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October 19, 2015

Dr. Nikolai P. Vitti
Superintendent
Duval County Public Schools
1701 Prudential Drive
Jacksonville, Florida 32207

Re: OCR Complaint #04-14-1514

Dear Dr. Vitti:

This letter is to inform you of the disposition of the above-referenced complaint filed against Duval County Public Schools (District), which the U.S. Department of Education (Department), Office for Civil Rights (OCR), received on April 22, 2014. The Complainant alleged that the District discriminated against the Complainant's son, (Student) on the basis of disability (cyclical vomiting, migraines, anxiety, and seizures) when the District failed to timely evaluate the Student in fall 2013 and make individualized determinations when it developed the Student's Section 504 Plan in January 2014.

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, 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.

OCR investigated whether the District denied the Student a free appropriate public education (FAPE) by: (a) failing to timely evaluate the Student, and (b) failing to make individualized determinations when it developed the Student's Section 504 Plan, thereby failing to comply with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33 and 104.35.

During the course of its investigation, OCR interviewed the Complainant and District staff. Specifically, OCR interviewed the District's Stanton College Preparatory School (Stanton) International Baccalaureate Program (IB) XXXXXXXXXXXX, Section 504 Designee/Guidance Counselor (Counselor), Assistant XXXXXXXXXXXX, XXXXXXXXXXXX, and the XXXXXXXXXXXX for the Hospital/Homebound Program (XXXXXXXXXX). OCR also reviewed documents provided by the District and the Complainant, including the District's Section 504 policies and procedures,

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the Student's transcripts and disability file, and correspondence and internal emails between the Complainant and District staff.

Based upon careful consideration of all the information obtained, OCR concludes that the evidence is sufficient to establish that the District discriminated against the Student on the basis of disability when it failed to timely evaluate the Student for related aids and services, and when it failed to make individualized determinations regarding the Student's needs when it developed his Section 504 Plan in January 2014. OCR sets forth below the basis for its determination.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no person, on the basis of disability, shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity that receives Federal financial assistance. The regulation implementing Title II 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), also requires school districts to make reasonable modifications in policies, procedures or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity.

The Section 504 regulation, at 34 C.F.R. § 104.33(a) and (b), 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 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards. Implementation of an IEP developed in accordance with 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. See 34 C.F.R. § 104.3(j). Pursuant to Section 504 and Title II, 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. Thus, under Section 504, a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance. 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. The regulation further requires that tests and other evaluation materials include those tailored to assess specific areas of

educational need. In addition, at 34 C.F.R. § 104.35(c), the Section 504 regulation requires a district, in interpreting evaluation data and making placement decisions to: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and a captive 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, which requires placement of a qualified student with a disability with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. Title II and its implementing regulations are interpreted consistent with these Section 504 regulations.

FACTUAL FINDINGS

Background

During the 2013-2014 school year, which is the relevant time period for OCR's investigation, the Student was in the 11th grade at Stanton College Preparatory School (Stanton). Stanton's mission is to provide a highly advanced academic program for students in grades 9-12. Stanton is one of a few schools in Florida to offer the International Baccalaureate Program (IB program), a rigorous, college-level program that provides course credit or advanced placement for up to one full year in a post-secondary institution. The course offerings include only honors-level, Advanced Placement (AP), dual enrollment and IB classes; traditional classes are not offered at the school. In addition to 25 AP and 25 IB courses taught at Stanton, eight dual enrollment courses are offered through educational partnerships with local universities and colleges. Graduation requirements include four years of English, Mathematics, Science and Social Studies, two years of a foreign language, and four AP, IB, or dual enrollment courses.

An award of an IB diploma is granted by the International Baccalaureate, an outside organization, and the requirements for the IB program are set by that organization. Although the District implements the IB program at Stanton, the majority of the requirements of the program are set by this outside organization.

The Student initially experienced difficulties attending school during the spring 2013 semester when he was in the 10th grade at Stanton. During that time, the Student received educational services through the District's Hospital Homebound program (HHB). The District stated HHB created a Section 504 Plan for the Student as he was no longer enrolled at Stanton during that time. In the fall of 2013, the Student returned to Stanton for the 11th grade and enrolled in the IB program. Neither the District nor the Complainant believed the Student needed any disability related aids or services at the time of his initial return to the school.

