



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I  
5 POST OFFICE SQUARE, 8<sup>th</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

May 17, 2018

Julie Regimbal  
Superintendent  
Franklin Northwest Supervisory Union  
100 Robin Hood Drive, Suite 2  
Swanton, VT 05488  
Via Email to: [JRegimbal@fnwsu.org](mailto:JRegimbal@fnwsu.org)

Re: Complaint No. 01-17-1343  
Franklin Northwest Supervisory Union

Dear Superintendent Julie Regimbal:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received against the Franklin Northwest Supervisory Union (District). The Complainant alleged that the District discriminated against her son (Student) on the basis of disability. Specifically, the complaint alleges that the District denied the Student a free, appropriate public education (FAPE) by:

- failing to evaluate the Student for special education during the 2016-2017 school year (Allegation 1);
- failing to provide the Student with a 1:1 aide, as required by his Section 504 plan, beginning in March 2017 (Allegation 2);
- making a significant change in the Student's placement in March 2017 without conducting an evaluation or providing procedural safeguards, when it prohibited the Student from returning to school due to symptoms of his medical condition, and required him to receive home instruction (Allegation 3); and
- failing to place the Student in the least restrictive environment by requiring him to receive home instruction or attend an alternative education setting at another school from March through June 2017 (Allegation 4).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District, and interviewed the Complainant and District faculty and staff. After carefully

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considering all of the information obtained during the investigation, OCR found sufficient evidence of violations of Section 504 and Title II which the District agreed to resolve through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

### **Background**

OCR determined that during the 2016-2017 school year, the Student was ten years old and enrolled in fourth grade at the Highgate Elementary School (the School). OCR determined that at the beginning of the school year, the Student's classroom teacher (Teacher) noticed that the Student was becoming frustrated, refusing to use the bathroom despite apparently needing to do so, and exhibiting social problems, such as refusing to associate with his peers. OCR determined that the Teacher contacted the Complainant, who explained that the Student was undergoing therapy for defiant behavior, and suffered from bowel problems and constipation.

OCR determined that from October to December 2016, the Teacher noticed that the Student exhibited signs of incontinence, including bowel leakage. After an incident in October 2016 when the Student refused to go to the bathroom and was sent home because of soiled clothing, the School and the Complainant developed a practice of having the Complainant provide changes of clothing for the Student. OCR determined that the Teacher frequently asked the Student if he needed to go to the bathroom, but that the Student often refused to use the toilet despite apparent need to do so. The Teacher stated to OCR that she was concerned for the Student, his and other students' hygiene, and social difficulties for the Student if other students noticed his incontinence.

OCR determined that on December 7, 2016, the Complainant wrote to the School's Principal regarding the Student's increasing problems with oppositional behavior and soiling. The School's Principal responded that in order to evaluate the Student for a Section 504 plan, the School would need a medical diagnosis, and then it would be appropriate to convene a Section 504 team for the Student. OCR also determined that later that month, the Complainant provided the Principal with a diagnosis from the Student's therapist and pediatrician, stating that the Student was diagnosed with Oppositional Defiant Disorder (ODD) and anxiety, and later added a diagnosis of encopresis.<sup>1</sup>

OCR determined that the District convened a Section 504 meeting on XXXXXXXXXXXXXXXX. The Section 504 team determined that the Student was eligible for a Section 504 plan based on his ODD and anxiety. OCR determined that the Student's Section 504 plan provided that the Student be assigned a "temporary" 1:1 paraprofessional (the Aide), to gather data on the Student (such as how frequently he was going to the bathroom, whether he needed to be asked, etc.), provide prompts and check-ins for the Student to stay on task, and let the Student know that he had to change his clothes. The Student's Section 504 plan also provided that the Student be given a "code word" to use in order to request to use the bathroom.

OCR determined that the Complainant also requested an evaluation for special education and/or related aids and services on December 21, 2016. The District notified the Complainant, by letter

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<sup>1</sup> Encopresis is described in medical literature as voluntary or involuntary fecal soiling in children who have usually already been toilet trained. Children with encopresis often leak stool into their undergarments.

dated XXXXXXXXXXXXXXXX, that it was referring the Student for an evaluation, and proposed to hold an initial eligibility meeting on XXXXXXXXXXXXXXXX, which was rescheduled for XXXXXXXXXXXXXXXX. The Complainant attended the meeting, and provided consent on the same day to evaluate the Student for special education.

