

# Cases

111 LRP 65338

**Lee's Summit (MO) R-VII School District**

**Office for Civil Rights, Midwestern  
Division, Kansas City (Missouri)**

07-09-1120

**August 23, 2011**

**Judge / Administrative Officer**

**Joshua Douglass, Supervisory Attorney**

**Full Text**

**Appearances:**

Dear Ms. Guin:

On April 6, 2009, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Lee's Summit R-VII School District (District), Lee's Summit, Missouri, alleging discrimination on the basis of disability. Specifically, the complainants alleged the District discriminated against their [ ] son on the basis of disability [ ] by failing to appropriately evaluate him to determine whether he qualified for an individualized education program (IEP), or a Section 504 Plan during the 2008-2009 school year. On July 27, 2009, OCR received a second complaint against the District alleging the District discriminated against the complainants' fifth grade son on the basis of his disability [ ] during the 2008-2009 school year, by failing to appropriately and/or timely identify and/or evaluate him pursuant to Section 504 to determine his eligibility for an accommodation plan or special education and related aids and services. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve this complaint.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA); and

- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of FFA from the Department and a public entity, the District is subject to these laws. Additional information about OCR and the laws we enforce is available on our website at <http://www.ed.gov/ocr>.

Prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy enclosed) on August 19, 2011 that, when fully implemented, will address the allegations of this complaint and other issues identified by OCR during the course of its investigation. OCR considers the allegations of these complaints resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close these complaints. If the District fails to carry out the Agreement, OCR may resume the investigation or take other action in one or both complaints.

This letter sets forth OCR's determination in these individual OCR 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. The complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to prompt and effective service. If you have any questions, please contact Pat Boyd, Equal Opportunity Specialist, at (816) 268-0554 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at [Patricia.Boyd@ed.gov](mailto:Patricia.Boyd@ed.gov).

### **Resolution Agreement**

**Lee's Summit School District**

The Lee's Summit School District (District),



Lee's Summit, Missouri, submits this Resolution Agreement (Agreement) to the U.S. Department of Education, Office for Civil Rights (OCR), in order to resolve the allegations of discrimination based on disability against the District in OCR Docket Nos. 07091120 and 07091199, and to ensure compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Prior to the completion of OCR's investigation, the District asked to resolve the allegations in the complaints pursuant to Section 302 of OCR's Case Processing Manual. Accordingly, to ensure compliance with Section 504/Title II and/or its implementing regulations and to resolve the allegations of these complaints and any other issues identified by OCR during the course of its investigation of these complaints, the District voluntarily agrees to take the following actions:

### **I. General Provisions**

A. This Agreement resolves the allegations in OCR Docket Nos. 07091120 and 07091199 and does not constitute an admission by the District of any violation of Section 504, Title II, or any other law.

B. This Agreement shall become effective upon the District's receipt of a letter from the Director of OCR, Kansas City Office, advising the District that this Agreement resolves the allegations raised in these complaints.

C. OCR agrees to discontinue its investigation of OCR Docket Nos. 07091120 and 07091199 based upon the District's commitment to take the actions specified in this Agreement which, when fully implemented, will resolve the allegations in these cases and any other issues identified by OCR during the course of its investigation.

D. In the event the District fails to implement any provision of this Agreement, OCR may resume its investigation of the complaints or take other

appropriate measures within its authority to effect compliance with Section 504 and Title II.

E. The District 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 District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 and Title II.

F. The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 and Title II, which were at issue in these cases.

## **II. Resolution Provisions**

### **A. Notice of Nondiscrimination and Dissemination**

1. By Oct. 31, 2011, the District will ensure it has met the identification, notification, and publication requirements set forth in the OCR publication, Notice of Non-Discrimination (August 2010). The publication is available at: <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>. The notice of nondiscrimination must include the name or title, address, and telephone number of the District employee(s) designated to coordinate efforts to comply with and carry out responsibilities under Title IX, Section 504, Title II, the Age Discrimination Act, and the Boy Scouts Act.<sup>1</sup> If more than one person is designated to coordinate compliance under these laws, the District shall specify which coordinator is responsible for each law. The District will ensure the designated individual(s) are correctly identified in its notice of discrimination and other major publications (such as employee and/or student handbooks). If OCR, through its technical assistance program, gives written approval to a model Board of

Education policy and/or notice of nondiscrimination submitted by the Missouri School Boards Association (MSBA) and/or the District to OCR, then the District may adopt the approved version of MSBA's model policy and notice of nondiscrimination. Such adoption by the District will meet the requirements pertaining to revision of the District's policy and notice of nondiscrimination in this Agreement. OCR is available to provide technical assistance to the District upon request.<sup>2</sup>

**REPORTING REQUIREMENT:** By Sept. 30, 2011, the District will provide OCR with a draft version of its combined notice of nondiscrimination for review and approval.

2. Upon receiving approval from OCR of its revised notice of nondiscrimination, the District will publish and prominently display its revised combined notice of nondiscrimination in an easily visible location, in student and employee hard-copy and online publications, including, but not limited to, the following publications: (a) major announcements as identified by the District; (b) catalogs; (c) student and employee application forms; (d) board policies and grievance procedures for discrimination complaints; (e) student, parent and staff handbooks; (h) employee handbooks or materials; and (i) any other major general publications.

**REPORTING REQUIREMENT:** By November 30, 2011, the District will provide OCR with copies or links to the information (if it is available on the District's website) of the major publications identified above evidencing its dissemination and publication of the OCR approved notice of nondiscrimination.

**B. Section 504 Policies, Procedures, Manuals and Forms and Dissemination**

1. By October 31, 2011, the District will review its current Title II and Section 504 policies, procedures, manuals, and forms to ensure these comply "with the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act)<sup>3</sup>, Title II, and Section 504 regulations, including the Section 504 regulations at 34 C.F.R. §§ 104.31

through 104.35 regarding the identification, evaluation, and educational placement of students who, because of a disability, need or are believed to need special education or related services. The District shall ensure its Section 504/Title II policies, procedures, manuals, and forms comport with the following:

a) The expanded definitions of physical and mental impairments and major life activities in accordance with the ADA Amendments Act;

b) The following language in accordance with the ADA Amendments Act:

i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as: (1) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (2) use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity;

ii) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability;

iii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

iv) The definition of disability shall be construed in favor of broad coverage of individuals under Section 504 and Title II, to the maximum extent permitted by the terms of those laws.

c) The following language in accordance with the Section 504 regulations at 34 C.F.R. §§ 104.33 and 104.34 (free appropriate public education (FAPE)

and educational setting):

i) The District shall provide a FAPE to each qualified student with a disability in the District's jurisdiction. An appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met, and complies with applicable federal regulations;

ii) The District shall educate, or shall provide for the education of, each qualified student with a disability in its jurisdiction with students without disabilities to the maximum extent appropriate to the needs of the student with a disability. The District shall place a student with a disability in the regular educational environment unless it is demonstrated by the District that the education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily; and

iii) The District shall ensure that students with disabilities participate with students without disabilities in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of the student with a disability. Nonacademic and extracurricular services and activities include, but are not limited to, meals, recess periods, counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the District, referrals to agencies which provide assistance to students with disabilities, and employment of students.

d) The following language in accordance with the Section 504 regulation at 34 C.F.R. § 104.35 (evaluation and placement):

i) The District shall conduct an evaluation of any student who, because of a 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 subsequent significant change in placement. The District shall ensure that:

1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

ii) The District shall ensure the following actions are taken when interpreting evaluation data and making placement decisions:

1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

2) Establish procedures to ensure that information obtained from all such sources is documented and carefully considered;

3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. A parent(s) or guardian is a required participant if he or she is a person knowledgeable about the student;

4) Ensure that the placement decision is made in a timely manner, and in the least restrictive environment in accordance with 34 C.F.R. § 104.34.

iii) The District shall ensure that students with disabilities who have been provided special education

or related services are periodically reevaluated.

**REPORTING REQUIREMENT:** By October 31, 2011, the District will provide to OCR for review and approval copies or links to the information (if it is available on the District's website) of its reviewed/revised Section 504/Title II policies, procedures, manuals, and forms, required in Section II.B.1 of this agreement, and a description of what changes, if any, were made as a result of the review.

2. By October 31, 2011, the District will review its current notice of procedural safeguards to ensure it complies with the Section 504 regulation at 34 C.F.R. § 104.36 regarding a system of procedural safeguards, including a specific written procedure detailing how and when the District will notify the parents or guardians of District students of the District's Section 504/Title II procedural safeguards, and how the District will maintain documentation indicating the parents or guardians have been informed of their procedural safeguards. The District's Section 504/Title II policies, procedures, and notice of procedural safeguards shall include the name or title, address, and telephone number of the District's designated Section 504 and Title II compliance coordinator.

**REPORTING REQUIREMENT:** By October 31, 2011, the District will provide to OCR for review and approval copies or links to the information (if it is available on the District's website) of its reviewed/revised notice of procedural safeguards, required in Section II.B.2 of this Agreement, and a description of what changes, if any, were made as a result of the review.

### **C. Training**

1. By November 30, 2011, the District will provide training on the subject of Section 504 and Title II compliance to District officials and staff, including but not limited to, administrators or officials, teachers, paraprofessionals, counselors, process coordinators, nurses and any other individuals who may be involved in the identification, evaluation, and placement of students suspected of having

disabilities. The training will be conducted by an individual(s) knowledgeable about the laws and issues pertaining to Section 504 and Title II. The District commits to providing training to staff regarding Section 504 and Title II on an annual basis. The District's training may be multi-tiered and will be tailored to reflect the level of detail appropriate to the persons in attendance at particular training sessions but will include the following topics and activities:

a) Information regarding the District's revised notice of nondiscrimination and revised Section 504 and Title II policies, procedures, manuals and forms.

b) The District requirement, pursuant to the Section 504 regulation at 34 C.F.R. § 104.33(a), to provide a FAPE to all qualified students with a disability in its jurisdiction and that the provision of a FAPE is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled students as adequately as the needs of non-disabled students are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

c) The District requirement pursuant to Section 504 at 34 C.F.R. § 104.37 to provide non-academic and extracurricular services, including athletics, transportation, recreational activities and non-curriculum field trips in such a manner as is necessary to afford all students with disabilities an equal opportunity for participation.

d) The Section 504 regulation at 34 C.F.R. § 104.3(j)(1)(i), definition of a qualified individual with a disability as any person who has a physical or mental impairment which substantially limits one or more major life activities or has a record of or is regarded as having such an impairment. Examples of physical and mental impairments shall be discussed.

e) The eligibility criteria under Section 504 and Title II (including information on the ADA Amendments Act that requires determination of whether an impairment substantially limits a major life activity to be made without regard to the

ameliorative effects of mitigating measures), including examples of the circumstances and situations that obligate the District to conduct an evaluation under Section 504. The examples should include scenarios that demonstrate the coordination sometimes required between District/school departments to implement services.

f) The District's obligation pursuant to 34 C.F.R. § 104.3 (and under 28 C.F.R. § 35.104), to consider the full range of major life activities (including, but which are not limited to, academic performance and/or educational impact) of a qualified individual with a disability, when identifying and evaluating a student who needs or is believed to need regular or special education and related aids and services due to a disability under Section 504.

g) The District's Section 504/Title II evaluation process and how it interfaces with student referrals and evaluations conducted pursuant to the Individuals with Disabilities in Education Act (IDEA) and individualized health plan (IHP) processes. The training will also include an explanation of the legal rights and responsibilities afforded students under Section 504/Title II versus any school obligations that may exist to students receiving services under an IHP.

h) The District's system of procedural safeguards under Section 504/Title II, including what it includes, and when and how the system of procedural safeguards is implemented (e.g., when the District's procedural safeguards document should be provided to parents/guardians).

**REPORTING REQUIREMENT:** By December 31, 2011, the District will provide OCR documentation showing it has completed the training described above for the 2011-2012 school year. The documentation must identify the following: (a) the date, time and location of the training; (b) the topics addressed at the training(s) (the District may provide OCR an outline of the training and copy of the materials disseminated at the training); (c) the name(s), title(s), and credentials of the individual(s) who conducted the training; and (d) the name, title, and work location of each District administrator or

employee who attended the training (a sign-in sheet with the attendees' names, titles, and work locations is sufficient). OCR is available to provide technical assistance and training to the District upon the District's request.

For any subsequent annual Section 504/Title II trainings, the District need not provide evidence to OCR that it has provided the annual training contemplated pursuant to this Agreement.

#### **D. Plan to Identify and Evaluate Students Currently Receiving Services Through IHPs**

1. By October 31, 2011, the District will provide OCR with a plan identifying the steps it will take to identify and evaluate, as appropriate, students currently receiving services through IHPs, who because of a physical or mental disability or suspected disability need or who are believed to need regular or special education or related services. The plan will describe the steps being taken by the District and the timeframes for completing the major activities described in the plan. The plan shall include but not be limited to the following:

a) Information detailing how the District intends to provide written notice to parents/guardians of the District's obligations under Section 504 and Title II to evaluate students who because of a physical or mental disability or suspected disability need or who are believed to need regular or special education or related services. The written notice shall include:

i) Information explaining the definition of a qualified individual with a disability under Section 504 (i.e., students who have medical conditions (physical or mental) may, if the student has a substantial limitation of a major life activity, qualify for services pursuant to Section 504). The District should consider including a link, if available, to its online Section 504 policies and procedures in the letter;

ii) Information informing parents that their child may be eligible for accommodation under Section 504, even though the student currently receives



services through an IHP;

iii) Information regarding the District's system of Section 504 procedural safeguards;

iv) The name, title and contact information for the District's Section 504/Title II coordinator(s); and

v) Contact information for parents/guardians who may have questions/concerns regarding the District's Section 504/Title II notice.

b) Information detailing how the District intends to review the IHPs of any currently enrolled students to determine whether those students should be referred for an evaluation pursuant to the District's revised Section 504 policies and procedures.

c) Information detailing how the District intends to identify and, as appropriate, evaluate, those students currently receiving homebound services to determine whether the students may be eligible for services pursuant to Section 504.

d) The process or steps the District will use to document those parents/guardians who have been advised, pursuant to this section of the Agreement, of the right for their child to be evaluated, pursuant to the District's revised Section 504 policies and procedures and have refused such services.

**REPORTING REQUIREMENT:** By November 15, 2011, the District will submit to OCR for approval a copy of its plan required in Section II.D.1. The documentation to OCR shall include a copy of the draft letter to the parents/guardians and any attachments or enclosures to the letter.

**REPORTING REQUIREMENT:** Upon receiving approval of the plan developed as a result of Section II.D.1 of this Agreement, the District will implement its plan. During the 2011-2012 school year, the District shall provide OCR with mid-year and end of the year updates describing the activities undertaken and completed by the District under the terms of its plan. If all activities identified in the District's plan or required by this Agreement are not completed by the end of the 2011-2012 school year, quarterly updates describing the activities undertaken and completed by the District under the terms of its plan shall be

provided to OCR until the District has completed all the activities identified and described in the OCR approved plan developed pursuant to Section II.D.1 of this Agreement.

### **E. Individual Remedies for the Complainants' Sons**

1. By October 31, 2011, the District will draft for OCR's review and input a letter to the parents of the students who are the subject of these complaints that advises the parents of the District's commitment to take appropriate steps to evaluate their children and, if required based on the results of the evaluation, provide with a FAPE as required by Section 504 and Title II and in accordance with 34 C.F.R. 104, Subpart D. The letter to the parents shall include:

a) A statement that if requested by the parents, the District will initiate their Section 504 identification and referral/evaluation process (including providing the complainants with notice of their due process rights) within 45 days of the date of the parents' request to determine whether Student 1<sup>4</sup> may be eligible for services under Section 504.

b) A statement that if the parents choose to reenroll Student 2<sup>5</sup> in the District, the District will initiate its identification and referral/evaluation process including promptly convening a meeting pursuant to the District's Section 504 procedures and which includes the parent(s). Pursuant to the District's Section 504 policies, the meeting participants will determine whether additional evaluation information is needed in order to determine the student's eligibility for services or whether the student qualifies for regular or special education and related aids and services, pursuant to Section 504.

c) A commitment by the District stating that in the event Student 2 is reenrolled in the District, the District will ensure personnel working with Student 2 are trained about celiac disease.

d) A statement in regard to any evaluation of Student 1 or Student 2, the District shall adhere to its Section 504/Title II policies, procedures, manuals, and forms when making its identification, evaluation,

and placement decisions. The District shall ensure that the District obtains current evaluations, if needed, at no expense to the parents, in all areas of suspected disability and that such information addresses the impact of disabilities on the respective students' educational performance, behavior, and attendance.

e) A statement, if it is determined that either Student 1 or Student 2 qualifies for regular or special education and related aids and services pursuant to Section 504, those services will be provided promptly. To the extent that Student 1 or Student 2 is determined to be a qualified individual with a disability, the District, consistent with the requirements of 34 C.F.R. 55 104.33(a) and (b), and 104.34, will provide the regular or special education and related aids and services that meet the individual educational needs of the student(s).

f) The letter will also provide the students' parents with a copy of the District's notice of procedural safeguards and the contact information of the District's Section 504/Title II coordinator.

**REPORTING REQUIREMENT:** Within 30 calendar days of OCR's review of and input about the District's draft letter to the students' parents drafted pursuant to Section II.D.1 of this Agreement, the District will incorporate OCR's input, as appropriate, and send the letter to the parents. Within 15 days of sending the letter to the parents, the District shall provide OCR with documentation confirming the correspondence to the parents, including any enclosures, has been mailed.

<sup>1</sup>Although the Department's Title VI regulation does not require a recipient to designate an individual to coordinate its efforts to comply with Title VI, OCR recommends that the District designate an individual to assist it in complying with Title VI and to include the contact information for this individual in its notice of nondiscrimination. See, the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, and its implementing regulation at 34 C.F.R. Part 108.

<sup>2</sup>OCR recognizes the variations among the regulations governing notice requirements and

understands that schools may wish to use one statement to comply with all requirements of the regulations implementing Title VI, Title IX, Section 504, Title II, the Age Discrimination Act and the Boy Scouts Act. A combined nondiscrimination notice should contain two basic elements: (1) a statement of nondiscrimination that specifies the basis for nondiscrimination; and (2) identification by name or title, address, and telephone number of the employee or employees responsible for coordinating the compliance efforts.

<sup>3</sup>The definition of a qualified individual with a disability was amended by the ADA Amendments Act (P.L. 110-325), which became effective on January 1, 2009, and also amended Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. § 705).

<sup>4</sup>Student 1 is the student at issue in the complaint referenced as OCR Docket # 07091120.

<sup>5</sup>Student 2 is the student at issue in the complaint referenced as OCR Docket # 07091199.

57 IDELR 141

6 GASLD 92

111 LRP 47378

**Catoosa County (GA) School District  
Office for Civil Rights, Southern Division,  
Atlanta (Georgia)**

04-10-1092

**March 3, 2011**

**Related Index Numbers**

**405.050 Harassment/Retaliation**

**60.005 Disability**

**100.025 Related Services**

**Judge / Administrative Officer**

**Cynthia G. Pierre, Office Director**

**Case Summary**

By continuing to allow the sale of peanut products from vending machines at school after learning that a student's exposure to them could be fatal, a district engaged in and failed to correct disability-based harassment. OCR reasoned that it took the principal nine months to properly respond to the continued presence of the items. The student's IHO stated that the district would request its snack machine vendor not to put any products containing peanuts and tree nuts in vending machines throughout the school, due to the student's severe allergies. The principal wrote several letters to the company over a nine-month period to no effect. At least some of the letters were in response to the student purchasing such items from the machines, and bringing them to the principal's attention. The principal also placed signs on the machines telling the company not to include the products. When all else failed, he finally had the machines removed. OCR noted that harassment may consist of a variety of possible verbal or nonverbal behavior, including conduct that is physically threatening, or harmful. OCR found that the conduct was harassing in nature, pointing out that the products remained in school vending machines for several months, despite the fact that the child's parents continually explained the severity of the student's

allergies. Moreover, the conduct was sufficiently severe, persistent, or pervasive as to deny or limit the student's ability to participate in the district's programs, and thus created hostile environment. Finally, the district's efforts to correct the problem came up short. "[B]ecause it took the Principal nine months ... to finally have the vending machines and peanut [sic] removed ... his actions were neither prompt nor effective," OCR wrote. Regarding an allegation that a classmate called the student "peanut boy," OCR found that the district responded promptly and effectively, including by disciplining the student involved.

**Full Text**

**Appearances:**

Dear Mrs. Reese:

This letter is to notify you of the determination of the U.S. Department of Education (Department), Office for Civil Rights (OCR), in the above-referenced complaint filed on December 4, 2009, against the Catoosa County School District (District), alleging discrimination on the basis of disability. The Complainant alleged that the District discriminated against her son (Student), who attends the Heritage Middle School (HMS) on the basis of disability [ ] (allergy). Specifically, the Complainant alleged the following:

1. The District failed to evaluate the Student for a Section 504 plan and refused to consider her requests for a 504 plan and recommendations regarding the Student.

2. HMS staff subjected the Student to harassment, based on his disability, by:

a. Continuing to allow peanut products to be sold in vending machines at HMS;

b. Allowing Chick-Fil-a food products to be sold at HMS;

c. Allowing cakes with potential nut ingredients to be made in home economics and sold to other students at HMS;

d. Allowing the Student's teacher to single him



out in the classroom as a student with a peanut allergy;

e. Allowing other students to call the Student names;

f. Making the Student go to the nurse's office when other students are allowed to eat nut related snacks in the classroom;

g. Planning field trips where the Student is exposed to peanut products; and

h. Not providing him with an alternative class for home economics.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 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 District is subject to these laws.

Based on the allegations, OCR investigated the following legal issues:

1. Whether the District denied the Student a free appropriate public education by failing to evaluate him for a Section 504 plan to address his disability during the 2009-2010 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33(a) and (b)(1) and (2) and 104.35(a) and (b)(1) and (2), and the Title II implementing regulation at 28 C.F.R. § 35.130.

2. Whether the District discriminated against the Student by subjecting him to harassment on the basis of disability, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(i)-(vii) and 28 C.F.R. § 35.130(a) and (b)(1)(vii).

In reaching a determination, OCR reviewed relevant documents, which were submitted by the

District, and interviewed the Complainant, the Student, and District and School personnel. Based on the investigation, OCR determined that there was sufficient evidence to establish that the District failed to comply with Section 504 or Title II, as alleged. We set forth the bases for this determination below.

### Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.4(a) and (b)(1)(i)-(vii) provides 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 Federal financial assistance. A recipient, in providing any aid, benefit, or service, may not, on the basis of disability, deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service, or afford a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others, or provide different or separate aid, benefits, or services to disabled persons unless such action is necessary to provide qualified disabled persons with aid, benefits, or services that are as effective as those provided to others.

The Section 504 regulation at 34 C.F.R. § 104.33(a) and (b)(1) provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

Implementation of an Individual Education Program in accordance with the Individuals with

Disabilities Education Act (IDEA) is one means of meeting this standard.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires that a recipient evaluate any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in a regular or special education program. The Section 504 regulation at 34 C.F.R. § 104.35(b) requires a recipient to establish standards and procedures for the evaluation and placement of students with disabilities.

The regulation at 34 C.F.R. § 104.36 requires a recipient that operates a public elementary or secondary education program or activity to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardians of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. With respect to recipients' FAPE obligations, the regulation implementing Title II at 28 C.F.R. § 35.130(a) and (b) is interpreted consistently with the standards set forth in the Section 504 regulation.

As set forth in Appendix A, Subpart D, of the Section 504 regulation, it is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the District complies with the "process" requirements of the Section 504 regulation concerning identification and location, evaluation, and due process procedures.

### **Factual Findings**

#### **Issue #1: Whether the District Denied the Student a Free Appropriate Public Education by Failing to Evaluate the Student for a Section 504 Plan to Address**

#### **His Disability During the 2009-2010 School Year, in Noncompliance With the Section 504 Implementing Regulation at 34 C.F.R. §§ 104.33(a) and (b)(1) and (2) and 104.35, and the Title II Implementing Regulation at 28 C.F.R. § 35.130**

##### **Failure to Conduct Timely and Appropriate Evaluation**

Documentation revealed that the Student has a severe allergy to peanuts and is also allergic to tree nuts, grass, tree and weed pollen, dust mites, and dog and cat dander. The Student has had written Individual Health Plans (IHPs) throughout his enrollment in the District. Documentation provided by the District indicates that the Student has attended four different schools within the District and during this time (approximately six years), he has never had an anaphylactic reaction, had to use an Epi-pen or had to have a dose of Benadryl while at school. At the beginning of the 2009-2010 school year, the Student was enrolled in the sixth grade at the Ringgold Middle School (RMS).

The cafeteria manager at RMS explained to OCR that several years ago, the District's food allergy protocol<sup>1</sup> was developed. District personnel met with two allergists practicing in Chattanooga, and asked them to look over the District's protocol and make any suggestions they believed to be necessary; however, no suggestions were made.

On August 3, 2009, a Student Support Team (SST) meeting was held to discuss procedures RMS would take in order to provide a safe environment for the Student. The SST included the SST/Section 504 Coordinator, the Principal, the District's Director of Child Nutrition, two assistant principals, an instructional specialist, the cafeteria manager, two teachers, the academic coach, and the Complainant and her husband. The Student came at the end of the meeting for introductions.

During the meeting, the Complainant requested that each student's lunch bag be inspected for peanut products before being allowed into the Student's

classroom. However, it was agreed that a letter would be sent home to all parents in the Student's classroom notifying them that a student was in the classroom who had a life threatening peanut allergy. The letter would also request parents not to send or bring products to the classroom that contain tree nuts, peanuts, peanut oil or other products that have been manufactured in a plant that contains peanuts. It was also requested and agreed that all students in the Student's class wash their hands after lunch. The placement of Epi-pens was also discussed. It was determined that the Student would not be allowed to carry an Epi-pen in his backpack and that a staff member would administer the Epi-pen, if needed. The Complainant wanted and it was agreed that the Student would be allowed to carry a cell phone with him. A paraprofessional or teacher was to follow the Student as he moved from room to room or to the cafeteria, etc. The Complainants indicated that the Student could go to the movies or on a school field trip, if his seat was cleaned using a wipe before he sat down. It was agreed that the Student would not ride the school bus and that his brother would pick him up from school. It was determined that a table, which would be wiped down with soapy water, would be set up for the Student to use in the cafeteria. The Student's friends could eat with him as long as they were not eating any foods containing peanuts. The cafeteria manager indicated that she would make sure that labels of all food in storage were checked for peanuts or peanut by-products.

On August 5, 2009, the school nurse assigned to RMS drafted an IHP for the Student after reviewing the physician's July 30, 2009 report. The school nurse sent the Complainant an email requesting any changes that she might want to make to the IHP. The Complainant disagreed with the use of Benadryl for minor reactions; however, the school nurse could not make the requested change because the doctor's statement indicated that Benadryl was to be used for minor reactions.

On August 13, 2009, an SST meeting was held in order to discuss the Student's IHP and whether a

Section 504 plan would be appropriate for the Student. The SST included the SST/Section 504 Coordinator, the school nurse, two teachers, the Principal, the counselor and a representative from student services. At that time, the Complainant brought in a written plan designated as a "504 Plan" which she and her husband had developed. The minutes from the District indicate that the SST/Section 504 Coordinator explained that in order to determine eligibility for a Section 504 Plan, the District must have documentation of a qualifying disability, the effect on a major life activity, and the impact on the student's education. She explained that they needed to gather additional information before making a determination. The Complainant and her husband were asked to explain what they wanted that was not in the IHP or the food allergy protocol. They stated that they wanted a written protocol and for it to be given to all core teachers, as well as carried in the Student's backpack or to go with the Epi-pen. They stated that at the last meeting nothing was put in writing. They further stated that they wanted all substitute teachers to be trained in the use of the Epi-pen and to know the Student's protocol or plan. The Complainant and her husband wanted to be assured that if the Student goes to the computer lab, the keyboards and area he would be working on would be wiped down. They stated that they wanted what was written to become a Section 504 plan because a Section 504 plan is a written plan and must be followed. Therefore, a meeting was scheduled for August 21, 2009, so that the staff could consider the proposed "504 Plan" submitted by the Complainant and obtain the Student's most current test results and medical records. The Complainant signed a medical authorization for the District to obtain the records. No written due process information was provided to the Complainant or her husband related to the meeting.

Documentation provided by the District indicated that the Complainant and her husband made various complaints that the Student's "504 Plan" was not being complied with, referring to the Complainant's proposed plan. Further on August 17,

2009, they emailed complaints to the District alleging discrimination, and stating that "a 504 plan is needed, warranted and must be put in place." Evidence shows that the proposed plan was never adopted by the District and the Student never had a Section 504 plan at any time while enrolled in the District.

On August 21, 2009, the Complainant requested that the Student be transferred to HMS. The Complainant stated that she made the request because HMS had a plan in place for students with severe peanut allergies; was following procedures for cafeteria ingredients review and table wash-downs; and had been using the county's written allergy protocol with students who had peanut allergies. The Complainant believed that HMS had more experience with students who have allergies and could provide the Student with a safe environment. According to the SST/Section 504 Coordinator, the Complainant stated that "in order to avoid a 504 Plan, she thought it was best to have him moved." The SST/Section 504 Coordinator explained that the Director of Student Services handles student transfers and the SST/Section 504 Coordinator contacted the Director of Student Services and explained the matter to her. In a conference call with the Director of Student Services, the SST/Section 504 Coordinator, and the Complainant, it was explained that the Superintendent wanted them to meet again and to work out a plan for the Student at RMS. The Complainant stated that RMS had never given them anything in writing, and she believed that the Student was in an unsafe environment because there was no plan in place to protect him. The Complainant was instructed to make her request for a transfer in writing to the Superintendent and she did so at that time.

The SST/Section 504 Coordinator told OCR that the Complainant dropped her request for a Section 504 plan with the stipulation that the Student could be transferred from RMS to HMS which is an out-of-zone school for the Student's residence. The Complainant and her husband told OCR that they did not drop their request for a 504 Plan due to the Student's transfer. On August 25, 2009, the District

transferred the Student from RMS to HMS as requested by the Complainant. No request for a Section 504 plan was made to the District 504 Coordinator or to anyone at HMS after the transfer occurred.

On August 26, 2009, a meeting was held at HMS in order to discuss the Student's IHP for anaphylaxis to peanuts. The meeting minutes state that the purpose of this meeting was to discuss the incoming student, who has severe allergies, and to address concerns. The Complainant and her husband were not given any due process rights related to this meeting. Persons attending the meeting included the Complainant and her husband; the Student; the Student's social studies, science, language arts and math teachers; the school nurse; and the HMS Principal, assistant principal and school counselor. The Complainant and her husband stressed their concerns including the Student's safety -- in particular during lunch, in classrooms and during breaks. They discussed practices which were already in place for allergy issues. For example, cafeteria staff had already removed peanut products from the ingredients in the meals that were served; a special booth existed for students with allergies and the booth and table would be sanitized to remove possible peanut residue and proteins; and, the Student's friends would be allowed to sit with him in the cafeteria so long as they did not have food from outside the cafeteria. Additional steps already underway included wiping down the computer keyboard, requesting that vendors remove peanut products from the vending machines, notifying parents of students concerning the presence of one or more students with peanut allergies; requesting that parents not allow students to bring peanut products in the school, having Epi-pens in the school, and other measures.

On December 8, 2009, an SST meeting was held in order to modify the Student's IHP. Members of the SST included the Principal, the Director of Student Services, the school nurse, and the student's homeroom and math teachers. However, the Complainant and her husband were invited but did not attend. The Complainant and her husband were not

given any due process rights related to this meeting. The SST agreed on the following: (1) The Student would be allowed to carry a cell phone at all times for the purpose of having a communication device in case of an emergency and (2) A sign would be posted by the substitute teacher sign-in sheet in the main office and in the substitute teacher folder located in the classroom notifying the substitute teacher that a student might have a life threatening allergy to peanuts. Listed on the sign would be the symptoms to look for along with the protocol to follow in case an allergic reaction takes place. The following items would be added to the County Food Allergy Protocol under the "School's Responsibility" section: (1) HMS will request that the snack machine vendor not put any products containing peanuts and tree nuts nor manufactured in a facility that processes peanuts or tree nuts in the vending machines located throughout the building; (2) Chick-Fil-a chicken biscuits would be sold outside of the building and could only be consumed in the dining hall per the Principal; (3) the Complainant and her husband would be notified in advance of upcoming field trips in order to discuss safe procedures and protocol for the Student; (4) the Student would be allowed to carry a cell phone at all times for the purpose of having a communication device in case of an emergency; and, (5) every nine weeks a generic parent/guardian letter would be sent home, requesting cooperation in classrooms. The letter would explain that there is a student in the classroom with a life threatening allergy to peanuts and tree nuts. It would also ask parents not to send or bring products to the classroom that contain tree nuts, peanuts, peanut oil or other products that have been manufactured in a plant that contains peanuts.

OCR found that the District did not provide the Complainant or her husband their due process rights before or at any of the SST meetings. The District acknowledges that written due process rights were not provided to the Complainant or her husband related to the above meetings. However, the District contends that the Complainant and her husband are fully aware of their due process rights and that the due process

rights are available on the District's website. Additionally, the Nurse and SST Director for the District informed OCR that they do not provide due process rights to any parents or guardians with an IHP for allergies. The Nurse also stated to OCR that they do not evaluate students who have an IHP under Section 504.

In a letter to OCR, dated May 19, 2010, the District indicated that on May 13, 2010, the District received an email from the Complainant requesting a Section 504 plan for the Student for the 2010-2011 school year. On the same date, the District sent a letter to the Complainant notifying her of due process rights and offering to set up an evaluation meeting, a request from the District to conduct an independent medical examination of the Student by a board-certified allergy specialist and a request for clarification of whether she was requesting a Section 504 evaluation for the Student.

### Summary

OCR notes that although an individual issue was presented with respect to the failure to evaluate, the evidence shows that the School has a practice of not evaluating students with allergies under Section 504 and instead providing IHPs. During an interview with OCR, the Section 504 coordinator stated that there was only one student with a food allergy who had a Section 504 Plan and that she was not the Section 504 Coordinator at the time the Section 504 Plan was developed for that particular student. She stated that the District did not have good IHPs at that time and the District wanted to make sure that the student's needs were being met. She contended that currently the IHPs are more intensive than Section 504 Plans and therefore can provide appropriate services.

A district is obligated to evaluate any child suspected of having a disability as defined by the Section 504 regulation to determine whether the child has a disability and because of that disability, needs special education or related aids or services. The required evaluation must be conducted prior to taking any action with respect to the initial placement of the



child in regular or special education and any subsequent significant change in placement. If a parent requests an evaluation of his or her child and the district declines to evaluate the child because it does not believe the child is in need of regular education with supplementary services or special education and related services, the school district must explain to the parent the reason for the refusal and inform the parent of his or her right to due process to challenge the decision not to evaluate.

The Complainant maintains and the Section 504 Coordinator has substantiated that the Complainant first requested that a Section 504 plan be developed for the Student in a meeting on August 13, 2009 at RMS and brought a proposed Section 504 plan to be adopted at that time due to the Student's severe peanut allergy. However, according to a statement provided by the SST/Section 504 Coordinator, on August 21, 2009 the Complainant contacted the Coordinator and stated that in order to "avoid a Section 504 Plan," she thought it best to have the Student transferred to HMS. The Complainant's husband contends that their request for a 504 Plan was never dropped due to the transfer.