Beginning in or around September 2013, the Student began experiencing illnesses in school that resulted in numerous absences based on his medical needs. The Student experienced cyclical vomiting, migraines, anxiety, and seizures. Based on the allegations of a failure to evaluate and make an individualized determination for services through January 2014 when the District

developed the Student’s Section 504 Plan, OCR’s investigation addressed the District’s response to the Student’s needs commencing with the fall 2013 semester.

The District’s Section 504 Guide 2012-2013 (Guide), in use during the 2013-2014 school year, required the District to timely schedule a meeting, “generally within 3 weeks”, to discuss Section 504 referral/eligibility for any student suspected of having a disability. The Guide required that the District determine eligibility for services under Section 504 based on whether a student has a documented mental or physical impairment; whether the impairments substantially limits a major life activity; and whether the limitation occurs in the school setting.

The Guide further states, under the section titled Section 504 Considerations, that “[i]f the district has a reason to suspect that a student has a disability, it has a child find responsibility to identify, locate, and evaluate the student. The fact that the parent has not requested an evaluation under Section 504 will not alleviate the school district’s responsibility in meeting the child find responsibility. The school district is responsible to evaluate a student under Section 504 or IDEA [sic]. . . .” The Guide lists factors the District should consider when it suspects a student should be evaluated, including “[c]urrent academic difficulties with potential for additional retention” and “[s]ignificant record of absenteeism.” The District’s Section 504 process is also triggered when a parent requests an evaluation of a student for a disability and needed related aids and services.

Appendix A of the Section 504 regulation provides that the Department will generally not review individual placement and other educational decisions as long as the school district has complied with the regulation’s process requirements. Exceptions to this policy arise where extraordinary circumstances are present, where a child is excluded from the education system, or where a pattern of discriminatory placements exists.

A. Failure to Timely Evaluate

OCR’s investigation found that the District received notice of the relevant impairments experienced by the Student, and its impact, beginning in early September 2013. The Student’s records show that during the first nine weeks of the fall 2013 semester, the Student missed approximately 65% of school days due to health issues. Although the record shows that during that time teachers and staff at Stanton worked with the Student to develop informal plans that would assist him, the District made no attempt to evaluate the Student to determine whether he qualified as a student with a disability under Section 504 or the Individuals with Disabilities Education Act (IDEA).

An email, dated September 30, 2014, among Stanton staff, including the Counselor, and the Complainant shows that the Counselor recognized that the Student “has missed many days of school and the administration has already addressed this with his parent.” The correspondence further stated that the Student had come into the Counselor’s office not feeling well, “but it’s the same as last week, he will be there physically, but mentally he’s out.” The email referenced steps taken to assist the Student to make up missed work, but did not address the need for an evaluation to determine whether the Student was a qualified person with a disability or needed any related aids or services to access the education program.

In emails dated April 1 and April 15, 2014 to the District and to the Complainant's attorney, the Complainant stated that in October 2013, she asked the IB XXXXXXXXXXXX for services for the Student, including partial homebound services, but she did not receive a response. The Complainant did not provide to OCR any document that directly reflected that she communicated such a request to the District in October 2013. However, the Complainant did provide a copy of a December 9, 2013, email to the Assistant XXXXXXXXXXXX and Counselor in which the Complainant expressly requested services for the Student. District staff members deny receiving any earlier request. The Complainant asserted that when she raised the possibility of partial homebound services and submitted a request for services beginning in October 2013, the District began to advocate to the Complainant that the Student participate in full-time homebound services for the year or attend another school in the District due to his illnesses. Further, in an email dated November 13, 2013, the Counselor concluded that Stanton no longer remained an option for the Student due to his well-being and the integrity of Stanton's program.

OCR's review of an email dated December 13, 2013, from the XXXXXXXXXXXX and an interview with the XXXXXXXXXXXX established that during a conference call on December 10, 2013, regarding homebound services, the XXXXXXXXXXXX questioned whether the District had evaluated the Student for a disability. At that time, despite a significant record of absenteeism dating back over several months, the District still had not evaluated the Student to determine whether he had a disability or needed related aids and services in order to participate in the education program. During this conference call, the Assistant XXXXXXXXXXXX stated that the District would not consider specific services such as partial homebound combined with virtual classes because that would be unfair to the other students since the other students could only take virtual classes for credit recovery after they had failed the course, not as an initial try at the course.

