligation to identify and evaluate students suspected of being an individual with a disability, including but not limited to upon parent request; (3) the development of Section 504 Plans; and (4) references to Title II, including but not limited to designating a Title II coordinator. Additionally, the procedures raise a compliance concern as to the prompt and equitable resolution of complaints; these compliance concerns could be addressed by adding timeframes/deadlines for setting a due process hearing upon request and for the stages of the internal complaint investigation, and by elaborating on the description of the internal complaint process. The "notice of rights" also describes the right to file a complaint with OCR, but lists contact information for a different agency; that contact information needs to be updated.

Conclusion

As noted above, the Academy voluntarily entered into an agreement with OCR to resolve these issues. We thank the Academy for voluntarily entering into an Agreement to resolve these issues. OCR is closing the investigative phase of this case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase will be completed when OCR determines that the Academy has fulfilled all of the terms of the Agreement. When the monitoring phase of this case is complete, OCR will close Case Number 08-16-1118 and will send a letter to the Academy, copied to the Complainant, stating that this case is closed.

This letter addresses only the issues listed above and should not be interpreted as a determination of the Academy's compliance or noncompliance with Title II, Section 504, or any other federal law in any other respect.

This letter is a letter of finding(s) 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.

The Academy is prohibited from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation.

Please also note that the Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation you and your staff, especially Thomas Doeblner, extended to us during the investigation of this case. If you have any questions, please contact Sarah Morris, Attorney and primary contact for this case, at (303) 844-3682 or by email at sarah.morris@ed.gov, or me at (303) 844-5927 or by email at tom.rock@ed.gov.

Resolution Agreement

Lincoln Preparatory Academy (Arizona)

The U.S. Department of Education, Office for Civil Rights ("OCR") received a complaint against Lincoln Preparatory Academy ("Academy") alleging that the Academy discriminated against the Complainant's grandson (Student), an eighth grader, on the basis of disability by (1) failing to properly implement the Student's Section 504 Plan, and (2) failing to timely and appropriately evaluate the Student for disability-related services. OCR investigated the allegation and found that the

Academy violated Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) in that it (1) did not properly implement the Student's Section 504 Plan, (2) failed to timely and appropriately evaluate the Student for disability-related services, and (3) failed to comply with Section 504 and Title II procedural requirements. "The Academy agrees to implement the following terms of this Resolution Agreement.

1. The Academy will expunge from Student's records (1) his suspension on December 16, 2015; and (2) his Fall 2015 grades, replacing those grades with a medical withdrawal.

Reporting Requirement

Within 30 days of this Agreement, the Academy will provide OCR with documentation that it has expunged from Student's records (1) his suspension on December 16, 2015; and (2) his Fall 2015 grades, replacing them with a medical withdrawal.

2. The Academy will designate at least one person as a Section 504 and Title II Coordinator to comply with the requirements of Section 504 and Title II and 34 C.F.R. § 104.7 and 28 C.F.R. § 35.107.

Reporting Requirement

By August 31, 2016, the Academy will provide for OCR's review the designated Section 504 and Title II Coordinator's credentials and qualifications, which demonstrate the Section 504 and Title II Coordinator's ability to appropriately meet the Academy's compliance obligations.

If OCR determines that the designated individual lacks the necessary qualifications, the Academy will develop a plan for immediately providing relevant training to the individual. Within 30 calendar days of notification from OCR that training is necessary, any necessary training must be completed. Within 45 calendar days of notification from OCR that training is necessary, the Academy will provide to OCR documentation that the designee has completed the training.

3. The Academy will revise its policy regarding its implementation of Section 504 and Title II. Topics addressed in the revised policy will include, but will not be limited to, (1) that even if a student is not eligible for special education services under the Individuals with Disabilities Education Act (IDEA), the Academy will consider the student for eligibility under Section 504 of the Rehabilitation Act of 1973, including the provision of "special education or related services" or other accommodations; (2) the affirmative obligation to identify and evaluate students suspected of being an individual with a disability, including but not limited to upon parent request; (3) the development of Section 504 Plans; and (4) references to Title II, including the designation of the Title II Coordinator pursuant to Term 2 of this Agreement. The revised policy will be updated to better provide for the prompt and equitable resolution of complaints, including but not limited to by (1) adding timeframes/deadlines for setting a due process hearing upon request and for the stages of the internal complaint investigation, and (2) elaborating on the description of the internal complaint process.