Once a District suspects that a student has a disability, it has an obligation to initiate an evaluation of the Student. Therefore, OCR finds that regardless of whether the Complainant and her husband requested the Student's transfer in order to "avoid a 504 Plan," it was the District's duty to evaluate the Student, once it was aware of a potential disability. OCR found that the District had information about the nature and severity of the Student's peanut allergy indicating that the Student could have a fatal reaction to peanuts and that steps must be taken to prevent the Student's exposure to peanuts and to ensure immediate treatment in case of exposure. Because of the severity of the Student's peanut allergy and information indicating the necessity for taking precautions in the school setting, the District had sufficient information to suggest that the Student may have a disability-related need for related aids and services. Although the District took steps to prevent

the student's exposure to peanuts, the District did not conduct a timely evaluation of the student, as required under the regulations implementing Section 504 at 34 C.F.R. § 104.35, before determining what services to provide to the Student. Further, the District has a practice of not considering Section 504 eligibility for students with IHPs. OCR notes that the District has agreed to resolve these issues by submitting the enclosed Resolution Agreement (Agreement).

### **Unalleged Procedural Concerns**

#### **a. Procedural Safeguards – Impartial Hearing**

The Section 504 regulation at 34 C.F.R. Section 104.36 requires that a recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

The Section 504 regulation at 34 C.F.R. § 104.36 and Appendix A state that parents must be offered an opportunity for a hearing before any action is taken regarding the identification, evaluation, or educational placement of their children who, because of disability, are believed to need special instruction or related services. For example, parents have a right to a hearing to challenge a school district's determination that their child is not disabled or does not need special education or related aids and services.

OCR requested a copy of the current policies and procedures utilized by the District to provide for the identification, evaluation, and placement of students with disabilities under Section 504. The District provided two separate policies governing the provision of procedural safeguards to parents or guardians regarding the identification, evaluation and

placement of students with disabilities. The District provided OCR copies of the "Notice of Rights of Students and Parents Under Section 504" (Notice). This Notice states that discrimination based on disability is prohibited and outlines procedures to be followed if a parent or student alleges they have been subjected to discrimination on the basis of disability under Section 504.

The Notice states that a parent or student has "the right to an impartial hearing, through the school system's Formal Grievance Procedure, with respect to the school system's actions or inactions regarding the child's identification, evaluation, or educational placement, with an opportunity for parental participation in the hearing and representation by an attorney." The Notice further states that "if you disagree with the decision of the impartial hearing officer, you have a right to a review of that decision according to the school system's Formal Grievance procedure."

The District's Formal Grievance Procedures, entitled, Board Policy Hearings (Appeals), Descriptor Code: BCAEA, provides that any employee, student, applicant for employment, parent or other person who believes he or she has been discriminated against must make a written complaint on the complaint initiation form. The complainant must file the complaint with the Principal of the school or the coordinator designated by the Board of Education. The complainant can appeal to the Superintendent of Schools. If the complainant is dissatisfied with the response of the Superintendent, then the complainant shall have the right, within 15 days to have the complaint referred to the Board of Education. In order to have the Board review the Superintendent's decision, the complainant must file with the Superintendent a written statement setting forth the reasons he or she disagrees with the response of the Superintendent and the action the complainant is requesting the system take. The complainant shall also include in the written response a request that his or her complaint be referred to the Board of Education. The Board shall review the original

complaint, the response of the coordinator or designee, the response of the Superintendent, and the response of the complainant. If the complainant has a due process right to a hearing, the board shall conduct a hearing or refer the matter to a tribunal to conduct a hearing and the Board will either uphold the recommendation of the Superintendent or require the system to take some other action in response to the complaint. The Board shall be the final reviewing authority within the system.

### Summary

The procedural safeguard requirements for the Section 504 regulation at 34 C.F.R. § 104.36 state that hearings must be impartial with an opportunity for participation by parents or guardians and representation by counsel. OCR adheres to a standard of fundamental fairness and looks to case law and other decisions under the IDEA for guidance in interpreting what is reasonable. While specific requirements of the IDEA or state law are not applied automatically, they serve to guide our determination of reasonableness.

With regard to who is an impartial hearing officer, OCR applies judicially recognized principles of fairness. For example, school districts may not use their own employees as hearing officers, nor may they use employees of a district that shares a contractual arrangement for the provision of services to children with disabilities. Further, school board members may not serve as hearing officers in proceedings conducted to resolve disputes between children with disabilities and officials of their school system.

Based on the above, OCR determined that the District failed to provide appropriate procedural safeguards to parents or guardians because they did not provide for an impartial hearing, with a hearing officer that is not a District employee. Specifically, the policy provided that a complaint is to be filed with the Principal, the complainant may appeal to the Superintendent and the School Board shall be the final reviewing authority within the system. It did not provide that parents or guardians can request an

impartial hearing by a hearing officer who is not a current District employee. The District indicated to OCR that it was willing to revise its policies and procedures to ensure that they explicitly included an impartial hearing. On November 1, 2010, the District provided evidence that it had changed its policies and procedures to ensure that they include an impartial hearing by a hearing officer who is not a current District employee. Accordingly the concerns regarding this issue have been resolved.

#### **b. Failure to Provide Notice of Procedural Safeguards**

As noted in the discussion of the factual background for Issue 1, the Complainant and her husband were not provided notice of their due process rights related to the August 29, 2009 meeting concerning the proposed 504 plan submitted by the Complainant; nor was such notice provided at any meetings regarding the Student's IHP. The District contended that the due process rights are available on the District's website. In interviews with OCR, the Section 504 Coordinator stated that the notice of procedural safeguards is provided in writing to parents of students being evaluated under Section 504. With respect to IHPs, evidence shows that the SST meets in order to develop an IHP and the School does not provide notice of procedural safeguards in connection with this process.

##### **Summary**

Based on the above OCR finds that the Complainant was not provided notice of her due process rights, and the District's posting of procedural safeguards on the District's website does not meet the notice requirements of the regulations implementing Section 504 at 34 C.F.R. § 104.36.

However, during OCR's investigation, the District provided evidence that parents of all students in the District who have IHPs were sent letters on October 29, 2010, offering them a Section 504 eligibility evaluation meeting upon their request. The district has ensured OCR that all parents requesting an evaluation or parents of students evaluated for

placement under Section 504 are now notified of the existence of procedural safeguards and of their right to an impartial hearing<sup>2</sup> in the District's "Notice of Rights of Students and Parents under Section 504/ADA." The District provided evidence that on May 13, 2010, the District, in response to an email message from the Complainant requesting a Section 504 Plan, sent a letter to the Complainant which included due process rights. The District also provided evidence that its IHP meeting minutes form has been revised to provide a check-off sheet to insure that parents and guardians of students who are provided with IHPs will be informed of their rights under Section 504, and offered an eligibility determination meeting under Section 504.

#### **c. Entitlement to FAPE**

During its investigation, OCR also reviewed the document entitled, "Procedures for Writing Section 504 Plans (Procedures)" and found inconsistencies in wording and the definition of "substantial limitations." First, the Procedures inconsistently describe what services students with disabilities are entitled to receive under Section 504. Some portions of the Procedures state that students with disabilities are entitled to mere "accommodations", and in other parts of the 504 manual, it states that students are entitled to "accommodations and/or services". Specifically, item D, entitled "Learning Environment Identified," states that the "committee determines the learning environment in which the student may be taught with the outlined accommodations," while item C, "Necessary Accommodations Identified," states that "the committee determines what accommodations and/or services" must be provided ...." Second, OCR's review of the Procedures section entitled, Determining Substantial Limitations, found that it was not consistent with the definition of an individual with a disability under Section 504 at 34 C.F.R. § 104.3(j).

##### **Summary**

Based on the above, OCR has determined that the District's procedures are inconsistent and may



cause District staff to be unaware of their full obligations to understand what a qualifying disability may be and provide the correct services to students with disabilities. Specifically, a FAPE consists of more than mere "accommodations," and includes general education, special education, and/or related aids and services.

Accordingly, the District submitted the enclosed signed Resolution Agreement, agreeing to revise its Procedures to make clear: (1) that the District is obligated to provide students who are covered under Section 504 with a FAPE, including general education, special education, and/or related aids and services, and (2) that the definition of substantial limitations is consistent with the definition of an individual with a disability set forth in the Section 504 regulation at 34 C.F.R. § 104.3(j). When fully implemented, the Resolution Agreement will resolve this procedural issue.

**Issue #2: Whether the District Discriminated Against the Student by Subjecting Him to Harassment on the Basis of Disability, and Whether the Alleged Harassing Conduct by District/School Officials Was Sufficiently Severe, Persistent or Pervasive to Have Created a Hostile Environment for the Student, in Noncompliance With the Section 504 Regulation at 34 C.F.R. §§ 104.4(a) and (b)(1)(i)-(vii) and the Title II Regulation at 28 C.F.R. § 35.130**

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying the student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

If OCR determines that a hostile environment

exists, OCR will evaluate whether the hostile environment was created by a recipient employee in the context of carrying out responsibilities in relation to students and if not, whether the recipient had actual or constructive knowledge of the alleged harassment, and whether or not the recipient took prompt and effective action to redress the hostile environment.

**a. Continuing to Allow Peanut Products to Be Sold in Vending Machines at the School**

The Complainant alleged that the District continued to allow the sale of peanut products from vending machines although she and her husband have continually explained to District staff that the Student has a severe allergy and exposure to peanut products could be life threatening.

OCR found that the Student transferred to HMS on August 25, 2009, and on August 26, 2009, an SST meeting was held. The SST agreed that HMS would instruct the snack machine vendor to avoid putting any products containing peanuts and tree nuts, or products manufactured in a facility that processes peanuts or tree nuts, in the vending machines located throughout the building. The HMS Principal explained that he contacted the vending machine company by telephone notifying the company that it should not place nut products or products manufactured in the same plant as nut products in the vending machines. According to the Principal, during October, 2009, he once again contacted the vending machine company and requested that items containing peanuts or tree nuts or that have been manufactured in a facility that processes peanuts or tree nuts not be placed in the vending machines. The District also provided OCR copies of letters dated December 8, 2009, and January 28, 2010, addressed to the vending machine company from the HMS Principal requesting that products with peanuts or tree nuts or that have been manufactured in a facility that processes peanuts or tree nuts not be placed in the vending machines. Evidence also shows that the HMS Principal placed laminated signs on each vending machine stating, "Attention! This is a formal request from Heritage

Middle School. Please do not put any products containing peanuts and tree nuts nor manufactured in a facility that processes peanuts or tree nuts in your machines located throughout our building. If you have any questions, please contact the main office." A chart or grid listing each item to be placed in the machines was also developed to facilitate filling the machines with proper non-nut products. The HMS Principal further stated that he met with representatives from the vending machine company on February 8, 2010, because the company failed to adhere to his request.

OCR discovered that on several occasions during the 2009-2010 school year, the Student had purchased items with peanuts or peanut products from the vending machines and taken the items to a teacher or the Principal in order to show that the items were being placed in the machines. In interviews with OCR, the Student's teachers indicated that whenever any item containing peanuts was found in the vending machine, the vending machine was turned off and unplugged so that no items could be purchased.

OCR found during its investigation, that on May 12, 2010, an item containing peanuts or peanut products was purchased by the Student from a vending machine at HMS. Documentation provided by the District indicates that on May 13, 2010, the Principal notified the vending machine company that it would have to remove all of the vending machines from the school because peanut products continued to be placed in the machines, and those machines were all unplugged and tied with plastic. The vending machines were subsequently removed from the School.

In summary, the vending machine company continued to place items containing peanuts or peanut products in vending machines at HMS over a nine-month period while the Principal attempted to remedy the situation by placing signs on the vending machines, sending letters to the company, and meeting with the company regarding his requests. Because the vending company failed to cooperate, the Principal finally had all vending machines removed

on May 13, 2010. OCR finds that because it took the Principal nine months (from August 2009 to May 2010) to finally have the vending machines and peanut removed from HMS, his actions were neither prompt nor effective. OCR concludes that there is sufficient evidence to show that the District's actions constituted harassment of the Student regarding this allegation.

#### **b. Allowing Chick-Fil-a Biscuits to Be Sold at the School**

The Complainant alleged that every Friday HMS allows the restaurant chain, Chick-Fil-a, to come on school property and sell breakfast sandwiches to all students. Because Chick-Fil-a makes its products with peanut oil, the Student cannot be around any of its food items. According to the Complainant, the Student is forced to go straight to his classroom in order to avoid a life threatening attack.

Evidence shows that Chick-Fil-a chicken biscuits are sold at HMS in the morning before school begins on the last day of the week. As students are dropped off at school, biscuits can be purchased for vehicle occupants, students exiting the vehicle, and students present at the school. In interviews with OCR, the Principal stated that although the food services department's research indicated that Chick-Fil-a biscuits do not pose an allergenic risk, the biscuits can only be eaten in the HMS cafeteria. In interviews with OCR, the Student's homeroom teacher and the Principal indicated that the Student eats breakfast at home, and in most cases arrives at school in time to go to homeroom. On the occasions that he arrives earlier, he does not enter the cafeteria where the biscuits are being eaten. On September 18, 2009, the Principal issued a memo to all staff stating that because more and more of the students were being affected by peanut allergies chicken biscuit consumption was to be limited to the cafeteria.

In conclusion, OCR finds that the District appropriately responded to the Complainant and her husband's concern related to the Chick-Fil-a biscuits, which are only available in the morning on the last

day of the week, by limiting the Chick-Fil-a biscuit consumption to the cafeteria. Accordingly, OCR finds that the District's conduct in this regard is not harassing and is not severe, persistent or pervasive.

**c. Allowing Cakes With Potential Nut Ingredients to Be Made in Home Economics and Sold to Other Students at the School**

The Complainant alleged that on Fridays the students in home economics class sell to other students, cookies that they have made in class and the cookies endanger the Student's life.

Evidence shows that students in the home economics class sell Otis Spunkmeyer cookies made from pre-frozen dough daily. The cookies are sold from the home economics classroom which is adjacent to the seventh and eighth grade hallways and not close to the sixth grade hallway where the Student has classes. In interviews with OCR, the home economics teacher maintained that she had contacted the maker of the cookie dough, and was told that the ingredients contain no peanut or nut products. She further maintained that the manufacturer advised that although the plant makes other nut products on certain days, the processing line is completely broken down, sanitized and tested for allergens to ensure that no nut residue proteins are present. The Complainant maintains that the cookies made in the home economics class are not safe because they are processed on equipment that also processes peanuts and tree nuts; however, the Complainant could not present any evidence to support her contention.

In conclusion, OCR finds that there is no evidence that the home economics class is selling potential nut products and accordingly the evidence does not support a conclusion that the sale of the cookies constitutes conduct that is harassing on the basis of the Student's disability and is severe, persistent or pervasive.

**d. Allowing the Student's Teacher to Single Him Out in the Classroom as a Student With a Peanut Allergy**

The Complainant alleged that on the first day of class at RMS, the teacher announced to the class that there was a student in the class with life threatening allergies to peanuts and to not bring peanuts or nut products into the classroom. The Complainant further alleges that the teacher made the Student stand up so that the rest of the class could see who he was talking about.

Evidence shows that on August 7, 2009, while the Student was enrolled at RMS, his math/social studies teacher handed out notices to be sent home to all parents that stated that a student in the school has allergies to peanuts and other various tree nuts. When the notices were being passed out, a female student asked, "Who is allergic to peanuts?" In interviews with OCR, the teacher indicated that before he could explain that they could not discuss the matter in class, a male student responded to the female student that the Student was allergic to peanuts, and then the Student turned to her, smiled and waved. The teacher stated that he did not acknowledge that the male student was correct, or make any statement or gesture that he was correct, but simply told the class that "we cannot discuss the matter." The teacher informed OCR that the male student explained that he knew the Student from elementary school where his name and picture were posted on the wall with a notation that he is a student with a peanut allergy. The teacher contended that at no time did he ever directly or indirectly inform any student or students that the Student had a peanut allergy or any allergy. The teacher also indicated that he reported the incident to the Complainant during the SST meeting on August 13, 2009.

In conclusion, OCR found that there are conflicting statements regarding whether or not the teacher revealed that the Student has a peanut allergy to the class. Based on the preponderance of the evidence, OCR has found that there is insufficient evidence to support a conclusion that this incident occurred as alleged, and therefore OCR finds there was no harassment regarding this alleged incident.

**e. Allowing Other Students to Call the**

### **Student Names**

The Complainant alleged that on the first day of school during the 2009-2010 school year, the person supervising the students in the after school program at RMS asked the Student if a certain snack was safe in front of all of the other students. The Complainant indicated that the Student stated that it was not safe because it was made on the same lines that process peanuts and tree nuts. The Complainant further stated that a few minutes later the kids were playing dodge ball and another student called the Student "peanut boy" because he had heard he was the student who was allergic to peanuts and had caused the class not to get a snack.

District officials stated that on August 10, 2009, they announced to the after-school students that they had some students with severe peanut allergies and that they could not have anything with peanuts or that may contain peanuts in the after school program (Program). In an affidavit, an after-school program staff member stated that the Student raised his hand and said, "It's me, I'm the one with the peanut allergy."

District officials further stated that on August 14, 2009, during the after-school program, several students were engaged in a dodge-ball game inside at the RMS gymnasium. The Student threw a Nerf ball toward Student #2 several times, repeatedly hitting him in the face, rather than hitting him on the legs or trunk of his body. Student #2, who was hit with the ball, became upset and responded by saying words to the effect of, "stop hitting me in the face, peanut boy." At that time, a staff member intervened and reported the incident to the Director of the Program. In response, the Director of the Program maintained that the incident was immediately reported to the Complainant and her husband. The Director also maintained that she discussed the incident with Student #2 and told him that three days of activity time would be taken away from him. Student #2 indicated that he would not be coming back to the after school program, and therefore, the Director told Student #2 that he had to apologize to the Student for

calling him "peanut boy." The Director stated to OCR that when she later followed up with Student #2 about the apology, he told her that he had written an apology and given it to the Student, but the Student immediately balled the apology up and threw it away. In an interview with OCR, the Complainant indicated that the Student had informed them that after the incident happened, Student #2 was immediately placed in time out, but they were unaware of any written apology being given to the Student.

In conclusion, OCR found that on one occasion a student referred to the Student as "peanut boy," the District responded appropriately to this incident and there was no recurrence of the name-calling. Therefore, OCR concludes this allegation did not amount to harassment.

### **f. Making the Student Go to the Nurse's Office When Other Students Are Allowed to Eat Nut Related Snacks in the Classroom**

The Complainant alleged that on September 14, 2009, a student brought a science project made from cake to class. The teacher took the cake from the student and asked the Student if he could eat the cake. The teacher sent the Student to the nurse's office so that the nurse could find out if he could eat the cake. The nurse called the Complainant and the Complainant asked what ingredients were in the cake and who had made it. Because the nurse did not know, the Complainant explained that the Student could not eat any of the cake.

The Student's Earth Science teacher stated in interviews with OCR and also in a written affidavit that she assigned a performance standard project, which required students to produce a physical model of the earth's layers and to bring it to school. She provided examples (Styrofoam balls, play dough, cake, etc.) of items that can be used. She sent a letter to parents on August 28, 2009, describing the project. On September 14, 2009, a student brought in a cake for this project. The teacher maintained that she asked the Student if he could eat the cake, and he stated that

he did not know. The teacher further maintained that she asked the Student if he would like to go and call the Complainant at the nurse's office and ask her if it was okay, and the Student said that he wanted to go to the nurse's office. The teacher stated that when the Student returned to the class, the activity was over, and she had saved him a piece of cake in case he could eat it. She contended that she did not make the Student go to the nurse's office but believed that it was the appropriate location for the Student to call the Complainant because the nurse would be able to assist in any medical issues that might arise. The teacher indicated that she explained the incident to the Complainant later the same day.

District staff indicated that on another occasion, the sixth grade team had hot cocoa during an activity held in the cafeteria. Documentation provided by the District revealed that the ingredients of the cocoa were reviewed, and there was nothing to indicate peanut products were in the cocoa. Because the Student was uncomfortable drinking the cocoa, one of the teachers offered him a Pepsi which he drank.

In summary, OCR found that in both of these incidents, District staff responded promptly and effectively to ensure the Student's safety related to the Student's peanut allergy, and there were no intimidating, demeaning or humiliating actions taken by District staff. Therefore, OCR finds that the incidents were not harassing and were not severe, persistent, or pervasive.

#### **g. Planning Field Trips Where the Student Is Exposed to Peanut Products**

The Complainant alleged that HMS sent a letter home stating that on November 23, 2009, the School was taking all sixth grade honor roll and star roll students on a field trip to the movies at a theater and then to the mall food court for lunch where the Complainant contended that the Student would be exposed to peanuts and/or peanut products.

Evidence shows that in November 2009, HMS planned a Renaissance<sup>3</sup> field trip to the theater to see a movie and to the mall food court for lunch. On

November 23, 2009, students would leave around 8:30 am and return to the building by 2:00 pm. In an email message to the Complainant, dated November 6, 2009, from the Principal, the Principal stated that the school nurse would attend the trip with an Epi-pen in case of emergencies. In an email message, dated November 4, 2009, the Complainant contacted the Principal voicing her concern and belief that HMS was discriminating against the Student and putting him in a life threatening situation by choosing the mall food court for lunch. In interviews with the Principal and according to an affidavit provided by him, HMS offered the Complainant the following options: (1) to sterilize the table where the Student would sit and position him away from Chick-Fil-a and ethnic eateries or (2) the Complainant could pick the Student up after the movie and take him to lunch.

The Complainant did not agree with either of these options. The Principal informed OCR that he then told the Complainant that he would take the Student and a few of his friends to CiCi's Pizza in his vehicle. However, the Complainant decided to pick the Student up from the theater and take him to lunch.

In summary, OCR found that the District provided the Complainant two options to address her concerns about the safety of the field trip. Therefore, OCR finds that this allegation does not amount to harassment.

#### **h. Not Providing Him With an Alternative Class for Home Economics**

The Complainant alleged that the District does not provide alternative classes for home economics although they cook items that contain peanut products and prevents the Student from taking the class.

Evidence shows that the home economics class is one of six different classes available as options for a sixth-grader to take as a "connections" class. Other classes include: keyboarding, technology, physical education, and drama. District staff indicated, however, that if the Student chose to take home economics, there would be no risk of the Student being exposed to nut products because these products



are not used in that class.

In summary, the evidence is insufficient to support a conclusion that if the Student opts to fulfill his "connections" class by taking home economics, he will be exposed to peanuts; therefore, OCR has found that there is insufficient evidence to support a conclusion that the Student is prevented from taking home economics and the District therefore engaged in harassing conduct as alleged.

### Summary

OCR reviewed the evidence under the preponderance theory to determine whether based upon the totality of circumstances, the Student was subjected to harassing conduct that was sufficiently severe, persistent or pervasive to have limited the Student in his participation in the District's program and if so, whether the hostile environment was either created by a District employee, or if not created by a District employee, whether the District had actual or constructive notice of the hostile environment and failed to take prompt and effective action to redress it. Based on the evidence discussed above, OCR finds that the evidence was insufficient to corroborate some of the alleged incidents or circumstances. Specifically, the evidence was not sufficient to demonstrate that the cookies sold by the home economics class are unsafe (Issue 2c), that the Student's teacher told the class that he had a peanut allergy (Issue 2d), or that the home economics class cooks items containing peanut products (Issue 2h).

Further, some of the incidents alleged by the Complainant did not involve conduct that was intimidating, humiliating, insulting or otherwise harassing in nature. Specifically, the evidence shows that the District restricts the location where Chick-Fil-a biscuits can be sold and consumed, so that the Student will not be exposed to the biscuits (Issue 2b). With respect to the allegation that the Student was required to go to the nurse's office while other students ate nut-related snack items in the classroom (Issue 2i), the evidence shows that on one occasion a Student brought in a cake as a class

project; District staff did not know whether the cake contained nut-related products; and, the Student was allowed to go to the nurse's office to call the Complainant to ask whether he could eat the cake. On a second occasion, cocoa was served after the District determined that it did not contain peanut products; however, because the Student was uncomfortable drinking the cocoa, he drank a Pepsi instead.

The evidence shows that on one occasion, a student referred to the Student as "peanut boy" (Issue 2e). The District addressed the incident promptly and effectively and the incident did not recur.

Based upon the foregoing, OCR finds that the evidence is insufficient to support a conclusion that the District is in noncompliance with Section 504 with respect to allegations (b)-(h). However, regarding Issue 2(a), OCR finds that by allowing peanut products to be sold in vending machines at the School for nine months the District engaged in conduct that was harassing in nature and failed to provide a prompt and effective response to address the Complainant's concerns for the Student's safety.

Although the Principal attempted to remedy the situation beginning in August 2009 by sending letters to the company, meeting with the company regarding his requests, and placing signs on the machine, the actions were ineffective and the nut-related products were not removed from the school until May 13, 2010, when the District had the vending machines removed from HMS. Therefore, OCR found that the District's conduct with regard to the vending machines was sufficiently severe, persistent, or pervasive as to deny or limit the Students' ability to participate in the District's program. The District voluntarily agreed to resolve the compliance issues by signing the enclosed Resolution Agreement (Agreement).

OCR will monitor the District's implementation of the Resolution Agreement. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. Further, you are advised that the Complainant may have the right to file a

private suit in federal court whether or not OCR finds a violation.

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.

This letter should not be construed as covering any other issues regarding compliance with Section 504 or Title II that may exist and are not specifically addressed in this letter. Please note that under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any unwarranted invasion of privacy.

Intimidation or retaliation against complaints by recipients of Federal financial assistance is prohibited. No recipient may intimidate, coerce, threaten or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint. We wish to thank you and your staff for the cooperation extended to OCR throughout the course of this investigation. If you have any questions about this matter, please contact Ms. Vicki Lewis, Acting Team Leader, at (404) 974-9332.

#### **Catoosa County School District, Georgia Resolution Agreement**

The Catoosa County School District (District), submits to the U.S. Department of Education, Office for Civil Rights (OCR), this Resolution Agreement (Agreement) to voluntarily resolve the above referenced complaint and to ensure compliance with

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35.

The District 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 District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the Section 504 implementing regulations at 34 C.F.R. §§ 104.4(a) and (b)(1)(i)-(vii), 104.33, 104.35, and 104.36; and the Title II implementing regulations at 28 C.F.R. §§ 35.130. Accordingly, the District agrees to implement the actions described below:

#### **Section 504 and Procedure**

1. The District will immediately determine if sufficient information exists to determine whether students at the School with individualized healthcare plans are Section 504 eligible and notify the students' parents/guardians.

(a) By February 15, 2011, the District will revise and implement policies and procedures to provide for the evaluation of students considered for placement under Section 504. This policy will include standards for determining eligibility for services under Section 504, and a statement that students with allergies or individualized healthcare plans may also be eligible for special education and/or related aids and services under Section 504.

(b) The District will revise its Section 504 policies and procedures, whether written or on-line, to consistently state that a student with a disability, who is covered under Section 504, is entitled to more than mere "accommodations", and that such students are entitled to a free appropriate public education (FAPE) that includes general education, special education,

and/or related aids and services.

(c) The District will revise its Procedures for Writing Section 504 Plan Determinations, to ensure the section on Determining Substantial Limitations includes the appropriate definition of substantial limitation of a major life activity found under Section 504 at 34 C.F.R. § 104.3(j).

Reporting Requirement: By February 15, 2011, the District will provide OCR with a copy of its revised Section 504 evaluation and placement policies and procedures.

The District will provide OCR with a copy of the District's new procedural safeguards.

Within 60 days of approval from OCR, the District will provide OCR with a copy of all handbooks where the procedural safeguards are published.

## **2. Section 504 Coordinator and Other Staff Training**

By August 31, 2011, the District will provide training to District staff involved in the evaluation and placement of students under Section 504. The training will explain the application of the District's policies and procedures pertaining to evaluation, eligibility determination and placement of students under Section 504, including how students with individualized healthcare plans may also be eligible for special education and/or related aids and services under Section 504.

The District will offer training on (a) harassment based on disability and (b) sensitivity training to ensure that all personnel are sensitive to the needs of students with allergies.

Reporting Requirements: By August 31, 2011, and upon receipt of approval from OCR, the District will provide training to appropriate staff on its Section 504 evaluation and placement policies and procedures, due process procedures, and grievance procedures. The District will submit evidence that it has conducted training in the District related to the evaluation, eligibility determination and placement of

students under Section 504, including the date of the training, the name of the trainer, the names and titles of the attendees and copies of any materials used.

By August 31, 2011, the District will provide written evidence of the sensitivity and harassment training, a copy of the agenda and any training materials provided to attendees.

## **Student Remedy**

3. By February 15, 2011, if the Complainant requests that the District evaluate the Student for Section 504 eligibility and provides consent, the District will convene a Section 504 eligibility committee meeting for the Student, consisting of a group of knowledgeable persons, to determine if the Student is eligible for regular or special education and/or related aids and services as a student with disabilities under Section 504. If the Student is determined to be eligible, the District will promptly develop a plan to provide a free appropriate public education to the Student based on his individual educational needs. Procedural safeguards pursuant to Section 504 will be provided to the Complainant and/or her husband during the evaluation and placement process.

Reporting Requirement: By February 15, 2011, the District will provide OCR with any copy of the Student's evaluation report, a copy of any minutes of the meeting held to determine whether the Student is eligible for services to meet his individual educational needs, and a description of any services that will be provided to the Student under Section 504, if such services are determined to be necessary.

## **Section 504 Eligibility for Students With Healthcare Plans**

4. By February 15, 2011, for those students with individualized healthcare plans and whose parents requested a Section 504 eligibility evaluation meeting, the District will convene a meeting to determine if any of these students are eligible for special education and/or related aids and services as students with disabilities under Section 504. If determined to be eligible, the District will promptly



develop a plan to provide a free appropriate public education to all students with individualized healthcare plans that were offered an eligibility evaluation meeting by the District and deemed eligible for special education and/or related aids and services.

Reporting Requirement: By February 15, 2011, the District will provide OCR with a copy of the minutes of the meetings held to determine whether the students are eligible for services to meet his/her individual educational needs, if appropriate, and a description of the services that will be provided to the students\* under Section 504.

The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the recipient has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 at 34 C.F.R. §§ 104.4(a), 104.33, and 104.35 and 104.61; and the Title II implementing regulations at 28 C.F.R. §§ 35.130, which were at issue in this case.

This Resolution Agreement will become effective immediately upon the signature of the District's designee below.

<sup>1</sup>The District's food allergy protocol was based on the "Food Allergy and Anaphylaxis Network Protocol" (FAAN). FAAN's mission is to raise public awareness, to provide advocacy and education, and to advance research on behalf of all those affected by food allergies and anaphylaxis. The FAAN website is [www.foodallergy.org](http://www.foodallergy.org).

<sup>2</sup>As discussed in subsection a above, the District revised its Section 504 policies and procedures to include provision of an impartial hearing by an impartial hearing officer who is not a current employee of the District.

<sup>3</sup>The Renaissance is a School wide program that rewards students for good grades and behavior.

#### **Statutes Cited**

29 USC 794  
42 USC 12131

#### **Regulations Cited**

34 CFR 104.33(b)  
34 CFR 104.33(b)(1)  
34 CFR 104.33(b)(2)  
34 CFR 104.33(a)  
34 CFR 104.35(a)  
34 CFR 104.35(b)(1)  
34 CFR 104.35(b)(2)  
28 CFR 35.130  
34 CFR 104.4(a)  
28 CFR 35.130(b)(1)(vii)  
34 CFR 104.36  
28 CFR 35.130(a)  
28 CFR 35.130(b)

111 LRP 65450

**Springer (NM) Municipal Schools  
Office for Civil Rights, Western Division,  
Denver (New Mexico)**

08-10-1057

**June 17, 2011**

**Full Text**

**Appearances:**

Dear Superintendent Lopez,

We have completed our investigation of this complaint filed against Springer Municipal Schools (District). The complainant alleged that the District discriminated against her daughter (Student) on the basis of her disability by not evaluating her for a suspected disability. We found that the District failed to evaluate the Student for special education or related aids and services where required and failed to provide procedural safeguards to the complainant. We thank the District for entering into the enclosed Agreement which, when fully executed, will resolve our compliance concerns.

We are responsible for enforcing:

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, et seq., and its implementing regulation at 28 C.F.R. pt. 35, which prohibit discrimination on the basis of disability by public entities.

The District is subject to the provisions of Section 504 and Title II because it is a recipient of Federal financial assistance from the U.S. Department of Education, a public entity.

We investigated whether the District failed to evaluate appropriately the Student for a suspected disability and develop and implement a plan to address the Student's educational needs, pursuant to

25 C.F.R. §§ 104.33-104.35, and whether the District failed to provide procedural safeguards to the complainant pursuant to 34 C.F.R. § 104.36.

We interviewed the complainant, the Student, an advocate, and District personnel. We also reviewed documents submitted by the complainant and the District. The applicable legal standards, the facts gathered during the investigation, and the reasons for our determinations are summarized below. We note that the Student is no longer enrolled in the District.

**Free Appropriate Public Education --  
Alleged Failure to Evaluate the Student**

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires that recipients that operate elementary or secondary education programs or activities conduct evaluations of any person who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement, in addition, a recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of disability, needs or is believed to need special education or related aids and services.

The District's booklet, entitled "Parent and Child Rights in Special Education Procedural Safeguards Notice," lists two requirements for students to participate in its special education program. First, the child must be found to have a disability as defined by IDEA. Second, the disability must affect the child's ability to learn and progress in the same educational program or setting provided for all students. The District provided no other documentation setting out procedural safeguards pursuant to Section 504.

There is no dispute that the student, a seventh grader who attended Miranda Middle School, had been diagnosed with pancreatitis when she was younger and was frequently absent from school for extended periods of time during the 2008-09 school year, and previous school years, due to her medical

condition.<sup>1</sup>

There is a dispute regarding whether the complainant asked the District to evaluate her daughter for an IEP or Section 504 Plan.<sup>2</sup> According to the complainant, she asked the District to develop an IEP or Section 504 Plan at the beginning of the school year. The complainant also alleges that on December 17, 2008, after the Student had been hospitalized for eight days, she asked the Middle School Principal/Special Education Director (Principal) for an Individualized Education Plan (IEP) for the Student or a Section 504 Plan, both of which were denied. According to the complainant, she was most interested in obtaining extended time for the Student to make up assignments missed during her hospitalization. The complainant stated that the Principal told her the Student did not need an IEP and that the District could meet all of her educational needs without one. According to the complainant, the District also declined to develop for the Student a Section 504 Plan or a health plan that would address the Student's absences, not just her dietary restrictions.

District representatives deny that the complainant asked for an IEP or a Section 504 Plan for the Student. The Principal stated that the complainant never asked for special education services and that, because the Student performed well academically (she was on the school's honor roll for both semesters of the school year), the District had no reason to believe she required education services.

There are a lot of factual disputes surrounding this case. According to the school nurse, the school attempted to meet with the complainant on numerous occasions, but the complainant failed to show up for these meetings; other District staff and documentation corroborated this assertion. On the other hand, the complainant stated that she was never notified of any meetings about a health plan for the Student. The nurse said the complainant did not provide her with any of the medical documentation she requested about the Student's health condition; the complainant alleges she provided the District with letters from two

doctors, one a pediatric gastroenterologist, stating that Student had chronic pancreatitis and that she needed a low fat diet. The complainant also alleges she provided the District with a Section 504 Plan from the school district previously attended by the Student. This Plan allegedly included the low fat diet plan as well as a plan for making up for missed school work, including shortened assignments. In any event, the nurse completed an Individualized Health Management Plan on February 10, 2009, to provide a low fat diet for the Student to address the pain caused by the pancreatitis. According to the complainant, the complainant arranged the low-fat diet plan by working directly with the school's cooks.