On December 9, 2013, after the Complainant's request for services on the same date, the District requested and the Complainant provided consent for the District to evaluate the Student. The Complainant received notice from the District of her procedural safeguards on December 13, 2013. On January 8, 2014, the District referred the Student for a Section 504 Eligibility Determination (Referral), based on his diagnosis of cyclical vomiting and noted that he suffers from migraines and nausea that are sometimes debilitating and causes him to miss school, resulting in multiple emergency room visits and treatments. The Referral states that the "Student is currently failing all of his core academic courses"; "his attendance is extremely poor"; and "He is absent over 75% of the time". The District found the Student eligible for Section 504 services in January 2014.

OCR notes that during a meeting on February 24, 2014, with three of Stanton's assistant principals, the Counselor, XXXXXXX officer, the Student's grandmother, and the Complainant, regarding the Student's attendance, the District, in response to the mistaken belief by the Student's grandmother that the Student had an Individualized Education Program (IEP), considered that a request for an evaluation for Exceptional Student Educational (ESE) services. After the District confirmed this with the Complainant, the District proceeded to evaluate the Student for ESE services and developed an IEP in spring 2014. The Student graduated in June 2015, with a Stanton diploma; however, his grades from fall 2013 for the ten courses he was

enrolled in include seven failed courses (IB Latin, IB Theory/Knowledge, AP English Composition, AP Calculus, AP U.S. History, IB Biology, and IB Psychology); an “A” in AP U.S. History, “B” in Band, and a “C” in AP English Composition.

Analysis and Conclusion

Based on the facts above, OCR finds that the District failed to timely evaluate the Student in violation of 34 C.F.R. § 104.35. The District failed to adequately respond to the Student’s extensive absences in fall 2013 that were related to his disabilities, including his cyclical vomiting, migraines, anxiety, and seizures. OCR further finds that the District also failed to adequately respond, by timely evaluating the Student in response to the low grades the Student obtained during the fall 2013 term. Instead, the District attributed the grades to the Student’s absences that were in fact related to his disabilities. OCR’s review of the above-referenced April 2014 emails from the Complainant also suggest she requested services for the Student in October 2013; however, the District did not respond until December 2013, after the Complainant made a request for a Section 504 meeting on December 9, 2013. The District finally requested consent to evaluate the Student and developed a 504 Plan for the Student in January 2014, months after the onset of his disabilities.

B. Failure to Make Individualized Determination

On the date of the Student’s Section 504 eligibility determination, January 8, 2014, the District developed a Section “504 Plan” (Plan) for the Student. It required the District to provide or permit:

- The Student to wear a hat/visor/shades in classes where lighting presents a problem;
- 50% extended time to complete tests, homework and class assignments; and
- When ill, send the Student to student services or the guidance office.

Emails from Stanton staff, referenced above, show that the District made statements to the Complainant that categorically limited the services available to the Student based on factors other than the individual needs of the Student. Specifically, as stated above, the District concluded, prior to any evaluation to determine the Student’s actual individual needs, that the Student could not continue at Stanton to maintain the integrity of the program. OCR also found that the District made statements about the aids and services available to the Student based on fairness to other students, not the Student’s individual needs. In addition, as stated above, the District stated it would not consider specific services such as partial homebound services with virtual classes because that would be unfair to the other students who must fail a course before they can take the virtual classes.

OCR reviewed the medical documents and the statement by other District staff, all of which requested or suggested flexible scheduling, such as partial homebound services, due to the Student’s medical condition and needs. Specifically, the Physician Application Section of the Student’s homebound application recommends part-time homebound services as the “Student is able to attend a partial school day/week;” and “Attend school on non-consecutive days based on chronic condition.” The Principal Agreement Section (completed by Stanton’s XXXXXXXXXX)

of the homebound application also states that “the student is highly driven but could use a more flexible schedule.” The Section 504 Plan and accompanying documents do not evidence that the District sought to address the request and recommendation for flexible or partial school days.

