



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

61 FORSYTH ST., SOUTHWEST, SUITE 19T70
ATLANTA, GA 30303-8927

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April 23, 2012

Dr. Kriner Cash
Superintendent
Memphis City School District
2597 Avery Avenue
Memphis, Tennessee 38112

RE: OCR Docket # 04-10-5002

Dear Dr. Cash:

This is to advise you of the resolution of the above-referenced compliance review that was initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR) on March 31, 2010. OCR had authority to initiate this compliance review under 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, 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 prohibit discrimination on the basis of disability in education programs and activities that receive Federal financial assistance (FFA) from the Department and public entities, respectively. As a recipient of Federal financial assistance and a public entity, the District is subject to Section 504 and Title II and their respective regulations.

Based on an initial data review which raised the possibility of race as a factor in determining a student's eligibility under Section 504, OCR notified the District by letter dated July 27, 2010, that OCR was expanding the compliance review to include Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color or national origin by recipients of FFA. As a recipient of FFA the District is also subject to Title VI and its implementing regulation.

The compliance review addressed the following legal issues:

- Whether the District appropriately evaluates students with food allergies, diabetes, asthma and other health impairments with Individual Health Care Plans (IHCP) to determine if the students are qualified students with a disability as defined by Section 504 and Title II.
- Whether the District is discriminating against students on the basis of race by denying them the opportunity to receive related aids and services under Section 504 in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.3(a)(b)(1)(i-v).

Applicable Legal Standards:

The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(1)(i) and (iii), which OCR interprets to include the recently expanded definitions from the Americans with Disabilities Act Amendments Act of 2008

(ADAAA), defines a disabled person as any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(2)(i), which OCR interprets to include the recently expanded definitions from the ADAAA, defines physical or mental impairment as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(2)(ii), which OCR interprets to include the recently expanded definitions from the ADAAA, provides that the phrase “*major life activities*” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The ADAAA added the following examples of major life activities to this non-exhaustive list: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating, and functions of the immune system, normal cell growth, digestive, bowel, bladder, brain, circulatory, endocrine, reproductive, neurological, and respiratory functions.

The ADAAA also provided that mitigating measures cannot be considered when the school district assesses whether the student has a disability. For example, when determining whether a student has a disability, the school district must evaluate whether the medical or health condition would be substantially limiting without considering amelioration by medication or other measures. If the health condition is likely to substantially limit a major life activity, the child would be considered to have a disability.

The regulation implementing Section 504 at 34 C.F.R. § 104.33 provides that (a) 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; and (b)(1) for the purpose of this subpart, 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 handicapped persons as adequately as the needs of nondisabled persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35 and 104.36.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a - c) requires a recipient to conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any actions with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. A recipient to which this subpart applies shall 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 which ensure that: 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; 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 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). In interpreting evaluation data and in making placement decisions, a recipient shall draw upon information from a variety of sources, including aptitude and

achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; 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, ensure that the placement decision is made in conformity with the regulation implementing Section 504 at 34 C.F.R. §104.34.

The regulation implementing Section 504 at 34 C.F.R. § 104.36 requires a recipient to 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 Title II implementing regulation at 28 C.F.R. § 35.104(1)(i) provides the same definition for “physical or mental impairment” and the regulation at 28 C.F.R. § 35.104(2) provides the same definition for “major life activities.” However, the Title II regulation at 28 C.F.R. § 35.104(1)(ii-iii), further defines physical or mental impairment as follows: “(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. (iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.”

Title II's general prohibitions against discrimination provide that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.” 28 C.F.R. § 35.130.

The Title VI implementing regulation at 34 C.F.R. §100.3(a)(b)(1)(i-v), provides that:

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

- (i) Deny an individual any service, financial aid, or other benefit provided under the program;
- (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
- (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
- (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.

Background

The District is a large urban public school district comprised of 191 schools located in western Tennessee. In the 2009-2010 school year, the District enrolled 110,376 students. The data shows that 93,806 (84.99%) of the students were black; 7,793 (7.06%) were white; 7,229 (6.55%) were Hispanic; and the remaining 1.04% were comprised of other groups.

Summary of Investigation to Date

OCR's investigative steps included a preliminary meeting with District administrators during May 2010, an on-site visit during the week of August 16, 2010 and an analysis of data obtained from the District. The data included the following: for each school in the District, student enrollment by race and national origin, the number of students with IHCPs, the number of students with a Section 504 plan and the health conditions of each student with a Section 504 plan. OCR also reviewed the District's policy for the evaluation and placement of students under Section 504. OCR's preliminary data review found that the District recognizes a broad range of physical and mental conditions that can qualify a student as having a disability under Section 504.