### Analysis

Our investigation sought to determine whether the District failed to evaluate the Student for a suspected disability and whether it subsequently failed to develop a plan to address her disability. The Section 504 regulations, at 34 C.F.R. § 104.35(a), requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement.

There is no dispute that the Student was absent for substantial periods of time during the school year. The complainant claims she provided medical documentation from two doctors regarding the pancreatitis; the District disputes this and says the complainant never provided any medical documentation. In any event, however, the District does not dispute that the Student's extended absences were caused by an underlying, long-term medical condition. We note that the Student had been on a Section 504 Plan from a previous school district and that the Plan addressed not only her diet, but how to address anticipated absences from school, including how much time the Student was to have to make up assignments.

The District claims that the diet-related health

plan it developed was sufficient to meet the Student's needs, citing to the Student's good grades as evidence that she did not need any disability-related academic adjustments. However, even if the dietary health plan had addressed all of the parents' concerns, it cannot be viewed as equivalent to a Section 504 Plan because it was not developed by an appropriately constituted Section 504 Team, nor was it subject to the procedural protections provided by Section 504.

Here, too, there is no dispute that the health plan did not address any academic adjustments. The District simply did not believe any academic adjustments were necessary. The complainant disagrees and believes that the Student would have benefited from extensions of time to make up work missed during extended absences, as well as tutoring.

In any event, we do not need to resolve the factual dispute regarding whether the complainant requested the District to evaluate her daughter for a suspected disability, nor do we need to resolve whether the complainant specifically asked the District to develop an IEP or Section 504 Plan. The Student's absences and the District's awareness that the absences were triggered by an underlying medical condition raised a duty for the District to conduct an appropriate evaluation and determination under Section 504. By failing to do this, the District did not meet its requirements for an evaluation under 34 C.F.R. § 104.35 because it did not conduct an appropriate disability evaluation of the Student. Recipients like the District should evaluate students for suspected disabilities even if the disabling condition affects major life other than the child's ability to learn especially where, as here, the disabling condition causes extended absences from the educational programs.

In the course of our investigation, we also found that the District has not adopted adequate policies and procedures for the evaluation and placement of students who need or are believed to need special education or related services.

### **Free Appropriate Public Education —**

### **Failure to Provide Procedural Safeguards**

The regulatory provision titled "Procedural Safeguards," 34 C.F.R. § 104.36, provides that a recipient shall establish and implement a system of procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of persons, who, because of disability, need or are believed to need special education or related aids and services.

Although for our analysis, above, we did not need to determine whether the complainant in this case requested disability-related assistance for the Student, we do make such finding for the purposes of this allegation. We find credible the complainant's assertions that she requested disability-related aids and services on behalf of her daughter and that the District should have initiated an evaluation of the Student. We note the existence of the prior district's Section 504 Plan, the District's health plan, the District's knowledge of the anticipated absences and their experience with the Student's actual extended absences during the 2008-09 school year. Consequently, the complainant should have been informed of her procedural rights under Section 504. If, when the District informed the complainant of its belief that it did not need to evaluate the Student or at any other time, it had provided notice of appropriate procedural safeguards, the complainant could have gone to due process to resolve the underlying dispute.

Thus, we have a compliance concern that the District failed to provide the complainant with notice of her procedural due process rights as required by 34 C.F.R. § 104.36

### **Conclusion**

We find that the District failed to meet its legal obligations when it failed to evaluate the Student for special education or related aids and services and develop an appropriate Section 504 Plan, and when it failed to provide procedural safeguards to the complainant. We have compliance concerns under Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA in these respects. Because the

District has entered into Resolution Agreement, we are closing the investigative phase of this case effective the date of this letter.

We will continue to monitor the District's compliance with the Agreement until all provisions are satisfied. If we find that the District has not fully complied with the Agreement, we may seek other enforcement options.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we protect personal information to the extent provided by law.

Individuals who file a complaint or participate in an investigation are protected from harassment, retaliation, or intimidation under 34 C.F.R. § 104.61 as it incorporates 34 C.F.R. § 100.7(e).

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative finds 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 official and made available to the public.

Thank you for the courtesy and cooperation extended to us throughout the investigation. If you have any questions regarding this complaint, you may contact Mr. Lou Kelley, Attorney-Advisor, and the primary contact for this case at 303-844-4498 or [ ], or me at 303-844-6083.

### **Resolution Agreement**

#### **Between Springer Municipal Schools (NM) and the Department of Education's Office for Civil Rights (Denver)**

#### **Background**

1. The U.S. Department of Education, Office for

Civil Rights (OCR) received a complaint against Springer Municipal Schools (District). The complainant alleged that the District failed to evaluate her daughter (the Student) for special education and related aids and services regarding her disability (pancreatitis). The Student has since left the school.

2. OCR initiated an investigation into this complaint pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. part 104, which prohibit discrimination on the basis of disability by recipients that receive funds from the U.S. Department of Education, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131-65, and its implementing regulation, which prohibit discrimination on the basis of disability by public entities.

3. During the course of OCR's investigation of this case, OCR found that the District failed to evaluate the Student for a suspected disability as required, and that the District failed to provide procedural safeguards to the Complainant.

4. The District recognizes its responsibility to ensure that all school aged children are provided an appropriate educational program. The District also recognizes it has a responsibility to follow the appropriate procedures for determining the eligibility of students who have a disability, consistent with Section 504 and Title II. The District acknowledges that OCR has made a finding of failure to evaluate. The District disagrees with that finding in part due to the student's continued success in her educational program and the accommodations and modification provided, and contends that in its own review of the relevant documents and statements by those who were involved with the student it determined that it met or exceed all requirements under IDEA and Section 504 of the Rehabilitation Act.

5. The District voluntarily agrees to take the steps outlined in this Resolution Agreement to ensure that the District, upon the student's reenrollment, will provide the student a free appropriate public education specifically designed to meet the individual

educational needs of the student.

### **Jurisdiction**

6. The District is a public entity and a recipient of funds from the U.S. Department of Education. Therefore, OCR has jurisdiction over this matter pursuant to Section 504, Title II, and their implementing regulations.

7. The parties to this Agreement are OCR and the District. In light of this Agreement, the parties have determined that OCR Case Number 08-10-1057 is resolved without further investigation or enforcement action at this time and have prepared and agreed to the terms of this Agreement.

8. In order to resolve this complaint and to avoid the burden and expense of further investigation and possible enforcement action, the parties enter into this Agreement, in consideration of, and consistent with, the terms of this Agreement, OCR agrees to refrain from initiating an enforcement action regarding areas covered in the "Remedial Action" section of this Agreement, except as provided below.

### **Remedial Action**

9. On January 18, 2011, the District provided OCR with its draft policies and procedures for the evaluation and placement of students who need or are believed to need special education or related services due to a disability. OCR will review the draft policies and procedures to ensure that these are consistent with 34 C.F.R. §§ 104.35 and 104.36.

10. Within 30 days of OCR's approval of the District's policies and procedures, the District will adopt and implement the OCR-approved policies and procedures, including giving notice of procedural safeguards to parents pursuant to 34 C.F.R. § 104.36.

- By September 1, 2011, the District will provide documentation to OCR demonstrating that it has complied with this provision.

11. By August 15, 2011, the District will provide written notice to all pertinent District staff of the content, requirements, and application of the newly established policies and procedures for the evaluation

and placement of students who, because of disability, need or are believed to need special education or related services.

- By September 1, 2011, the District will submit to OCR documentation demonstrating that it has complied with this provision.

12. The District will provide training to all pertinent District staff regarding these newly established policies and procedures. The training will be presented by one or more persons knowledgeable about Section 504 and its requirements as well as the District's newly established policies and procedures. The District will pay particular attention to:

- a. Evaluation and placement requirements;
- b. Procedural safeguards; and
- c. Understanding the needs and identifying attributes of students with disabilities.

- By September 16, 2011, the District will provide to OCR documentation that it has complied with this provision, including:

- a. Sign in sheets for staff;
- b. Handouts provided to participants;
- c. A copy of presenter's qualifications; and
- d. A copy of presenter's presentation in electronic or hard copy format.

13. The District will provide the complainant with notice of her procedural safeguards pursuant to 34 C.F.R. § 104.36 and advise the complainant that should their family move back into the Springer attendance zone that the District will comply with all federal and state regulations regarding the determination of the Student's eligibility for special education and related aids and services.

- By July 15, 2011, the District will provide OCR with documentation confirming that the notice and advisory required by this term have been given to the complainant.

### **Enforcement of This Agreement**

14. If, at any time, the District desires to modify any portion of this Agreement because of changed



conditions making performance impossible or impractical or for any other reason, it will promptly notify OCR in writing, setting forth the facts and circumstances thought to justify modification of this Agreement and the substance of the proposed modification. Until OCR notifies the District in writing that it has agreed to the proposed modification, the proposed modification will not take effect. Any modifications must receive the prior written approval of OCR, which approval shall not be unreasonably withheld or delayed.

15. For purposes of the immediately preceding paragraph, it is a violation of this Agreement for the District to fail to comply in a timely manner with any of its requirements without obtaining sufficient advance written agreement with OCR for an extension of the relevant time frame imposed by the Agreement.

16. The District 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 District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 and Title II, at 34 C.F.R. § 104.35, 34 C.F.R. § 104.36, and 28 C.F.R. § 35.103, which were at issue in this case.

17. If OCR believes that the District has failed to comply in a timely manner with any requirement of this Agreement without obtaining sufficient advance written permission from OCR regarding a modification of the relevant terms under the terms set forth above, OCR will so notify the District in writing and we will attempt to resolve the issue or issues in good faith. If OCR is unable to reach a satisfactory resolution of the issue or issues raised within 30 days of the date it provides notice to the District, it may take steps to initiate an enforcement action through administrative proceedings through the Department of

Education or as a referral to the Department of Justice to enforce the terms of this Agreement and to take appropriate steps to enforce Section 504 and Title II and their respective implementing regulation.

18. Failure by OCR to enforce this entire Agreement or any provisions of it with regard to any deadline or any other provisions shall not be construed as a waiver of OCR's rights to enforce other deadlines and provisions of this Agreement or of the District's obligation to comply with Section 504 or Title II and their respective implementing regulations.

19. This Agreement constitutes the entire Agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or agents of either party, that is not contained in this written Agreement, shall be enforceable.

20. This Agreement does not purport to remedy any other potential violations of Section 504, Title II or their respective implementing regulations, or any other federal law. This Agreement does not affect the District's continuing responsibility to comply with these laws and regulations.

### **Implementation of This Agreement**

21. The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 and Title II at 34 C.F.R. § 104.35, § 104.36, and 28 C.F.R. § 35.103, which were at issue in this case.

22. The persons signing for the parties represent that they are authorized to bind the parties to this Agreement.

23. The effective date of this Agreement is the date of the last signature below.

<sup>1</sup>The Student was also hospitalized from January 26 to 29, 2009 and then February 5 to 19 or 20, 2009.

<sup>2</sup>The complainant also believes that the District should have evaluated her daughter for a disability related to her knees. We contacted a social worker

from the Children's Medical Services of the New Mexico Public Health Division (CMS) and also reviewed the social worker's consultation notes. The notes showed that the complainant discussed the Student's need for an IEP due to her knee problems and her "issues with medical needs and accommodations." According to the notes, the social worker discussed the Student's need for physical therapy for her knees with the Principal on March 20, 2009. The notes also show that the social worker sent a fax to the Principal on April 5, 2009 and that the fax contained a doctor's order that the Student was to receive physical therapy for her knees. The social worker stated that the District informed him that he needed to provide more medical documentation regarding the Student's disability. However, since the Student is no longer in the District, we do not need to determine whether the knowledge of the Student's knee condition was sufficient to trigger a disability-related evaluation under Section 504 and we did not pursue this allegation with the District.



**59 IDELR 17**

**112 LRP 17599**

**Roselle Park (NJ) School District  
Office for Civil Rights, Eastern Division,  
New York (New Jersey)**

**02-11-1192**

**January 6, 2012**

**Related Index Numbers**

**405.038 Evaluation**

**405.065 Procedural Safeguards**

**405.045 Facilities/Persons Covered by Section 504**

**Judge / Administrative Officer**

**Timothy C. J. Blanchard, Director**

**Case Summary**

A New York district's provision of an IHP to help a 10th-grader navigate school during his 10-week recovery from foot surgery fell shy of satisfying Section 504 requirements. As a result, the district will have to provide staff member training on the proper Section 504 procedures to follow when evaluating students with temporary impairments. The student's mother filed an OCR complaint alleging that the district failed to evaluate her son for Section 504 eligibility when it offered him an IHP instead of a Section 504 plan. There's no Section 504 implementing regulation that requires that districts name plans providing services "Section 504 plans," OCR explained. Thus, the district's provision of an IHP could have sufficed if it drew upon information from a variety of sources; was based on careful consideration of that information; was finalized by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and otherwise complied with Section 504 regulations. Here, the district convened a team comprised of a school nurse, guidance counselor, and the principal to address the student's mobility issues. The team reviewed the student's medical documentation and consulted with his mother before finalizing the IHP. The resultant IHP may have been substantively sound, but the developmental process

was still procedurally lacking, OCR observed. The district glossed over an important step in developing the IHP -- it failed to notify the mother of her right to request a due process hearing if she disagreed with the contents of the IHP. In fact, the record showed that when the IHP was first implemented, the mother took issue with the amount of tutoring services the student received in one class. She resorted to complaining to the school itself, rather than filing for due process, as was her right. The district's simple failure to provide the mother notice of procedural safeguards made what may have been an otherwise appropriate action plan for the student, inadequate.

**Full Text**

**Appearances:**

Dear Superintendent Spagnoletti:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) with respect to the above-referenced complaint filed against the Roselle Park School District. The complainant alleged that classes on the second floor of the Roselle Park High School (the School) are inaccessible to individuals with mobility impairments (Allegation 1). Additionally, the complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by failing to evaluate the Student to determine his eligibility to receive related aids and services in April 2011 (Allegation 2).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed

against certain public entities. The District is a recipient of financial assistance from the Department, and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

In its investigation, OCR reviewed documentation the complainant and the District submitted. OCR also interviewed the complainant and the District's Superintendent and Guidance Director, as well as the Student's guidance counselor for school year 2010-2011 (the Guidance Counselor). OCR made the follow determinations.

With respect to Allegation 1, the complainant alleged that classes on the second floor of the School are inaccessible to individuals with mobility impairments. The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by disabled persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies. The ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149.

OCR determined that the School was built in or around 1961, and an additional wing was added to the side of the School's first floor, in or around March 1992. OCR determined that the addition did not constitute an alteration to the existing building,

The regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities built prior to June 3, 1977, as "existing facilities." Accordingly, OCR determined that the School's original building is an "existing facility" under Section 504.<sup>1</sup> The regulation implementing Section 504 requires a recipient to operate each program or activity conducted in existing facilities so that the program or activity, when viewed in its entirety, is readily accessible to individuals with disabilities.<sup>2</sup> Accordingly, each program or activity operated in the original building, when viewed in its entirety, must be readily accessible to individuals with disabilities.<sup>3</sup>

The regulation implementing Section 504 does not require a recipient to make structural changes to existing facilities. A recipient may comply through means such as redesign of equipment, or reassignment of classes or other services to accessible buildings or locations. Where programs or activities cannot or will not be made accessible using alternative methods, structural changes may be required in order for recipients to comply.

OCR determined that the School has two floors. The second floor is accessed by a flight of stairs; accordingly, it is not accessible to the mobility impaired. The second floor houses classrooms, including biology and chemistry laboratories, art classes and a computer laboratory for personal law classes. Due to the specialized nature of certain equipment, neither the biology and chemistry laboratories nor the art classes can be moved to the first floor. The District advised OCR that the computer room could be moved with sufficient advance notice, ideally prior to the start of the school year. Since the School is an existing facility, the District must have an alternate plan for achieving accessibility or make structural changes in order to comply with Section 504 and the ADA.

OCR determined that the District does not have an alternate plan for achieving accessibility. The District advised OCR that in order to make its programs accessible, it is currently investigating the feasibility of installing a lift on the staircase to the second floor; and if a lift is not feasible, it will explore the installation of an elevator. Therefore, OCR negotiated the enclosed resolution agreement, which requires the District to develop a plan that creates access for students with mobility impairments to the programs located on the second floor, or to make structural changes to allow access to the second floor.

With respect to Allegation 2, the complainant alleged that following an injury to the Student's leg in April 2011, the District failed to evaluate the Student to determine whether he was a qualified individual with a disability and thus eligible to receive related

aids and services pursuant to Section 504. OCR determined that during school year 2010-2011, the Student was enrolled in the tenth grade. OCR determined that in an electronic mail message (email), sent on April 14, 2011, the complainant advised the School's Principal that the Student had fractured his ankle and required surgery. The complainant wrote that upon his return to school, the Student would be using crutches for approximately ten weeks and inquired how the Student would have access to his classes held in classrooms on the School's second floor; these included mathematics, biology (including biology lab), personal law, and painting.

OCR determined that the Principal replied by email on the same day that the Guidance Counselor would work with the School Nurse (the Nurse) to create a plan for the Student to move around the building, and that the Guidance Counselor would notify the Student's teachers to facilitate getting the Student's assignments. The email also stated that efforts would be made to move as many of the Student's classes as possible to the first floor if the Student could not access the second floor, and that his teachers would modify deadlines for completing his work for the school year.

OCR determined that the Student returned to school on April 26, 2011, by which point, the School had not provided the complainant with a plan to address the Student's needs for the duration of his incapacitation. As a result, the complainant attempted to meet with the Principal, but instead was referred to the Guidance Counselor and the Nurse for assistance. The complainant provided the Nurse with medical documentation from the Student's physician stating that the Student had limitations with respect to certain physical activities; including prolonged standing, squatting, and touching his toes for the ensuing three weeks. The documentation also indicated that the Student was unable to bear weight on his injured foot. The Nurse noted in a medical log entry, dated April 26, 2011, that the Student was also unable to climb stairs.

On April 27, 2011, the Nurse, in consultation

with the Guidance Counselor, the Director of Guidance and the Principal, and with input from the complainant, drafted an Individual Health Care Plan (IHP) for the Student. The IHP provided that the School would determine alternate sites for the Student's classes located on the School's second floor, provide assistance with carrying his backpack, and permit him extra time to travel between classes. As discussed previously, the biology, art and personal law classes housed in second floor classrooms could not be moved since these contained unique equipment not transportable to the first floor. Therefore, the IHP provided that the Student would receive tutoring in all three of these classes in lieu of instruction, and be allowed to perform independent studies in his personal law and art classes in the library during the school day. The IHP also provided for tutoring for the Student's math class, although the District moved the Student's math class to the first floor.

Subsequently, the complainant indicated to both the Director of Guidance as well as the Board of Education her dissatisfaction with what she considered to be an inadequate amount of tutoring in biology provided to the Student.<sup>4</sup> By May 11, 2011, the District began providing the Student with one-on-one tutoring services for three hours and forty minutes per week in biology, as well as two hours per week in math in the School's library on the first floor. As stated above, tutoring was also provided in art and personal law. The complainant advised OCR that as of May 11, 2011, approximately two weeks after the Student returned to school after his injury, she was satisfied with the aids and services the Student was receiving.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), provides that it is a district's responsibility to conduct an evaluation, in accordance with the requirements of 34 C.F.R. § 104.35(b), of any student who needs or is believed to need special education or related aids or services because of a disability. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.3(j), an individual with a disability is a person who has a

physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.<sup>5</sup> For purposes of Section 504 and the ADA, whether "a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual."

The regulation implementing Section 504 does not require districts to evaluate all students with diagnosed medical conditions, or solely upon a parent's request; however, if evidence indicates that a student has an impairment, and may need special education or related aids and services because of that impairment, the District has an obligation to conduct an evaluation. In determining whether a district has an obligation to evaluate a student, OCR considers the indicia of disability that were available to the district; including but not limited to, academic performance and medical and behavioral conditions.

In this case, the District was aware that the Student had an impairment that substantially limited the major life activity of walking, as his injury rendered him unable to climb stairs for approximately ten weeks. Notice of this condition, which was provided to the District in the form of medical documentation, the complainant's communications, and then subsequently by personal observation, triggered the District's obligation to conduct an evaluation of the Student under Section 504.

If a district is obligated to conduct an evaluation, the district must follow the procedural requirements outlined in the regulation implementing Section 504, at 34 C.F.R. § 104.35(c), in making determinations after conducting the evaluation; including (1) drawing upon information from a variety of sources; (2) ensuring that the information is documented and carefully considered; and (3) ensuring that decisions are made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The regulation implementing

Section 504 does not require that any particular individuals be included in this group of persons, as long the group is knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the district determines that a student is a qualified individual with a disability who requires special education or related aids and services, the district is required to provide the student with regular or special education and related aids and services that are designed to meet the individual educational needs of the student pursuant to 34 C.F.R. § 104.33(b). Usually, a written plan for providing special education and related aids and services is developed to document decisions made by the group of knowledgeable persons.

In this case, OCR determined that the Nurse, Guidance Counselor, Director of Guidance and the Principal conducted an evaluation by reviewing the Student's medical documentation. These individuals also consulted with the complainant in making a determination regarding the related aids and services to be provided to the Student, and in drafting an IHP. OCR determined that this group was a group of knowledgeable persons for purposes of Section 504.

The regulation implementing Section 504 does not require that the district name the plan for providing services a "Section 504 Plan," or any other particular name. Thus, an IHP may meet the requirements of the regulation implementing Section 504 if the District followed the procedural requirements of the regulation implementing Section 504, at 34 C.F.R. § 104.34, 104.35, and 104.36, in developing the IHP. The regulation implementing Section 504, at 34 C.F.R. § 104.36, requires a district to provide notice to a parent regarding any actions related to the evaluation or placement of the student, and of the parent's right to request an impartial hearing if the parent disagrees with decisions that are made. OCR determined that the District's process in developing the IHP did not follow the procedural requirements of the regulation implementing Section 504, at 34 C.F.R. § 104.36, in that it did not provide the complainant with notice of her rights to request an

impartial hearing if she disagreed with the placement decisions.

Based on the above, OCR determined that although the District developed an IHP for the Student with a plan to address the Student's limited mobility, the development process for the IHP did not comport with the procedural requirements of the regulation implementing Section 504. Specifically, although the District convened a group of knowledgeable persons in developing the IHP, it did not notify the complainant of her right to request a due process hearing if she disagreed with the contents of IHP. Thus, when the complainant disagreed with the amount of tutoring that was being provided to the Student under the IHP, she resorted to an ad hoc process of advocacy rather than filing for due process as she could have done had she been provided with notice of her procedural safeguards pursuant to 34 C.F.R. § 104.36. Accordingly, OCR negotiated the enclosed resolution agreement with the District to monitor its policies and procedures for ensuring that the procedural requirements of Section 504 are followed when evaluating students that have a temporary impairment that might constitute a substantial limitation on a major life activity such that the student needs or is believed to need special education or related services.<sup>6</sup>

As stated above, the School agreed to implement the enclosed resolution agreement with respect to Allegations 1 and 2. OCR will monitor implementation of the resolution agreement. If the District fails to implement the terms of the resolution agreement, OCR will resume its investigation.

This letter is not intended, nor should it be construed, to cover any issues regarding the District's compliance with Section 504 and the ADA that may exist and are not discussed herein. This letter is intended to address this 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 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 complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

It is unlawful to harass or intimidate an individual who has filed a complaint or participated in actions to secure protected rights.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this letter and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that if released, could constitute an unwarranted invasion of personal privacy.

If you have any questions regarding OCR's determination in this matter, please contact Matt Faiella, Compliance Team Attorney, at 646-428-3766 or [Matt.Faiella@ed.gov](mailto:Matt.Faiella@ed.gov); Miriam Nunberg, Compliance Team Attorney, at 646-428-3830 or [Miriam.Nunberg@ed.gov](mailto:Miriam.Nunberg@ed.gov); or Felice A. Bowen, Compliance Team Leader, at 646-428-3806 or [Felice.Bowen@ed.gov](mailto:Felice.Bowen@ed.gov).

### **Resolution Agreement**

#### **Roselle Park School District**

In order to resolve the compliance concerns identified in Case No. 02-11-1162, the Roselle Park School District (the District) assures the U.S. Department of Education, New York Office for Civil Rights (OCR), that it will take the actions detailed below pursuant to the requirements of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104 (Section 504); and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35.

#### **Action Item 1**

By February 29, 2012, the District will provide OCR with a plan for ensuring that the programs and



activities located on the second floor of its High School (the School) are accessible to persons with mobility impairments. If the plan requires structural changes, the District's plan will provide the details of the structural changes to be made, including the date when such alteration(s) or construction shall be completed, with a completion date no later than June 30, 2012. If structural changes are necessary, the District will develop an interim plan to ensure that the programs and activities located on the second floor of the School are accessible to persons with mobility impairments during the planning and completion of such alteration(s) or construction.

Any structural changes proposed are subject to approval by the New Jersey Department of Education, and must be made in conformance with public contracts law. The District asserts that prior to the filing of the instant complaint, the District was already in the process of implementing a plan for accessibility of its High School and had solicited bids pursuant to the public contracts law.

**Reporting Requirements:**

a) By February 29, 2012, the District will submit to OCR a copy of its plan developed pursuant to Action Item 1 above, including an interim plan if necessary.

b) By June 30, 2012, if structural changes are part of the plan, the District will submit evidence to OCR (e.g., photographs, measurements, summaries, etc.) demonstrating completion of all alterations or construction, and compliance with the applicable accessibility standards.

**Action Item 2**

By February 29, 2012, the District will develop policies and procedures to ensure that the procedural requirements of Section 504 are followed when evaluating students who have a temporary impairment that might constitute a substantial limitation on a major life activity such that the student needs or is believed to need special education or related aids and services.

Reporting Requirement: By February 29, 2012,

the School will provide OCR with a draft of its policies and procedures developed pursuant to Action Item 2 above. OCR will review the draft policies and procedures and respond within fifteen (15) days, advising the District whether OCR approves the draft policies and procedures. Within fifteen (15) days of the District's receipt of OCR's approval of the policies and procedures the District will formally adopt the policies and procedures, and update its printed publications and on-line publications with the new policies and procedures.

The District asserts that the Student in this matter received appropriate accommodations from the District during the duration of his temporary impairment

**Action Item 3**

By March 16, 2012, the District will provide training to relevant staff and administrators at the School regarding its new procedures developed pursuant to Action Item 2 above.

**Reporting Requirement:**

By March 16, 2012, the School will provide OCR with: (a) the name(s) of the individuals who conducted the training outlined in Action Item 3 above; (b) a list of the individuals who attended the training and their positions; (c) the date(s) the training was conducted; and (d) copies of any training materials disseminated.

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the recipient has fulfilled the terms of this agreement and is in compliance with the regulations implementing Section 504, at 34 C.F.R. §§ 104.22(a) and (b) and 104.36, and the ADA, at 28 C.F.R. § 35.150(a) and § 35.150(b)(1), which were at issue in this case. The District also 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 District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and

students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with the regulations implementing Section 504, at 34 C.F.R. §§ 104.22(a) and (b) and 104.35, and the ADA, at 28 C.F.R. § 35.150(a) and § 35.150(b)(1), which were at issue in this case.

<sup>1</sup>It is also an existing facility under the ADA. Under the ADA, an existing facility includes facilities that were constructed, or for which construction was commenced, prior to January 26, 1992, the effective date of the regulation implementing the ADA.

<sup>2</sup>The ADA includes a similar requirement for public entities at 28 C.F.R. §§ 35.149-35.150.

<sup>3</sup>A different accessibility standard applies to the new wing of the School, but no allegations were raised regarding this area; accordingly, this area will not be addressed in this case.

<sup>4</sup>The complainant first discussed the Student's impairment with the Director of Guidance on April 26, 2011. Thereafter, the complainant communicated via telephone and email with the Director of Guidance on an almost daily basis, mostly regarding tutoring services for the Student in his biology class, which the complainant believed was insufficient. The complainant also complained about the matter at a Board of Education meeting on May 10, 2011; and on May 11, 2011, the District advised the complainant that the Student's biology teacher would be able to provide him with an amount of tutoring the complainant found satisfactory.

<sup>5</sup>The regulation implementing the ADA has a similar definition at 28 C.F.R. § 35.104.

<sup>6</sup>The complainant informed OCR that the Student has since recovered, and does not require any compensatory services for the time period. OCR found that the Student completed all of his tenth grade courses and his grades remained consistent, or in some instances improved during the two marking periods in which he was impaired. As such, no individual relief is necessary.

#### **Regulations Cited**

34 CFR 104.21  
28 CFR 35.149  
34 CFR 104.22  
34 CFR 104.35(a)  
34 CFR 104.35(b)  
34 CFR 104.35(c)  
34 CFR 104.33(b)  
34 CFR 104.34  
34 CFR 104.35  
34 CFR 104.36  
34 CFR 104.22(a)  
34 CFR 104.22(b)  
28 CFR 35.150(a)  
28 CFR 35.150(b)(1)  
28 CFR 35.150(a)  
28 CFR 35.150  
28 CFR 35.104

**58 IDELR 172**

**112 LRP 7417**

**Marquette Area (MI) Public Schools  
Office for Civil Rights, Midwestern  
Division, Cleveland (Michigan)**

**15-11-1216**

**November 22, 2011**

**Related Index Numbers**

**405.036 Eligibility for Related Services**

**Judge / Administrative Officer**

**Catherine D. Criswell, Director**

**Case Summary**

A Michigan district may have to compensate for failing to evaluate a high schooler for Section 504 eligibility. The 17-year-old student had a mood disorder which caused her to experience irritability, mood swings, and occasional difficulty sleeping. In November 2010, because the student had behavioral and attendance issues, her mother requested that the district evaluate her for special education eligibility. Maintaining that any disabilities the student had weren't affecting her education, the district refused the mother's request. By October 2011, the district finally agreed that the student required a Section 504 plan but failed to finalize a plan. Consequently, the mother filed an OCR complaint alleging disability discrimination. OCR explained that a student that has a mental or physical impairment that substantially limits one or more major life activities is eligible to receive a FAPE under Section 504. 34 CFR 104.4(j). A student may qualify as having a disability under Section 504 even if her impairment does not substantially impact her academic performance or ability to attend class. Here, to address the student's anxiety or fatigue, the district provided her informal accommodations, such as opportunities to drink a cup of coffee or to lie down as needed. However, it relied on the fact that the student was successful in, and passed all of her classes as a basis for refusing to evaluate her for Section 504 eligibility. Plus, when the district did act on the mother's request to memorialize

the accommodations in a formal 504 plan, it required the student and her teachers to fill out a worksheet that stated, "[t]o qualify for protection under Section 504 based on a disability in learning, a student must have a physical or mental impairment that substantially limits his/her learning." The worksheet also provided that "[i]f a student does not need accommodations/ modifications/ interventions at school beyond those normally made available to all students, then s/he is not eligible for a 504 plan." OCR explained that Section 504 eligibility, however, can be based on limitations including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, eating, sleeping, standing, lifting, or operation of a major bodily function, to name a few. Consequently, in determining the student's eligibility for Section 504 benefits, the district should not have limited its consideration to the major life activity of learning.

**Full Text**

**Appearances:**

Dear Ms. Veiht:

This letter is to notify you of the disposition of the complaint filed June 2, 2011, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Marquette Area Public Schools (the District). The complaint alleged that the District had discriminated against a high school student (the Student) on the basis of her disability (mood disorder). Specifically, the complaint alleged that: (1) the District failed to evaluate the Student after it became aware that she had a mood disorder and needed related aids and services, relying instead on the informal provision of services; (2) when the District did evaluate the Student, it did not consider whether she was substantially limited in any major life activity except learning, did not consider the episodic nature of her disability, and put the burden on the Student's parent to provide needed medical information; and (3) the District delayed making an eligibility determination even though it had sufficient information to make such a

determination.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws; therefore, OCR had jurisdiction to investigate this complaint. Based on the complaint allegations, OCR opened an investigation into the following legal issues:

- whether the District failed to timely and appropriately evaluate and place a student with a disability, resulting in a denial of a free appropriate public education (FAPE) in violation of Section 504's implementing regulation at 34 C.F.R. §§ 104.33 and 104.35; and

- whether the District failed to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of a student who, because of disability, needs or is believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the student to examine relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian and representation by counsel, and a review procedure in violation of 34 C.F.R. § 104.36.

OCR began to investigate this complaint by reviewing documents submitted by the Complainant and the District and by interviewing the Complainant. In addition, OCR reviewed documents from a previous complaint filed by the Complainant on behalf of the Student against the District. Prior to the completion of this investigation, however, the District

asked to resolve the complaint allegations pursuant to Section 302 of OCR's Case Processing Manual (CPM).

### **Summary of Investigation to Date**

The Student is 17 years old and in the twelfth grade. During the 2010-2011 school year, she attended the District's Alternative High School at Graveraet, where she is currently enrolled. At the start of the 2011-2012 school year, however, she also enrolled in and began attending Health Occupations courses at the District's other high school, which is the only school that offers the courses. She has been diagnosed with a mood disorder, not otherwise specified. In a letter dated April 19, 2011, the Student's treating psychiatrist stated that the Student had symptoms of depression or bipolar disorder, such as irritability, mood swings, and occasional difficulty sleeping, but "did not necessarily meet all of the guidelines for those symptoms." The Complainant described the Student's symptoms as episodic. The Student was not on a Section 504 plan at the time the complaint was filed, but the District is presently in the process of evaluating the Student to determine appropriate placement, aids and services for her disability.

According to the Complainant, the Student was on a Section 504 plan from seventh grade through September 2010, when she transferred to the District's alternative school. The Complainant alleged that the District removed the Student from her Section 504 plan when she was placed in the alternative school, in part because the District does not provide Section 504 plans for students at the alternative school. The Complainant explained that she believes this because the former special education director, who has since retired, told her that the alternative school did not provide such services, and the principal at the alternative school told her that he has "not written a Section 504 plan in his life." The Complainant asserted that, according to the District, the inherent nature of the alternative school program (i.e., smaller class sizes, different class format) rendered specific accommodations unnecessary. The District disputed

this assertion, however, and provided documents from an unrelated case, which the Complainant filed against the District (OCR Docket No. 15-10-1054), to support that the District held a Section 504 meeting for the Student on September 9, 2010, at which time the Complainant and the Student asserted that no Section 504 plan was needed, so the Student's plan was therefore terminated. The District social worker who attended the meeting notified the Complainant and the Student that they could request a new Section 504 plan at any time.

In November 2010, the Student was at risk of being expelled from the alternative school because of behavioral and attendance issues. In emails from the Complainant to the District's then special education director and the alternative school principal, dated November 1 and 2, 2010, the Complainant requested that the District evaluate the Student for special education services and supports because of her behavioral difficulties and deficits in social skills, which the Complainant asserted had affected the Student's education. The Complainant specifically requested a "comprehensive multidisciplinary educational evaluation" and a functional behavior assessment so that the District could develop a positive behavior support plan for the Student. The Complainant said that she met with District staff, who considered only the Student's special education eligibility and ignored the Complainant's other requests. The Complainant contended that staff members did not feel that there were any disabilities affecting the Student's education and that they therefore refused to evaluate her.