The District conducted evaluations<sup>2</sup> of the Student for special education in April 2017, and determined on XXXXXXXXXXXXXXXX, that the Student was eligible for special education and/or related aids and services. The District classified the Student with Emotional Disturbance, Specific Learning Disability, and Speech/Language Impairment, and provided an Individualized Education Plan (IEP) to be implemented at the school where the Complainant was transferring the Student effective XXXXXXXXXXXXXXXX. The services in the IEP consisted of in-class supports, i.e., academic support in writing, behavior intervention, and written expression development, in addition to weekly case management meetings and monthly psychologist consultations.

### **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is 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 developed in compliance with Section 504's procedural requirements. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires school districts to conduct an evaluation, in accordance with the requirements of 34 C.F.R. § 104.35(b), of any student who, because of a disability, needs or is believed to need special education and/or related aids or services, before taking any action with respect to the initial placement of the student in regular or special education. The regulation implementing Section 504 does not require school districts to evaluate all students with suspected or diagnosed medical conditions or at a parent's request. In determining whether a school district has an obligation to evaluate a student, OCR considers the indicia of disability that were available to the school district suggesting a need for special education and/or related aids and services, including but not limited to academic performance and medical and behavioral conditions.

The Section 504 regulation, at 34 C.F.R. § 104.35(b), also requires that school districts must conduct an evaluation before any subsequent significant change in placement. OCR considers any exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. The Section 504 regulation, at 34 C.F.R. § 104.35(c)(3), requires that with regard to any significant change in placement related to, or

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<sup>2</sup> The District administered the following evaluations: academic/educational; Wechsler Individual Achievement Test-III (WIAT-III); speech-language; occupational therapy; and psycho-educational.

because of, the student’s disability, the placement determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options.

The Section 504 regulation, at 34 C.F.R. § 104.34(a), requires school districts to educate a student with a disability with his/her nondisabled peers to the maximum extent appropriate to the needs of the student with a disability. A school district must place a student with a disability in the regular educational environment unless the district demonstrates that it cannot satisfactorily educate the student in the regular environment even with the use of supplementary aids and services.

### **Allegation 1**

With respect to Allegation 1, the Complainant alleged that the District denied the Student a FAPE by failing to evaluate the Student for special education during the 2016-2017 school year.

As an initial matter, OCR determined that the District did not provide, in response to OCR’s request, any procedures for the evaluation and placement of students under Section 504, and procedural safeguards. OCR also did not find any publicly available information indicating that the School or District has developed, published, or disseminated such procedures. Accordingly, OCR determined that the District failed to maintain policies and procedures as required by the regulations implementing Section 504, at 34 C.F.R. §§ 104.35 and 104.36.

The District asserted that it evaluated the Student for eligibility under Section 504 promptly after receiving the Complainant’s request in December 2016. OCR confirmed that the Complainant did not make a request for an evaluation prior to December 2016; however, OCR determined that the evidence indicated that the District failed to appropriately initiate an evaluation of the Student for special education and/or related aids and services in fall 2016, prior to the Complainant’s request.

OCR determined that in September 2016, the Student’s Teacher asked the Complainant if the Student had any medical issues based on difficulties he was experiencing with peers. The Complainant responded that the Student was “angry and unsociable,” and was using medication for bowel issues, including uncontrollable leakage due to constipation. Thereafter, the School counselor, the Student’s Teacher, the School nurse and the Complainant met to discuss the Student, and the Student began regularly meeting with the School guidance counselor. District staff informed OCR in interviews that in October 2016, the Student began soiling his clothing, resulting in fecal discharge on classroom seats, and engaging in defiant and oppositional behavior. District staff repeatedly reminded the Complainant to bring in extra clothing for the Student, which was laundered at school. District staff informed OCR that the incidents of incontinence continued to increase in frequency throughout fall 2016, despite attempts by the Student’s Teachers to use classroom strategies, and regular meetings with the guidance counselor. District staff also stated that during this time period, the Student would leave the classroom without specifying a reason, which was generally allowed to due to his incontinence (on an increasing basis, up to approximately once or twice a day by December 2016), even though he did not always use the restroom when he left class.

Based on the above, OCR determined that the evidence indicated that the District did not evaluate the Student in fall 2016, prior to the Complainant’s December 2016 request, despite indicia of disability that included increasing incidents of bowel incontinence and defiant/oppositional behavior which suggested a need for special education and/or related aids and services. In addition, OCR determined that the evidence indicated that District staff failed to apply standards for eligibility consistent with the requirements of Section 504 and Title II by informing the Complainant that a diagnosis was required for the Student to be eligible for a Section 504 plan, and using a standard for eligibility that was inconsistent with the requirements of Section 504 and Title II.

