

December 8, 2014

XXXXXX XXXXXX, XXXXXX

Missouri Schools for the Severely Disabled
Post Office Box 480
Jefferson City, Missouri 65102

Re: OCR Docket # 07141162

Dear XXXXXX XXXXXX:

On June 11, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Missouri Schools for the Severely Disabled (MSSD), Jefferson City, Missouri, specifically the B.W. Shepherd State School (State School), alleging discrimination on the basis of disability. OCR completed its investigation of allegation (a) of the complaint and has determined there is insufficient evidence to conclude that the State School discriminated against students on the basis of disability as alleged. Prior to the conclusion of OCR's investigation into allegation (b) of the complaint, the District offered to resolve the allegation by entering into a Resolution Agreement with OCR.

Specifically, the Complainant alleged the State School failed to provide students with a free appropriate public education by:

- a. failing to have a person that was knowledgeable of students' medical conditions participate in the drafting and revision of Individualized Education Plans (IEPs) after January 14, 2014; and
- b. failing to implement IEPs when students missed instructional time to receive gastronomy tube feedings.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA).
- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of FFA from the Department and a public entity, the State School is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

To protect individuals' privacy, the names of employees, witnesses, and other parties also were not used in this letter.

OCR applies a preponderance-of-the-evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion. Based on our review and analysis of the information obtained during this investigation, OCR determined that there is insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II.

In reaching the determination in this complaint, OCR considered information the Complainant and the State School submitted, including State School policies and procedures, student records, and interviews with staff members. In addition, OCR interviewed the Complainant. The legal and factual bases for OCR's determination are set forth below.

The Complainant alleged the State School failed to provide students with a free appropriate public education (FAPE) when it failed to have a person knowledgeable of students' medical conditions participate in the drafting and revision of IEPs after January 14, 2014.

Legal Standard

General Prohibition against Discrimination

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives FFA. The Section 504 regulation at 34 C.F.R. § 104.4(b) specifically prohibits recipients of FFA from: i) denying an individual with a disability the opportunity to participate in or benefit from any aid, benefit, or services provided by the recipient; ii) affording a qualified individual with a disability an opportunity to participate in or benefit from any aid, benefit, or service that is not equal to the opportunity afforded to others; or iii) providing a qualified individual with a disability in the enjoyment of an aid, benefit, or service that is not as effective as that provided to others.

The regulation implementing Title II at 28 C.F.R. § 35.130(a) states no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected

to discrimination by any public entity. The regulation at 28 C.F.R. § 35.130(b)(1)(ii) further states that a public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others.

Subpart D of the Regulations Implementing Section 504

As explained in Appendix A to the regulations implementing Section 504, Subpart D of the regulations sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities operated by elementary and secondary schools. Subpart D includes the regulations at 34 C.F.R. §§ 104.33, 104.34, 104.35, and 104.36 described below. The requirements are designed to ensure no child with a disability is excluded from school on the basis of disability and, if a recipient demonstrates that placement in a regular education setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional costs to the student's parent or guardian.

Provision of a Free Appropriate Public Education

The Section 504 regulation at 34 C.F.R. § 104.33(a) requires recipients of FFA that operate a public elementary or secondary education program, such as the State School, to provide a FAPE to each qualified individual with a disability (QID) who is in the recipient's jurisdiction, regardless of the nature or severity of the individual's disability. The regulation implementing Section 504 at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as regular or special education and related aids and services that: (i) are designed to meet individual needs of individuals with a disability as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.34 (evaluation and placement), and 104.36 (procedural safeguards). Pursuant to 34 C.F.R. § 104.33(b)(2), implementation of an Individualized Education Plan (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the "appropriate education" standard under 34 C.F.R. § 104.33(b)(1)(i).

As further explained in Appendix A to the Section 504 regulations, an appropriate education may consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other support services.

Findings of Fact

OCR investigated whether the State School failed to have a person who was knowledgeable about students' medical conditions participate in the drafting and revision of IEPs after January 14, 2014. OCR made the following factual findings based on information the Complainant and the State School provided.

Background

- The State School is one of several schools operated by the state of Missouri to provide educational services to students with severe disabilities. The State School serves children and young adults between the ages of 5 and 21; its main office for the superintendent and other supervisory staff is located in Jefferson City, Missouri. Students are referred to the State School when their local school districts are unable to meet their educational needs. There are currently a total of thirty-four schools operated by MDESE located throughout the state of Missouri.
- The Complainant was employed as a nurse at the State School which was closed at the end of the 2013-14 school year and the students were transferred to other schools. Most of the staff members were reassigned to other schools but the Complainant was not reassigned to another school.