Documentation provided by the Complainant and the District shows that on November 5, 2010, the Section 504 team held an evaluation meeting, after which the team agreed that the Student did not need an assessment evaluation. In correspondence from the Complainant to District administrators, the Complainant clarified that she was withdrawing her request for a special education evaluation based on the unanimous opinion of the participants at the meeting that no disabilities were affecting the

Student's education at that time. However, the Complainant stated that if the Student continued to struggle with behaviors noticed in previous assessments, Section 504 plans, and behavior plans, or if the Student received another behavioral "strike" (which put her at risk of being sent back to the District's other high school), the Complainant would expect the District to complete a formal assessment. The documentation also shows that the Complainant had previously received information regarding procedural safeguards.

The Complainant asserted that the Student's behavioral problems continued and that, on March 16, 2011, she requested a Section 504 meeting and a new Section 504 plan for the Student. In a letter the Complainant wrote to the District's special education director, another supervisor of special education, and the principal of the alternative school, the Complainant asserted that the Student had been diagnosed with bipolar disorder in December 2010, was trying to find the right medications, was having difficulties with the medication due to other health complications, and was having difficulty sleeping. The Complainant said that, since the Student had reached "the point of removal" from the alternative school, she was requesting that the removal be postponed while the District completed a functional behavioral assessment as soon as possible. She also asked to meet and discuss specific accommodations for the Student, such as permission to take a nap during the school day.

The principal of the alternative school responded to this request by email on the same day, stating: "If medication is what has [the Student] so loopy and disconnected, my suggestion is to talk to her doctor to change it or pull her out of school until she is fit to continue so she doesn't lose her spot at [the alternative school]." Later the same day, he sent another email to the Complainant and the District's special education director, stating that the alternative school was having difficulty keeping track of the Student's whereabouts and that he was concerned about her safety. He then recommended that she be released from school until



she can get back to a "healthy" status" so as not to jeopardize her standing at the alternative school. He commented that he was asking for the support of others to keep the Student out until she was "stable and functioning regularly to avoid harm" and that it would be a welcome break for "someone who was acting so abnormally."

The Complainant contended that after some resistance, the District held a Section 504 meeting for the Student on March 21, 2011, at which time the school psychologist said that she had done an informal assessment and had determined that the Student was not a student with a disability under Section 504. The District agreed to provide accommodations to the Student informally, however, and to place her on a behavior intervention plan based on a review of existing evaluation data (REED). The behavior intervention plan stated that, when the Student was feeling anxious, tired, or needed to leave school, she would discuss her needs with her current teacher and request permission to lie down and/or take a five-minute walk. She would also consult or discuss her request with the principal. District staff agreed to permit the Student to drink a cup of coffee and to lie down as needed as additional informal accommodations. At the meeting, participants discussed the Student's anxiety and her limitations in the major life activities of sleeping, thinking, learning, concentrating, and her communication/social interaction with others. However, the Complainant said the District did not understand mood disorders, which are episodic and cyclical, and they did not understand the Student's condition. She asserted that the District based its decisions on the Student's present condition, not on her past history of recurring episodes of limiting conditions such as anxiety and sleep disorders. For example, the Student had been having sleep issues all year, but not at the specific time of the March 21 meeting, so the District did not consider her impairment's effect on sleep in making its determination that she did not have a disability under Section 504. The Complainant contended that the whole tone of the meeting was that the District did

not want to give the Student a Section 504 plan.

On March 22, 2011, the Complainant emailed the assistant special education director, stating that she agreed with the proposed accommodations but that they needed to be formally written into a Section 504 plan along with documentation and an explanation of the accommodations provided "by the inherent characteristics of the alternative school." The Complainant said that following the March meeting, the Student and her teachers filled out a "Section 504/ADA Learning Evaluation Worksheet," a District-generated assessment. The worksheet states at the top that "[t]o qualify for protection under Section 504 based on a disability in learning, a student must have a physical or mental impairment that substantially limits his/her learning." The worksheet goes on to state that "[i]f a student does not need accommodations/modifications/interventions at school beyond those normally made available to all students, then s/he is not eligible for a 504 plan." The worksheet consists of ten questions for which the responder must check yes or no, and most of the questions focus on the student's ability to learn.

On May 9, 2011, the District convened another meeting regarding the Complainant's request for a Section 504 plan, attended by the Complainant, the Student's teacher and alternative school supervisor, and the District's Section 504 coordinator. Contemporaneous meeting notes reflect that they could not reach a consensus regarding whether the Student was substantially limited in a major life activity. District notes of a later meeting held in October 2011, however, indicate that the team actually determined in May 2011 that the Student did not have a physical or mental impairment that was substantially limiting in an academic setting and that she was successful in and passing all her classes at the alternative school. Complicating the situation was the Complainant's description of the Student as being in total denial of her disability. The May 2011 meeting notes further show that the Complainant declined to sign a medical release for the Student's physician to complete the District's "Section 504 Physician

Questionnaire." Additionally, the notes reflect that the accommodations the Complainant wanted for the Student -- permission for the Student to lie down for fifteen minutes during the school day and the ability to text the principal to request permission to walk around the building if she needed a break -- were already in place without a Section 504 plan. Finally, the notes from that meeting indicate that the District gave the Complainant notice of Section 504 procedural information and rights.

Attached to the meeting notes is a copy of the psychiatrist's letter referenced above, describing the Student's medical condition and recommending that the Student continue with her current accommodation (without elaborating on the nature of that accommodation). It further says, "Other considerations would be for the patient to have somebody that she can see on a regular basis to discuss any issues that she is having and also considerations be made for the patient potentially having mood swings in the classroom." The meeting notes state that the District told the Complainant that it wanted more information from the Student's psychiatrist about the Student's mood disorder before the District would consider a Section 504 plan.

The Complainant alleged that, other than placement in the alternative school, the Student has been given no services and has not had a behavior plan to assist her, which has resulted in the Student having discipline trouble.

District documents show that on September 12, 2011, at the beginning of the 2011-2012 school year, the Complainant again submitted a written request for a Section 504 plan with accommodations and a positive behavior support plan. She was particularly concerned because the Student was taking classes at both high schools, and she worried that the Student would have trouble adjusting to the regular high school. On October 5, 2011, the Student's Section 504 team met and agreed that the Student was eligible for a Section 504 plan, based on input from the team members and the psychiatrist's April 2011 letter. The meeting notes, which are titled "Section 504-Student

Accommodation Plan, Working Draft," state that the Student did not attend the meeting, although she was invited. The notes indicate that the Student's cooperation was necessary to provide effective accommodations. The draft plan also states that the counselor requested additional medical information to help determine what accommodations the Student needed and also provided the Complainant with a Section 504 physician questionnaire. The team decided to reconvene following the development of a temporary positive behavior support plan for the Student, with her input. The Complainant, the Student and the Student's counselor met to develop the temporary behavior plan on October 10. The notes on the temporary behavior plan state that the Student was "strongly opposed" to a behavior plan, so they were unable to obtain her input in composing the temporary plan.

On October 11, 2011, the Complainant renewed her request, in correspondence with the guidance counselor, for a functional behavioral assessment and a behavior plan. On October 12, the guidance counselor replied that she agreed that the Student needed a positive behavior support plan as soon as possible but that the Student was not cooperating. The counselor further indicated that she had consulted with the school psychologist and social worker, that she would ask them to observe the Student in her classes, and that, once those behavioral observations were completed, they would meet to write a plan. In the meantime, the counselor, working with school staff, drafted a temporary plan, which was effective October 13. To date, no Section 504 plan or behavior plan has been finalized of which OCR has been made aware.

### **Applicable Legal Standards**

Title II provides no greater protection than Section 504 with respect to the issues raised by this complaint; OCR therefore utilized Section 504 standards during its preliminary investigation. The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts to provide a free appropriate public education (FAPE) to each qualified

individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. 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 nondisabled 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 procedural safeguards. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Improvement Act (IDEA) is one means of meeting these requirements.

To be eligible to receive a FAPE under Section 504, a student must have a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j). Pursuant to Section 504, as amended by the ADA Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Thus, under Section 504, a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance or ability to attend class. In addition, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires recipient school districts to conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35(b) of any person 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 person in regular or special education and any subsequent significant change in placement. Subsection (b) requires a recipient school district to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services.

A district cannot require a parent or student to provide a medical statement if the district suspects that the student has a disability that would necessitate the provision of regular or special education and related aids and services under Section 504. If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. § 104.35(a) and (b), the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, these methods may be used in lieu of a medical assessment.

The Section 504 regulation at 34 C.F.R. § 104.36 requires recipient school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of person who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian, representation by counsel, and a review procedure.

### **Voluntary Resolution**

As noted above, the District asked to resolve the complaint pursuant to Section 302 of OCR's CPM. The CPM provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint

allegations. Such a request does not constitute an admission of liability on the part of a recipient institution such as the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and are to be consistent with applicable regulations.

On November 14, 2011, the District signed the enclosed resolution agreement, which, once implemented, will fully address the complaint allegations in accordance with Section 504 and Title II. The agreement requires that the District complete its evaluation of the Student and, if appropriate, place her on a Section 504 plan that will be in effect at all of the schools she attends, including the alternative school; provide compensatory education as needed; and notify parents and guardians of students enrolled at the alternative school of student rights under Section 504 and Title II and their implementing regulations. To the extent that additional issues regarding the District's Section 504 policies, procedures, or practices for timely identifying, evaluating, and placing students have arisen during OCR's investigation of this complaint to date, these issues are the subject of another complaint investigation, OCR Docket No. 15-10-1161, and will be addressed in the resolution of that complaint.

In light of the signed agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the agreement. Should the District fail to fully implement the agreement, OCR will reopen the case and resume its investigation of the complaint allegations.

This letter sets forth OCR's determination in an individual OCR case. 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. The Complainant may have the right to file a private suit

in Federal court whether or not OCR finds a violation.

We appreciate the cooperation of District staff during the investigation of this complaint. We look forward to receiving the District's first monitoring report on or before December 9, 2011. Please address your monitoring report to Sarah Poppleton, who will be handling OCR's monitoring of this agreement. Ms. Poppleton can be reached at (216) 522-2674 or Sarah.Poppleton@ed.gov. If you have questions or concerns about this letter, you should contact Ms. Karla K. Ussery, Team Leader, by e-mail at Karla.Ussery@ed.gov, or by telephone at (216) 522-2683.

### **Resolution Agreement**

#### **Marquette Area Public Schools**

The Marquette Area Public Schools (the District) submits the following agreement to the U.S. Department of Education, Office for Civil Rights (OCR), to resolve the above-referenced complaint and to ensure compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, as amended by the ADA Amendments Act of 2008 (ADAAA); accordingly, the District agrees to take the following actions:

#### **Individual Relief – Reevaluation and Placement**

1. By December 9, 2011, the District will complete its evaluation of the student at issue in this complaint (the Student) and determine what aids and services the Student requires under Section 504 to provide her with a free appropriate public education (FAPE). The evaluation and determination of aids and services will be consistent with the Section 504 implementing regulation at 34 C.F.R. § 104.35, may include a behavioral assessment of the Student, and must be in accordance with the principles set forth below:

a. If the Section 504 team believes that a medical evaluation is necessary to determine what aids and services are required to provide the Student with a FAPE, the District must offer to pay for a medical evaluation at no cost to the Student's parent, unless there is another effective alternative assessment available to make an eligibility determination.

b. The team will consider whether the Student has a mental or physical impairment that substantially limits one or more major life activities, and will not limit its consideration to the major life activity of learning.

c. The Student's parent will be included in the meeting or otherwise provided with a meaningful opportunity to provide input into the Section 504 team's decision.

d. If the Section 504 team determines that the only related aid and service the Student requires due to her disability is placement at the alternative high school, then the team must set that determination forth in a Section 504 plan and must provide the Student's parent with written notice of the determination and an explanation of the basis for that determination.

e. The District will inform the Student's parent of Section 504 procedural safeguards with respect to any actions regarding the identification, evaluation, and placement of the Student, including notice, an opportunity to examine relevant records, and the right to an impartial hearing and review procedure.

2. By December 9, 2011, the Section 504 team will also determine whether the Student needs compensatory education for the 2010-2011 school year as a result of the District's not having completed a Section 504 evaluation of her in the spring of 2011, and, if so, the type and amount of compensatory education services appropriate for the Student. The District will provide the Student's parent with notice of the determination and of her right to challenge the determination through a due process hearing. The compensatory education determined necessary by the Section 504 team will be provided at no cost to the

Student or her parent during the 2011-2012 school year.

Reporting Requirements: By December 9, 2011, the District will submit to OCR documentation showing implementation of Items #1 and 2 above, including documentation produced as a result of the Section 504 team meeting; identification of the meeting participants; the team's determinations regarding eligibility, placement and services, and compensatory education; the notice provided to the parent. By June 15, 2012, the District will submit to OCR documentation verifying that any compensatory services determined to be appropriate for the Student were provided to her.

### Procedural Remedies

3. By December 9, 2011, the District will draft and submit to OCR a notice to the parents or guardians of all students in enrolled at the Marquette Alternative High School (the alternative high school) that the alternative high school is subject to the requirements of Section 504 and Title II and their implementing regulations, and that students enrolled at the alternative high school are entitled to civil rights and protections under these statutes and their implementing regulations, including the right, if a student is determined to be a student with a disability, to receive a free appropriate public education under Section 504.

4. Within 30 calendar days of OCR approval of the notice, the District will send the notice to alternative high school students and/or their guardians, by means reasonably calculated to reach them, such as by sending an e-mail message or letter, including a notice in newsletters, and/or similar effective means. The notice will also include information regarding where copies of the District's Section 504 policies and procedures may be obtained.

Reporting Requirement: By December 9, 2011, the District will submit to OCR the draft notice. Within 30 calendar days of OCR approval of the notice, the District will submit to OCR documentation showing its implementation of Item #4 above,



including a copy of the notice and information regarding the means used to provide the notice.

### **General Requirements**

The District understands that OCR will not close the monitoring of this agreement until OCR determines that it has fulfilled the terms of this agreement and is in compliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The District 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 District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36.

### **Regulations Cited**

34 CFR 104.33  
34 CFR 104.35  
34 CFR 104.36  
34 CFR 104.3(j)  
34 CFR 104.35(a)  
34 CFR 104.35(b)

56 IDELR 53

6 GASLD 64

110 LRP 66172

**Miller County (GA) School District  
Office for Civil Rights, Southern Division,  
Atlanta (Georgia)**

04-10-1082

**April 29, 2010**

**Related Index Numbers**

405.022 Child Find

405.036 Eligibility for Related Services

92.040 Need for Evaluation

**Judge / Administrative Officer**

Cynthia G. Pierre, Acting Office Director

**Case Summary**

The fact that a student with Tourette syndrome and obsessive compulsive disorder was achieving good grades in honors classes did not mean that he was ineligible for a Section 504 plan. OCR found that a Georgia district violated Section 504 when a special education coordinator continually rebuffed a parent's requests for an evaluation. The parent sought the evaluation after her son was repeatedly sent to the office for his behavior, and missed instructional time. The coordinator insisted that the student did not qualify because he was an honor student, highly functioning, and making good grades. The coordinator later told OCR that the district normally tried informal interventions initially, but would provide an evaluation if the parent insisted on it. The parent filed an OCR complaint. OCR noted that a district must evaluate a student who needs or is believed to need special education or related services before taking any action with respect to his placement. 34 CFR 104.35(a). The district had sufficient reason to suspect the student might be a student with a disability, according to OCR, based on the parent's verbal requests. Moreover, in rejecting the referral, the district improperly considered only the student's grades. "While learning is a frequently impacted major life [activity] ... academic success as

reflected by good grades, may not, by itself be sufficient to determine whether that student is substantially limited as to learning," OCR wrote. Other potentially relevant factors are the student's ability to interact with others, control his behavior, attend school, and participate in the educational program. Moreover, OCR noted that the list of Section 504 major life activities, which was expanded by the ADA Amendments Act, is non-exhaustive.

**Full Text**

**Appearances:**

Dear Mr. Phillips:

This letter is to notify you of the determination of the Department of Education (Department), Office for Civil Rights (OCR), in the above referenced complaint filed on November 24, 2009, against the Miller County School District (District), alleging discrimination at Miller County High School (School). Specifically, the Complainant alleges that the District discriminated against her son (Student), on the basis of disability [ ] and retaliated against him. The Complainant alleges that the District: (1) failed to conduct an evaluation of the Student to determine if he qualified to receive services as a student with a disability; (2) disciplined the Student more harshly than a non-disabled student for the same or similar actions; and, (3) retaliated against the Student by placing him on in-school suspension (ISS) on November 20, 2009, when it had been cancelled for all students.

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department; and, Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by public entities. Section 504 at 34 C.F.R. Section 104.61, and the Title II regulation

implementing regulation at 28 C.F.R. Section 35.134 incorporate by reference the regulation implementing Title VI of the Civil Rights Act of 1964, 34 C.F.R. Section 100.7(e), which prohibits retaliation against an individual who exercises rights or participates in an investigation or proceeding under any of the laws enforced by OCR. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

Based on the Complainant's allegations, OCR investigated the following issues:

(1) Whether the District failed to conduct an evaluation to determine if the Student is a qualified student with a disability, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. Section 104.35(a), and Title II and its implementing regulation at 28 C.F.R. Section 35.130(a).

(2) Whether the District discriminated against the Student by disciplining the Student more harshly than a non-disabled student for the same or similar actions, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. Section 104.4(a), and Title II and its implementing regulation at 28 C.F.R. Section 35.130(a).

(3) Whether the District retaliated against the Student by placing him on in-school suspension (ISS) on November 20, 2009, when it had been cancelled for all students, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. Section 104.61, and Title II and its implementing regulation at 28 C.F.R. Section 35.134.

### **Legal Standards**

The Section 504 regulation at 34 C.F.R. Section 104.4(a) provides 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. The Section 504 regulation at 34 C.F.R. Section 104.4(b)(1)(ii)

prohibits affording a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others. The Title II regulation at 28 C.F.R. Section 35.130(a) and (b)(1)(ii) contains similar standards.

To determine whether a recipient has subjected a student to different treatment on the basis of disability, OCR looks at whether there is evidence that the student was treated differently than students without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of education, services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination based on race or disability. To find noncompliance, the preponderance of evidence must establish that the recipient's actions were based on the student's disability.

The regulation implementing Section 504 at C.F.R. Section 104.33(a) and (b) require a recipient to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the educational needs of individuals with disabilities as adequately as the needs of individuals without a disability are met and that satisfy the requirements of the regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36 (regarding educational setting, evaluation and placement, and procedural safeguards). Pursuant to the regulation implementing Section 504 at 34 C.F.R. § 104.33(b), implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the District's obligations under Section 504.

The Section 504 regulation at 34 C.F.R. Section 104.35(a) requires that a recipient evaluate any person who, because of disability, needs or is believed to need special education or related aids and services

before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. Section 104.35(b) requires a recipient to establish standards and procedures for the evaluation and placement of students with disabilities. The Section 504 regulation at 34 C.F.R. Section 104.35(c) states that in interpreting evaluation data and in making placement decisions, a recipient shall: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with Section 104.34.

As set forth in Appendix A, Subpart D of the Section 504 regulation, it is not the intention of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the "process" requirements of the Section 504 regulation concerning the identification, location, evaluation, and due process procedures.

The Section 504 regulation at 34 C.F.R. Section 104.36 requires a recipient to establish and implement a system of procedural safeguards that includes notice, an opportunity to examine records, and an impartial hearing with an opportunity for participation by the parents or guardian and representation by counsel, and a review procedure. The regulation implementing Title II at 28 C.F.R. Section 35.130(a) and (b) is interpreted consistently with the standards set forth in the Section 504 regulation.

The regulation implementing Title VI of the Civil Rights Act of 1964, 34 C.F.R. Section 100.7(e), prohibits retaliation for engaging in a protected

activity. Retaliation is prohibited under the Section 504 regulation at 34 C.F.R. Section 104.61, which incorporates by reference the procedural provisions of the Title VI regulation. The regulation implementing Title II at 28 C.F.R. Section 35.134 contains a similar prohibition against retaliation.

In reaching its determination, OCR reviewed and analyzed documents pertinent to the allegations in this complaint. OCR also conducted interviews with the Complainant and District personnel. After a thorough review of all of the available evidence, OCR has determined that there is insufficient evidence to support a finding of noncompliance with applicable Section 504 and Title II regulations as it relates to allegations 2 and 3. However, OCR has determined that there is sufficient evidence to support a finding of noncompliance with the applicable Section 504 and Title II regulations as it relates to the allegation 1. In addition, the District agreed to resolve a procedural issue discovered during the course of the investigation regarding inconsistencies in the wording of the District's procedures regarding the extent of what services must be provided under Section 504. The District however, has voluntarily agreed to resolve the noncompliance issue of allegation 1 and the procedural issue by implementing corrective actions outlined in the enclosed Resolution Agreement (Agreement). The factual and legal bases for OCR's determination are set forth below.

### **Allegation 1**

#### **Whether the District Failed to Conduct an Evaluation to Determine If the Student Is a Qualified Student With a Disability**

The District has Section 504 procedures that provide an overview of the statute and the District's steps for writing a Section 504 Plan. The District's policy for providing academic services to qualified students is based on eligibility standards from the Georgia Department of Education (GADOE). Students are referred for services based on the Pyramid of Interventions (Pyramid). The Pyramid requires three (3) essential components: 1) multiple

tiers of intervention services delivery; 2) a problem-solving method; and 3) an integrated data collection system to inform decisions at each tier of service delivery. Student Support Team (SST) is an integrated system embedded in the Student Achievement Pyramid of Intervention. SST is required before consideration of a Section 504 Plan and Special Education. The school system can bypass the SST process if interim strategies, interventions, and modifications (changes in the learning expectation rather than accommodation) should be attempted for the student. During the SST level of instructional intervention, an independent evaluation or in-system comprehensive evaluation composed of psychometric testing may need to be accepted or considered. Together with data provided through the Student Achievement Pyramid, it can be decided if an eligibility process for Section 504 or Special Education should be initiated.

After students qualify for services, the District's Department of Special Education is responsible for evaluating students, determining the need for placement with the Special Education program, and providing for identified needs in compliance with the GADOE and the Individuals with Disabilities Education Act (IDEA).

In the District's Parent Notice for Section 504 Evaluation form, parents are informed if an evaluation team has been formed to determine if their child has a qualifying disability under Section 504, and they are given their procedural rights. On the District's Section 504 Evaluation Referral form, the person making the referral can state the nature of their concern (academic, behavioral, major life activity that may be limited), describe supporting observations, and attach test scores and medical documentation that supports the possible disability. The District's Special Education Coordinator (Coordinator) confirmed to OCR that parents may request an evaluation. Ordinarily, informal evaluations and interventions are initially attempted, however if parents insist upon an evaluation, the District will honor the parent's wish because they have the right to receive an evaluation to

determine disability.

For the 2009-2010 school year, the Student is a 10th grade student at Miller County High School (School). The Complainant informed OCR that in the 6th grade, the Student was diagnosed with Tourette's Syndrome, Obsessive Compulsive Disease (OCD) and he also suffers from migraines. The Complainant did not initially pursue a Section 504 Plan, at that time, because she wanted to work with the Student's teachers using informal accommodations and/or interventions. Last year, while in the 9th grade, the Student started getting sent to the office for his behavior and was missing instructional time. The Complainant stated that she met with the Coordinator who told her that the Student does not qualify for a Section 504 Plan because he makes good grades. The Complainant stated that the Coordinator made this decision without an evaluation team and did not provide her with procedural rights.

On September 8, 2009, the Complainant stated that she spoke with the Coordinator a second time. She informed the Coordinator that she had conducted some research and found that making good grades was not a reason to be ineligible for a Section 504 Plan. The Complainant stated that the Coordinator agreed with her and told her he would get back with her. The Complainant stated that she tried to provide doctors' diagnoses of the Student's disabilities to the Coordinator, but that he refused to accept the documentation.

The Coordinator stated that the Complainant never requested an evaluation for the Student in writing and that he had unilaterally denied her verbal requests for an evaluation because the Student was highly functioning, an honors Student, and had no behavior problems. He acknowledged that the Complainant tried to provide him with an independent evaluation and he did not accept it because he and School personnel did not consider the Student to be a person with a disability. The Coordinator also acknowledged that after he told the Complainant that the Student did not qualify to have an evaluation or a 504 Plan, he did not provide her with any procedural



safeguards because he did not believe it was necessary at the intervention stage.

On October 7, 2009, the Complainant gave copies of the Student's diagnoses to his teachers and information on how to handle the Student's disabilities, in order to obtain informal interventions for the Student. However, she did not have a subsequent dialogue with the teachers nor did she receive a response from them about the information she had provided. The Coordinator stated that he made this suggestion to the Complainant during their meeting in order for her to arrange informal interventions for the Student.

On November 13, 2009, the Complainant contacted the Coordinator and requested a behavior plan for the Student after he got into trouble. The Coordinator told the Complainant that he would speak to the teachers to find out what happened. When she did not hear from the Coordinator, the Complainant contacted him soon afterwards and told OCR that he had stated that if a student was making good grades, but having problems, they did not necessarily qualify for services under Section 504. Shortly thereafter, the Complainant stated that she called the Superintendent's office and was told that because the Coordinator had spoken to the GADOE about the matter, that the decision was final. The Complainant confirmed to OCR that all her requests for an evaluation had been verbal. She also stated that the Student's teachers knew of the Student's disabilities, based on her visit with them in October 2009, when she gave them handouts about the Student's disabilities.

### **Conclusion**

As the Title II implementing regulation provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations, OCR conducted its investigation in accordance with the applicable Section 504 standards.

The evidence shows that the District has established procedures for developing a Section 504 Plan. The District's Section 504 Evaluation Referral

form states that the person making the referral can state the nature of their concern (academic, behavioral, major life activity that may be limited), describe supporting observations, and attach test scores and medical documentation that supports the possible disability. The District's Special Education Coordinator confirmed that parents may request an evaluation to determine disability.

The Coordinator denied the Complainant's verbal request for an evaluation because he did not consider the Student a qualified individual with a disability, in light of his good grades. He also stated that he did not provide the Complainant with a copy of the due process rights because he did not believe it was necessary at the intervention stage. Section 504 regulation at 104.35(b) states that a recipient shall conduct an evaluation of any person who is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 104.36 states that a recipient will provide a parent or guardian an opportunity for an impartial hearing with respect to actions regarding the identification, evaluation or educational placement of persons who, because of disability, need or are believed to need special instruction or related services. OCR determined that the Complainant's verbal request that the Student be evaluated provided the District with sufficient notice that the Student was a person believed to need special education or related services, and that the District failed to evaluate the Student. OCR also found that the Complainant was not provided with due process rights after the District refused to evaluate the Student, in noncompliance with the Section 504 regulation.

The Coordinator stated that he had unilaterally denied the Complainant's verbal requests for an evaluation because the Student was highly functioning, an honors Student, and had no behavior problems. The Section 504 regulation at 104.35(c)(1) and (3) states that in evaluating a student for special education and related services, a recipient shall draw

upon information from a variety of sources, including aptitude test and achievement test, teacher recommendations, physical condition, social or cultural background and adaptive behavior. The recipient also will ensure that the decision on the evaluation and placement of the student is made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and placement options. OCR determined that the District only considered the Student's grades and behaviors and failed to consider a broad range of information provided by a group of persons knowledgeable about the Student, the meaning of any evaluation data, and placement options, in determining whether the Student is eligible for special education and related services in noncompliance with the Section 504 regulation.

While learning is a frequently impacted major life activities for students, the District should be cognizant that, in the elementary and secondary context, consideration of a student's academic success as reflected by good grades, may not, by itself be sufficient to determine whether that student is substantially limited as to learning. Potentially relevant when a district is considering whether learning is substantially limited are factors such as a student's ability to interact with others, a student's ability to control his or her behavior, a student's ability to attend school, and a student's ability to participate in the educational program. The Section 504 implementing regulation provides a non-exhaustive list of possible major life activities that may be affected. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) expanded the list of major life activities, but also stated that major life activities are not limited to those identified in the statute. 42 U.S.C. Section 12102(2).

Based on the foregoing, OCR concludes that the District is in noncompliance with Section 504 and Title II with respect to the failure to evaluate the Student, or, in the alternative, provide the Complainant with a copy of the Section 504 procedural safeguards so that the Complainant could

challenge the failure to evaluate in a due process hearing. However, on April 27, 2010, the District agreed to implement the enclosed Resolution Agreement (Agreement), which when fully implemented resolves the compliance issues. OCR will monitor the District's implementation of the Agreement. If the District fails to fully implement the Agreement, OCR will reopen this allegation and take appropriate action to ensure the District compliance with Section 504 and Title II.

### **Allegation 2**

#### **Whether the District Discriminated Against the Student By Disciplining the Student More Harshly Than a Non-Disabled Student for the Same or Similar Actions**

To be afforded protection under the Section 504 regulation, a person must be an individual with a disability. For the purposes of this allegation, OCR considered the Student to be protected under Section 504 because the District acknowledged that the Complainant requested an evaluation for the Student, who is therefore an individual believed to need special education or related services. Consequently, OCR proceeded with the investigation of this allegation by comparing the Student's discipline record with that of another non-disabled student (Peer), specifically named by the Complainant as a student who was disciplined differently and preferentially treated, compared to the Student.

The District adheres to a flexible discipline procedure which encourages teachers to manage their own discipline problems, initially. If problems must be referred to administrators, students can expect to be dealt with more severely. Disciplinary actions for office referrals may include, but are not limited to, conference with student, verbal reprimand, corporal punishment, in-school suspension, home suspension, or expulsion. Discipline notices are kept on file in the office for future reference and every effort is made to insure that all disciplinary actions are fair, consistent and commensurate with the offense. The School has a

corporal punishment policy which requires parents to opt out of the administration of corporal punishment as a means of discipline.

The Complainant alleged that the Student was disciplined for actions, which the Peer also committed, but who received a lesser disciplinary measure or none at all. In reviewing the disciplinary files for both students, the only similar infraction was for disruptive conduct. For disruptive conduct, the Student's first two incidents resulted in one day of In School Suspension (ISS) and the third time a conference with the Principal. For the Peer's first disruptive conduct, he received corporal punishment, and for his second offense he received three days of ISS. In explaining the differences, the Principal stated that the Peer's father expressly requested that corporal punishment be used on the Peer, when appropriate.

As for why the Student did not receive corporal punishment, the Principal stated that he opted the Student out of receiving corporal punishment because, in the previous year, the Complainant informed him of an incident of corporal punishment that had left bruises, and he did not want to inflict any bruises. Additionally, the Student's disruptive behaviors warranted ISS because they were multiple behaviors that added up in severity or length of time before the teacher felt it was necessary to send the Student to the Principal's office.

The Complainant stated that on November 3, 2009, the Student was disciplined for putting his head down on his desk, which he sometimes did when he suffered from migraines. The Principal stated that the Student was never penalized for putting his head down on the desk.

The Principal stated that disciplinary sanction for a student follows a four (4) step process. The first step is a warning, the second step is a phone call to the parent, the third step is some type of teacher assigned discipline such as lunch detention or after school detention, and the fourth step is office referral. With reference to the office November 3, 2009 referral in which the Student received one (1) day ISS, the Principal stated that, although the referral states that

the Student placed his head on the desk three (3) times, he was disciplined for the totality of disciplinary infractions such as disrupting the classroom and disrespecting the teacher and was a "last straw" referral.

The Complainant stated that the Student was written up for sleeping and given a 3-day ISS, which was served during a football playoff game, which resulted in the Student being denied an opportunity to play in the band during the playoff game. The Complainant stated that the Peer was permitted to play in the football game even though he was cited for sleeping on the day of the game.

The discipline records indicate that on November 17, 2009, the Student received three (3) day ISS for a harassment incident in which he inappropriately touched a female student, and not for sleeping as stated by the Complainant. The Principal stated that he considered it a serious offense and as a result the Student was suspended for three (3) days ISS.

The disciplinary records show that on November 19, 2009, the Peer was charged with sleeping. As a result the Peer received corporal punishment on the day of the game for the infraction of sleeping. As stated above, the Peer receives corporal punishment as a result of a discussion with the Peer's father, while the Principal opted the Student out of receiving corporal punishment.

When the Complainant was given a chance to rebut the differences in discipline, she was unable to refute the District's information; however, she stated that it was unfair that the Peer was permitted to play in sporting events whereas the Student's three-day ISS impacted his band participation.

The Principal informed OCR that if a student is serving any length of suspension, it was the School's policy to suspend that student from any extracurricular activities that occurred on or immediately subsequent to the date of their suspension. The Student was not permitted to accompany the band on November 20, 2009, because that was a day he was serving ISS. The Peer was

permitted to play in the football game because his referral was for a different infraction, sleeping, which did not require that he be suspended from any extracurricular activities. The Principal stated that the Peer and another student were required to miss extracurricular activities while serving ISS on additional occasions.

### **Conclusion**

As previously stated, when investigating issues of differential treatment, OCR examines whether there is evidence that the student was treated differently than students without disabilities under similar circumstances, and whether the treatment resulted in the denial or limitation of education, services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination based on disability.

There is no evidence to indicate that the Student was subjected to different treatment than the Peer, a student without disabilities. Furthermore, the evidence shows that the Student and the Peer were disciplined for different infractions. The severity of their infractions was different and accordingly, the disciplinary action taken was different. Additionally, the Principal stated that the Peer was required to miss extracurricular activities while serving ISS and OSS, similar to the Student. Based on the foregoing, OCR finds insufficient evidence that the District discriminated against the Student in noncompliance with Section 504 and Title II.

### **Allegation 3**

#### **Whether the District Retaliated Against the Student by Placing Him on In-School Suspension (ISS) On November 20, 2009, When It Had Previously Been Cancelled for All Students**

In investigating allegations of retaliation, OCR examines whether the individual allegedly retaliated against engaged in a protected activity, whether the recipient was aware of the individual's participation in

the protected activity, whether the recipient took adverse action against the individual contemporaneous with or subsequent to the protected activity, and whether a causal connection between the adverse action and the individual's participation in the protected activity can be reasonably inferred. If these elements are established, OCR determines whether the recipient has a legitimate, non-discriminatory, non-pretextual reason for the adverse action.

#### **A. Protected Activity and the District's Knowledge of the Protected Activity**

There are two commonly recognized circumstances under which an individual engages in a protected activity, and thus is protected from retaliation. First, if the individual has opposed any act or policy that is unlawful under one of the laws that OCR enforces, they have engaged in a protected activity. Secondly, if the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, or proceeding or hearing conducted under the laws that OCR enforces, they have engaged in a protected activity.

The Complainant has a history of advocating on the Student's behalf throughout the 2009-2010 school year, and the District has acknowledged the Complainant's advocacy for the Student. The Complainant attempted to secure a Section 504 Plan for the Student in September and November 2009, therefore, OCR determined that the Complainant was engaged in a protected activity and that the District had knowledge of the protected activity.

#### **B. Adverse Actions**

OCR next determined whether the District took adverse action against the Complainant or Student contemporaneous with or subsequent to the protected activity. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Complainant or Student in their ability to gain the benefits of the recipient's program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational

opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further the protected activity, or if the individual was, because of the challenged action, precluded from pursuing their discrimination claims.

The Complainant alleged that the adverse action occurred on November 20, 2009 when the Student was required to serve a day of ISS, which the Complainant believed was cancelled.

OCR finds that an adverse action took place on November 20, 2009, which was subsequent to the protected activity. The Student was required to serve a day of in-school suspension, as it had been previously scheduled. OCR determined that the Student's ISS could be construed as an adverse action since the disciplinary sanction could significantly disadvantage the Student in his ability to gain the benefits of the recipient's program.