Specifically, the Principal informed the Complainant in an email dated December 11, 2017, in response to her request for an evaluation, that the Student “could fall under” Section 504, which would require a “diagnosis of a disability that limits his access to a free and appropriate education.” Subsequent correspondence between District staff also indicated their belief that the Complainant needed to present a diagnosis in order for the Student to be potentially eligible under Section 504. However, the regulations implementing Section 504 do not require parents/guardians to provide a diagnosis in order to initiate the evaluation process or for a student to be eligible for a Section 504 plan. OCR further determined the District did not advise the Complainant of the correct standard for eligibility under Section 504 and Title II, at 34 C.F.R. § 104.3(j) and 28 C.F.R. § 35.108, which state that a student has a disability and is therefore entitled to individually prescribed special education or related aids and services if the student has a physical or mental impairment that substantially limits one or more major life activities, as opposed to a “diagnosis of a disability that limits his access to [FAPE].”<sup>3</sup>

Based on the above, OCR determined that the District failed to appropriately initiate an evaluation of the Student despite the above-referenced indicia of disability, pursuant to the correct eligibility standards, to determine whether he was eligible for special education and/or related aids and services. OCR also determined the District failed to maintain procedures for the evaluation and placement of students consistent with the requirements of the regulations implementing Section 504 and Title II.

## **Allegation 2**

With respect to Allegation 2, the Complainant alleged that the District denied the Student a FAPE by failing to provide the Student with a 1:1 aide, as required by his Section 504 plan, beginning in March 2017.

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<sup>3</sup> This includes the ADA Amendments Act No. 110-325 (2008), codified as amended at 42 U.S.C. § 12102, which sets forth the expanded definitions of physical or mental impairment, and major life activities, consistent with 28 C.F.R. Section 35.108; the revised definition and considerations for “substantially limits,” consistent with 28 C.F.R. Section 35.108, including that evaluation teams must (1) consider students in their unmitigated state, without regard to the ameliorative effects of mitigating measures and (2) that “substantially limits a major life activity does not mean substantially limits access to the curriculum;” and that teams must consider all information provided to the team, including information relating to how an alleged disability impacts the time, manner or duration of a student’s performance of any major life activity, including information derived from outside of school (clinicians and or medical diagnoses).

OCR determined that the Student's Section 504 plan, dated December 20, 2016, provided that the Student "will have a temporary one-on-one paraprofessional to gather data" and "let [the Student] know when he needs to change his clothes." The Plan also provided that the 1:1 paraprofessional would "collect data about the Student, [and] discreetly remind the Student to visit the bathroom."

OCR determined that on March 9, 2017, the Principal notified the Complainant, by email, that the District was "withdrawing" the Student's 1:1 aide, and stated:

[The District] has experienced a loss in para-educators and will need to withdraw para-educator support for [the Student] beginning tomorrow. IEPs as you know carry a more binding level of entitled support as opposed to 504 status which protects against discrimination. There is no question[] that [the Student] has improved, but I have no doubt that it will be a challenge for him. Please try to speak with him tonight about how important it will [be] for him to remain in class, do the work, and most importantly, that he not wander off. We do not have the support to stay with him while he wanders or disappears without letting people know.

The Principal advised OCR that he removed the aide because "he did not feel that there was any benefit to having [him] any longer." The District also advised OCR that the Principal's removal of the 1:1 paraprofessional comported with the Student's Section 504 plan because the Plan provided that the aide would be "temporary." However, OCR determined that the Student's Section 504 plan did not contain any timeframe or specific benchmarks for removing the aide. OCR determined that the District failed to base its decision to remove the aide on an individualized assessment of the Student's needs; rather, the Principal unilaterally removed the aide based on staffing shortages and his belief that the Student was no longer benefitting from the aide. The District also appears to have believed that students on IEPs were more "entitled" to retain support services, as opposed to students on Section 504 plans, which is not consistent with the requirements of Section 504.

OCR further determined that on March 20, 2017, the Teacher notified the Principal that the Student's soiling was "out of control," and that she was "concerned for our health." On March 20, 2017, the Principal advised the Complainant, by email, that the Student's soiling "was more of a concern." The Principal further stated that the Student could "not come to school unless he has absorbent protection, in addition to clothing on at all times," due to "leakage and smell" and "residue is being left on seats." The Principal asked if the Complainant had spoken with the Student's physician about "absorbent layer product," as "when a practical solution is available for a condition which may otherwise rise to the level of a public health risk," he needed to "act on his behalf as well as all students and staff."

Accordingly, the evidence gathered by OCR indicates that the Student's soiling symptoms worsened immediately after the Principal's removal of the 1:1 aide. The evidence indicated that the removal of the aide, without convening a Section 504 team to determine whether it was appropriate to remove the aide in the context of the Student's educational plan, immediately preceded a change/deterioration in symptoms of the Student's disability known to the School.