IEP Meeting Participants

- Section 300.321 of the IDEA states that an IEP Team for each child with a disability must include a parent, not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment), not less than one special education teacher of the child, a representative of a public agency, and an individual who can interpret the instructional implication of evaluation results.
- The Missouri Department of Elementary and Secondary Education (MDESE) classifies the regular educator, the special educator, an individual to interpret instructional implications of evaluation results, and a local education agency representative as mandatory participants in an IEP meeting.
- The Section 504 regulation at 34 C.F.R. § 104.35(c)(3) states that in interpreting evaluation data and in making placement decisions, a recipient shall 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.

Nurse Attendance at IEP Meeting

- In an interview with OCR on June 24, 2014, the Complainant informed OCR that after she filed a complaint against the State School’s XXXXX XXXXX accusing her of falsifying student attendance records, the building administrator refused to allow the Complainant to attend IEP meetings. The Complainant contends that after January 2014, she was no longer invited to attend IEP meetings.
- The Complainant alleges that participating in IEP meetings was previously an essential part of her job at the State School.
- The Complainant provided OCR with a copy of MSSD’s registered nursing job description. The job description states employees must have the ability to “participate in staffings and IEP conferences to provide information on the student’s physical and health needs.”
- The Complainant also provided OCR with a copy of MSSD’s Policy 8100 which lists the most common roles of individuals attending IEP conferences. The policy states that the classifications will be used to the fullest extent possible. The following roles are listed in the policy.

Parent	Teacher
LEA Representative	MSSD Administrative Representative
Building Administrator	Occupational Therapist
Physical Therapist	Speech Therapist
PE Teacher	Nurse
Supervisor for Instruction	ISL Manager
Group Home Manager	DMH Casemanager
DFS Casemanager	Student
Friend	Vision Consultant
Sister/Brother	General Education Teacher
Behavior Consultant	Diagnostic Consultant Psychological Examiner

- The Complainant alleged that she was the only person at the school that contacted doctors and obtained medical information on behalf of the students. She also alleged

that she was the only person at the State School with the necessary expertise to incorporate the medical information into students' IEPs.

- During the June 24, 2014 interview with OCR, the Complainant stated that prior to filing the complaint against the XXXXX XXXXX XXXXX she was regularly used as a member of IEP teams and was allowed to participate in IEP meetings. She stated that after the principal refused to allow her to attend IEP meetings beginning in January of 2014 all of the students would have incorrect IEPs because she was not allowed to participate in IEP meetings.
- In a November 13, 2014, interview the Complainant stated she did not remember the names of any students whose IEP meetings she was allowed to participate in during the 2013-14 school year. She stated that the school administrator began to exclude her from participation starting in October 2013. The Complainant stated that the school administrator stopped sending her notices to attend IEP meetings a couple of years ago. She stated that she would offer her input on the needs of students and make sure that the IEP team had all of the necessary information, but the school administrator made her job more difficult by not allowing her to participate in IEP meetings. The Complainant also stated that she wasn't formally invited to IEP meetings for many years but felt that did not mean that she was not supposed to be a part of IEP teams.
- OCR interviewed the State School's XXXXX XXXXX on December 2, 2014. She stated she has been an employee of MSSD since 1989 and worked as the building administrator at the State School for seven years. In her position as the school administrator she is responsible for sending out the communications concerning student IEP meetings. She stated that she invites specific individuals to attend IEP meetings and communicates that attendance with parents.
- The XXXXX XXXXX XXXXX stated the State School's policy is to invite the following individuals to IEP meetings:
 - parent
 - building administrator;
 - MSSD representative;
 - classroom teacher;

