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

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ATLANTA, GA 30303-8927

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May 9, 2019

Mr. Jeff Eakins, Superintendent
Hillsborough County Schools
901 East Kennedy Boulevard
P.O. Box 3408
Tampa, Florida 33601

Re: Complaint #04-19-1081

Dear Superintendent Eakins:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Hillsborough County School District (District) on November 11, 2018, on behalf of a Student at Walker Middle Magnet School (School), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the School failed to implement the Student's Section 504 Plan and expelled him for misbehaviors caused by his disability. The Complainant also alleged that she was not provided with her parental rights documents at any meetings.

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.

OCR proceeded with an investigation of the following legal issues:

1. Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to implement his Section 504 Plan, in noncompliance with Section 504, implementing regulation at 34 C.F.R. §104.33;

2. Whether the District discriminated against the Student on the basis of disability by failing to timely evaluate him for eligibility for an Individualized Education Program (IEP), in noncompliance with Section 504, implementing regulation at 34 C.F.R. §104.35; and

3. Whether the District failed to provide the Complainant with parental rights documentation, in noncompliance with Section 504, implementing regulation at 34 C.F.R. §104.36.

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient (such as the District) failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

During the complaint resolution process, OCR reviewed documents provided by the District, and interviewed the Student's Physical Education, Band, Science, Math, English/Language Arts (ELA), Spanish teachers, the School Counselor, the Assistant Principal, the Principal and the Complainant. Based on the available evidence, OCR found sufficient evidence to support a finding of noncompliance with regard to Issue #1 above but insufficient evidence to support a finding of noncompliance with regard to Issues #2 and #3 above. Set forth below is a summary of OCR's findings.

Applicable Regulatory Requirements

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 regulation implementing Section 504 at 34 C.F.R. §104.33(a)-(b)(2) requires a recipient that operates a public elementary or secondary education program or activity to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education 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 disabilities are met and that satisfy the requirements of the regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36 (educational setting, evaluation and placement, and procedural safeguards).

The regulation implementing Section 504 at 34 C.F.R. §104.35(a) requires a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of 34 C.F.R. §104.35(b) of any person 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 person in regular or special education and any subsequent significant change in placement.

The regulation implementing Section 504 at 34 C.F.R. §104.36 provides 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 include notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with an opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

Background

The Student is 13 years old and attends eighth grade at the School. The Complainant stated that the Student has Attention-Deficit/Hyperactivity Disorder (ADHD), Social Anxiety with a School Phobia, Major Depression and Impulse Control Disorder. The Complainant stated that the Student was expelled from the School in October 2018 and has been homeschooled since that time.

Factual Findings and Analysis

Issue #1: Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to implement his Section 504 Plan.

The Complainant stated that the Student was expelled from the School on October 11, 2018 for threatening a District employee on the bus (bus driver) at the end of September 2018. The Complainant stated that a manifestation determination hearing was held, and the District determined that the threat made to the bus driver was not a manifestation of the Student's disability because it occurred on the bus and his Section 504 Plan applied only to issues that may come up in the School or the classroom. The Complainant stated that she believes if the School had followed the Student's Section 504 Plan and re-evaluated him for an IEP, he would not have been expelled.

OCR interviewed the School's Principal, Assistant Principal (AP), School Counselor (Counselor) and the Student's Teachers for the 2018-2019 school year.

All of the Student's teachers confirmed that they knew that he had a Section 504 Plan, they had copies of the Section 504 Plan and that the Section 504 Plan was implemented in their classes The teachers stated that the Student was smart, but he did have moments where he had outbursts in class or where he was disruptive. The teachers stated that when the Student did have verbal or emotional outbursts in class, they were able to use accommodations in his Section 504 Plan to get him back on track – cool down periods, a walk to the office, or re-direction back to task. Only one of the Student's teachers who were interviewed remembered giving the Student a formal written discipline referral and that was for a uniform infraction.

The AP and Principal stated that the Student rode the bus each day to and from school for the 2018-2019 school year. They both stated that there was only one incident on the bus, and it occurred in September 2018. The AP and Principal stated that the Student got on the bus at dismissal and became agitated because the bus driver was asking him questions and then asked him to move his seat to the front of the bus. The Principal stated that the Student continued to

get more and more agitated and began hitting the windows on the bus. The bus driver asked him to stop and the Student said that he would "do the same thing" to the bus driver. At that point, the bus driver called for assistance at the bus and several staff members came to the bus, including the AP. The AP stated that the Student was asked to leave the bus and come to the office. On the way to the office, the Student knocked some things over and threw a trash can. The Student was charged with Threat/Intimidation of Staff, which, according to the Principal, is a Zero Tolerance offense. The resulting punishment is 5-10 days of out-of-school suspension. The Student was suspended for 10 days and a manifestation determination hearing was set up. The AP and Principal stated that the outcome of the manifestation determination hearing was that the behaviors exhibited on the bus were not a manifestation of the Student's disability because the Student's Section 504 Plan was written to address behaviors that occur in the School or in class but not on the bus. The AP and the Principal were asked if the bus driver had a copy of the Student's Section 504 Plan or if the bus driver had knowledge that the Student had a Section 504 Plan. The AP and Principal both stated that the bus driver did not have a copy of the Section 504 Plan.