### **C. Causal Connection**

Having established the first three elements of a case of retaliation, OCR then looks for evidence of a causal connection between the adverse action and the protected activity. There are several types of evidence relevant to proof of a causal connection, including: (1) closeness in time between the District's knowledge of the protected activity and the adverse action; (2) change in treatment of the individual after the District had knowledge of the protected activity; and (3) different treatment of the individual from similarly-situated persons.

The last date of the Complainant's protected activity was November 13, 2009, when she sought a behavior plan from the Special Education Director. The adverse action occurred on November 20, 2009 when the Student served ISS.

Because there is closeness in time between the protected activity and the adverse action, OCR determined that there was a causal connection between the two events.

### **D. The District's Reason for Its Action**

Because the Complainant established a prima facie case of retaliation, OCR next analyzed whether the District has a legitimate, nondiscriminatory and non-pretextual reason for its action.

OCR found that on November 17, 2009, the Student received a disciplinary referral for harassing a female student in class. The Principal deemed the severity of the Student's infraction warranted a three day ISS. The ISS would be served immediately subsequent to the infraction, on November 19th, 20th, and 30th.

The Complainant stated that she had heard from the School secretary that ISS had been cancelled for November 20, 2009. However, the Principal informed OCR that while the ISS schedule for November 20th may have been uncertain earlier in the week, it was never officially cancelled. The Principal explained that the reason the schedule was uncertain was because many teachers are also football coaches, and he was uncertain whether there would be enough personnel to cover classes and the ISS classroom.

The School's daily bulletin reflects that ISS was held every day of the week of November 16-20, 2009. The November 20, 2009, daily bulletins also reflect that the Student and another student were to serve ISS on that date. The ISS teacher verified that there were two students in ISS on that day. The bulletin does not state that ISS was cancelled on November 20th.

Based on the above, there was no evidence to suggest that the District's proffered reasons for placing the Student in ISS on November 20, 2009 was motivated by retaliation or was a pretext for retaliation. Accordingly, although the Complainant established a prima facie case of retaliation, the District proffered a legitimate nondiscriminatory and non-pretextual reason for its action.

OCR concludes that there is insufficient evidence to support the allegation the District retaliated against the Student by placing him on ISS on November 20, 2009.

### **Procedural Issue**

During the course of the investigation OCR



discovered that the District's written Section 504 manual is inconsistent in how it describes what services students with disabilities are entitled to receive under Section 504. In some portions of its Section 504 manual, it states that students with disabilities are entitled to "accommodations" and in other sections the manual references Section 504 Accommodation Plans. To ensure that the policies and procedures are consistent and District staff are aware of their obligations to provide the correct services to student with disabilities, the District requested to take voluntary action to resolve this concern by revising its Section 504 policies and procedures, whether written or on-line, to consistently state that a student with a disability, who is covered solely under Section 504, is entitled to more than mere "accommodations", and that such students are entitled to a FAPE that includes general education, special education, and/or related aids and services.

Based on the above, the District submitted the enclosed Resolution Agreement, agreeing to revise its policies and procedures to make clear that the District is obligated to provide students who are covered solely under Section 504 with a FAPE, including general education, special education, and/or related aids and services. When fully implemented, the Resolution Agreement will resolve this procedural issue.

### **Conclusion**

Based on the above, OCR has determined that there is insufficient evidence to establish noncompliance with Section 504 and Title II regarding Issues #2 and #3, as alleged in the above-referenced complaint. With respect to Issue #1 and the procedural issue discussed above, the District has voluntarily agreed to resolve those issues. On April 27, 2010, OCR received the enclosed signed Resolution Agreement (Agreement) that when fully implemented, will resolve Issue #1 and the procedural issue in the above-referenced complaint. OCR will monitor the implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen

the case and take appropriate action to ensure compliance with Section 504 and Title II.

This letter is not intended, nor should it be construed, to cover any other issues regarding the District's compliance with the regulations enforced by OCR that may exist and are not discussed herein. Please be advised 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. If we receive such a request, we will seek to protect, to the extent possible, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, testified, assisted, or participated in any manner in an investigation in connection with a complaint.

This is a letter of finding 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.

OCR will monitor implementation of the enclosed Agreement. The monitoring report is due to OCR on July 15, 2010. OCR is committed to a high quality resolution of every case.

Thank you for the courtesy and cooperation that you and your staff extended to the staff of OCR. If you have any questions or concerns regarding OCR's determination, please contact Ms. Sonia Lee, General

Attorney, at (404) 974-9371, or Virgil Hollis, Compliance Team Leader, at (404) 974-9366.

### **Resolution Agreement**

#### **Miller County School District**

Miller County School District (District) voluntarily submits this Resolution Agreement (Agreement) to the U.S. Department of Education, Office for Civil Rights, to resolve the compliance issues identified in the investigation of the above-referenced complaint, and to ensure compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title 42 U.S.C. § 12131, and its implementing regulation, at 28 C.F.R. Part 35.

#### **Corrective Actions**

By June 1, 2010, the District will do the following:

1. Convene a meeting with individuals knowledgeable about the Student to determine whether the Student, because of a disability, needs or is believed to need special education or related services that are designed to meet his individual educational needs, or in the alternative, if the District determines that the Student does not have a disability, or that the Student has a disability but does not need special education or related services, the District will provide the Complainant with notice of her due process rights.

2. Revise its Section 504 Procedures to state that, if the District determines that a student is not eligible to be evaluated, they will provide the parent or guardian with notice of their due process rights.

3. Revise its Section 504 Procedures to clarify that, in evaluating a student to determine eligibility under Section 504, the 504 committee will consider a broad range of major life activities, not only learning.

4. Revise its Section 504 policies and procedures, whether written or on-line, to consistently state that a student with a disability, who is covered

solely under Section 504, and not the Individuals with Disabilities Education Act (IDEA), is entitled to a free appropriate public education (FAPE) that includes general education, special education, or related aids and services.

#### **Monitoring Requirements**

In order for OCR to monitor implementation of the above actions, the District agrees to provide the following information by July 15, 2010:

- A. Provide documentation showing the implementation of item one, including: meeting notes regarding the Student, a copy of the notice regarding the Student, a copy of the notice of due process rights to the Complainant, and the date that the notice was provided to the Complainant.

- B. Provide a copy of the revised Section 504 Procedures showing the implementation of items two through four above.

#### **Regulations Cited**

34 CFR 104.35(a)  
28 CFR 35.130(a)  
34 CFR 104.4(a)  
34 CFR 104.61  
34 CFR 104.4(b)(1)(ii)  
34 CFR 104.33(b)

**58 IDELR 82****111 LRP 70119****Hamilton (OH) Local School District  
Office for Civil Rights, Midwestern  
Division, Cleveland (Ohio)****15-10-1123****September 16, 2011****Related Index Numbers****405.022 Child Find****405.036 Eligibility for Related Services****405.038 Evaluation****Judge / Administrative Officer****Catherine D. Criswell, Director****Case Summary**

A student's medical problems and excessive absences should have prompted an Ohio district to evaluate her for Section 504 eligibility. Despite having knowledge that the first-grader's 34 absences were related to her chronic hypoglycemia and migraines, the district initiated truancy proceedings against her and reassigned her to an online program. The student's mother filed for due process alleging that the district denied her daughter FAPE. OCR pointed out that Section 504 requires districts to provide qualified students with disabilities with FAPE regardless of the nature or severity of their disabilities. 34 CFR 104.33(a). To provide FAPE, districts must facilitate regular or special education and related aides and services designed to meet the individual educational needs of a student with a disability as adequately as the needs of students without disabilities are met. The FAPE requirement, OCR explained, is not subject to a reasonable accommodation standard or other limitation. Thus, accommodating a student with a disability may require modifications to a regular education program, including adjustments to policies on absences if the student's disability impacts her attendance. OCR observed that before charging the student with truancy, the district had sufficient knowledge that she had a physical impairment that substantially limited a

major life activity. The student's mother regularly discussed her daughter's hypoglycemia with the student's teacher. Moreover, district records showed that the district knew that at least 22 of the student's absences were related to medical conditions. OCR decided that the district violated the Section 504 regulation at 34 CFR 104.33 and the Title II regulation at 28 CFR 35.130(b)(7) in failing to consider whether it needed to modify its attendance policy to ensure that the student was not discriminated against for absences related to her disability. Before OCR conducted its investigation, the district developed a 504 plan for the student, permitted her to re-enroll in her former elementary school, and resolved to provide any compensatory education necessary. However, OCR noted that the district's process for identifying and referring students for evaluation for Section 504 eligibility did not comply with the requirements of 34 CFR 104.33, 34 CFR 104.35, and 34 CFR 104.36. The investigation revealed that the district habitually failed to evaluate students for Section 504 eligibility after becoming aware that physical or mental impairments impacted their attendance. The district's flawed practices necessitated remedial action.

**Full Text****Appearances:**

Dear Mr. Hirt:

This letter is to inform you of the disposition of the above-referenced complaint filed against the Hamilton Local School District (the District) with the U.S. Department of Education (Department), Office for Civil Rights (OCR), on March 5, 2010. The complaint alleged that the District discriminated against a student (the Student) on the basis of her disabilities [ ]. Specifically, the complaint alleged that the District withdrew the Student from school on March 2, 2010, and refused to reinstate her because of her disabilities.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104.

Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. The District is a recipient of Federal financial assistance from the Department and a public entity; accordingly, OCR had jurisdiction over this complaint.

The complaint raised the issue of whether the District denied a qualified student with a disability the opportunity to participate in or benefit from its aids, benefits, or services on the basis of disability in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1)(i) and the Title II regulation at 28 C.F.R. § 35.130(a).

### **Background**

During the 2009-2010 school year, the Student was seven years old and enrolled in the first grade at the District's elementary school. The Student had been diagnosed with chronic hypoglycemia and migraine headaches. The Complainant asserted that she had provided information to the District about the Student's medical impairments throughout the school year, but the Student was not evaluated by the District for disability. Based on the number of absences the Student had during the 2009-2010 school year, on March 2, 2010, the District terminated the Student's enrollment in a traditional classroom at the District's elementary school, and notified the Complainant that she needed to enroll the Student in the District's Digital Academy, an online school. The District also filed charges against the Complainant for educational neglect based on the Student's number of unexcused absences. Following the Student's change in placement to the Digital Academy, her parents requested that the District evaluate her to determine whether she was eligible as a student with a disability. After receiving notice from OCR about this complaint, the District held an intervention team meeting and decided not to refer the Student for an

evaluation to determine whether she was eligible as a student with a disability under Section 504. The following day, the District reconvened a meeting and determined that the Student was eligible as a student with a disability under Section 504. Following that determination, the Superintendent reassigned the Student to the elementary school. The Student resumed attendance at the elementary school on April 5, 2010, and her placement has continued to be at the elementary school. However, disputes have continued between the District and the Student's parents regarding the Student's ongoing absences, which the Complainant asserts are related to her disabilities. The Student did not receive any schooling from March 2 to April 5, 2010.

During its investigation, OCR interviewed the Student's parents, District witnesses, and the School Court Liaison for the Educational Service Center of Central Ohio (the court liaison). Additionally, OCR reviewed documents provided by the District and the Complainant.

Based on a careful analysis of this information, OCR has determined that the District denied the Student an opportunity to participate in or benefit from its aids, benefits, or services on the basis of disability in violation of Section 504. OCR's investigation also revealed that the District was not evaluating students with medical conditions to determine if they were eligible as students with a disability; and reassigned students with disabilities to its alternative programs without considering if their disabling conditions were the reason for absences, or whether the students would receive an equal opportunity to access the programs and services of the alternative school. Further, OCR determined that the District's procedures for identifying, evaluating, reevaluating, and placing students with disabilities do not comply with Section 504. We set forth the bases for our determinations below.

### **The Student's Absences**

According to the Complainant, the Student's chronic hypoglycemia and migraines sometimes

er her unable to function and force her to have to rest or sleep. The symptoms and medical appointments associated with her medical conditions resulted in several absences from school during the 2009-2010 school year. From September 8, 2009, to March 1, 2010, the Student missed 34 days of school. The District classified 16 of her absences during the time period from September 8 to December 2, 2009, as excused, with illness as the documented the reason. The District classified the remaining 18 absences as unexcused, although for five of these absences the District's records listed illness as the reason. The records showed that other absences were unrelated to illness or a medical condition, such as absences related to a death in the family. According to the Complainant, the District refused to accept doctors' notes that she turned in for some of the absences it classified as unexcused.

The Complainant stated that she first learned that the Student had accumulated too many unexcused absences on March 2, 2010, when the District left a voice mail message at the family's home. The voice mail stated that the District had terminated the Student's enrollment in the District's elementary school because she had 18 unexcused absences. The District also sent a letter, dated March 1, 2010, informing the Complainant that the District was removing the Student from the elementary school effective March 2, 2010, for being a chronic truant, and instructing the Complainant to enroll the Student in the District's Alternative Academy by March 5, 2010, or risk the District pursuing additional charges against her.

According to District policy, a student can be considered "habitually truant" from school if the student is absent from school without legitimate excuse for five or more consecutive school days, for seven or more school days in one month, or for twelve or more school days in one school year. District policy defines "chronic truancy" as absence from school without legitimate excuse for seven or more consecutive school days, for ten or more school days in one month, or for fifteen or more days in one

school year.

The District's Student Handbook for the 2009-2010 school year (the Handbook) states that when a student is absent a parent or guardian should contact the school, either by phone or in person, during the first two hours on the day of the absence. Absences which are not verified by parent contact within three days are classified as "unexcused." Up to ten absences can be excused by the parent notifying the school of the student's absence. After a student has accrued ten absences in the school year, the District requires physician verification in order for each additional absence to be considered as excused.

As for the application of the attendance policy for students with chronic medical conditions, the District Administrator stated that a student with a medical condition could provide one advance note from a physician that would cover absences related to that condition and a student would not need a physician's note to excuse every absence. However, that view was contradicted by every other District witness, who each stated that a student would need to submit a physician's note specifying the date of each absence due to a medical condition within three days of the absence. They asserted to OCR that a general note from a physician about a student's medical conditions that did not contain specific dates would not excuse future absences. According to the principal of the elementary school, an Individualized Education Program (IEP) or a Section 504 plan could modify the District's attendance policy, but a student would still need to submit, within three days of an absence, a note from a physician specifying the day or days missed.

The District's attendance officer advised OCR that the District sends notices automatically to parents after a student has accumulated five, ten, and twelve unexcused absences. The District advised OCR that in May 2009 the School Board adopted a policy that included alternative placement as an option for dealing with truancy. The use of the alternative placement was included in an effort to achieve 100% attendance at the District. Before February 2010, the



District used in-school and out-of-school suspensions to deal with truant students. In mid-February 2010 the attendance officer began producing attendance reports more frequently and was told to provide a list of students with more than 15 unexcused absences to the principal, who would notify the appropriate District administrator and the court liaison.

Once a student is involuntarily removed from the elementary school and placed in the Alternative Academy, regardless of the point in the school year that the child is involuntarily removed, the student cannot petition to return to the elementary school until the following school year. Even then, the student may not return to the school unless they met attendance and participation requirements while placed in the Alternative Academy.

The District provided OCR a copy of a notice sent to the Complainant on January 4, 2010, regarding the Student's absences. The notice indicated that the Student had accumulated five unexcused absences. According to the principal, absence notification letters are prepared every other day. The principal also noted that the District did not send the Complainant a notice when Student reached ten unexcused absences because the Student had reached fifteen unexcused absences by the time the District prepared the 10-day notice. On March 1, 2010, the District sent a letter notifying the Complainant that the Student had accumulated 15 unexcused absences and she was being reassigned to the Alternative Academy's Digital Academy.

### **Alternative Academy Placement**

The Alternative Academy is a community school sponsored by the District. According to the District's website, there are four programs within the Academy: the Digital Academy, the Alternative Academy, the Special Needs Academy, and Alternative Classrooms. The Digital Academy is an online program which students complete from home; the Alternative Academy, which serves high school students only, is a correspondence program; the Special Needs Academy is available for grades four through twelve

and also requires the students to complete assignments at home. The Alternative Classrooms program has self-contained classrooms housed at some of the District's school buildings but is not offered to elementary students.

The only Alternative Academy program that the Student qualified for was the Digital Academy. According to the principal, the purpose of the Alternative Academy is to allow students with medical conditions to have an active school life. The District advised OCR that building administrators refer students with medical conditions that prevent them from attending school, as well as students who are at-risk, those with behavior issues, and students with special needs, to the Alternative Academy. The Superintendent stated that a student may be assigned to the Digital Academy, despite a desire to remain in traditional school, if a student's medical condition does not allow a student to come to school every day.

The District involuntarily assigned the Student to the Digital Academy effective March 2, 2010. The Complainant advised OCR that when she asked the District to reenroll the Student in the elementary school she was told that the District believed it was in the Student's best interest for her to be educated online due to her medical conditions.

With regard to reassigning students with IEPs or Section 504 plans to the Alternative Academy, the principal asserted to OCR that an IEP or Section 504 meeting is held before the District reassigns such students. However, the District's special education director stated that an IEP meeting is held "within days" of the reassignment.

### **Tuancy Hearing**

On March 3, 2010, the Complainant attended a hearing with the court liaison and the District Administrator regarding whether the District would file educational neglect charges against the Complainant and her husband in juvenile court. The Complainant advised the court liaison and the District Administrator that the absences were due to the Student's chronic hypoglycemia and migraines. The

Complainant explained that previously the District had refused to accept excuses that the Student's doctor had written for absences dating back to December 2009, and she was permitted to submit the excuses at the hearing. She also said that she wanted the Student to return to the elementary school. The Complainant told OCR that she was told at the hearing that the District would not file truancy charges because the absences were due to the Student's medical conditions.

The District referred to the Complainant's meeting with the court liaison and District Administrator as a "due process hearing." Typically, the court liaison conducts the hearing, writes up a report, and sends the report to the District Administrator. The District Administrator advised OCR that the court liaison confirms the number of unexcused absences and determines whether to pursue truancy or educational neglect charges. However, the court liaison told OCR that the purpose of the meeting is to explain the court process to the parents, and to give the parents a "pep talk" to get their student back in school the following year. He said charges are usually filed with the court after the hearing unless a student's principal directs him not to file. The court liaison advised OCR that he does not investigate the number of unexcused absences, and relies on the District's determination as to whether a student is truant.

The court liaison indicated that he files truancy charges even if a student has a chronic medical condition. However, he said he does write a report reflecting the information provided by the parent and he sends it to the student's principal within a day or two of the hearing. The District provided OCR with two reports written by the court liaison regarding the Student's truancy proceedings. One report, dated March 3, 2010, states that the Student "is hyperglycemic and has severe migraine headaches. She is scheduled for an MRI on March 18th." The report also states that she had 17 unexcused absences and that her parents indicated that "they had excuses for some of the unexcused days, but they were turned

into the school after the three day limit." A second report, dated March 22, 2010, which was several weeks after the hearing and after OCR notified the District of this complaint, focused on the parents' concerns that they had not received notice about the Student being a chronic truant. This second report also stated that the parents did not provide the District with medical excuses. The court liaison told OCR that the District Administrator instructed him to file truancy charges against the Student's parents, and that he submitted the March 22 report to the court as part of the paperwork.

OCR requested and reviewed copies of the court liaison's reports regarding each District student who was found to be a habitual or chronic truant during the 2008-2009 and 2009-2010 school years. OCR received copies of 33 reports regarding individual students. Thirteen reports, including the Student's, contained some evidence of medical conditions potentially impacting attendance but none of the students were referred for evaluation to determine whether they were a student with a disability under Federal disability laws prior to being reassigned. There was also no evidence that the District considered what would be required to provide equal access to the Alternative Academy for students with disabilities prior to a truancy reassignment to that program. Examples of information suggesting medical conditions that may have contributed to the absences of these 13 students included a student who was asserted to be suicidal and under treatment; a student asserted to have severe asthma; a student asserted to have attention deficit hyperactivity disorder and Oppositional Defiant Disorder (ODD) and to be under the care of a psychologist; and a student asserted to be suffering from severe chronic allergies that triggered asthma and headaches.

When asked whether the District ever refers students for a disability evaluation based on information provided at truancy hearings, the District Administrator stated that he has made referrals on a few occasions based on information provided at the hearing. However, the District Administrator advised

OCR that he did not refer any of the 13 students noted above and indicated that those students should have been referred to the District's special education department for evaluation. The special education director stated that she never received a referral for evaluation based on information obtained at a truancy hearing.

### **Referral of the Student for Evaluation as a Student With a Disability**

The Complainant asserted that the District had knowledge that the Student suffered from chronic hypoglycemia and migraine headaches prior to the truancy hearing. She stated that she frequently spoke to the Student's teacher about the Student's medical conditions. She stated that she first notified the principal, vice principal, nurse, and the Student's teacher about the Student's hypoglycemic episodes on September 26, 2009. At that time, the Complainant explained that the Student might miss school due to the hypoglycemia. She also provided the District with a physician's note from a September 25 2009, visit to the emergency room that stated that the Student had been seen at a hospital emergency department for hypoglycemia. The Complainant also advised OCR that she had multiple conversations with the Student's teacher about the Student's hypoglycemia. In October 2009, the Student suffered a hypoglycemic attack during an awards assembly at school, during which she began to shake and turned purple around the eyes. The Complainant took the Student home early, after telling the principal and the nurse that the Student was having a hypoglycemic attack. The Complainant provided OCR a copy of a doctor's note dated October 2, 2009, stating that the Student had been treated for hypoglycemia, which she gave to the District.

The Complainant also stated that she went to the school on February 24, 2010, and spoke to the principal and nurse about the migraines the Student was experiencing in addition to the hypoglycemia. The Complainant requested that the Student be able to carry a water bottle with her during school. She also discussed medication that the District would need to administer to the Student, and explained that the

Student might miss school until her health issues were under control. The Complainant provided OCR with a copy of a letter from a physician, dated February, 24, 2010, notifying the District of the Student's migraines and symptoms, as well as her need for medication and a water bottle at school.

The Student's teacher confirmed that she and the Complainant regularly discussed the Student's medical conditions and that the Complainant regularly sent notes about the Student's medical conditions and related needs. She confirmed that the Complainant notified her in October 2009 about the Student's hypoglycemia. The teacher stated that she forwarded notes regarding the Student's medical conditions to the nurse's office. In February 2010, the Complainant advised the teacher that the Student was suffering from migraines and explained that the Student was seeing a neurologist. The teacher also indicated that the Complainant told her that the Student's absences were due to illness; however, the teacher did not share this with other District staff because she assumed the Complainant had also provided that information to the District and the attendance officer.

The teacher told OCR she has never had a student with a Section 504 plan in her class and the only students with disabilities have been students with "speech IEPs." The teacher had never referred a student for evaluation of a suspected disability. Moreover, the teacher told OCR that she has never received training on Section 504, or what to do if she suspects that a student has a disability. The teacher said that if she suspected that a student had a disability she would report it to the principal. The teacher advised OCR that she never considered referring the Student for an evaluation because the District had implemented all of the Student's doctor's recommendations.

The principal told OCR that she did not consider evaluating the Student for disability because she had been assigned to the Digital Academy. The principal advised OCR that she did not discuss the Student's medical conditions with the Digital Academy or discuss the possibility of an evaluation with the

Complainant.

Several District witnesses stated that, before evaluating students for Section 504 eligibility, the District refers students to the intervention team. The guidance counselor, who is also the Section 504 coordinator for the elementary school, explained that the intervention team follows a two-step process. The team implements a first set of interventions for 20 days. If unsuccessful, the team implements a second set of interventions for an additional 20 days. Only if the interventions are unsuccessful does the team then meet to determine if the team suspects a disability. At that point, the intervention team will refer a student for an evaluation if the team suspects the student has a disability.

District staff told OCR that students are referred to the intervention team for behavior or academic issues. The principal indicated that students with medical conditions are also sent through the intervention team process and, if a Section 504 plan is needed, the guidance counselor handles it. However, the guidance counselor indicated that students with medical issues are brought to her attention through the nurse and not through the intervention team.

The teacher and the attendance officer advised OCR that they forward any information related to medical issues to the school nurse. The nurse creates "health management plans" for students with special needs related to health conditions, including students with allergies, diabetes, and other medical issues. According to the principal and the guidance counselor, only two out of the 954 students in the elementary school had Section 504 plans.

The Alternative Academy director told OCR that students with suspected disabilities who are in her program are subject to the same procedure for identification and evaluation as other students in the District. However, the director indicated that, while she was aware of students with medical conditions, she did not refer them for disability evaluations because the District was focused on the students' "academic needs."

On March 4, 2010, the Complainant orally requested that the District evaluate the Student for a Section 504 plan based on her medical conditions. On March 11, 2010, she reiterated her request in writing.

The District Administrator asserted that he referred the Student for evaluation after the truancy hearing on March 3. As part of the referral, he forwarded the information provided by the Complainant at the hearing regarding the Student's absences being related to her medical conditions. The special education director advised OCR that the Student's referral was the first time a student was referred for evaluation based on raising a medical condition at a truancy hearing.

According to the Complainant, the District held an intervention team meeting for the Student on March 22, 2010. The Complainant stated that the purpose of the meeting was to determine whether the Student qualified for an IEP or a Section 504 plan. The team determined that the Student did not qualify for an IEP due to her academic performance. Additionally, the team also determined that the Student did not qualify for a Section 504 plan because District staff had not observed symptoms of her medical conditions at school. The Complainant stated that the team told her that it might consider developing a Section 504 plan for the Student the following school year. The District and the Complainant provided OCR with a copy of a "Determination of Suspected Disability" form dated March 22, 2010, which stated that the team did not find the Student eligible as a student with a disability, that the Student's parents were to continue to work with the Student's doctors to address the migraines and the hypoglycemia, and that another intervention meeting might be held in August or September to review attendance and academic progress.

According to multiple District witnesses, the purpose of the March 22, 2010, intervention team meeting, which was attended by the Student's parents, the special education director, the guidance counselor, the District's school psychologist, and the Alternative Academy director, was to determine whether the

Student was suspected of having a disability as defined pursuant to the Individuals with Disabilities Education Act (IDEA) and pursuant to Section 504. The guidance counselor stated that the team considered the Student's academics to be "right on track," and also discussed her behavior. According to the guidance counselor and the Superintendent, the team ultimately concluded that the Student was not suspected of having a disability for Section 504 purposes and, consequently, the team decided not to refer the Student for a Section 504 evaluation. The guidance counselor further stated that the team discussed what the District was currently doing to manage the Student's hypoglycemia, and concluded that the District was already addressing the Student's needs related to the hypoglycemia and migraines. She stated that the team felt that the Student's absenteeism was not something that the District could do anything about, and that a Section 504 plan was not necessary because the District was doing everything it could do for the Student.

The special education director stated that the team did not consider whether the Student was eligible for a Section 504 plan because the parents had not submitted medical documentation. She stated that, a few days later, the parents submitted medical documentation.

On March 25, 2010, the District invited the parents to another meeting. At that meeting, the Student was found to be eligible as a student with a disability due to her chronic hypoglycemia and migraine headaches, which the District found to substantially limit the Student in the major life activity of caring for herself. The team drafted a "Section 504 Accommodation Plan" for the Student as a result of that meeting.

The team did not consider modifying the District's attendance policy for the Student. The guidance counselor stated that the team concluded that the attendance issue was "beyond the school day" and was the responsibility of the parents; she stated that the team did not believe that anything could be done in a Section 504 plan to address the Student's

attendance.

With regard the Student's placement, the team informed the Student's parents that it did not have the authority to decide the Student's placement, and that only the Superintendent could change her placement. On March 26, 2010, the Superintendent notified the Complainant by letter that he had determined that it was in the Student's best interest to return to the elementary school and that the elementary school would be her placement effective Monday, April 5, 2010, at the conclusion of spring break.

During the course of this investigation, OCR asked the District about the potential need for compensatory education for the Student for the time she was withdrawn from the elementary school. On March 3, 2011, the Student's Section 504 team met and reviewed the Student's academic progress. The team determined that the Student was performing at grade level and did not require compensatory services. The District provided a letter indicating the decision to OCR, which showed that the Complainant had signed in agreement. When contacted by OCR the Complainant confirmed that she signed the document but stated that she did not understand what she was signing

The Complainant also advised OCR that the Student missed 20 days of school during the 2010-2011 school year due to her disability and that the District several times warned her it would take truancy action and the Complainant was required to provide a physician's note for every absence throughout the year. She said that the principal again told her this at the beginning of the current school year, in August 2011. You asserted on behalf of the District that the principal had had a conversation with the Complainant about providing the Student with educational services by alternative methods, such as tutoring, if she missed a lot of school due to her health conditions. The Complainant provided OCR with an audio recording of a meeting that was held on August 31, 2011. The recording revealed that at the meeting the District asserted that the Student would have to provide a doctor's note for every absence after 10



absences for the absence to be excused. The District stated that the doctor note requirement was District policy and could not be modified.

### **The District's Section 504 Policies**

During its investigation, OCR reviewed the District's Section 504 policies and identified a number of compliance concerns. For example, the District's policies are inconsistent as to the identity of the District's Section 504 Coordinator and do not provide contact information for the Coordinator. The Section 504 policies limit the individual's major life activities to be considered in determining whether a person has a disability. The policies also indicate that students with Section 504-only disabilities are never eligible for special education. The policies suggest that placement and services for a student with a disability under Section 504 are limited by a "reasonableness" requirement, rather than the free appropriate public education (FAPE) standard required by Section 504. The policy also incorrectly states that the District may discipline a student who is "disabled only under Section 504 [and who] is caught with drugs and alcohol" without following the procedural requirements of the Section 504 regulation.

### **Applicable Legal Standards**

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), prohibits recipient school districts from, on the basis of disability, excluding a qualified person with a disability from participation in, denying her the benefits of, or otherwise subjecting her to discrimination under any program or activity. The Title II implementing regulation contains a similar provision at 28 C.F.R. § 35.130(a).

The Title II regulation, at 28 C.F.R. § 35.130(b)(7), requires public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Under Section 504, recipients must provide a

free appropriate public education (FAPE) to each qualified student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the disability. 34 C.F.R. § 104.33(a). The provision of a free appropriate public education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36 regarding educational setting, evaluation, placement, and procedural safeguards. Those services may include modifications to the regular education program, including adjustments to rules regarding absences when a student's absences are due to a disability. The FAPE requirement is not subject to a reasonable accommodation standard or other similar limitation.

To be eligible to receive FAPE under Section 504, a student must have a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j). Pursuant to Section 504 and Title II, as amended by the ADA Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulator, endocrine, and reproductive functions.

Section 504 places an affirmative duty on the recipient to individually evaluate any student who, because of disability, needs or is believed to need special education or related services. 34 C.F.R. § 104.35(a). If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. §

104.35, the district must ensure that the child receives this assessment at no cost to the parents. School districts may always use regular education intervention strategies to assist students with difficulties in school. However, Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.

In interpreting evaluation data and in making placement decisions, the recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with 34 C.F.R. § 104.34, 34 C.F.R. § 104.35(c).

The Section 504 regulation, at 34 C.F.R. § 104.34, requires the recipient to educate, or provide for the education of, each qualified student with a disability in its jurisdiction with persons without disabilities to the maximum extent appropriate to the needs of the student with a disability. The recipient must place a student with a disability in the regular educational environment unless it is demonstrated that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 504 at 34 C.F.R. § 104.36 requires recipient school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an

opportunity for the parents or guardian of the student to examine relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian and representation by counsel, and a review procedure.

School districts must reevaluate a student with disabilities periodically and before any significant change in placement. Under OCR policy, any suspension, exclusion, or expulsion that exceeds 10 days or any series of shorter suspensions or exclusions that in the aggregate totals more than 10 days and creates a pattern of exclusions constitutes a significant change of placement that would trigger the district's duty to reevaluate a student under 34 C.F.R. § 104.35(a). OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

### Analysis and Conclusions

In this case, the evidence indicates that the District had sufficient knowledge to suspect the Student of having a physical impairment that substantially limited a major life activity for purposes of Section 504 prior to reassigning her to the Digital Academy. The evidence shows that starting in September 2009, the Complainant regularly discussed the Student's chronic hypoglycemia with the Student's teacher. In February 2010, the teacher and guidance counselor learned about the Student's migraines.

The evidence further establishes that the Student's teacher knew that the Student's medical conditions were impacting her attendance at school, that the Student needed medication at school, and needed to carry a water bottle. School staff further indicated that they had been providing some interventions for the Student based on these medical conditions.

Additionally, the District's records indicate that the District knew that the Student had at least 22 absences related to her medical conditions prior to her reassignment. Finally, the evidence shows that the District received sufficient information to suspect a

disability based on information provided at the truancy hearing on March 2. Thus, the District had sufficient notice to suspect that, due to medical conditions, the Student might be a person with a disability who requires related aids and services and that knowledge triggered the District's affirmative obligation to evaluate the Student.

On March 25, 2010, the Section 504 team deemed the Student's migraines and chronic hypoglycemia were a physical impairment that substantially limited the major life activity of caring for oneself and, therefore, identified the Student as a person with a disability entitled to services under Section 504. OCR finds that the District violated the requirements of the Section 504 regulation at 34 C.F.R. 104.33 and the Title II regulation at 28 C.F.R. § 35.130(b)(7) when it failed to consider whether it needed to modify the District's attendance policy as applied to the Student to ensure that the District did not discriminate against her for absences related to her disability. Although the Student is currently on a Section 504 plan, the District has, as recently as August 31, 2011, continued to refuse to make reasonable modifications in its attendance policies, practices and procedures that may be necessary for her disability. Moreover, the evidence shows that the District has categorically refused to make reasonable modifications to its attendance policies for any student with a disability.

Prior to the conclusion of our investigation, the District partially resolved the compliance issues related to the Student by allowing the Student to reenroll in the District's Elementary School and having her Section 504 team determine whether compensatory education services were appropriate for the month that the Student was out of school.

OCR's investigation revealed that the District's process for identifying and evaluating students for Section 504 eligibility is inconsistent with Section 504's requirements at 34 C.F.R. §§ 104.33, 104.35, and 104.36. Despite the District's affirmative obligation to identify and evaluate students who may be eligible for special education and related aids and

services due to a mental or physical impairment that substantially limits a major life activity, the District witnesses demonstrated a lack of adequate knowledge about Section 504 to appropriately identify and refer students who may be eligible. This was for instance evidenced by the District's failure to evaluate students who were indicated at their truancy hearings to have severe mental or physical impairments causing them to miss substantial time periods of school.

Additionally, the investigation revealed other problems with the District's process for identifying and referring students for evaluation for Section 504 eligibility. According to the principal, all students who are ultimately referred for an evaluation must first go through the intervention team process. However, the evidence establishes that students typically must be experiencing academic or behavioral problems in order begin the intervention team process. Those students receive interventions through the intervention team process and then may be referred for an evaluation if the interventions do not meet the student's needs and if the team suspects a disability. The evidence shows that students with medical conditions are sent to the school nurse, unless a student's medical condition is affecting the student academically or behaviorally. For those students, including students with allergies, diabetes, and other medical issues, the nurse may create a "health management plan." Moreover, any information received by a student's teacher or the attendance officer related to a student's medical condition or absences related to a medical condition is sent to the school nurse, not the intervention team. The evidence establishes that there is little communication between the elementary school Section 504 Coordinator, the nurse, and the District's special education department regarding students with medical conditions. Thus, students with medical impairments whose conditions do not affect their behavior or academics are unable to access the District's process for identifying students with disabilities, in violation of Section 504. In addition, the evidence indicated that if interventions are found to work for a student, the student is not

referred for disability evaluation, even if the interventions are necessary because of a suspected disability.