An email from the Complainant to the District dated April 15, 2014, states that, during the December 10, 2013, homebound meeting, the Assistant XXXXXXXXXX informed the Complainant that “Stanton does not make accommodations other than extended time on tests and time and a half on homework” and “if [the Student] needs more accommodations then he needs to go to his district school.” The email also stated that, at the January 13, 2014, Section 504 meeting, the Assistant XXXXXXXXXX repeated this remark and stated that the only accommodation Stanton would provide were limited to the items offered in his Section 504 Plan. The email states that, at the homebound meeting, a District staff member informed the Assistant XXXXXXXXXX that the request for a flexible schedule was reasonable, to which the Assistant XXXXXXXXXX made the above-referenced comment that Stanton would not allow virtual classes for the Student based on what Stanton deemed fair to other students. The email then states the staff member commented that the Student is sick, to which the Assistant XXXXXXXXXX repeated “then he needs to go to his district school.”

A review of the Section 504 Plan developed by the District supports the Complainant’s assertion that the District determined the services it would provide the Student based on factors other than the Student’s medical documentation, evaluation and identified needs.

Analysis and Conclusion

OCR finds that extraordinary circumstances exist with regard to the Student's Section 504 Plan developed in January 2014, such that it is proper for OCR to review the District's placement and services decisions for the Student. OCR finds that the Student’s Section 504 Plan was not designed to provide him a FAPE. District staff acknowledged that they were aware of the Student's extensive absences related to his cyclical vomiting, migraines, anxiety, and seizures, and treatment for these conditions. Instead of considering whether the Student could be served by a flexible schedule, as requested by the Complainant and medical professionals, and further supported by the XXXXXXXXXX’s comments in the homebound application, the District provided services, such as extended time for class assignments and tests without giving consideration to other options that could be made available to the Student that would have served his individual needs. Neither the medical documentation nor the Complainant ever requested or recommended such services.

The evidence shows that the Section 504 team failed to consider the specific services requested, whether the Student actually needed those services, and whether the services or alternatives could allow the Student to continue to participate in the IB program offered at Stanton. The evidence reviewed by OCR supports the allegation that the District, through the Student’s Section 504 team, offered and provided services it deemed appropriate for Stanton rather than the Student.

Although the District has asserted that the Student received services in the fall of 2013, the District did not adequately evaluate the Student before it made any of these placement

determinations. In addition to the violations of 34 C.F.R. §§ 104.33-104.35, OCR finds that the District's actions denied the Student an equal opportunity to benefit from its high school educational program, based on his disability, in violation of 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130.

After a review of the District's Section 504 procedures, OCR determined that the District's process, as written, meets the process requirements of Section 504. Specifically, it requires the District to: 1) identify when a student has a disability (i.e., if the District suspects a student has such a disability, it will initiate its referral process); 2) appropriately evaluate the student to determine the student's disability and services needed, if any; and 3) develop and implement a proper placement for the student based on the evaluation. However, as stated above, OCR has determined that the District failed to follow this process for the Student. Even after it delayed its referral of the Student for services under Section 504, the District failed to make an individualized determination with regard to the Student's services.

OCR finds that the District's practice failed to comply with Section 504 and the District will, therefore, amend its procedures to explicitly state that it must develop Section 504 plans for qualified students with disabilities based on the students' individualized needs as determined by an evaluation and the interpretation of an evaluation in accordance with the requirements of 34 C.F.R. § 104.35. Further, before making any placement decisions regarding a student with a disability, or suspected of having a disability, the District will conduct an evaluation that draws upon information from a variety of sources; ensures that information obtained from all such sources is documented and carefully considered; ensures 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; and ensure that the placement decision is the least restrictive environment appropriate for the student.

In sum, OCR concludes that the evidence is sufficient to support a finding that the District discriminated against the Student based on disability in violation of Section 504 and Title II as alleged. The District has agreed to the enclosed Agreement, which when fully implemented, will address the noncompliance issues identified by OCR's investigation. The agreement requires the District to revise its Section 504 policy and procedures, and train staff to ensure Stanton conducts evaluations and makes individualized placement determinations for students suspected of having a disability. The agreement also requires the District to revise the Student's transcript, including recalculating his grade point average, to mitigate the lasting educational impact of the District's failure to appropriately evaluate the Student and provide needed services to the Student.

OCR will monitor the District's implementation of the 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 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 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, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

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.

This concludes OCR's consideration of this complaint. If you have any questions about this letter, please contact Kokayi Issa, Investigating Attorney, at (404) 974-9381, or Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

/s/

Melanie Velez
Regional Director

Enclosure