During the 2009-2010 school year, there were 838 District students with Section 504 plans; OCR examined the distribution of these students among District schools. In 92 of the District's schools, at least three students receive Section 504 services, while in 24 schools there are no students who receive Section 504 related aids and services. All of the schools which have no students receiving Section 504 related aids and services have predominantly minority populations, and five have student enrollments comprised exclusively of black students.

The District's data demonstrated that 419, or 50%, of those students with Section 504 plans were classified as Attention Deficit Disorder (ADD) or Attention Deficit Hyperactive Disorder (ADHD). The remaining 419 students were identified as having learning disabilities, bipolar disorder, diabetes, allergies, asthma, sickle cell anemia, and other conditions. District data identified 9,824 students with IHCPs. However, OCR learned that the District generated this figure based on the number of students whose parents or guardians identified them as having a medical condition when enrolling a student in the District. Most of the students whose parents identified them as having a medical condition did not receive IHCPs. Also, with few exceptions, students with IHCPs were not identified as students with disabilities as defined by Section 504 and did not receive the required screening and evaluation, nor were procedural safeguards provided to their parents or guardians. Some schools with a virtually 100% minority student population had large numbers of students with documented health issues but no students with Section 504 plans. OCR visited nine of these schools and found that although students with IHCPs were enrolled, they were not evaluated and their parents were not provided information about their rights, including the right to due process. As noted above, the regulation implementing Section 504 at 34 C.F.R. § 104.35 requires the District to conduct an evaluation of any student who, because of a disability, needs or is believed to need special education or related services. Further, the regulation implementing Section 504 at 34 C.F.R. § 104.36 requires the District to provide procedural safeguards to the parents or guardians of students who, because of disability, need or are believed to need special instruction or related services.

Policies and Procedures

OCR found that the District's policy and procedures regarding the identification of students as students with disabilities, as defined by Section 504, track the definition of disability found in the Section 504 regulation.

The process begins with a referral to the student support team (S-Team). The S-Team may implement interventions unless the student's condition merits immediate referral for evaluation. If attempted interventions do not address the identified concerns the S-team may subsequently refer students for an evaluation. Parents are provided information about their rights including the right to due process. The eligibility and placement determinations are made by a group of persons with knowledge of the student and the evaluation results. Parents are invited to participate in the eligibility and placement meetings. The District has the requisite forms to capture referral, S-Team, evaluation and placement information. The District uses a computer-based program, Easy 504, to record information about the evaluation and placement of students. The District provided documentation showing that staff including guidance counselors, are trained on the requirements of Section 504 and how to use Easy 504. The document that results from the Section 504 evaluation and placement process is called a "Section 504 Plan" by the District.

It is important to note that an IHCP may also comply with the provisions of Section 504, provided that, where appropriate, students with IHCPs, whom the District identifies as students with disabilities who may need related aids and services, are provided evaluation, placement, and procedural safeguards required by the Section 504 regulation. However, as noted above, OCR's investigation revealed that most students in the District with IHCPs were not evaluated pursuant to the process set forth in Section 504, nor were they provided procedural safeguards.

Section 504 Coordination

Based on the results of the data review, OCR selected 18 elementary, middle, and high schools for the on-site portion of the review. Nine of the schools selected for an on-site visit had a student enrollment that was 100% minority, or had fewer than five white students. These schools also had a substantial number of students identified by the District as having IHCPs but had no students with Section 504 plans. The other nine schools had a non-minority student enrollment which ranged from 7% to 70%. These schools also had large numbers of students with IHCPs and the largest numbers of students with Section 504 plans in the District.

While on-site, OCR interviewed central office staff, including the four Area Superintendents, the Section 504 Coordinator, the Director of Psychological Services, the Director of Counseling, nursing supervisors and special education coordinators. In the schools visited, OCR interviewed the schools' principal, guidance counselor, assigned nurse, psychologists, social workers and teachers.

At the school level, the guidance counselor is responsible for coordinating Section 504 activities. In this regard, the guidance counselor is solely responsible for ensuring that students who may qualify as students with disabilities under Section 504 receive interventions, evaluations, and where appropriate, Section 504 related aids and services. The guidance counselor must also insure that relevant documentation is obtained and entered into Easy 504. The guidance counselor's Section 504 responsibilities are in addition to the other duties routinely performed by guidance counselors, which are in large part determined by the principal at each school. OCR learned from guidance counselors that they may be called upon by the principal to perform tasks not directly related to their regular duties. In some schools, however, the guidance counselors appear able to set their own priorities. Although the guidance counselors interviewed stated that they received training on Section 504, most expressed the need for more training.