The District is not following Section 504's requirement that students with disabilities receive a FAPE consisting of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36. In a position letter submitted to OCR, you articulated a "reasonable accommodation" standard for determining the services Section 504 requires. Interviews of District witnesses, including the special education director and the elementary school's Section 504 coordinator, revealed a pervasive belief in the District that students with disabilities are not entitled to FAPE under Section 504, but to some lesser "intervention" or "accommodation" standard. This is also illustrated by the District's form for addressing the needs of students identified as eligible for Section 504, which is entitled "504 Accommodations Plan."

The District's practices regarding placement of students with disabilities in the Alternative Academy also violate Section 504's requirements at 34 C.F.R. § 104.34, by not allowing students to be educated with students without disabilities to the maximum extent appropriate. Three of the four Alternative Academy programs require a student to be educated at home, where students are isolated from other students. The only program that does not take place in a student's home is the Alternative Classrooms, which operates in self-contained classrooms but even that restrictive option is not available at the elementary school. Furthermore, students with disabilities whose disabilities are causing their absences are unilaterally reassigned to that program outside of the Section 504 team process by a District administrator without any consideration for whether the education of the student could be achieved satisfactorily in the regular

environment with the use of supplementary aids and services. Changes in placement of students with disabilities to the Alternative Academy are made without prior reevaluations and without the required notice and other procedural safeguards. In interviewing District witnesses, OCR learned that the District views the Alternative Academy as the best place for students who experience absences due to medical impairments to attend. Thus, the presumption is that students with absences related to medical conditions are best served in the Alternative Academy. Finally, assignments of students with disabilities to the Alternative Academy are made without consideration as to whether services or modifications may be necessary to provide students with equal opportunity to access the Alternative Academy's educational program.

### **Resolution Agreement**

On September 9, 2011, the District submitted the enclosed Resolution Agreement, which, when fully implemented, will resolve the issues identified as a result of OCR's investigation. Specifically, the agreement requires the District to revise and/or draft and submit to OCR for review its Section 504 policies and procedures that provide for the identification, evaluation, and placement of students with disabilities in conformance with the regulation implementing Section 504, and with Title II and the ADA. Once the proposed drafts are approved by OCR, the District is to adopt the policies and procedures, publish them on its website, and notify students, parents, and guardians of the policies and procedures and where a copy may be obtained by means that are designed to reach each student, parent and guardian. The agreement also requires the District to provide a copy of the new policies and procedures to all relevant administrators and teachers and to any other District staff, as well as to provide training to all relevant District administrators and staff on Section 504 and the District's revised policies and procedures.

The agreement also requires the District to develop and implement a procedure for referring students for disability evaluation when information

presented at a truancy hearing suggests that the student has a mental or physical impairment that substantially limits one or more major life activities. In conducting the evaluations, the District is to use the definition of disability stated in the Section 504 regulation as amended by the ADA Amendments Act, and will follow the procedural requirements set forth in the Section 504 regulation at 34 C.F.R. §§ 104.33-104.36 for evaluation, placement, educational setting, and procedural safeguards. Further, the District must develop and implement a procedure for students with disabilities that requires the Student's team to determine what related aids and services are necessary to ensure that the students are provided equal access to the Alternative Academy.

Finally, the Agreement requires the District to reconvene the Student's Section 504 Team to determine what modifications are necessary to its attendance policy for any disability-related absences and to address what services, if any, the Student may need as a result of the disability-related absences.

This concludes OCR's investigation of this matter. OCR will monitor the implementation of the Agreement, and if the District does not fully implement the terms of the Agreement OCR will reopen the complaint and take appropriate action to ensure the District's compliance with Section 504 and Title II.

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. The complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

We appreciate the cooperation of you and District staff during OCR's processing of this complaint. We look forward to receiving the District's first monitoring report under this Agreement on or before September 23, 2011. Ms. Vanessa Cotterel will be coordinating OCR's monitoring of the implementation of this agreement, and can be reached at (216) 522-4974 or [Vanessa.Cotterel@ed.gov](mailto:Vanessa.Cotterel@ed.gov). If you

have any questions about this letter, please contact team leader Karla K. Ussery at [Karla.Ussery@ed.gov](mailto:Karla.Ussery@ed.gov) or (216) 522-2683.

### **Commitment to Resolve**

#### **Hamilton Local School District**

The Hamilton Local School District (the District) submits this Commitment to Resolve to the U.S. Department of Education, Office for Civil Rights (OCR), for the purpose of resolving OCR Docket 415-10-1123 and ensuring compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, as amended by the ADA Amendments Act of 2008 (ADAAA). The District submits this Commitment to Resolve based on the representation by OCR that the District's compliance with the terms of this Commitment shall cause OCR to end its involvement with the District with no further action by OCR. Accordingly, the District agrees to take the actions indicated below:

#### **Action Steps -- Individual Student Remedy**

1. By September 16, 2011, the District will reconvene the Student's Section 504 team to determine what modifications, if any, are necessary to its attendance policy for any disability-related absences and to address what services, if any, the Student may need as a result of disability-related absences. The Student's parents will be invited to the meeting or will otherwise be given a meaningful opportunity to provide input into the decisions. The Section 504 team will modify the Student's 504 Plan as necessary, basing its determinations on currently available evaluation data and any additional information gathered by the District or that the parents wish to provide.

The District will notify the Student's parents, in writing, of the District's decisions regarding any changes to the Student's Section 504 plan. The



District will also notify the Student's parents in writing of their procedural safeguards, which includes the right to challenge any decisions with which they disagree through a due process hearing.

**REPORTING REQUIREMENTS:** By September 23, 2011, the District will provide OCR with documentation to demonstrate its implementation of Item #1 above, including: the team's report from the meeting showing when the team met, who was present, what was discussed, the team's decisions, and the basis for those decisions; and a copy of the notification sent to the Student's parents. By December 31, 2011, the District will provide OCR with documentation to show that it has implemented any revisions made to the Student's Section 504 plan.

#### **Action Steps – Class Remedies**

2. By September 16, 2011, the District will request consent to evaluate for disability from the parent/guardian of each student who was assigned by the District to the Alternative Academy programs during the 2009-2010 school year because of truancy and for whom it was suggested during a truancy hearing, by the student or parent/guardian, that the student missed school because of a mental or physical condition. The purpose of the evaluation will be to determine whether the student is disabled and whether the student needs a Section 504 plan. The District will conduct evaluations of each student whose parent/guardian provides consent. In conducting the evaluations, the District will use the definition of disability stated in the Section 504 regulation as amended by the ADAAA, and will follow the procedural requirements set forth in the Section 504 regulation at 34 C.F.R. §§ 104.33-104.36 for evaluation, placement, educational setting, and procedural safeguards.

**REPORTING REQUIREMENT:** By September 23, 2011, the District will provide OCR with copies of the notices sent pursuant to Item #2. By December 31, 2011, the District will provide OCR with documentation verifying that it conducted the

evaluations required by Item #2, including each student's evaluation team report and any resulting Section 504 plan or IEP. The District will also provide a list of all students from whom the District was unable to obtain parental consent to evaluate.

3. By September 30, 2011, the District will revise and/or draft and submit to OCR for review and approval its Section 504 policies and procedures for the identification, evaluation, reevaluation, and placement of students with or suspected of having a disability, to conform with the regulations implementing Section 504, including 34 C.F.R. §§ 104.3 (definitions), 104.33 (free appropriate public education), 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards); Title II of the ADA; and the ADAAA.

4. By September 30, 2011, the District will develop procedures regarding the assignment of students to the Alternative Academy as a result of truancy proceedings as follows:

a. The District shall not assign a student to the Alternative Academy for truancy reasons prior to holding a truancy hearing. If the District schedules a truancy hearing, gives the parent and/or student notice of the hearing, but the parent and/or student fails to appear for the hearing, the District may assign the student to the Alternative Academy.

b. When the District refers a student to a truancy hearing, the District shall give the student's parent/guardian written notice that the student may be assigned to the Alternative Academy as a result of the truancy proceedings. The District shall request that the parent/guardian provide the District with any information the parent/guardian has regarding the student's absences.

c. When the District refers a student who has a Section 504 plan or an IEP to a truancy hearing, and it is determined that the student will be assigned to the Alternative Academy, the District will convene the student's Section 504 or IEP Team prior to the student's assignment to the Alternative Academy taking effect. The student's Section 504 or IEP team

must determine and put into place the related aids and services and modifications necessary to ensure that the student is provided equal access to the Alternative Academy program and educational benefits that are as effective as those provided to students without disabilities. The student will not be placed at the Alternative Academy if the team determines that the student cannot educationally benefit from the Alternative Academy program because of disability.

d. When a student who has a Section 504 plan is referred to a truancy hearing and, as a result of the truancy hearing, the District assigns the student to its Alternative Academy without the parent/guardian's consent, for a period longer than 10 days, the District shall convene the student's Section 504 team within ten school days of the assignment to the Alternative Academy. The purpose of the team meeting shall be to conduct a manifestation determination review ("MDR") (i.e., to determine whether the student's absences were a manifestation of the student's disability).

i. If the 504 team determines that the student's truancy was a manifestation of the student's disability, the student's placement shall be the placement from which the child was truant, unless the team agrees that a different placement is appropriate. The team shall consider whether any changes to the student's 504 plan are necessary to address the student's truancy.

ii. If the 504 team determines that the student's truancy was not a manifestation of the student's disability, the student's placement shall be the Alternative Academy unless the 504 team determines that the student cannot educationally benefit from the Alternative Academy because of the disability. The 504 team shall consider whether any modifications to the 504 plan are necessary to ensure that the student is provided equal access to the Alternative Academy program and educational benefits that are as effective as those provided to students without disabilities.

e. Unless the exception in subsection f below applies, when a student who does not have a Section 504 plan is referred to a truancy hearing, and if the student or the parent/guardian indicates to the truancy

hearing officer that the student missed school because of a mental or physical condition, the District shall hold the truancy proceedings in abeyance and shall request consent from the parent/guardian to evaluate the student to determine whether the student is a child with a disability.

i. If the parent/guardian does not provide consent for an evaluation, the truancy proceeding shall recommence.

ii. If the parent/guardian provides consent for an evaluation, the District shall evaluate the student.

A. If the student is identified as a child with a disability and the parent/guardian consents to the implementation of a Section 504 Plan or an Individualized Education Program ("IEP"), the team shall complete an MDR.

I. If the team determines that the student's absences were not a manifestation of the student's disability, the truancy proceedings shall recommence. Prior to any placement of the student at the Alternative Academy, the student's 504 team shall convene to determine whether any modifications to the 504 plan are necessary to ensure that the student is provided equal access to the Alternative Academy program and educational benefits that are as effective as those provided to students without disabilities.

II. If the team determines that the student's absences were a manifestation of the student's disability, the truancy proceedings shall be dismissed. The team shall determine the appropriate placement for the student, specifically taking into account the services that the student may need while absent due to the student's disability, to ensure the student is provided with a free appropriate public education. The student will not be placed in the Alternative Academy, unless the Section 504 team determines that to be the appropriate placement for the student pursuant to 34 C.F.R. § 104.33, taking into consideration those students with disabilities should be placed in the regular education setting to the maximum extent appropriate. The 504 team shall consider whether the 504 plan needs to be revised to

include services that the student may need while absent due to the student's disability and any necessary modifications to the District's attendance policy.

B. If the parent/guardian does not consent to implementation of a Section 504 Plan or an IEP, the truancy proceedings shall recommence.

C. If the student is not identified as a child with a disability, the truancy proceedings shall recommence.

f. The District shall be under no obligation to hold a truancy proceeding in abeyance pursuant to subpart e above if the student's parent/guardian has within the previous calendar year refused consent to evaluate whether the student is a child with a disability for the same suspected disability, has within the previous calendar year refused to consent to the implementation of a Section 504 plan or an IEP to address the same suspected disability, or if the student has been evaluated in the previous calendar year for the same suspected disability and determined not to be a child with a disability. If the District refers the student to a truancy hearing and then the parent/guardian provides consent for an evaluation, the truancy proceedings shall continue and the District shall perform an expedited evaluation or give prior written notice regarding refusal to evaluate. If the parent/guardian consents to the implementation of a Section 504 plan or an IEP, the Alternative Academy shall be the student's current placement unless the Section 504 or IEP team agrees otherwise.

5. Within 60 days of written notification from OCR that the policies and procedures developed pursuant to Items #3-4 above are consistent with Section 504/Title II of the ADA/ADAAA requirements, the District will:

a. adopt the policies and procedures, publish them on its website, and notify students, parents, and guardians of the policies and procedures and where a copy may be obtained by means that are designed to reach each student, parent, and guardian. Such means could include placing a notification in any regularly issued District newsletters or bulletins or sending a

notice or a copy of the policies and procedures home with each student;

b. provide a copy, by electronic or other means, of the policies and procedures to all administrators (including Section 504 Coordinators, the Special Education Director, principals, and assistant principals), teachers and any other District staff (i.e., Alternative Academy staff, court liaison) responsible for the identification, evaluation, and placement of students that have or are suspected of having a disability under Section 504, or who play any role in implementing students' Section 504 plans or IEP's; and

c. provide training on the District's obligations to students with disabilities under Section 504 and the revised District policies to all District administrators, guidance counselors, and Section 504 Coordinators.

**REPORTING REQUIREMENTS:** By September 30, 2011, the District will submit the policies and procedures revised and/or drafted pursuant to Items #3-4 above to OCR. Within 60 days of written notification from OCR that the policies and procedures developed pursuant to Items #3-4 above are consistent with Section 504/Title II/ADAAA requirements, the District will submit information to OCR documenting implementation of Item #5, including: description of the means used to provide notice to students, parents, and guardians of the District's new policies and procedures and copies of any notices issued; the link to the policies and procedures on the District's website; documentation that copies of the policies and procedures were distributed to appropriate staff; the date(s) of the training(s); a copy of the training agenda; copies of training materials used; the name, title, and qualifications of the person(s) who provided the training(s); and sign-in sheets showing the names and job titles of all persons who attended the training.

### **General Requirements**

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the District has fulfilled the terms of

this agreement and is in compliance with the regulations implementing Section 504 at 34 C.F.R. Subpart D and Title II of the ADA at 28 C.F.R. § 35.130(b)(7), which were at issue in this case.

The District 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 District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with 34 C.F.R. Subpart D and 28 C.F.R. § 35.130(b)(7).

**Regulations Cited**

34 CFR 104.4(b)(1)(i)  
28 CFR 35.130(a)  
34 CFR 104.4(a)  
28 CFR 35.130(b)(7)  
34 CFR 104.33(a)  
34 CFR 104.35  
34 CFR 104.36  
34 CFR 104.34  
34 CFR 104.3(j)  
34 CFR 104.35(c)

**58 IDELR 22**

**111 LRP 70044**

**Hudson (NH) School District  
Office for Civil Rights, Eastern Division,  
Boston (New Hampshire)**

**01-09-1210**

**September 30, 2011**

**Related Index Numbers**

**405.076 Section 504 Plans**

**Judge / Administrative Officer**

**Thomas J. Hibino, Regional Director**

**Case Summary**

A New Hampshire district committed a procedural error in failing to convene a Section 504 team meeting before it discontinued a student's 504 plan. For the 2007-08 school year, the high school junior had a 504 plan that included an abridged school day to accommodate her chronic migraines. In May 2008, the student's father presented the district with a doctor's note explaining that the student's headaches had subsided and she could return to classes full time. Email correspondence between the father and the school principal indicated an understanding that the student's 504 plan would remain in effect at least until the end of the 2007-08 school year. In August 2008, the father requested assurance from the principal that accommodations would be available in event that the student's migraines resurfaced in the coming school year. The principal responded with a letter proposing measures to address the effects of the student's migraines. However, these measures were significantly more rigid than the 504 accommodations previously provided. The next month, the student's migraines reemerged, so the Section 504 team drafted a new plan which incorporated the principal's proposed measures. The father disagreed with plan provisions and filed an OCR complaint. Referring to 34 CFR 104.35(c)(3), which requires placement decisions to be made by a group of persons knowledgeable about the student, the meaning of evaluation data, and the placement options, OCR

explained that a district may not make unilateral decisions regarding the placement of a student with a disability. The student's Section 504 plan was effectively discontinued at the end of the 2007-08 school year, and the decision to discontinue it was made outside of the Section 504 team process. Although it pointed out that the doctor's note, stating that the student's migraines had abated, likely would have made the decision to discontinue the 504 plan reasonable, OCR observed no evidence that the district formally determined the student's continued eligibility for accommodations. Moreover, the principal's proposed measures were created and adopted without a formal Section 504 team meeting. OCR concluded that the district failed to comply with Section 504 procedural requirements in making determinations about the student's plan.

**Full Text**

**Appearances:**

Dear Superintendent Bell:

This letter is to inform you that the U.S. Department of Education, Boston Office for Civil Rights (OCR) has concluded its investigation of the above-referenced complaint that was filed against the Hudson School District (District). We apologize for the delay in issuing the resolution letter in this case. As indicated below, based on our investigation, OCR identified concerns regarding the District's 504 policies and procedures, which the District has since remedied. Therefore, OCR is closing this complaint, effective the date of this letter.

The Complainant alleged that the District discriminated against his daughter (Student) by failing to follow proper procedures in determining the Student's eligibility for services under Section 504 prior to and during the 2008-2009 school year.

OCR accepted this complaint for investigation under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104 (Section 504), and Title II of the Americans with Disabilities Act of 1990 and its implementing



regulation at 28 C.F.R. Part 35 (Title II). Both Section 504 and Title II prohibit discrimination on the basis of disability. The District is subject to Section 504 because it is a recipient of Federal financial assistance from the U.S. Department of Education. The District is also subject to Title II because it is a public entity operating an educational system.

Based on the allegations presented, OCR proceeded to investigate the following legal issues:

### **Issues**

1. Whether the District denied the Student a free appropriate public education (FAPE) by not following required procedures to review and make placement decisions for the 2008-2009 school year, in violation of 34 C.F.R. §§ 104.33, 104.34, and 104.35; and 28 C.F.R. § 35.130.

2. Whether the District failed to provide the Complainant with appropriate procedural safeguards, in violation of 34 C.F.R. § 104.36 and 28 C.F.R. § 35.130.

During the investigation, OCR requested and reviewed copies of the Student's special education records and various written correspondence between the Complainant and District staff, including Section 504 plans, emails and tutoring records. OCR also interviewed the District staff and administrators.

### **Legal Standards**

The regulation implementing Section 504 requires a recipient that operates an elementary or secondary education program, such as the District, to provide a FAPE to each qualified individual with a disability in its jurisdiction (34 C.F.R. § 104.33(a)). A FAPE, as defined by 34 C.F.R. § 104.33(b)(1)(i), is the provision of regular or special education and related aids and services that are designed to meet the needs of individuals with disabilities as adequately as the needs of individuals without disabilities are met, and depends upon a recipient following procedural requirements concerning, in relevant part, evaluation and placement and notice of procedural safeguards (34 C.F.R. § 104.33(b)(1), incorporating by reference

the provisions of §§ 104.35 and 104.36).

The Section 504 regulation, at § 104.35(a), requires a recipient to conduct an evaluation of any person 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 person in regular or special education and any subsequent significant change in placement. Section 104.35(b) and (c) of the regulation implementing Section 504 requires a covered entity, in order to provide a FAPE to eligible students, to establish standards and procedures for conducting an evaluation and making a placement. In interpreting evaluation data and in making placement decisions, a covered entity shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; and (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. OCR interprets these provisions to prohibit unilateral decisions by a covered entity regarding evaluation and placement.

The Section 504 regulation also provides that "a recipient that operates a public or elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation or educational placement of persons who, because of disability, need or are believe to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." The implementing regulation for Title II explicitly states that it does not set a lesser standard than Section 504. OCR interprets 28 C.F.R. § 35.130(b)(1)(ii) to require public

education systems to provide a FAPE to the same extent as is required under the Section 504 regulation.

### **Discussion and Analysis**

At the time the complaint was filed, the Student was a junior at Alvirne High School and had suffered from chronic migraine headaches. The Complainant originally filed this complaint in February 2009. The case was referred to Early Complaint Resolution and was closed after an agreement was reached between the District and the Complainant. The Complainant, in late July 2009, re-filed with OCR alleging breach of the agreement. Accordingly, OCR proceeded with this investigation of the original complaint.

OCR's investigation revealed that on March 17, 2008, a Teaching Assistance Team (TAT) meeting was held and a 504 Plan was developed for the Student. The 504 Plan identified the Student's impairment as migraine headaches and noted that these headaches impacted the Student's learning, as the Student was only able to attend school half days. The 504 Plan provided the following modifications for the Student: 1) adjustment of academic schedule as needed to accommodate for medical difficulties; 2) makeup privileges for medically documented absences; and 3) in-home tutoring to facilitate makeup work and continuing class work. The 504 Plan did not state how often the tutoring services would be, nor did it prescribe any conditions for the Student's receipt of such services.

In early May 2008, the District received a doctor's note from the Complainant stating that the Student's headaches had abated and that she could return to school full time. The Student subsequently returned to school on a full-time basis. Email communication between the Complainant and the Principal indicated that there was understanding that the Student's Section 504 Plan would remain in effect, at the very least through the end of the 2007-2008 school year. In an email to the Principal dated May 11, 2008, the Complainant stated that the Student's guidance counselor informed him that the Principal had recommended that the Section 504 Plan remain in

effect and stated that both he and the Student's mother were in agreement. It was unclear from the email or other evidence whether there was an understanding between the Complainant and District staff that the Section 504 Plan would continue into the 2008-2009 school year.

In an email to the Principal dated August 2008, the Complainant requested assistance with ensuring that tutoring services would be available in September for the 2008-2009 school year in the event that Student's the headaches resurfaced. In this email, the Complainant stated that he did not believe that tutoring services were required at that time, but expressed interest in the Principal putting a process in place to prevent delays in the event that the migraine headaches returned. In a letter dated September 4, 2008, the Principal notified the Complainant of proposed measures to address the Student's potential absences from school due to medical issues. Unlike the measures in the Section 504 Plan that was in place at the conclusion of the 2007-2008 school year, these measures included a detailed description of how and under what circumstances the Student would receive tutoring services, and provided for a progressive level of tutoring services depending on the number of absences from school. The measures included a provision stating that the Student would be provided tutoring services if absent 60% within a three-week period.

In the September 4, 2008 letter, the Principal also notified the Complainant that the measures would take effect immediately even though the District had not received any medical documentation indicating that the Student's medical issues were impacting her learning "this year." The Principal requested that the medical documentation be provided by October 1, 2008, so that the District could put together a "formal 504 plan." During the interview with OCR staff, the Principal stated that he did not specifically review the Student's Section 504 Plan or consult with the TAT in developing the proposed measures. However, the evidence indicated that the Principal was familiar with the circumstances

involving the Student, and had prior communications with District staff and the Complainant regarding the Section 504 Plan that was in effect at the conclusion of the 2007-2008 school year.

The District subsequently received a letter from the Student's doctor, dated September 18, 2008, stating that he met with the Student on September 17, 2008, and that her headaches were not under control. He further stated that the Student "may require accommodations at school that would allow for her to come for an abbreviated day." On October 6, 2008, a TAT meeting was held and a new Section 504 Plan was developed for the Student, which incorporated the recommendations outlined in the Principal's letter. Neither the Complainant nor the Student's mother, with whom the Student resided at the time, was present at this meeting. The revised Section 504 Plan was subsequently sent to the Complainant and the Student's mother, which they then signed. The Complainant, however, made notations on the bottom of the Section 504 Plan, requesting that the 60% requirement not be a "hard and fast" rule and stating that the "after school help" may not be feasible because the Student takes naps after school. The guidance counselor informed OCR that he reviewed this information, but did not take any further action because he believed that the accommodations in place were sufficient. Neither the Complainant nor the Student's mother was provided notice of the District's 504 procedural safeguards prior or subsequent to the development of this Section 504 Plan.

At a January 26, 2009, TAT meeting, the Student's Section 504 Plan was modified to reflect, among other things, an increase in tutoring and the Student's enrollment in a Spanish 1 course, which was an option identified in the October Section 504 Plan. OCR learned that neither the Complainant nor the Student's mother was notified in advance of the meeting. The Complainant informed OCR that he provided the District with input regarding the January 2009 revisions because he disagreed with certain elements of the Section 504 Plan. The Complainant informed OCR that he did not hear back from the

District regarding the concerns he raised.

Based on the above information, OCR found that the District failed to comply with the procedural requirements of Section 504 in making decisions regarding the Student's Section 504 placement and services. Specifically, OCR found that the District's Section 504 Plan was effectively discontinued at the conclusion of the 2007-2008 year, and that this action occurred outside of the Section 504 team process. Although the medical documentation indicated that the Student's migraines had abated and that she could return to school on a full-time basis, and that based on this information the District may have reasonably concluded that the Student no longer qualified for Section 504 services, OCR found no evidence to indicate that the District made a formal determination regarding the Student's continued eligibility either through the Student's TAT team or some other team-based process. Moreover, although the Principal put various measures in place to address the Student's potential absences for the 2008-2009 school year, pending the submission of additional medical documentation and the reconvening of a Section 504 team meeting, this too, was done outside of the Section 504 team process.

OCR also identified a compliance concern regarding the District's failure to provide the Complainant with notice of the TAT meetings and their Section 504 procedural safeguards. Although the evidence indicates that there was consistent communication between the District and the Student's parents during the relevant timeframe, and that the District considered information provided by the Student's parents in developing the Student's October 2008 and January 2009 Section 504 Plans, they did not receive prior notice of these meetings nor did they attend. Section 504 requires that school districts provide parents with notice of proposed actions regarding the identification, evaluation and placement of students and also requires that parents be afforded an opportunity to provide input in the process. OCR also found that the District did not provide the parents with notice of their procedural safeguards as is

required by Section 504.

With respect to the discontinuation of the Section 504 Plan at the conclusion of the 2007-2008 school year, given that the medical documentation at that time indicated that the Student was no longer experiencing migraine headaches and could return to school on a full-time basis; that neither the Complainant nor the Principal believed that the Student was in need of tutoring services at the start of the 2008-2009 school year; that interim measures were put in place pending receipt of updated medical documentation, which were subsequently incorporated into the Student's October 2008 Section 504 Plan; OCR did not find sufficient evidence to establish that the discontinuation of the Section 504 Plan at the conclusion of the 2007-2008 school year required an individual remedy for the Student. As for the District's failure to provide the Student's parents with notice of the October 2008 and 2009 TAT meetings, given the extensive communication between District staff and the parents regarding the Student during the relevant timeframe, there was insufficient evidence to establish that the District failed to consider the parents' input in developing the Section 504 Plan or that the process impacted the Student in such a manner to require an individual remedy.

### **Conclusion**

Overall, OCR found that the District failed to comply with the procedural requirements of Section 504 in making determinations regarding the Student's Section 504 Plan. However, OCR did not find sufficient evidence to establish that these procedural errors resulted in a loss of services requiring an individual remedy.

During our onsite visit the District informed OCR that the Section 504 policies and procedures had been revised to ensure that parents are provided notice of TAT/Section 504 meetings as well as notice of their Section 504 procedural safeguards. The District subsequently provided OCR with documentation confirming that the District revised its Section 504

protocols to ensure that parents receive prior notice of Section 504 meetings and notice of the District's Section 504 procedural safeguards. In addition, OCR confirmed through District counsel, that the District, in August 2010, conducted training for staff regarding the requirements of Section 504, including the areas of concern identified by OCR. Based on this information, OCR concluded that the District has taken adequate steps to remedy the procedural concerns identified by OCR, and that no additional remedial actions are required at this time. Therefore, OCR is closing this complaint, effective the date of this letter, and will take no further action regarding this complaint.

This letter is a letter of findings issued by OCR to address an individual OCR case, and should not be construed to cover any other compliance issues with Section 504 or Title II that may exist but are not discussed above. 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. Please also be advised that the Complainant may have the right to file a private suit in Federal court on these issues, whether or not OCR found a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect all personal information to the extent provided by law that, if released, could constitute an unwarranted invasion of privacy.

We thank you and your staff for your cooperation during this investigation. We also appreciate the assistance and cooperation OCR received from Attorney Jeanne Kincaid, in resolving this complaint. If you have any questions about this letter, please contact Mary-Anne Khoulnani, Senior Investigator, at (617) 289-0036, or by electronic mail at [Mary-Anne.Khoulnani@ed.gov](mailto:Mary-Anne.Khoulnani@ed.gov). You may also

contact Anthony Cruthird, Civil Rights Attorney, at (617) 289-0037 or by electronic mail at Anthony.Cruthird@ed.gov, or me at (617) 289-0111.

**Regulations Cited**

34 CFR 104.33  
34 CFR 104.34  
34 CFR 104.35  
28 CFR 35.130  
34 CFR 104.36  
34 CFR 104.33(a)  
34 CFR 104.33(b)(1)(i)  
34 CFR 104.33(b)(1)  
28 CFR 35.130(b)(1)(ii)



**54 IDELR 61**

**110 LRP 7395**

**Memphis (MI) Community Schools  
Office for Civil Rights, Midwestern  
Division, Cleveland (Michigan)**

**15-09-1035**

**May 11, 2009**

**Related Index Numbers**

**185.060 Scope of Evaluation Procedures**

**487. TERMINATION OF SERVICES**

**Judge / Administrative Officer**

**Catherine D. Anderle, Acting Director**

**Case Summary**

OCR cleared a Michigan district of charges that it prematurely terminated a grade schooler's Section 504 services. OCR concluded that the district never terminated the student's services, but information the district provided during the investigation raised concerns about its 504 evaluation policies and procedures. The district placed the student on a 504 plan due to his asthma when he entered kindergarten. When he started second grade, school officials evaluated whether the student still qualified for 504 services because his asthma substantially limited the life activity of breathing but did not impact his education. School officials met in October 2008 and decided that a medical management plan -- rather than a 504 plan -- met the student's needs. The parent disagreed and promised to obtain additional medical information for the district's consideration. The district continued to implement the student's 504 plan and later agreed that the student qualified for a 504 plan. OCR's investigation established that the district initially did not follow the proper reevaluation procedures or use the correct definition of disability in making its eligibility decision in October. But because the district never discontinued the student's 504 services, and it ultimately used the correct standard in making its final eligibility determination, OCR considered the complaint's termination of services allegation to be resolved. OCR provided the district

with technical assistance on the correct eligibility standards, noting that a student's impairment does not necessarily have to have an educational impact for the student to qualify for a 504 plan. The district agreed to review its 504 procedures, to make necessary revisions, and to notify parents of students affected by the changes.

**Full Text**

**Appearances:**

Dear Dr. Symington:

This letter is to advise you of the disposition of the above-referenced complaint, received by the U.S. Department of Education (the Department), Office for Civil Rights (OCR), on November 12, 2008. The complaint alleged that the Memphis Community Schools (the District) did not follow Section 504 procedures and standards in evaluating and terminating the Section 504 placement and services of a student (the Student) with a disability, asthma.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. The District is a recipient of Federal financial assistance from the Department and is a public school system; thus, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following issues: whether the District followed proper placement and evaluation procedures for the Student in accordance with Section 504's implementing regulation at 34 C.F.R. § 104.35, and whether the District denied the Student a free appropriate public education (FAPE) pursuant to Section 504's implementing regulation at 34 C.F.R. §

104.33. Because the regulation implementing Title II provides no greater protection than the regulation implementing Section 504 with respect to this case, OCR applied Section 504 standards in analyzing these issues.

During the investigation OCR interviewed the Complainant and relevant District staff. In addition, OCR reviewed documentation submitted by the Complainant and the District. Based on a careful analysis of this information, OCR determined that the initial reevaluation of the Student, which had found the Student did not qualify for a 504 plan because his impairment did not impact his learning or education, was not done in accordance with Section 504 requirements. However, during the course of OCR's investigation, the District reevaluated the Student using appropriate evaluation criteria. Further, the District never terminated the Student's 504 services. Thus, OCR considers the individual allegation involving the Student to be resolved. During the course of the investigation, OCR reviewed the District's Section 504 policies and procedures and the materials used by District staff for Section 504 evaluations and eligibility determinations and found that they do not fully comply with Section 504 requirements. However, the District has agreed to take actions to resolve these procedural compliance issues. We set forth the bases for these determinations below.

The Student started kindergarten at the District during the 2006-2007 school year, and he was placed on a Section 504 plan in December 2006 due to his asthma. In November 2007, the 504 plan was renewed. The Complainant asserted, however, that in September 2008 the District wanted to terminate the Student's Section 504 plan after the building-level Section 504 coordinator attended a training during the summer provided by the St. Clair County Regional Educational Service Agency (St. Clair RESA). The Complainant said the coordinator gave her a copy of a three-page document entitled, "Introduction to Section 504 of the Rehabilitation Act of 1973," which was distributed at the St. Clair RESA training, and

showed her that the document states that students with impairments, such as asthma, may qualify for Section 504 protection only if their disability impacts their education.

The Complainant stated that on October 7, 2008, she met with District staff to sign the Parent Notification and Consent form for a reevaluation. The Complainant said that during this meeting District staff told her that the Student needed to be "educationally impacted" to qualify for a 504 plan. The Complainant stated that on October 22, 2008, she met with the coordinator and the Student's teacher for the eligibility determination meeting. At that meeting, the team determined that the Student's major life activity of breathing was substantially limited by his asthma. However, the team told the Complainant that they needed to evaluate whether the Student's education was impacted by his disability. According to the Complainant, the District felt that the Student's education was not impacted by his disability and therefore determined that the Student did not qualify for a 504 plan any longer and only needed a "medical management plan."

District staff confirmed to OCR that the Student had been on a 504 plan since 2006, which was renewed in 2007. The District acknowledged that it decided that the Student needed to be reevaluated for the 2008-2009 school year, and that they met with the Complainant to discuss the reevaluation results on October 22, 2008. District staff involved in the Student's reevaluation told OCR that they determined at the October 22 meeting that, although the Student's asthma is a disabling condition that substantially limits his breathing, the Student did not qualify for a 504 plan because the asthma was no longer substantially impacting his learning. According to the District, the Complainant disagreed with this decision and said she would obtain additional information from the Student's doctor to support the need for a 504 plan. In the interim, the District continued to implement the Student's 504 plan from the previous school year.

The District indicated to OCR that, when

administrators learned about changes in the law that took effect under the ADA Amendments Act during a December 2008 training offered by a Michigan attorney, they then believed that, contrary to the decision made at the October 22 meeting, the Student was eligible for a 504 plan, since the team had already determined that his breathing was substantially limited by his asthma and that he was a student with a disability. As a result, the District reconvened another evaluation meeting on December 15, 2008, and the team determined that the Student was substantially limited by his medical condition and therefore qualified for a 504 plan. The Complainant confirmed to OCR that this occurred. However, the 504 team was unable at that time to reach agreement on the appropriate aids and services for the Student's 504 plan and the Complainant wanted to go back to the Student's doctor for additional information. Again, in the interim, the Student continued to receive services.

The Complainant and the District informed OCR that the team subsequently reconvened on March 20, 2009, and reached agreement on the provisions for the Student's 504 plan, which they all signed. The Complainant and the District provided OCR with a copy of the 504 plan signed on March 20, 2009. The Complainant indicated that she was aware of her right to challenge the plan through a due process hearing if she disagreed with it.