Based on the foregoing, OCR determined that there was sufficient evidence to establish, by a preponderance of the evidence, that the District denied the Student a FAPE, by failing to provide the Student with a 1:1 aide, as required by his Section 504 plan, beginning on March 9, 2017.

### **Allegation 3**

With respect to Allegation 3, the Complainant alleged that the District denied the Student a FAPE, by making a significant change in the Student’s placement in March 2017 without conducting an evaluation or providing procedural safeguards, when it prohibited the Student from returning to school due to symptoms of his medical condition, and required him to receive home instruction.

OCR determined that on March 22, 2017, the Complainant advised the Principal that it was her belief that the Student “should be at school and it is not my choice to have him remain at home,” and, in the interim, she requested that the Principal provide school work so that the Student could keep up with his peers. The Principal responded to the Complainant on March 22, 2017, stating that the District could provide tutoring, and the Complainant stated that she “would be open to exploring [tutoring] as a temporary alternative.”

OCR further determined that the Complainant did not send the Student to the School thereafter with the absorbent protection requested by the Principal, but continued to request tutoring for the Student. The Principal requested and scheduled a Section 504 meeting, which was conducted on XXXXXXXXXXXXXXX, but the Section 504 team did not reach a decision about the Student’s educational placement, partly due to the Student’s then pending special education evaluation. The Principal notified the Complainant on April 17, 2017, that the District had located a tutor to provide two hours of tutoring per day to the Student, and began providing that tutoring the following day. The District continued to provide the Student with tutoring until the Student was transitioned to another school on or about XXXXXXXXXXXXXXX. OCR determined that the Student received no educational services from about March 21, 2017 to April 18, 2017.

The District advised OCR that the Principal did not make a unilateral change in the Student’s placement, because the Principal was simply asking for the Complainant to make the Student wear a “pull-up” or absorbent garment, before sending the Student to the School, and the Complainant declined (or the Student refused) to comply with the Principal’s directive. The Principal also stated that he did not seek to exclude the Student based on manifestations of his disability; instead he was taking precautions to ensure the health and safety of other students. However, OCR determined that the Principal’s directive effectively changed the Student’s placement in lieu of a determination by the Section 504 team.

Based on the foregoing, OCR determined that there was sufficient evidence to establish, by a preponderance of the evidence, that the District denied the Student a FAPE, by making a significant change in the Student’s placement in March 2017 without conducting an evaluation or providing procedural safeguards, when it prohibited the Student from returning to school due to symptoms of his medical condition, and required him to receive home instruction.

#### **Allegation 4**

With respect to Allegation 4, the Complainant alleged that the District denied the Student a FAPE, by failing to place the Student in the least restrictive environment by requiring him to receive home instruction or attend an alternative education setting at another school from March through June 2017 (Allegation 4).

The District did not provide evidence to support that a group of persons knowledgeable about the Student determined that that Student's placement at in-home tutoring, without any contact with his peers, constituted the least restrictive environment in which the Student could be educated. OCR determined that prior to the Principal's March 20, 2017 directive and the Student's resulting change in placement, the most recent Section 504 team meeting the School convened for the Student was on February 20, 2017, but at that meeting the team did not address the appropriateness of the Student's educational setting, consider other services, or make any conclusion about whether the Student should be placed in a more restrictive educational setting.

Subsequent to the Principal's March 20, 2017 directive, the District conducted a follow-up Section 504 meeting on XXXXXXXXXXXX. The meeting minutes also do not reflect that the team considered whether the in-home tutoring then being proposed for the Student was the least restrictive educational setting appropriate for the Student, or whether other services could be appropriate. OCR determined that the evidence fails to indicate that the District demonstrated that it considered whether the Student could not remain in the regular educational environment, even with the use of supplementary aids and services.

Based on the foregoing, OCR determined that the evidence indicates that the District failed to appropriately assess whether the Student was being placed in the least restrictive environment, when it required him to receive home instruction or attend an alternative education setting at another school from March through June 2017, thereby denying the Student FAPE.

#### **Conclusion**

On April 2, 2018, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into and fulfills the terms of an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it 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 personal privacy.

If you have any questions, you may contact James Moser at (617) 289-0146 or by email at [james.moser@ed.gov](mailto:james.moser@ed.gov).

Sincerely,

Ramzi Ajami *w/p MBK*  
Acting Regional Director

Enclosure

cc: XXXXXXXXXXXXXXXXXXXXXXXX  
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