OCR interviews established that guidance counselors vary enormously from school-to-school with respect to their understanding of the requirements of Section 504 and their responsibility to identify students with disabilities who may need related aids or services. Generally, the counselors at the nine schools with substantial white student enrollments were more aware than their counterparts at other schools of the Section 504

requirements concerning possible Section 504 eligibility for students with health-related impairments such as asthma, diabetes, etc. Although the proactive identification efforts of the guidance counselors are uniformly low in all 18 schools visited, in the predominantly minority schools those efforts appear to be virtually nonexistent. In schools with a significant white student population, witnesses informed OCR that parental referrals constitute the majority of referrals for Section 504 eligibility.

Witnesses informed OCR that the psychological evaluation is required for possible placement in the Other Health Impaired (OHI) category under the Individuals with Disabilities Education Act, (IDEA. OCR also learned that the Tennessee Department of Education requires certification from a medical doctor before placing a student with ADD or ADHD in the OHI category of special education. OCR found inconsistency among school staff interviewed with respect to their understanding of the requirement to obtain medical certification before placing a student with ADD or ADHD (or other behavioral disorder) under Section 504 versus IDEA. Although District policy does not require medical certification for a Section 504 placement of a student with ADD or ADHD, some guidance counselors believed that it is required. One witness informed OCR that a very disruptive, physically aggressive student was not placed because the school was waiting for an unnecessary medical certification. The student eventually moved out of the District.

As stated previously, most of the students with IHCPs were not screened and evaluated to determine whether they were students with disabilities as defined by Section 504 and, in general, the District did not issue procedural safeguards to their parents or guardians. The data also raised additional concerns regarding the 24 schools with virtually 100% minority enrollments that identified no students as having disabilities as defined by Section 504.

OCR interviews with nurses and the nursing supervisors established that when parents or guardians register their children, they are asked if the student has a medical condition. In many instances, parents and guardians report historical medical data. For example, if a student had asthma early in life, it is reported in spite of the fact that the child has not had symptoms for several years. The school nurse reviews these reports and determines if the student will require medical intervention at school. In many instances, the nurse determines that no intervention is required, and no further action is taken. In some cases, however, ongoing monitoring and/or intervention is required, and a plan is developed and implemented. According to witness testimony, the interventions are applied so that the student does not lose instructional time. At the school level, these determinations appear to be the province of the nurse serving the particular school. The nurse does not consider the student for Section 504 eligibility, consult with the guidance counselor or refer the student to the S-Team.

According to the District's data, fewer than 400 of the students who have Section 504 plans are identified as having health-related disabilities. Anecdotal information obtained from witnesses interviewed points to significant parental initiation of the Section 504 evaluation process. However, guidance counselors in the nine schools with substantial white student enrollments are more aware of the requirement to consider these students for Section 504 eligibility.

A comparable level of understanding is not present in the nine schools with 100% minority enrollment. There is not a significantly greater level of cooperation between the school nurse and the guidance counselor in the schools with a significant white student enrollment and the total minority schools. There is also not a significant difference regarding the outreach to parents between the two types of schools. Rather, it appears that the level of parental awareness and involvement is responsible for the disparity.

Prior to the conclusion of OCR's investigation the District requested to resolve the compliance review. Subsequent discussions with District officials resulted in the District signing the enclosed Resolution Agreement (Agreement) which, when fully implemented, will fully resolve the issues covered by the review. The provisions of the Agreement are aligned with the issues and the information obtained during OCR's investigation and are consistent with the applicable regulations. OCR will monitor the District's implementation of the Agreement. We look forward to receiving the District's first monitoring report which is due by [DATE].

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

Pursuant to OCR procedure, we have reminded the District that no recipient may 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, or participated in any manner in connection with a complaint.

OCR wishes to thank you, and your staff for the cooperation extended to OCR during the course of its investigation. If you or your staff have any questions regarding this matter, please do not hesitate to contact me at (404) 974-9331, or Arthur Manigault, Compliance Team Leader at 404-974-9376.

Sincerely,

/s/

Cynthia G. Pierre, Ph. D.
Regional Director

Enclosure