Pursuant to the regulation implementing Section 504, at 34 C.F.R. § 104.33 a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. A student will be deemed to have a disability under Section 504 and to be entitled to a FAPE if the student has a mental or physical impairment that substantially limits one or

more major life activities, such as breathing, walking, learning, and caring for oneself. Thus, under Section 504 a student may qualify as having a disability even if his impairment does not substantially limit learning. 34 C.F.R. § 104.3(j).

The regulation at 34 C.F.R. § 104.35(b) requires recipients to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. The regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions for students with disabilities, a recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and placement options; and (4) ensure that the placement decision is made in conformance with the educational setting requirements at Section 104.34. Finally, Section 104.35(d) requires a district to establish evaluation procedures for periodic re-evaluation of students who have been provided special education and related services prior to any significant change in placement.

OCR's investigation established that the District initially did not follow proper reevaluation procedures or use the correct definition of disability in making its eligibility decision for the Student in September and October 2008. However, the District reconvened the team in December 2008 and again in March 2009, at which time it conducted a reevaluation pursuant to Section 504 regulatory standards and used the correct definition of disability. The Student's 504 team, including the Complainant, agreed to a 504 plan for the Student on March 20, 2009. Because at no time were the Student's 504 plan and services actually terminated, OCR considers the allegation as it

pertains to the Student to be resolved.

As part of the investigation, OCR also reviewed the District's policies, procedures, and practices for evaluating students to determine eligibility under Section 504. The District advised OCR that, prior to December 2008, it generally had been using medical management plans instead of 504 plans for students with disabilities who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the disability was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a 504 plan and would instead provide a medical management plan for medical needs. However, since staff attended the December 2008 training about the ADA Amendments Act of 2008, the District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment. Additionally, the District is no longer requiring that a student's impairment have an educational impact in order for the student to qualify for a 504 plan. In January 2009, the District also sent a letter to all District parents who have students on medical management plans and 504 plans letting them know that, in compliance with the new ADA Amendments Act, the District will be reviewing their children's records to see if they are eligible as a student with a disability under Section 504. The District requested that parents contact the District to schedule a meeting. OCR provided technical assistance to the District during the investigation to explain that this was not a change that occurred with the ADA Amendments Act, and that, under Section 504, the District should not have been limiting its eligibility determinations to the major life activity of learning prior to December 2008.

The District also provided OCR with a copy of its Section 504 policy and procedures and the forms it uses for Section 504 evaluations and placement. OCR reviewed these materials and noted several areas in

which the policy does not comply with the requirements of Section 504 regulation. We highlight a few examples of the portions that do not comply below.

For example, the District's Section 504 procedures indicate that a student's Section 504 team only evaluates substantial limitations in learning and not other major life activities. The documents do not ensure that parents/guardians are provided with a meaningful opportunity to provide input into Section 504 decisions for their child. Several forms define the term "substantially limits" too narrowly as meaning "unable to perform" or "significantly restricted." The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate. In one section, the materials erroneously indicate that a student is not protected from disability discrimination if the student has a record of an impairment or is regarded as disabled. To the contrary, such students are protected from disability discrimination and harassment. The District's "Section 504 Individual Accommodation Plan (IAP)" form does not include any space to state the student's placement and it provides only for a list of "recommended accommodations" for the student, not agreed upon related aids and services. The form also has a line for the "Date of expiration of IAP," suggesting that the plan will expire on the date entered, instead of continuing until a new plan is developed and/or following a reevaluation.

To ensure that its Section 504 policies, procedures, and practices comply with Section 504 and the ADA Amendments Act, the District, on May 8, 2009, agreed to implement the enclosed Resolution Agreement. The agreement requires the District to: revise its Section 504 documents so that they comply with the requirements of the Section 504 regulation and the ADA Amendments Act; publish the procedures to all parents and students; provide

training on Section 504 to all District staff who participate and are responsible for Section 504 evaluations; and reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-2009 school year, using the definition of disability slated in the Section 504 regulation and the ADA Amendments Act.

This concludes our investigation of this matter. OCR will monitor the implementation of the Agreement and, if the District does not fully implement the terms of the Agreement, OCR will reopen the complaint and take appropriate action to ensure the District's compliance with Section 504 and Title II. Please be advised that a complainant may file a private lawsuit pursuant to Section 203 of the Americans with Disabilities Act whether or not OCR finds a violation of Title II.

Thank you for your cooperation and that of District staff during the investigation and resolution of this complaint. We look forward to receiving the District's first monitoring report, which is due June 15, 2009. If you have questions about this letter or the resolution of this complaint, please contact Mr. Donald S. Yarab, Team Leader, by telephone at (216) 522-7634.

### **Resolution Agreement**

#### **Memphis Community Schools**

The Memphis Community Schools (the District) submits the following Resolution Agreement to the U.S. Department of Education, Office for Civil Rights (OCR), to resolve the above-referenced complaint and to ensure the District's compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation, at 28 C.F.R. Part 35, as amended by the ADA Amendments Act of 2008 (ADAAA). Accordingly, the District agrees to take the following actions:

1. By January 15, 2009, the District will revise

and submit to OCR for review its Section 504 policies and procedures to ensure that they comply with the regulation implementing Section 504 at 34 C.F.R. §§ 104.3 (definitions), 104.33 (free appropriate public education), 104.35 (evaluation), and 104.3d (procedural safeguards) and with Title II of ADAAA. Specifically, the revised materials will:

- modify the definition of disability to comply with Section 504 and Title II/ADAAA;

- clarify that when evaluating a student to determine eligibility under Section 504, the District will not limit its assessment only to whether the mental or physical impairment substantially limits the major life activity of learning;

- clarify that a student may be eligible for a Section 504 plan if the student does not require educational services but does require modifications to District policies or health services in order to participate in District programs and activities;

- clarify that each qualified student with a disability in a recipient's jurisdiction, regardless of the nature or severity of the student's disability, must be provided a free appropriate public education and that an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met;

- state that a reevaluation of a student with a disability must be conducted before any subsequent significant change to the student's placement;

- clarify that if the District denies a parental request for a reevaluation, it will provide the parent with their procedural safeguards;

- provide for notice and other required procedural safeguards to parents/guardians with respect to actions regarding the identification, evaluation/reevaluation, or educational placement of students with disabilities;

- clarify that parents/guardians either will be invited to participate in Section 504 meetings or otherwise will be given a meaningful opportunity to



provide input into Section 504 team decisions regarding the identification, evaluation, and placement of students with disabilities;

- clarify that "substantially limits" does not mean "unable to perform" or "significantly restricted in" a major life activity; and

- clarify that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active and that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or learning strategies.

2. Within 90 days after written notification from OCR that the documents revised pursuant to item #1 above are consistent with the requirements of Section 504 and Title II/ADAAA, the District will publish the procedures to all parents and students. The District will also provide training by a competent authority on Section 504 to all District staff who participate in or are responsible for Section 504 evaluations, which will, at a minimum, cover the definition of disability under Section 504 and Title II/ADAAA and the District's obligations pursuant to Subpart D of the Section 504 implementing regulation. The District will submit documentation to OCR showing implementation of this item, including documentation showing how and when the revised Section 504 materials were published, as well as the name, title, and qualifications of the trainer, the date of the training, and a copy of the agenda, outline, attendance sheet, and any other handouts from the training.

3. By October 31, 2009, the District will reevaluate any student who was on a Medical Management Plan or who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-2009 school year. For these reevaluations, the District will use the definition of disability stated in the Section 504 regulation, as amended by the ADAAA, and will submit documentation to OCR verifying that it has done so, such as copies of the 504 team evaluation and eligibility reports.

#### Regulations Cited

34 CFR 104.35(b)  
34 CFR 104.35(c)  
34 CFR 104.33  
34 CFR 104.35  
34 CFR 104.35(d)  
34 CFR 104.3(j)

**55 IDELR 21**

**110 LRP 24403**

**Oxnard (CA) Union High School District  
Office for Civil Rights, Western Division,  
San Francisco (California)**

**09-09-1195**

**October 13, 2009**

**Related Index Numbers**

**405.038 Evaluation**

**405.076 Section 504 Plans**

**Judge / Administrative Officer**

**Arthur Zeidman, Regional Director**

**Case Summary**

A California district created Section 504 compliance concerns when it improperly concluded that a high school student with a gastrointestinal disorder was not a student with a disability under Section 504. The student was absent for 28 days due to illness during ninth grade, and 35 days during 10th grade. The student's physician wrote a letter to school officials stating that due to recurrent vomiting, nausea and abdominal pain, the student was likely to have tardiness and a high number of absences. The letter requested that he receive absolute bathroom privileges and any other accommodations that would ensure that he receive an education. Despite receiving medical documentation from the student's mother, the district determined that the student was ineligible under Section 504. Because the student received good grades despite his high rate of absenteeism, the district concluded that his condition did not substantially limit his ability to learn. Despite this determination, the district offered the student bathroom privileges, excusal of tardiness, and a reasonable make-up period for missed assignments. OCR investigated whether the district made its determination in a manner consistent with Section 504 because it only considered the major life activity of learning. Under Section 504, an individual has a disability if he has a physical or mental impairment that substantially limits one or more life activities,

including major bodily functions such as digestive and bowel functions. Because the district failed to consider the impact the student's symptoms had on these bodily functions, the eligibility standard it applied to the student did not comply with Section 504.

**Full Text**

**Appearances:**

Dear Dr. Carter:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Oxnard Union High School District. The complainant<sup>1</sup> alleged that the District discriminated against the Student on the basis of disability. The issues OCR investigated were whether the District failed to provide the Student with a free appropriate public education (FAPE) by not: 1) following adequate procedures for evaluation and placement of the Student; and 2) providing the Student with procedural safeguards when it made its determination that the Student failed to qualify for services under Section 504.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. 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 District staff. OCR also reviewed documents provided by the District and the complainant.

OCR concluded that the evidence showed the District was not in compliance with Section 504, Title II or the regulations with respect to either issue investigated in this case. However, the District has agreed to the corrective actions outlined in the enclosed resolution agreement, which address the compliance concerns. The facts gathered during the investigation, the applicable legal standards, and the reasons for our determination are summarized below.

The regulations implementing Section 504, at 34 C.F.R. § 104.33, require 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 §§ 104.34-104.35 pertaining to educational setting, evaluation and placement, and procedural safeguards. 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.

In the context of providing a FAPE under Section 504, the regulation, at 34 C.F.R. § 104.3(j), defines an individual with a disability as any person who has a physical or mental impairment which substantially limits a major life activity. Under the Section 504 and Title II,<sup>2</sup> the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants, or other implantable hearing

devices, or oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications. Major life activities include, but are not limited to caring for one's self, performing manual tasks, walking, seeing, hearing, eating sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Section 504 and Title II apply to any student who has a physical or mental impairment that substantially limits a major life activity.

Section 104.35(a) of the Section 504 regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under § 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), 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.

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.

The complainant alleged that the District failed to provide the Student with FAPE. Our investigation showed the following:

- According to the District's Section 504 administrative procedures, AP 6164.6, Section 504 referrals are considered by a Student Study Team (SST), which first determines whether an evaluation under the District's Section 504 procedure is appropriate. The SST bases this determination on a review of the student's existing school records and the student's needs. If the SST determines that an evaluation is needed, it will refer to the student to appropriate evaluation specialists.

- AP 6164.6 provides that the District's Section 504 evaluation may include classroom and campus observation, performance-based testing, academic assessment information, data offered by the parent and consultant assessment.

- The SST determines whether a student is eligible under Section 504 by reviewing the nature of the student's impairment(s), whether impairment significantly affects the student's education/learning, whether accommodations are needed, and if so, what are the appropriate accommodations.

- The District's procedural safeguards notice, according to AP 6145.6 is required to include a statement of parents' rights to examine relevant records, have an impartial hearing with an opportunity for participation by the parents and their counsel and the right to appeal under the District's Uniform Complaint Procedures. However, the District's Section 504 Procedural Safeguards notice, "Parents' Rights for Accommodating Students with Disabilities (non-special education)" states that if parents disagree

with the assessment and or accommodation plan, they may file a complaint through the District's Uniform Complaint Procedure. The notice does not mention that parents have a right to an impartial hearing.

- During the 2008-2009 school year, the Student was in tenth grade at a District school. During the 2007-2008 school year, the Student was absent 28 days due to illness. During the 2008-2009 school year, the Student was absent 35 days due to illness; 27 of those days were consecutive absences.

- On September 25, 2008, the Student's physician sent his school a letter stated that the student's medical conditions caused the Student to have recurrent vomiting, nausea and abdominal pain and indicated that the Student was likely to have tardiness and a high number of absences. The letter further stated that the Student needed absolute bathroom privileges and requested that the school provide any accommodation to the Student which would ensure that he had "the best education possible despite his chronic illnesses,"

- On October 2, 2008, the School held an SST meeting to discuss first period tardiness and the need for bathroom privileges.

- On December 2, 2009, the Student's mother emailed the assistant principal, stating that she believed the Student may need a Section 504 plan because of the difficulty the Student was having catching up after returning from several days of absence. The Student's mother gave the example that within a week of a four-day absence, the Student had to make up five major tests. The Student's mother indicated that although the Student does well on tests, he is often so fatigued from his illness that he cannot complete all of his homework. The Student's mother stated that she believed a Section 504 plan would give the teachers ideas of acceptable modification options for the Student.

- On December 9, 2008, the Student's doctor sent a letter to the District that informed the District he had given the Student an additional diagnosis of post-infectious gastroparesis and reiterated the

Student's IBS diagnosis.

- On December 9, 2009, the Student's mother provided the District with a written request that the Student be considered for eligibility under Section 504.

- On January 29, 2009, the District sent the Student's mother a letter which stated that the Section 504 team determined that based on the Student's academic success from the previous school year in honors and college preparatory courses, the Student's CST test results from the previous school year which showed proficient to advanced academic skills, and the Student's continued above-average academic performance during the 2008-2009 school year with accommodations through the SST process; although the Student had a complex medical condition, it did not substantially limit his ability to learn or deny him equal access to the standards based curriculum. Therefore, the Section 504 team concluded that the Student was not eligible for services or accommodations under Section 504.

- The January 29 letter stated that the Section 504 team was concerned that the demands of the Student's honors level courses were causing stress for the Student which might be making his medical condition worse. The Section 504 team suggested that the Student change some of his courses and once his medical condition stabilized, he could return to honors level courses. The letter also expressed concern about the Student's emotional health as it recognized that chronic illness may cause excessive amounts of stress and physical discomfort and lead to depression. The letter stated that if the Student would like counseling, the school could provide it free of charge.

- Notwithstanding the SST's determination that the Student was not an individual with a disability under Section 504, the January 29 letter also stated that the SST decided to offer the Student the following accommodations: bathroom privileges, excused first-period tardies or dismissal, a reasonable make-up period for homework missed due to excused absences.

- The January 29 letter informed the Student's mother that if she disagreed with the assessment of the Section 504 team, she could file a uniform complaint.

- A document entitled, "504 Eligibility Determination" reviews the information considered by the SST in reaching its determination for the Student.

- The document notes that the Student was absent from school an extensive number of days due to his poor health in both the 2007-2008 and 2008-2009 school years, but despite his absences, the Student was progressing in his education because he maintained average to above average grades.

- The SST concluded that the first semester grades for 2008-2009 dropped as compared to the Student's GPA from the 2007-2008 school year because the Student did not take his finals.

- The Student was placed on medical Home Hospital Teaching (HHT) on February 4, 2009.

- The District has different placement procedures for medical home teaching and special education home teaching. The medical home teaching request is processed by the school nurse. Special education home teaching is initiated by a student's Individualized Education Program (IEP) team. The HHT placement is made through the IEP process. Once the period of HHT has passed, the IEP team must meet to evaluate the student's needs and determine an appropriate placement.

- A variation available under the District's HHT program is "audit-home teaching" for students too ill to attend classes on a regular basis. The purpose of this option is to alleviate some of the social isolation and depression experienced by some students assigned home teaching. The student is dropped from the class roll, but attends class when he or she is able so that the student can benefit from class discussion and social interaction.

- Another variation available under the District's HHT program is combination/home teaching. The purpose of this option is to accommodate student



strength. It is developed by the school nurse in consultation with the student's counselor and family in whatever combination most benefits the student.

- A February 3, 2009 email to the Student's teachers stated that the Student could not have modified assignments while he was on HHT because they would negate the honors curriculum.

- From February 16, 2009 to June 26, 2009, the Student was enrolled in an online charter school. In a February 24, 2009 email to the District, the Student's mother notified the District of her intent to withdraw the Student from the District school. The Student's mother stated that the Student had lost his education since November 2008 and explained that the Student did not take his finals for the first semester of the 2008-2009 school year because the Student did not have a realistic opportunity to be taught the material on the finals. The Student's mother indicated that the Student would return to the District for the 2009-2010 school year.

- In a March 11, 2009 email to the assistant principal, the Assistant Superintendent stated that the school should not develop Section 504 plans for students on home teaching. A March 11, 2009 email to the assistant principal from the District's IB coordinator states that students on HHT are not eligible to participate in the IB program.

**Issue 1. Whether the District Failed to Provide the Student With a Free Appropriate Public Education (FAPE) Because It Did Not Follow Adequate Procedures for Evaluation and Placement of the Student**

In determining whether a school district is required to provide FAPE to a student, the school district must first determine whether the student has a disability as defined under 34 C.F.R. 104.3(j). According to the District's policies and procedures, an SST makes this determination. In the case of the Student, the SST failed to make this initial determination in a manner consistent with Section 504 because it only considered the major life activity

of "learning" and in considering learning, failed to apply appropriate standards.

Under Section 504, an individual is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities. Major life activity under Section 504 includes the operation of a major bodily function such as digestive and bowel functions, which are relevant for the Student based on his medical diagnoses. However, the SST/Section 504 team failed to consider the impact of the Student's medical condition on these bodily functions. The complainant provided the SST with medical documentation regarding the Student's recurrent vomiting, nausea and abdominal pain and the Student's frequent inability to attend school because of these symptoms. Because the SST failed to consider the impact of these symptoms on the Student's digestive and bowel functions, OCR found the District applied a standard that was not in compliance with Section 504 and Title II.

The SST/Section 504 team determined that because the Student's CST results and academic performance from the 2007-2008 school year were above average, the Student's medical condition in the 2008-2009 school year did not substantially limit his ability to learn or deny him equal access to the standards based curriculum. It is appropriate to consider learning as another major life activity that may be limited by the Student's medical condition and in this regard, to consider past academic performance as a comparison to current performance. Such a comparison indicates that the Student's GPA dropped significantly during the 2008-2009 school year while he was experiencing increased cumulative and consecutive absences related to his medical condition. The SST/Section 504 team reviewed the Student's academic performance during the 2008-2009 school year, considered what his grades would likely have been had he taken his finals, and then concluded that with accommodations which were provided through the SST process, the Student was able to maintain average grades. The SST then concluded that the Student's learning was not substantially limited by his

medical condition.

Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility. Under Section 504 and the Americans with Disabilities Act Amendment of 2008, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, reasonable accommodations or auxiliary aids or services. Thus, in order to be consistent with Section 504 and Title II, the SST/Section 504 team should have considered how the Student would have performed without SST accommodations in making its Section 504 eligibility determination.

Further, school attendance is related to the major life activity of learning because a student would have difficulty learning if his or her ability to attend school were substantially impaired. Thus, although the SST noted that the Student had a number of absences in the past two school years, it did not consider the impact of the absences on the Student's opportunity to learn from classroom instruction/discussion or the difficulty of completing missed assignments due to prolonged consecutive and cumulative absences.

OCR also determined that based on the March 11, 2009 email to the assistant principal from the Assistant Superintendent stating that Section 504 plans should not be developed for students on HHT, the District does not recognize HHT or its variations as placement options under Section 504. Because students who are disabled under Section 504 should not have to set aside the protection the law affords in order to be considered for one of these placement options, OCR considers the District's restriction to be inconsistent with Section 504. A Section 504 team should make the determination whether a student with a disability should be placed on HHT or one of its variations and the decision should be made in accordance with the Section 504 regulation for evaluation, placement and procedural safeguards.

Similarly, the Section 504 FAPE regulation

applies and must be adhered to for students with disabilities who participate in an IB, Advanced Placement, or other academically rigorous program. Even if the Section 504 team is considering a HHT placement for such a student, the Section 504 team should consider the full range of service and placement options that would allow the student to continue participating in the program. If the SST/Section 504 team finds that the individual educational needs of the student cannot be met in the academically rigorous program, the District must provide the student and his/her parents with appropriate Section 504 procedural safeguards.

### **Issue 2. Whether the District Failed to Provide the Student With Procedural Safeguards When It Made Its Determination That the Student Was Not Eligible for Services Under Section 504**

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 found that in violation of Section 504, the District failed to provide the Student with procedural safeguards. The January 29th letter to the Student's mother stated that if she disagreed with the District's determination that the Student was ineligible under Section 504, she could file a uniform complaint. The District's uniform complaint procedure is not equivalent to and does not meet the due process standards for an impartial hearing. Additionally, the District's uniform complaint procedure is not an adequate review procedure for an impartial hearing.

OCR determined that the District failed to consider whether the Student is an individual with a disability under the standards of the Section 504, Title

II of the ADA and the ADA Amendments Act of 2008, arbitrarily restricted the range of possible placements available to the Student according to Section 504 standards and failed to provide Section 504 procedural safeguards to the parents when they were dissatisfied with the eligibility and placement decisions. To address the inconsistencies with appropriate legal standards, however, the District has agreed to reconsider its eligibility determination of the Student and revise its Section 504 policies and procedures as set forth in the enclosed resolution agreement. OCR concludes that the actions agreed to by the District will resolve the compliance issues in this case. OCR will monitor the implementation of the agreement and is informing the complainant of these findings by concurrent letter.

If you have any questions about this letter, please contact Lolan Ho Wong, at (415) 486-5522, Gloria Guinto at (415) 486-5519 or me at (415) 486-5555.

<sup>1</sup>OCR notified the District of the names of the complainant and the Student at the start of this investigation. They are withheld here to protect their privacy.

<sup>2</sup>The ADA Amendments Act of 2008, P.L. 110-325, at Section 7 provides that the definition of disability under the Americans with Disabilities Act of 1990, as amended by P.L. 110-325, applies to the Rehabilitation Act of 1973. Section 4 contains the definition of disability and rules of construction regarding the definition of disability including how to determine whether an impairment substantially limits a major life activity and examples of major life activities.

### **Resolution Agreement**

#### **Oxnard Union High School District**

In order to resolve the issues raised under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 in the above-referenced complaint filed with the Office for Civil Rights (OCR), and without admitting any unlawful or wrongful acts or other liability or conceding any violation of Federal law with respect to

the issues raised in the complaint, the Oxnard Union High School District agrees to the following:

1. Within three (3) weeks of the date this agreement is signed, the District will convene an SST/Section 504 team meeting to reconsider the decision that the Student is not an individual with a disability under Section 504 as amended by the ADA Amendments Act of 2008 (ADAAA).<sup>1</sup> The SST/Section 504 team will apply the definition of disability under Section 4 of the ADAAA and consider the full range of major life activities, including the operation of a major bodily function, encompassed by the ADAAA. The SST/Section 504 team may include, but will not restrict its consideration to the major life activity of "learning." In considering learning, the SST/Section 504 team will not use grades as the sole measure of whether the identified impairment(s) substantially limits learning.

2. The SST/Section 504 team will consist of individuals who are knowledgeable about the Student, the meaning of the evaluation data, including medical diagnoses and reports, and the full range of service and placement options available under Section 504 including specially designed instruction in classrooms, at home, or in private or public institutions. Prior to the SST/Section 504 team meeting, the District will inform the SST/Section 504 team members who are District employees of the following:

a. The basis for OCR's finding that the District was in noncompliance with Section 504 and Title II in this case.

b. The December 26, 2007 Dear Colleague letter from the Assistant Secretary of Civil Rights, U.S. Department of Education that affirms and explains the right of students with disabilities to participate in AP and IB classes.

3. The District will invite the Student and the Student's parents to participate in the SST/Section 504 team meeting.

4. If the SST/Section 504 team determines that a Section 504 plan is appropriate, it will develop a plan

for the provision of regular or special education and related aids and services designed to meet the Student's current individual educational needs.

a. The SST/Section 504 team will consider information from a variety of sources including information about the Student's physical condition and all other significant factors relating to the learning process, including school attendance and areas of concern and accommodations identified by the Student's SST/Section 504 team during the 2008-2009 school year.

b. Within 48 hours of the SST/Section 504 team meeting, the District will provide the Complainant with the notes of the SST/Section 504 team meeting which document the information considered and the decisions made by the SST/Section 504 team; the plan; and a letter describing Section 504 procedural safeguards which states that with respect to any action taken by the District regarding the identification, evaluation or placement of the Student, the Complainant has the right to notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by the Complainant and representation by counsel (at the Complainant's expense), and a review procedure. The letter will further state that the District is in the process of revising its [missing text].

5. The District will revise its Section 504 policies, procedures and forms to include the definition of an individual with a disability at 34 C.F.R. 1043(j)(2), as amended by the ADA. The definition will also include several examples of major life activities, major bodily functions, and an explanation of "substantially limits." This explanation will state that "substantially limits" means unable to perform a major life activity that the average person in the general population can perform or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

6. The District will further revise its Section 504 policies and procedures and notice of Section 504 procedural safeguards to ensure that with respect to any action taken by the District regarding the identification, evaluation, or placement of a student (including the services or accommodations provided in a student's Section 504 plan), parents receive notice of the action, an opportunity to examine relevant records, an impartial hearing with an opportunity for participation by Parents or guardians and representation by counsel and a review.

7. The District will revise its HHT policies and procedures to make clear that if a student has a Section 504 plan or is suspected of being disabled as defined under Section 504, HHT placement shall be considered and determined through the Section 504 FAPE process.

8. The District will draft an administrative guidance to be provided to OCR for review and then distributed to all staff who participate on SST/Section 504 team and Section 504 teams. The administrative guidance will notify staff of the following:

a. The definition of an individual with a disability under Section 504, Title II and the Americans with Disabilities Amendment Act of 2008.

b. The procedural safeguards revision to the District's Section 504 policies and procedures described in Item 5.

c. The revision to the District's HHT policies and procedures described in Item 6.

d. Information about the December 26, 2007 Dear Colleague letter from the Assistant secretary of Civil Rights, U.S. Department of Education that affirms the right of students with disabilities to participate in challenging academic programs such as AP and IB classes.

### **Reporting Requirements**

By November 30, 2009, the District will provide OCR with the following documentation:

A. A narrative description and any supporting documentation which shows the District implemented

Item 2.

B. A copy of the documents described in Item 4  
b.

C. A draft of the District's revised Section 504 policies and procedures which are consistent with items 5 and 6.

D. A draft of the District's revised HHT policies and procedures described in Item 7.

E. A draft of the administrative guidance described in Item 8.

Within 90 days of OCR's final review of the documents described in C, D and E, the District will provide OCR with the following:

F. Documentation which shows that the Section 504 and HHT policies and procedures have been approved by the Board.

G. Documentation which shows that the District has distributed the administrative guidance to the staff described in Item 8.

<sup>1</sup>The SST/Section 504 team may also consider whether the Student is eligible for services under the Individuals, Items 1-4 apply to the IEP team. If the SST/Section 504 team determines that the Student is not eligible under the IDEA, it still must consider whether the Student is an individual with a disability under Section 504 as amended by the ADAAA.

#### **Regulations Cited**

34 CFR 104.33  
28 CFR 35.103(a)  
28 CFR 35.130(b)(1)(ii)  
28 CFR 35.130(b)(1)(iii)  
34 CFR 104.3(j)



**58 IDELR 114**

**111 LRP 70117**

**Forest Hills (OH) Local School District  
Office for Civil Rights, Midwestern  
Division, Cleveland (Ohio)**

**15-09-1280**

**September 1, 2011**

**Related Index Numbers**

**405.038 Evaluation**

**Judge / Administrative Officer**

**Thomas J. Hibino, Regional Director**

**Case Summary**

An Ohio district violated Section 504 in failing to identify and evaluate students with diabetes. The district had a practice of addressing the needs of students with diabetes strictly through health plans and conducting Section 504 evaluation only when parents specifically requested them. The parent of one student with type 1 diabetes filed a complaint with OCR alleging that the district discriminated against students with diabetes. Noting the district's position that Section 504 contains no requirement to conduct evaluations of students with diabetes, OCR pointed out that 34 CFR 104.33 requires school districts to provide FAPE to all students with disabilities, regardless of the nature or severity of their individual disabilities. Plus, 34 CFR 104.35(a) provides that districts shall evaluate any person who, because of disability, needs or is believed to need special education or related services. Students with diabetes may be found to have physical impairments that limit the operation of their bodily functions, thereby requiring related services, OCR explained. In providing health plans for students with diabetes that facilitated blood glucose monitoring, administration of medication or adjustment of medications, and modification of eating policies, the district had notice that students with diabetes needed such related services, observed OCR. Although no Section 504 implementing regulations require a written plan for providing students with services or that any plan be

labeled as a Section 504 plan, OCR stated that the regulations do stipulate evaluation, placement, and FAPE requirements for students with disabilities. Consequently, the district's blanket policy of not evaluating students with diabetes before providing them with health plans contravened Section 504 regulations.

**Full Text**

**Appearances:**

Dear Mr. Deters:

This is to notify you of the disposition of the above-referenced complaint that was filed on September 11, 2009; with the U.S. Department of Education's Office for Civil Rights (OCR), against the Forest Hills Local School District (the District), alleging discrimination on the basis of disability. Specifically, the complaint alleged that the District failed to identify and evaluate students with diabetes in compliance with the requirements of Section 504 and Title II.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws.

Based on the complaint allegation, OCR investigated the following legal issue: whether the District failed to evaluate students suspected of having a disability in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35 and whether the District therefore denied students with disabilities a free appropriate public education

(FAPE) in violation of 34 C.F.R. § 104.33.

#### **- Summary of OCR's Investigation**

Witnesses identified by the Complainant included parents of students in the District who had type 1 diabetes. The Complainant and one of the witnesses informed OCR that they were able to have their children identified by the District as students with disabilities under Section 504 only through repeated efforts and persistence. They and other parents interviewed by OCR reported that they were given various reasons by District staff for the District's refusal to proceed to Section 504 evaluations, such as that their children were too young or that there was no need to do an evaluation because their children's grades were good. In most cases, parents were told that the District deals with diabetic students by means of Health Plans, not Section 504 Plans. Another parent told OCR that she also was initially denied recognition of her child's diabetes under Section 504; later, when the child was recognized as a child with a learning disability under the Individuals with Disabilities Education improvement Act (IDEA), the parent again asked about eligibility for diabetes. She reported the District telling her that her child could not have both an Individualized Education Program (IEP) under IDEA and a Section 504 Plan; instead, the District instead attached a Health Plan to the IEP. Diabetes was not mentioned in the IEP.

The District submitted information demonstrating that, among its enrolled students during the 2010-2011 school year, twenty-four were students with type 1 diabetes and two were students with type 2 diabetes. Virtually all of these students had "Individual Student Health Plans" of some type, which in most cases was the only document addressing their diabetes. Only two of these students had Section 504 Plans. The Section 504 Plan for the Complainant's child specifically referenced an attached Health Plan. Five of the other students with diabetes had IEPs for disabilities other than diabetes, as well as Health Plans for diabetes. The IEPs generally did not refer to a Health Plan or to diabetes.

The Health Plans addressed matters such as the symptoms the student might exhibit, whether the student could test his/her blood sugar by himself/herself, whether to test for ketones above certain blood sugar level, whether snacks or juice were to be provided, and what needed to be considered relating to participation in physical education.

You and the District's Director of Student Services (the Director) confirmed to OCR that the District did not evaluate and serve students with diabetes under Section 504 unless a parent specifically requested such an evaluation or a Section 504 Plan. Contrary to the assertions of the parents noted above, the District contended that, if a parent specifically requested a Section 504 evaluation, the request would be granted. The District denied that its principals refused to provide Section 504 evaluations when parents asked them to do so.

You contended that Section 504 contains no requirement that the District perform Section 504 evaluations for students with diabetes. In addition, you stated that the District was aware that Section 504 provides rights related to students with disabilities, such as rights relating to discipline, but you stated that it would be hard to imagine that it would ever be decided that a behavior problem was related to diabetes; if so, such a student would most likely be classified by the District as a student with a disability under IDEA, not Section 504.

The Director oversees the District's special education program and was also the District's Section 504 Coordinator at the time the complaint was filed. The Director and you confirmed to OCR that the District's method of addressing the needs of students who have diabetes was to provide services through Health Plans. Health Plans were developed, generally, with input only from an individual student's physician or hospital pertaining to the student's diabetes. The only District staff members generally involved in the process of developing the Health Plans were a school nurse and a building administrator, not a student's teacher or others involved in providing the District's

program to students. In addition, the District did not routinely provide parents with notification of the procedural safeguards afforded parents under Section 504.

During its investigation, OCR received copies of District policies and procedures relating to students with disabilities and Section 504. The District also informed OCR that those policies and procedures were being revised.

OCR reviewed the District's "Procedures for the Implementation of Section 504 of the Rehabilitation Act of 1973," which included a document entitled "Forest Hills School District Section 504 Procedures," stating that students must first be referred to the Intervention Assistance Process. The intervention team meets and identifies educational concerns and appropriate interventions. The process involves three stages and a number of months. If interventions and documented results indicate disability, the student would be referred for Section 504 Assistance, and the parents would receive documents about Section 504, Parent/Student Rights, and a Parental Consent to Evaluate form. The review as described used the definition of disability in effect prior to the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which took effect on January 1, 2009 and amended Title II and Section 504.

The District's procedures call for completing an evaluation, inviting the parents to a Section 504 conference, and making an eligibility determination. The procedures then state that, "if student is eligible under 504, complete Section 504 Accommodation Plan." There is no mention of providing any notice regarding the procedural safeguards afforded parents/guardians under Section 504, such as the right to challenge determinations about identification, evaluation, and placement, including District determinations not to evaluate students, through an impartial due process hearing.

A separate form entitled "Information regarding Section 504 of the Rehabilitation Act of 1973" states that, "If a parent or guardian disagrees with the determination made by the professional staff of the

school district, he/she has a right to a hearing with an impartial hearing officer." A further form entitled "Parent/Student Rights in Identification, Evaluation and Placement pursuant to Section 504 of the Rehabilitation Act" sets out the parent's right to seek an impartial due process hearing by contacting the Section 504 coordinator but then includes language stating that parents may request a case review by the District, that the decision on the case review will be issued in writing, that parents who disagree may request an impartial hearing by writing to the Superintendent, that the hearing officer's decision will be submitted in writing to all parties and that, should any party disagree, he/she may submit the issues in dispute to the Board of Education. The Board's decision is final.

The Parent/Student Rights document mentioned above states that parents have the right to have their child receive a FAPE and that includes "the right to have the school district make reasonable accommodation to allow your child an equal opportunity to participate in school and school-related activities."

The procedures call for review of "the Individual Accommodation Plan (IAP)" each year, but they also state:

If interventions are no longer required in order for the student to be successful, the IAP may be terminated. This decision will be documented on the Individual Accommodation Plan, indicating the reasons accommodations are no longer required. This form should be dated, signed and returned to the student's 504 compliance file.

The procedures also state that "[a] re-evaluation to determine continued eligibility under Section 504 of the Rehabilitation Act will be conducted every three years."

By letter dated April 4, 2011, the District indicated that its Section 504 policy had been revised. During a telephone conference call on August 29, 2011, the District indicated that it will provide OCR with a copy of the revised Section 504 policies by

September 30, 2011.

