

SCHOOL AND COLLEGE LEGAL SERVICES *of California*

General Counsel
Margaret M. Merchat

Attorneys
Janna L. Lambert
Nancy L. Klein
Marko H. Fong
Adam S. Ferber
Carl D. Corbin
Patrick C. Wilson
Virginia A. Riegel
Loren W. Soukup
Frank Zotter, Jr.

*A Joint Powers Authority serving school and
college districts throughout the state with offices in
Eureka, Hayward, San Rafael, Santa Cruz and Santa Rosa*

Reply to:
Santa Rosa Office
5350 Skylane Blvd.
Santa Rosa, CA 95403
(707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org

*Employer-Employee
Relations Coordinator*
Robert S. Latchaw

Of Counsel
Susanne K. Reed

LEGAL UPDATE

March 20, 2009

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, Schools Legal Counsel *CDC*

Subject: Districts Have Duty to Ensure Students with Disabilities in an After-School Program Have Equal Access
Memo No. 09-2009

Our office is regularly asked questions about the responsibility of a school district to provide accommodations/services, such as a 1:1 aide, to a student with a disability in an after-school program (such as child care, homework club, sports, etc.). Districts must address the following three questions in order to determine a district's responsibility to provide accommodations/services in an after-school program or activity:

1. Does the student's IEP team believe the student requires an after-school program to receive a FAPE?

The district must determine whether the student is eligible during the regular school day for services under the Individuals with Disabilities Education Act ("IDEA"). If the student is eligible, then the district will have a duty to develop an Individualized Education Program ("IEP"). The IEP team under the IDEA must provide the student an offer of a Free Appropriate Public Education ("FAPE") based on the student's educational needs. One of the questions the IEP team may consider is whether or not the student requires an after-school program in order to address the student's educational needs and receive a FAPE. While not absolutely impossible, it would be an unusual situation for an IEP team to determine a student requires an after-school program in order to receive a FAPE. However, if the IEP team did determine the student required an after-school program in order to receive a FAPE, then the IEP team must ensure the

appropriate supports and services (which could include a 1:1 aide) are in place in the after-school program to allow the student to receive meaningful educational benefit.

2. If the student has an IEP or a Section 504 disability, then what organization is responsible for the after-school program?

A student may qualify for accommodations and modifications (such as a 1:1 aide) in an after-school program under either the IDEA or under Section 504 of the 1973 Rehabilitation Act (“Section 504”). Even if, as discussed above, the student’s IEP team determined the student does not require an after-school program in order to receive a FAPE, the student is still potentially eligible for accommodations in the after-school program under Section 504. Also, a student who does not qualify for an IEP under the IDEA may qualify for accommodations under Section 504 insofar as the student has a mental or physical disability that substantially limits a major life activity. In this case, the entity conducting the after-school program (if it receives federal education funds) will be responsible to “provide nonacademic and extracurricular services in such manner as to afford [students with disabilities] an equal opportunity for participation in such activities.”¹

If the district operates the after-school program then the district will be responsible for analyzing the student’s needs for accommodations (such as 1:1 aide) under Section 504 (described below). The U.S. Department of Education, Office for Civil Rights (“OCR”) has held that if there is a lack of substantial relationship between the district and the after-school program, then the district will not be responsible for addressing the student’s potential Section 504 needs.² OCR has determined a “lack substantial relationship” between the district and after-school program when 1) there is minimal or lack of financial support provided by the district to the organization and 2) there is an absence of relationship between the organization’s programs and activities and the district’s organization and activities. For example, in the *Vicksburg* case, OCR found that the school district was not responsible for providing accommodations (a 1:1 aide) to a student with autism that was attending an after-school YMCA program located at the school district because the district did not financially support the YMCA and did not control or supervise the YMCA program. Rather OCR found that the district merely granted permission for the YMCA to use the district’s facilities in a similar manner as the district allowed the Cub Scouts, Girl Scouts, 4-H Club and other organizations to use the district’s facilities.

3. If the student has an IEP or a Section 504 disability and the district is responsible for the after-school program, would providing the student with a disability with reasonable modifications to allow the student equal access to the program create an undue administrative or financial burden or fundamentally alter the nature of the program?

OCR has consistently found that a district must modify its practices, policies and procedures by providing accommodations (such as a 1:1 aide) for a student with a disability to allow the student equal access to a program, unless the district affirmatively determines the accommodations

¹ 34 C.F.R. 104.37(a)(1).

² *Vicksburg Warren School District* (OCR July 27, 2006) 06-06-1135, 46 IDELR 200, 106 LRP 56727.

would either fundamentally alter the nature of the program or would impose an undue administrative or financial hardship on the district.³

A. Fundamentally Alter the Nature of the Program

In the *Hayward* case, the district alleged the student posed a direct threat to the health and safety of others in the after-school childcare program such that it would fundamentally alter the nature of the program. OCR found it would be permissible to exclude a student from a program, but the determination must be based on an individualized assessment that takes into account factors such as: nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk. However, in this case OCR found the district impermissibly dismissed the student from the program, based on the student's behavioral problems, without discussing whether he could be successful with accommodations such as a 1:1 aide. Therefore, "blanket" policies, which prohibit the use of 1:1 aides or state if any student exhibits certain behaviors then the student can be excluded, should not be used by districts, but rather these decisions should be based on an individualized case-by-case basis.

B. Undue Administrative or Financial Hardship

OCR has established a fairly high standard for a district to demonstrate providing the accommodation would result in an undue financial hardship.⁴ In the *Hermitage* case, a district refused to provide a sign language interpreter for a child (with a hearing disability) for an extracurricular play open to the general public. The district denied the request based on the fact that the cost of a sign language interpreter would exceed the proceeds from the drama club play. The district had offered to provide the student with a copy of the script of the play and allow the student to sit close to the stage as an alternative accommodation instead of providing a sign language interpreter.⁵ OCR found that the district determination of whether the accommodation (providing a sign language interpreter in this case) would result in an undue financial hardship must be based on the overall district budget rather than basing the decision only on the ticket sales associated with the play. Therefore, districts need to be able to demonstrate the accommodation will impose an undue financial hardship based on the total district budget rather than just the budget associated with the specific activity in which accommodations are being sought.

Please contact any of our attorneys for additional assistance regarding this or any other legal issue.

³ *Hayward Unified School District* (OCR May 16, 2008) 09-08-1024, 50 IDELR 289, 108 LRP 53164.

⁴ *Hermitage R-IV School District* (OCR Feb. 11, 2008) 07-06-1227, 108 LRP 53412.

⁵ OCR found that providing a script of the play was 1) effective and timely; 2) an accurate translation; 3) but since the student's reading level was at the 1.7 grade level – the alternative accommodation was not appropriate.