OCR determined that the Student had a Section 504 Plan for the 2018-2019 school year. The accommodations provided in the Section 504 Plan included:

- Breaks for physical movement, including going to the office, errands for teachers, getting water, etc.
- Allowed to stand in the back of the class for a few minutes if necessary
- Proximity control
- Preferential seating
- Positive reinforcement – student helper/assistant
- Study buddy
- Positive peer for Student
- Group participation for projects and large assignments
- Core classes early as possible during the day

Each of the Student's teachers, whom he saw daily, confirmed that they had copies of his Section 504 Plan and implemented the accommodations to help the Student. However, even though the Student rode the school bus each day, the bus driver did not have a copy of his Section 504 Plan or knowledge of its accommodations. The behaviors the Student exhibited in class and the School were the same behaviors he exhibited on the bus in September 2018. Because the behaviors were the same, OCR determined that the bus driver should have also had a copy of the Student's Section 504 Plan in order to utilize the accommodations the Student was entitled to when his behaviors occur. For example, the Student could have had preferential seating on the bus or have been given time to cool down before the bus left the School.

Based on the foregoing, OCR determined that there is sufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to this issue. During the course of the investigation, OCR spoke with the District and it agreed to voluntarily remedy the compliance issue. The enclosed Resolution Agreement (Agreement), when fully complied with, will fully remedy the compliance issue.

<u>Issue #2</u>: Whether the District discriminated against the Student on the basis of disability by failing to timely evaluate him for IEP eligibility.

The Complainant stated that she repeatedly requested an evaluation for an IEP for the Student because she felt that his Section 504 Plan was not sufficient to meet his needs. She stated that she first made the request in May 2018, but was told it was too close to the end of the school year for an IEP evaluation and that staff would do it when school started in August. The Complainant stated that she asked as soon as school resumed in August, but a meeting was not held until two weeks later. The Complainant stated that she signed a Consent for the evaluation and for a behavior assessment then, but the behavior assessment and other testing did not start until the week of September 21, 2018. The Complainant stated that a week later, the Student had the incident on the bus, was suspended and ultimately expelled from the School. The Complainant believes that if the Student's evaluation had been conducted sooner, he would not have been expelled from the School.

The Principal stated that the Complainant did request to have the Student evaluated for an IEP in May 2018. The Principal stated that since it was the end of the school year, the Complainant was told that an evaluation would be initiated once the new school year started in August 2018. The Principal stated that on August 24, 2018, the Complainant signed the Consent for Evaluation form and the evaluation was started. The AP and Principal stated that the Student was suspended on September 21, 2018 for the incident on the bus, as described in Issue #1. The AP and Principal stated that even though the Student was suspended for 10 days, the evaluation continued. On September 28, 2018, the Student's Psychological Evaluation was done. A manifestation determination hearing was held on October 5, 2018 and it was determined that he would be expelled from the School and sent to the alternative school for the remainder of the semester and at that point, it would be determined if he would be able to return to his zoned school, not the School. On October 11, 2018, the Complainant withdrew the Student from the District and began homeschooling him.

The AP and the Principal stated that even though the Student was expelled from the School, the evaluation continued at the School and on October 11, 2018, the Student's Psychosocial Evaluation was done. The eligibility/IEP meeting was held on December 11, 2018. The AP and Principal stated that they have had no further contact with the Complainant or Student since he left the School.

OCR determined that the Complainant signed the Consent for evaluation on August 24, 2018 and the evaluations began within the required 60 days. During the evaluation period, the Student was suspended, a manifestation determination hearing was held, and the Student was ultimately expelled. Despite this interruption, the evaluation was completed and the Student was given an IEP.

Based on the foregoing, OCR determined that there is insufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to Issue #2.

<u>Issue #3</u>: Whether the District failed to provide the Complainant with parental rights documentation.

The Complainant stated that she was never provided with any parental rights documentation at any of the meetings regarding the Student.

The documents provided to OCR by the District show that the Complainant signed an acknowledgement of the Notice of Parental Rights and Safeguards on March 21, 2018 when the Student's Section 504 Plan was written. The documents also show that when the manifestation determination hearing was held, there are no signatures. The AP and Principal stated that the Complainant refused to sign any documentation because she did not agree with the outcome of the hearing. The evidence showed that the Complainant was provided with the procedural safeguards but at one meeting, chose not to sign the documentation.

Based on the foregoing, OCR determined that that there is insufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to Issue #3.

Conclusion

This concludes OCR's investigation of the complaint and 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.

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.

The Complainant has a right to appeal OCR's insufficient evidence findings concerning Issues #2 and #3 (failure to timely evaluate for IEP eligibility and procedural safeguards) within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

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. 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 personal

privacy. A complainant may file a private suit in Federal court whether or not OCR finds a violation.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. OCR is committed to a high quality resolution of every case.

If you have any questions regarding this letter, please contact Michelle Vaughan, at (404) 974-9398 or michelle.vaughan@ed.gov.

Sincerely,

Vahn Wagner
Acting Compliance Team Leader

Enclosure (Resolution Agreement)