### **- Applicable Regulatory and Policy Requirements**

As Title II provided no greater protections than Section 504 in relation to the facts of this complaint, OCR analyzed the complaint using Section 504 standards. OCR notes that the definition of disability in the ADA has been amended by the ADAAA, as mentioned above. The ADAAA also amended the definition of disability in Section 504 before the events at issue in this complaint. 42 U.S.C. § 12134(b), OCR therefore analyzed this complaint using the revised standards.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires a recipient school district to provide a FAPE to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with disabilities as adequately as the needs of individuals without disabilities are met and which have been developed in accordance with process requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). For students whose disability is diabetes, related aids and services may entail provisions involving blood glucose monitoring, such as when and how blood glucose monitoring will occur, including whether the student may monitor his/her condition independently; the administration of medication, such as insulin, humalog, or glucagon; and relaxation of food policies.

A student will be determined to have a disability under Section 504 and to be entitled to a FAPE, including necessary related services, if the student has a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j)(1)(i). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing,

learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Thus, under Section 504, a student may qualify as having a disability even if his impairment does not substantially limit learning. Use of mitigating measures such as insulin or a specific eating regimen may not be considered in making a determination of whether an impairment substantially limits a major life activity.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), provides that a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services. The evaluation is to be conducted in accordance with procedures set forth in § 104.35(b) and (c), which provide that an evaluation must use appropriate testing and draw upon information from a variety of sources and that placement decisions must be made by a group of persons, including persons knowledgeable about the student, the meaning of evaluation data, and placement options.

The Section 504 regulation, at 34 C.F.R. § 104.36, also requires recipient school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of such persons, a system of procedural safeguards that includes, in relevant part, notice and an impartial hearing. If a parent requests a disability evaluation, the school district has two choices: the district may either (1) evaluate the student within a reasonable period of time; or (2) decline to evaluate the student, because the district does not suspect that the student has a disability. In the latter case, the district must explain to the parent the reason for the refusal and inform them that they have the right to challenge the refusal to evaluate the student by

requesting an impartial due process hearing.

### **- Analysis and Conclusion**

As stated above, the Section 504 implementing regulation requires recipient school districts to provide a FAPE to each qualified student with a disability who resides in their jurisdiction, which may include provision of related aids and services, such as blood glucose monitoring, administration of medication, and modification of food policies for a student with diabetes. Under Section 504, school districts have a duty to evaluate students who need or are believed to need special education or related aids and services before classifying any student as having a disability and/or providing related services on that basis.

The issue under consideration in this complaint is whether the District may serve students with diabetes under a medical Health Plan unless a parent specifically requests a Section 504 Plan. The evidence, including direct input from the District's Director of Student Services and the District's legal counsel, established that the District places students on Health Plans and does not evaluate students with disabilities under Section 504 unless specifically requested to do so by a parent.

A student with type 1 diabetes could be found to have a physical impairment that limits operation of a major bodily system, the endocrine system, and may also experience limitations to other major bodily functions or life activities, such as eating and caring for oneself. Further, the student may need related services in a district's program and activities such as blood glucose monitoring, administration of medication or adjustments to medication policies, and modification of eating policies. The Complainant's child's Section 504 Plan, as well as Health Plans for other students with diabetes, demonstrated that the District provided such services to District students with diabetes and therefore had notice of the students' impairments and need for such related services. While nothing in the Section 504 implementing regulation requires a written plan for providing services nor

requires that any plan be labeled as a Section 504 Plan, the regulation does require school districts to evaluate students in accordance with the requirements of the Section 504 regulation if they suspect students may have a disability and need related services and, if they determine that the students have disabilities under Section 504, to determine placements to meet their individual needs. A blanket policy of not evaluating and serving students with type 1 diabetes under Section 504 does not, therefore, comport with the Section 504 regulation's evaluation, placement, and FAPE requirements.

In addition, the Health Plans submitted by the District did not show evidence that whatever evaluations the District performed comported with Section 504 regulatory requirements in that they demonstrated limited participation by school personnel with little or no input from teachers and other staff and little if any information other than that provided by students' physicians. The District also provided no evidence that it generally informed parents of the rights afforded them by the procedural safeguards in the Section 504 implementing regulation.

Various other aspects of the District's Section 504 policies and procedures raised compliance concerns. For example, the policy did not contain the definition of disability applicable during the time period in question, specifically as to the definitions of major life activities and of substantial limitation. The IAP team portions of the District's Section 504 policy raise compliance concerns because, as written, lengthy intervention must take place before an evaluation can commence; Section 504, on the other hand, requires Districts to evaluate students they suspect of having a disability and needing services. While interventions may form part of the evaluation process, the procedures as written would cause undue delay in evaluation or supplant it completely.

In addition, the District's Section 504 policy and procedures in effect during the time period in question indicated that the District could terminate a student's Section 504 Plan if the student no longer needs



services/is eligible, but there is no articulated requirement that the District reevaluate a student before terminating a Plan. Under Section 504's implementing regulation at 34 C.F.R. § 104.34(a), school districts must reevaluate students with disabilities not only periodically but also before any significant change in placement, such as terminating services altogether. Similarly, the District's policy and procedures require a reevaluation only every three years. There is no articulated provision for commencing a reevaluation before a significant change in placement or for other reasons when conditions warrant.

Furthermore, the policy and procedures do not require staff members to provide parents/guardians with notice of the procedural safeguards afforded them by the Section 504 regulation, particularly when a District does not proceed to evaluation. In addition, while Section 504 requires procedural safeguards that include an impartial hearing and a review procedure, the District's review process includes a provision that an impartial hearing officer's decision may be overturned by the School Board, which is not an impartial body.

Based on the forgoing, the weight of the evidence supports that the District has failed to properly evaluate students with diabetes in compliance with the requirements of the regulation implementing Section 504 and to notify parents/guardians of their procedural safeguards in violation of 34 C.F.R. §§ 104.35 and 104.36. The District has, however, agreed to take appropriate actions to resolve the compliance issues OCR identified, as set forth in the resolution agreement signed on August 30, 2011. The agreement requires the District to offer to evaluate each child currently enrolled who is suspected of having diabetes and, with parent/guardian consent, to complete evaluations to determine whether they are eligible as students with disabilities under Section 504; if so, to determine their individual education needs to ensure they are provided with a FAPE; to notify the students' parents of their procedural safeguards; to modify its Section

504 policy and procedures to meet the requirements of Section 504, to submit those for OCR review, and to publish approved policy and procedures; and to require that pertinent individuals at the District who are involved in the Section 504 evaluation process be trained on these concepts. Finally, the Agreement requires the District to provide OCR with documentation of any actions undertaken by the District to address the aforementioned compliance concerns. OCR notes that the District has indicated that it has already taken action to address several of the compliance concerns mentioned above and that documentation to that effect is forthcoming.

This concludes our investigation of this matter. We will monitor the implementation of the resolution agreement. If the District does not fully implement the agreement, OCR will reopen the investigation and take appropriate action. We look forward to receiving the District's first monitoring submission by October 29, 2011, or earlier.

This letter sets forth OCR's determination in an individual OCR case. 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. Finally, regardless of our finding in this letter, the complainant may file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to a high quality resolution of every case. If you have any questions, please contact Mr. Brian Larson by telephone at (216) 522-7626 or by e-mail at [Brian.Larson@ed.gov](mailto:Brian.Larson@ed.gov).

### **Resolution Agreement**

#### **Forest Hills Local School District**

The Forest Hills Local School District (the District) submits this Resolution Agreement (Agreement) to the U.S. Department of Education, Office for Civil Rights (OCR), to resolve the above-referenced complaint and to ensure the District's compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §

794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, et seq., and its implementing regulation at 28 C.F.R. Part 35, as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The District acknowledges that students with medical impairments such as diabetes may be covered as students with disabilities under Section 504 and Title II.

The District agrees to take the following actions:

### **I. Notice to Parents/Guardians**

Within 30 calendar days of the date of this Agreement, the District will provide written notification to the parent(s) or guardian(s) of all currently enrolled students who are suspected of having diabetes and who are not presently identified as students with disabilities under Section 504, or who have Individualized Education Plans (IEPs) under the Individuals with Disabilities Education Improvement Act of 2004 for disabilities other than diabetes, that it will evaluate these students to determine whether they qualify as students with disabilities under Section 504 based on their diabetes and, if so, to determine their need for related aids or services to ensure the provision of a free appropriate public education (FAPE). The notice to parent(s)/guardian(s) will include a description of the procedural requirements of Section 504, as well as a form for parents to sign granting their consent for the District to evaluate the students. The District need evaluate only those students with diabetes for whom they receive signed consent forms. In lieu of the above-described written notice, the District may provide the notice by inviting the parents or guardians to a meeting at which OCR representatives will explain to the parents their rights and the students' rights under Section 504.

### **REPORTING REQUIREMENTS:**

Within sixty calendar days of the date of the this Agreement, the District will provide OCR with information documenting the implementation of Part 1, including a copy of each letter sent to the

parents/guardians, a copy of the notice of Section 504's procedural requirements, and a copy of forms signed by parents to grant or deny consent for evaluation.

If by the date this Agreement is signed, the District has completed any of the steps required by Item I of this Agreement, the above-described information and documentation will be submitted within 14 calendar days of the date of signing this Agreement.

### **II. Evaluation**

Within sixty calendar days of the notification to parents/guardians required by Item I, the District will complete evaluations of all currently enrolled students suspected of having diabetes for whom parental consent has been obtained. The evaluations will be conducted in accordance with the requirements of the Section 504 regulation, including 34 C.F.R. §§ 104.35 (evaluation and placement), 104.36 (procedural safeguards), and with Title II and the ADAAA. At a minimum, each evaluation will be conducted in accordance with items II.A-F below:

A. The evaluation will be conducted by the District at no cost to the parent.

B. The interpretation of the evaluation data and any placement decision for each student will be made by a group of persons (the 504 Team) knowledgeable about the student, the meaning of the evaluation data, and the placement options. Each student's parent(s) or guardian(s) will be provided a meaningful opportunity to provide input into the evaluation process.

C. The 504 Team will determine whether each student is eligible to receive services as a student with a disability under Section 504, i.e., whether each student has a physical or mental impairment that substantially limits one or more major life activities as defined by the ADAAA.

D. In evaluating each student to determine if the student has a physical or mental impairment that substantially limits one or more major life activities, the 504 Team will: (1) consider whether any particular mental or physical impairment substantially

limits one or more major life activities, not solely learning or the ability to function in the school setting; (2) not take into account mitigating measures, such as medication being taken by the student or related aids and services or modifications already being provided to the student by the District; and (3) recognize that, if the student has an impairment that is episodic in nature or in remission, the student is eligible if the impairment, when active, substantially limits one or more major life activities.

E. If the 504 Team determines that a student has a physical or mental impairment that substantially limits one or more major life activities, the 504 Team will develop and implement a plan to ensure that the student is provided with a free appropriate public education, which means the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the student as adequately as the needs of nondisabled students are met. The District understands that the provision of a FAPE to students with medical conditions such as diabetes may involve the provision of related aids and services designed to meet the students' individual needs, such as blood glucose monitoring, administration of medication, and adjustment of food policies. The 504 Team will document its decisions.

F. The District will provide notification to the students' parents/guardians of the rights afforded them through Section 504's procedural safeguards with respect to any actions regarding the identification, evaluation, and placement of the students, including when the District declines to evaluate a student. Such rights include notice; an opportunity to examine relevant records; the right to an impartial hearing with opportunity for participation by the student's parents or guardian and representation by counsel; and an appeal procedure.

#### REPORTING REQUIREMENTS:

Within 90 calendar days of the date of this Agreement, the District will submit to OCR information documenting its implementation of Part II of this Agreement. Such documentation should

include, but not necessarily be limited to, a description of the information gathered and considered by the 504 Team for each student; the 504 Team's determination about each student's eligibility; a copy of any Section 504 plans developed for eligible students and documentation of the plans' implementation; and information documenting that the students' parents were provided an opportunity to provide input and notice of Section 504's procedural safeguards.

If by the date this Agreement is signed, the District has evaluated currently enrolled students with diabetes under Section 504 as described in Item II, the District will submit the above-described information and documentation within 14 calendar days of the date of signing this Agreement.

### III. Policies and Procedures

The District will ensure that its Section 504 policies and procedures are compliant with the requirements of the regulation implementing Section 504, including 34 C.F.R. §§ 104.3 (definitions), 104.33 (FAPE), 104.34 (educational setting), 104.35 (evaluation and placement), 104.36 (procedural safeguards), and with Title II and the ADAAA. To this end, the District will utilize option A, B, or C below and will submit to OCR for review its proposed Section 504 policies providing for the identification, evaluation, and placement of students with disabilities.

A. If the District chooses to revise its existing procedures, the District will, at a minimum, complete steps 111.A.1-10 below.

1. remove from the District's "Section 504 Procedures," its "High School Intervention Assistance Team Process and Procedures," its "Section 504 Compliance Checklist," and elsewhere as appropriate, any language that indicates that the initiation of an evaluation under Section 504 is dependent upon a request from a parent or that implies that the District's Intervention Assistance Process (IAP) or Response To Intervention (RTI) process is either a prerequisite or a substitute for an evaluation under Section 504;

2. revise the language in item #3 of the District's "Section 504 Procedures" and in item #1 of the District's "Information regarding Section 504 of the Rehabilitation Act of 1973" to conform to the definition of a disability contained in the ADA; and

3. revise the language in item #5 of the District's "Section 504 Procedures" to indicate that a re-evaluation may be conducted periodically or when conditions warrant a reevaluation, to distinguish between an IAP and a 504 plan and to clarify that a 504 plan may be terminated only if supported by a Team decision upon completion of a re-evaluation of the student;

4. clarify that although IAP/RTI interventions may be used as part of the evaluation process, they cannot be used to delay completion of an evaluation;

5. in the District's "Section 504 Notice of Conference" and elsewhere, as appropriate, clarify that parents will be provided an opportunity to provide input into the evaluation process before a final eligibility determination is made whether or not they actually attend the meeting;

6. in the paragraph following item #3 in the document "Information regarding Section 504 of the Rehabilitation Act of 1973," remove the words "solely" and "knowingly";

7. in item #4 of the document "Parent/Student Rights in Identification, Evaluation, and Placement Pursuant to Section 504 of the Rehabilitation Act Procedural Safeguards," replace the words "reasonable accommodation" with language describing FAPE, as specified in Part II.E. of this Agreement;

8. in item #14 of the document "Parent/Student Rights in Identification, Evaluation, and Placement Pursuant to Section 504 of the Rehabilitation Act -- Procedural Safeguards," and elsewhere, as appropriate, remove or amend language that implies that a District case review is a prerequisite to requesting an impartial due process hearing under Section 504;

9. with regard to item #14 of the document

"Parent/Student Rights in Identification, Evaluation, and Placement Pursuant to Section 504 of the Rehabilitation Act -- Procedural Safeguards," remove the following provision: (#14) ... Any party dissatisfied with the hearing officer's decision and/or recommendation may submit the issues still in dispute to the Board of Education for review. The Board of Education's decision on the issues submitted will be final; and

10. in item #15 of the same document, add "under the District's Section 504 grievance procedures."

B. The District may opt to draft new policies and procedures providing for the identification, evaluation, and placement of students with disabilities under Section 504, but in doing so, it will be mindful of the requirements specified in part III.A above.

C. The District may adopt the OCR-approved Section 504 policies and procedures provided to the District by OCR.

#### REPORTING REQUIREMENTS:

Within 60 calendar days of the date of this Agreement, the District will submit to OCR for review its revised policies or proposed Section 504 policies.

If by the date this Agreement is signed, the District has completed its proposed revision of its Section 504 policies and procedures as specified by Item III of the Agreement, it will submit a copy for OCR review within 14 calendar days of the date of signing this Agreement.

#### IV. Notice and Training on Revised Policies and Procedures

Within 60 calendar days of written notification from OCR that the policies and procedures developed pursuant to Item III.A. or III.B above are consistent with Section 504 requirements, the District will:

1. adopt the policies and procedures, publish them on its website, and notify students, parents, and guardians of the policies and procedures and where a copy may be obtained by means that are designed to

reach each student, parent, and guardian. Such means could include placing a notification in any regularly issued District newsletters or bulletins or sending a notice or a copy of the policies and procedures home with each student;

2. provide a copy of the policies and procedures to all administrators and teachers and to any other District staff responsible for the identification, evaluation, and placement of students that have or are suspected of having a disability under Section 504 and who play any role in implementing students' Section 504 plans or Individualized Education Programs (IEPs); and

3. provide training to all District administrators, teachers and staff responsible for the identification, evaluation, and placement of students that have or are suspected of having a disability under Section 504, regarding Section 504's identification, evaluation and placement requirements and the District's new Section 504 policies and procedures. This training shall be provided by an authority competent on Section 504 and shall emphasize the District's obligation to provide qualified students with disabilities a FAPE. The training will also instruct staff that students with medical impairments, such as diabetes, may be eligible for services as students with disabilities under Section 504 and Title II.

#### **REPORTING REQUIREMENTS:**

Within 120 calendar days of the date of this Agreement, the District will provide OCR with documentation demonstrating its compliance with Part III above, including:

1. the website address where the District's OCR-approved, revised policies and procedures are posted;

2. documentation regarding how the District notified students, parents, and guardians of the District's OCR-approved, revised policies and procedures and where a copy could be obtained;

3. documentation that a copy of the OCR-approved policies and procedures was provided to appropriate District staff as required by the Part

III.B.2 of the Agreement; and

4. documentation that the District provided the training required by Part III.B.3 of the Agreement to relevant District staff, including: The dates when the training occurred, the name, title, and qualifications of the individual who provided the training, a copy of the training agenda and all materials used or distributed during the training, and a sign in sheet with the names and titles of District staff who attended the training.

If by the date this Agreement is signed, the District has completed any of the steps required by Part IV of this Agreement, the above-described information and documentation will be submitted within 14 calendar days of the date of signing this Agreement.

### **General Requirements**

The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with Section 504 and its implementing regulation, at 34 C.F.R. Part 104, and Title II and its implementing regulation, at 28 C.F.R. Part 35, which were at issue in this case.

The District understands that by signing this document it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the District understands that during the monitoring of this Agreement OCR may visit the District to interview staff, students, or parents/guardians, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Section 504 and Title II.

#### **Statutes Cited**

42 USC 12134(b)

#### **Regulations Cited**

34 CFR 104.35

34 CFR 104.33

34 CFR 104.36

34 CFR 104.34



34 CFR 104.3(j)(1)(i)

34 CFR 104.35(a)

34 CFR 104.35(b)

111 LRP 70127

**Batavia (OH) Local School District  
Office for Civil Rights, Midwestern  
Division, Cleveland (Ohio)**

15-11-1110

**September 29, 2011**

**Judge / Administrative Officer**

**Thomas J. Hibino, Regional Director**

**Full Text**

**Appearances:**

Dear Mr. McCord:

This letter is to inform you of the disposition of the above-referenced complaint filed against the Batavia Local School District (the District), with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), on March 1, 2009. The complaint alleged that the District discriminated against a student (the Student) on the basis of disability and retaliated against her. Specifically, the complaint alleged that on February 28, 2011, the District failed to provide the Student with a free and appropriate public education (FAPE) when it failed to implement the provisions of her Section 504 plan by not appropriately monitoring her blood glucose levels. Additionally, the complaint alleged that the District retaliated against the Student when, after the Student's parent (the Complainant) advised the District that she had contacted the Ohio Department of Education and OCR about filing a complaint, the Special Education Director stated and two other District personnel implied that the District would not address the Student's needs or address the Complainant's concerns unless she dismissed the complaint she filed with OCR.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR also is responsible for

enforcing Title II of the Americans with Disabilities Act of 1990, 43 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws; accordingly, OCR has jurisdiction over this complaint.

OCR's Case Processing Manual, at Section 110(1), states that OCR will administratively close an allegation that is withdrawn by the Complainant. On July 21, 2011, the Complainant informed Mr. Myrle Weems of my staff via telephone that she was withdrawing the retaliation allegation. Based on her withdrawal, we have closed that allegation effective the date of this letter.

Based on the complaint allegation that was not withdraw, OCR investigated whether the District failed to evaluate a student with diabetes who, because of disability, needs regular or special education or related aids and services and to provide her with a free appropriate public education in violation of Section 504's implementing regulation at 34 C.F.R. § 104.33(a) and (b) and Title II's implementing regulation at 28 C.F.R. § 35.130.

In conducting our investigation, OCR interviewed the Complainant and reviewed documents she submitted. OCR also reviewed documentation submitted by the District. As Title II provides no greater protection than does Section 504 with regard to the facts at issue in this complaint, OCR analyzed this complaint using Section 504 standards.

Based on a careful analysis of the evidence obtained during the investigation, OCR finds that, despite having information indicating that the Student might have a disability as defined by Section 504, the District failed to evaluate the Student to determine whether she was eligible for services as a student with a disability under Section 504 in violation of Section 504 and its implementing regulation at 34 C.F.R. § 104.35. We set forth below the basis for OCR's determination.

### Summary of Case Investigation

During the 2010-2011 school year, the Student was eleven years old and enrolled in the fifth grade at Batavia Middle School in the Batavia Local School District (the District). She had been diagnosed with Type 1 diabetes. The Complainant filed the complaint after an incident on February 28, 2011, during which she received a telephone call from the District stating that the Student's blood glucose level was low and the Complainant indicated that she would be sending someone to pick the Student up from school. The Complainant contended that the District left the Student unattended while she waited to be picked up from school. She further contended that the Student's Section 504 plan required the District to monitor her blood glucose level and supervise her at all times when her blood glucose was low and also provided for the administration of medication and provision of juice, as appropriate. Finally, the Complainant contended that the District employee who was assigned to monitor the Student that day lacked adequate training to care for the Student.

After filing this complaint and initially speaking to OCR, the Complainant contacted the District to request a copy of the Student's Section 504 plan and learned that the Student did not have a Section 504 plan. OCR learned from the Complainant that she had requested a Section 504 plan for the Student; the Student's treating physician had sent in medical documentation related to the Student's needs specific to her diabetes; the nurse wrote a plan to address the services related to diabetes that the Student needed at school; and the nurse reviewed that plan, which the Complainant understood to be a Section 504 plan, with the Complainant.

The District, however, asserted to OCR that it did not have a Section 504 plan in place for the Student during the 2010-2011 school year or prior to that school year. Instead, District officials indicated that the Student has a "diabetic care plan" that the nurse at the middle school unilaterally drafted. The District stated that it had not completed an evaluation of the Student to determine eligibility for services as a

student with a disability or prior to placing her on a diabetic care plan. OCR's review of the diabetic care plan for the Student indicates that she has a meter to check her blood glucose level at school when she gets off of the school bus, at breakfast, at 11:00 am, before lunch, before and after gym, and before getting on the bus to go home. A backup meter is kept in the office where she goes to check her blood glucose levels at designated times each day. The plan provides that District staff monitor the Student when she checks her levels, check her math when she calculates her carbohydrates, and verify the information she records in her pump is correct. The plan also provides the steps the District would take if the Student's blood glucose reaches specified levels, including providing snacks or providing water and further testing through a urine sample, and requires that the Complainant be notified by telephone of concerns that arise. Additionally, the plan indicates symptoms that would necessitate calling an ambulance.

The District provided OCR with a list of the staff who assist the Student when the nurse is not in the building, the specific training the school nurse and/or medical assistant attended regarding diabetes, and a copy of the informational materials the school nurse provided to District staff regarding diabetes. During the 2009-2010 and 2010-2011 school years, the District logged the following in a computerized medical health log each school day that the Student attended school: her blood glucose level; the time and date of each blood glucose level check; the person who cared for her during that check; the person contacted about any concerns or issues, if any, that arose during the check; and the response to the Student's levels, if any.

OCR requested a copy of the District's policies and procedures for the evaluation and placement of students with disabilities. The policies and procedures provided to OCR by the District do not include any provisions specific to students with medical impairments. They also address only the provision of Individualized Education Programs (IEPs) for students with disabilities and make no mention of

Section 504 plans.

### **Applicable Regulatory Requirements**

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipient school districts to provide a FAPE to each qualified student with a disability. The regulation defines a FAPE as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met and which have been developed in accordance with process requirements of 34 C.F.R. § 104.34 (educational setting), § 104.35 (evaluation and placement), and § 104.36 (procedural safeguards). For students whose disabling condition is diabetes, related aids and services may entail provisions involving blood glucose monitoring, such as when and how blood glucose monitoring will occur, including whether the student may monitor his/her condition independently; the administration of medication, such as insulin, humalog, or glucagon; and relaxation of food policies.

To be eligible to receive a FAPE under Section 504, a student must have a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j). Pursuant to Section 504 and Title II, as amended by the ADA Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Thus, under Section 504, a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance or ability to attend class. Use of mitigating measures such as insulin or a specific eating regimen may not be

considered in making a determination of whether an impairment substantially limits a major life activity.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), provides that a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services. The evaluation is to be conducted in accordance with procedures set forth in § 104.35(b) and (c), which provide that an evaluation must use appropriate testing and draw upon information from a variety of sources and that placement decisions must be made by a group of persons, including persons knowledgeable about the student, the meaning of evaluation data, and placement options.

Recipient school districts are also required to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the student to examine relevant records, an impartial hearing. If a parent requests a disability evaluation, the school district may either (1) evaluate the student within a reasonable period of time; or (2) decline to evaluate the student, because the district does not suspect that the student has a disability. In the latter case, the district must explain to the parent the reason for the refusal and inform them that they have the right to challenge the refusal to evaluate the student by requesting an impartial due process hearing pursuant to 34 C.F.R. § 104.36. There is no requirement in the Section 504 regulation that a parent's request for disability evaluation be in writing and parents requesting services for their child under Section 504 need not use "magic words" to request those services so long as they give a reasonable indication that they are seeking assistance in the educational setting because of a child's physical or mental impairments.

### **Analysis and Conclusion**

In the instant case, the evidence demonstrates that the District failed to evaluate the Student to determine whether, based on her medical impairment of diabetes, she is eligible to receive services as an individual with a disability pursuant to Section 504 in violation of 34 C.F.R. § 104.35. The District provided documentation indicating that it was aware that the Student has diabetes, acknowledged the services it is providing to her due to her diabetes, and stated in writing that the District has not evaluated her pursuant to Section 504. Instead the District placed the Student on a "diabetic care plan," which provided for glucose monitoring and provision of snacks when glucose levels reached certain levels. OCR therefore concludes that there is sufficient evidence to support a finding that the District had Information sufficient to suspect that the Student had a disability as defined by Section 504 and needed related aids and services as a result but failed to evaluate her in violation of Section 504 and its implementing regulation at 34 C.F.R. § 104.35.

The failure of the District to evaluate the Student to determine her eligibility to receive services as a student with a disability under Section 504 and its lack of Section 504-specific policies raised concerns as to whether the District was, as a class, failing to evaluate students enrolled in the District with medical impairments, such as diabetes, who, because of disability, need or are believed to need regular or special education or related aids and services and to provide such students with a FAPE in violation of Section 504's implementing regulation at 34 C.F.R. § 104.33(a) and (b) and Title II's implementing regulation at 28 C.F.R. § 35.130. On July 1, 2011, OCR advised the District that we would be investigating this broader, class issue. Prior to OCR completing an investigation of this broader class-wide issue, however, the District expressed an interest in voluntarily resolving the issue pursuant to Section 302 of OCR's Case Processing Manual.

Under OCR's procedures, a complaint allegation or issue may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the

complaint allegation or issue and signs a resolution agreement that addresses it. Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. In such circumstances, the resolution agreement will be aligned with the complaint allegations or the information obtained during the investigation and will be consistent with the applicable regulations.

Based on the foregoing, the District has signed the enclosed resolution agreement, which, once implemented, will fully address the individual violations with respect to the Student as well as OCR's compliance concerns regarding the District's policies, practices, and procedures pursuant to Section 504 and Title II. The agreement requires the District to offer to appropriately evaluate the Student in compliance with Section 504 and Title II requirements and, if she is found eligible as a student with a disability, develop and implement a plan to provide her with a FAPE in accordance with Section 504 procedural requirements. Moreover, the District will draft Section 504 policies regarding the identification, evaluation, and placement of students with disabilities, including students with medical impairments such as diabetes, that fully comply with Section 504 and Title II, as amended, requirements. Finally, the District will provide in-service training concerning the requirements of Section 504 to staff involved in making referrals or conducting evaluations under Section 504.

In light of this agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the enclosed agreement. Should the District fail to fully implement the agreement, OCR will reopen the case and take appropriate action to ensure the District's full compliance with Section 504 and Title II as pertains to the Student and the District's Section 504 policies, practices, and procedures at issue in this complaint.

This letter sets forth OCR's determination in an



individual OCR case. 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. The complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

We appreciate the cooperation of the District during the resolution of this complaint. We look forward to receiving the District's first monitoring report by October 14, 2011. If you have questions or concerns about this letter, please contact Mr. Myrle Weems, Equal Opportunity Specialist, by telephone at (216) 522-7629 or by e-mail at [Myrle.Weems@ed.gov](mailto:Myrle.Weems@ed.gov).

### **Resolution Agreement**

#### **Batavia Local Schools**

The Batavia Local Schools (the District) voluntarily submits the following Resolution Agreement (Agreement) to the U.S. Department of Education, Office for Civil Rights (OCR) to resolve the above-referenced complaint and to ensure the District's compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, as amended by the Americans with Disabilities Amendments Act of 2008 (ADAAA); accordingly, the District agrees to take the following actions:

#### **A. Individual Remedies**

1. On or before October 14, 2011, the District will contact the parents of the student at issue in this complaint (the Student) to offer to evaluate the Student to determine: (1) whether she has a disability, as defined by Section 504 and Title II, as amended by the ADAAA; and (2) if so, what she needs to receive a free appropriate public education (FAPE), i.e., the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the Student as

adequately as the needs of persons without disabilities are met.

2. If the Student's parents provide consent for the evaluation, the District will initiate an evaluation of the Student based on information gathered from a variety of sources to determine if she has a disability under Section 504 consistent with the Section 504 implementing regulation at 34 C.F.R. § 104.3 (definitions), as amended by the ADAAA and § 104.35 (evaluation and placement), and in accordance with the following:

a. All decisions regarding evaluation will be made by a group of persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options (the Section 504 team). The Student's parent will be invited to attend the meeting and, if unable to attend, will otherwise be provided a meaningful opportunity to provide input regarding the evaluation and placement of the Student.

b. The Section 504 team will determine whether the Student, because of diabetes, has a disability within the meaning of Section 504, i.e., whether she has a physical or mental impairment that substantially limits one or more major life activities. In evaluating the Student to determine if she has a physical or mental impairment that substantially limits one or more major life activities, the Section 504 team: (i) will consider all possible major life activities, including operation of major bodily functions; (ii) will not limit "substantial limitation" or "major life activities" to past or present limitation on academic performance or school attendance but will consider all manner of substantial limitation of major life activities; and (iii) will not take into account the ameliorative effects of any mitigating measures, such as related aids and services or modifications already being provided to the Student by the District or the Student's parents. The District will construe the definition of disability broadly in accordance with the ADAAA.

c. If the Student is determined to have a disability under Section 504, the Section 504 team will develop a plan to ensure that the Student receives

a FAPE. The District will provide the Student's parents with a meaningful opportunity to provide input into the determination of what will be included in the Student's Section 504 plan, notice of the determination, and notice of their right to challenge the plan through an impartial hearing.

**REPORTING REQUIREMENTS:** On or before October 14, 2011, the District will provide documentation to OCR showing that it has implemented item A.1 above, such as a copy of any letter, form, or other correspondence to the Students parents. By November 30, 2011, the District will provide documentation to OCR showing that it has completed the Section 504 evaluation, convened the Section 504 team, and made a Section 504 eligibility determination in accordance with item A.2 above, applying appropriate evaluation standards and criteria, including a copy of the evaluation report and all related documentation, all notes from the evaluation and placement meeting(s), documentation showing how the Section 504 team applied appropriate evaluation standards and criteria in reaching its eligibility determination, a copy of the Student's Section 504 plan, if applicable, and documentation that the Student's parents were provided with a meaningful opportunity to provide input into the team's determinations and with notice of the determinations made by the Section 504 team and their right to challenge them. If the Student's parents refuse to provide consent to the evaluation, a statement from the District to OCR to that effect will be sufficient to demonstrate implementation of item A.2.

### **B. District-Wide Remedies**

1. By November 30, 2011, the District will draft and submit to OCR for review Section 504 policies and procedures that address the identification, evaluation, and placement of students who the District knows or has reason to suspect have a mental or physical impairment that substantially limits a major life activity, including students with medical impairments such as diabetes, as well as required procedural safeguards. The policies and procedures

will comply with the regulation implementing Section 504, including at 34 C.F.R. §§ 104.3 (definitions), 104.35 (evaluation), and 104.36 (procedural safeguards), and with Title II and the ADAAA.

**REPORTING REQUIREMENT:** On or before November 30, 2011, the District will submit its Section 504 policies and procedures in accordance with item B.1 above to OCR for review and approval.

2. Within forty-five (45) calendar days of receiving the OCR-approved Section 504 policies and procedures, the District will adopt the policies and procedures.

**REPORTING REQUIREMENT:** Within forty-five (45) calendar days of receiving the OCR-approved Section 504 policies and procedures, the District will submit documentation to OCR sufficient to demonstrate the adoption of the Section 504 policies and procedures.

3. Within ninety (90) calendar days of receipt of the OCR-approved Section 504 policies and procedures, the District will post those policies and procedures on its website and notify students, parents, guardians, and staff of the procedures and where copies may be obtained. The District will further certify that it has reviewed all of its existing policies and procedures that address Section 504 to ensure they are consistent, or withdrawn to the extent necessary, to eliminate confusion for students and staff.

4. Within ninety (90) calendar days of receipt of the OCR-approved Section 504 policies and procedures, the District will provide in-service Section 504 training, by a competent authority on Section 504, to all of its administrators and staff members, including nursing staff and teaching staff at Batavia Middle School, who are responsible for Section 504 referrals, decision-making and/or the provision of services under Section 504 to students with disabilities. The training will focus on the District's responsibilities regarding identification, evaluation, reevaluation, and placement procedures required by Section 504, as well as the District's

obligation to provide qualified students with disabilities a FAPE, including that students with medical impairments, such as diabetes, may be eligible for services as students with disabilities under Section 504 and Title II. The in-service will also include a review of the District's Section 504 policies and procedures.

**REPORTING REQUIREMENTS:** Within ninety (90) calendar days of receiving OCR's approval of the District's Section 504 policies and procedures, the District will submit to OCR information documenting the implementation of items B.3 and B.4, including copies of the notices issued to staff, administrators, and parents or guardians and the link to the procedures on the District's website, the description of the in-service training presenter's qualifications, the dates(s) and time(s) of the training, the agenda covered during the training, any materials provided during the training, and the sign-in lists for each session, including the name, title, and school of each attendee. The District also will provide a list of all those persons who require the training pursuant to B.4. but were unable to attend and a statement as to when they will attend such training. The District will supplement its response to this reporting requirement until all such staff are trained.

### **General Requirements**

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the District has fulfilled the terms of this agreement and is in compliance with Section 504 and its implementing regulation, at 34 C.F.R. Part 104, and Title II and its implementing regulation, at 28 C.F.R. Part 35, which were at issue in this case.

The District understands that by signing this document it agrees to provide data and other information in a reasonably timely manner in accordance with the reporting requirements of this agreement. Further, the District understands that during the monitoring of this agreement OCR may visit the District to interview staff and students, and request such additional reports or data as are

necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with the regulations implementing Section 504 and Title II.