Reporting Requirement

By September 15, 2016, the Academy will provide OCR, for OCR's approval, its revised draft Section 504 and Title II policy.

4. The Academy will revise its Notice of Non-Discrimination to identify the individual designated as its Title II Coordinator pursuant to Term 2 of this Agreement.

Reporting Requirement A

By August 31, 2016, the Academy will provide OCR, for OCR's approval, its revised notice of nondiscrimination.

5. Within 30 days of OCR's approval of the revised policy identified in Term 3 and the revised notice identified in Term 4, the Academy will (1) adopt and implement the revised policy and notice, and (2) publish the revised policy and notice.

Reporting Requirement

Within 60 days of OCR's approval, the Academy will provide OCR documentation that it has (1) adopted and implemented the revised policy and notice, and (2) a list of locations, including the internet, where the Academy has published the revised policy and notice.

6. Within 15 days of the adoption and implementation of the approved policy, the Academy will provide a memo to all staff (1) informing the recipients of the changes to the Academy's policy, and (2) explaining the Academy's affirmative obligation to identify and evaluate students suspected of being an individual with a disability, including but not limited to upon parent request.

Reporting Requirement

Within 15 days after the Academy has issued the memo, the Academy will provide OCR with a copy of the memo and documentation that it was provided to all Academy staff.

7. Within 15 days of the adoption and implementation of the approved policy, the Academy will provide a letter to all parents/guardians of enrolled students, explaining that it has changed its policies and procedures regarding the evaluation and placement of students with disabilities. The letter will state that, even if a student is not eligible for special education services under the Individuals with Disabilities Education Act (IDEA), the Academy will consider the student for eligibility under Section 504 of the Rehabilitation Act of 1973, including the provision of "special education or related services" or other accommodations. Additionally, the letter will invite the parents/guardians to contact the Academy to request a meeting if the parents/guardians feel the student requires special education or related services or other accommodations, even if a meeting had been held recently.

Reporting Requirement

Within 15 days after the Academy has mailed and/or e-mailed the letter, the Academy will provide OCR with a copy of the letter and affirm that it has mailed and/or e-mailed the letter to all

rents/guardians of enrolled students.

8. The Academy will provide training to all staff at the Academy regarding the Academy's revised policy and the requirements of Section 504 and Title II, including but not limited to the affirmative obligation to identify and evaluate students suspected of being an individual with a disability and the affirmative obligation to respond to parental requests for evaluation.

Reporting Requirement A

Within 90 days of this Agreement, the Academy will provide OCR its draft training materials; identify who will be providing the training, by name, title, and qualifications; and provide a list of personnel required to participate in the training, by name and title.

Reporting Requirement B

Within 60 days of OCR's approval, the Academy will provide documentation demonstrating that the training was provided and a copy of the training sign-in sheets.

The Academy understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the Academy understands that during the monitoring of this Agreement, if necessary, OCR may visit the Academy, interview Academy staff and students, and request such additional reports or data as are necessary for OCR to determine whether the Academy has fulfilled the terms of this Agreement and is in compliance with Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which were at issue in this case.

The Academy understands that OCR will not close the monitoring of this Agreement until OCR determines that the Academy has fulfilled the terms of this Agreement and is in compliance with Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which were at issue in this case.

The Academy understands and acknowledges that OCR may initiate enforcement proceedings to enforce the specific terms and obligations of this Agreement. Before initiating enforcement proceedings (28 C.F.R. § 35.174) to enforce the Agreement, OCR shall give the Academy written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

¹The Academy is a public charter school operated by Great Hearts Academies.

Regulations Cited

- 34 CFR 104.33
- 28 CFR 35.130(b)(1)(ii)
- 28 CFR 35.130(b)(1)(iii)
- 34 CFR 104.35(a)
- 34 CFR 104.8
- 28 CFR 35.106
- 34 CFR 104.7(b)
- 28 CFR 35.107(b)
- 34 CFR 104.7(a)
- 28 CFR 35.107(a)
- 28 CFR 35.107
- 28 CFR 35.130(a)