- homeschool coordinator (if available);
 - local education agency representative; and
 - the student (age 16 and over are required participants).
- The XXXXX XXXXX XXXXX stated that other individuals frequently attend IEP meetings either at the request of the parent or when she believes that another individual's input is needed.
- The XXXXX XXXXX XXXXX stated that under the State School's policy the nurse is not typically invited to attend IEP meetings. She only remembers the Complainant attending one IEP during the seven years she has served as the school's administrator. She could recall one instance several years ago when the Complainant participated in an IEP meeting when a student was new to the building and there were questions about the student's medications.
- The XXXXX XXXXX XXXXX told OCR she has never denied the Complainant the opportunity to participate in IEP meetings; if the Complainant requested to be a part of an IEP meeting and provided a reason for her request, she could have participated. The XXXXX XXXXX XXXXX could not remember the Complainant ever requesting to attend a meeting in advance. She also stated that if a parent requested that the nurse be allowed to participate she would have participated. She stated the Complainant's role concerning student IEPs has not changed since January 2014 and her role after January 2014 was consistent with her role during the previous seven years.
- The XXXXX XXXXX XXXXX stated that the nurse provided the IEP team with a list of the each student's special health care procedures and orders from a student's physicians. She stated the team reviews the information from the student's physicians and the team places the special health care procedures in the student's IEP.
- On December 2, 2014 OCR interviewed three of the State School's special education teachers. Teacher 1 stated she worked at the school for three years and she did not remember the Complainant being a part of any of her students' IEP teams. Teacher 2 stated that she worked at the school for one year and the Complainant did not participate as a member of any of her students' IEP meetings. Teacher 3 stated she

worked at the school for two school years and the Complainant was not a part of any of her students' IEP teams.

- OCR reviewed 15 student IEPs that were drafted between August 2013 and January 2014 and the accompanying documents, Complainant was not a part of any of the IEP teams.

Group of Knowledgeable Persons

- OCR reviewed the IEPs of ten students that had IEPs drafted or revised after January 2014. Of these ten students, five of them had IEPs that contained special health care procedures. OCR interviewed staff members specifically concerning these five students.
- Student A's IEP contained special health care procedures that required gastronomy tube feedings (tube feedings) and catheterization (only in certain situations). The Complainant was not a part of this student's IEP team. The XXXXX XXXXX XXXXX stated that she, teacher 3, and the parent all had knowledge about the student's medical condition and the student's special health care procedures. She also stated that teacher 3 was trained in tube feeding and catheterization. She stated that the catheterization was only supposed to be used in special situations.
- Teacher 3 also stated that both she and the XXXXX XXXXX XXXXX had knowledge of Student A's medical condition and special health care procedures. She stated that all special education teachers that work for the school are trained on how to give tube feedings and the Complainant certifies that the special education teachers can carry out the tube feeding procedure properly. She stated that her classroom aides also attended the tube feeding training session. The school administrator stated that nurse was not an IEP meeting participant but that she provided the special medical procedures to the IEP team and the IEP team placed the information in the student's IEP.
- Student B's IEP contained a list of special health care procedures, including tube feedings and suctioning. The Complainant was not a part of the Student B's IEP team. The XXXXX XXXXX XXXXX stated that she, teacher 2, and the parent all had knowledge about the Student B's medical condition and her special health care procedures. She also stated that classroom staff performed all of the student B's

special healthcare procedures on a daily basis and that the nurse would perform some suctioning if the student was having a rough time getting phlegm or saliva up. The XXXXX XXXXX XXXXX stated the nurse provided the IEP team with a list of special health care procedures that needed to be followed.

- Teacher 2 stated that she, the XXXXX XXXXX XXXXX, and the student's parent all were knowledgeable of Student B's medical conditions and special health care procedures. She confirmed the Complainant was not a part of the student's IEP team. Teacher 2 also stated that the nurse was not required to provide any of the special health care procedures for the student. She stated that all of Student B's special health care procedures were performed by the classroom staff. She stated that the nurse's participation in the IEP meeting was not necessary to draft the student's IEP because the IEP consisted of education goals and any medical information came from Student B's doctors.
- Student C's IEP contained a list of special health care procedures that included tube feeding, tracheostomy care and suctioning, and oral suctioning. The XXXXX XXXXX XXXXX stated that she was familiar with Student C's medical condition and special health care procedures, but the school was not responsible for performing any of Student C's health care procedures because a personal health care nurse was responsible for all of the Student C's health care needs. She stated the classroom staff was only responsible for Student C's educational needs. She stated Student C's mother also had knowledge of the student's medical condition and was a part of Student C's IEP team. The XXXXX XXXXX XXXXX stated that the Complainant was not involved with the IEP meeting and that the Complainant was not responsible for providing any of Student C's health care needs. She stated that Complainant's input was not needed because all of the information and care was provided by Student C's personal health care nurse.
- Teacher 2 stated that she, the parent, and the XXXXX XXXXX XXXXX all had knowledge of Student C's medical condition and special health care procedures. She stated that the Complainant was not involved in the creation of Student C's IEP. She stated the Complainant was not required to provide any of the special health care procedures for Student C because the student had her own nurse who was with her at all times and performed all of her health care procedures. Teacher 2 stated the

Complainant's input was not necessary because the IEP contained education goals and any medical information was received from Student C's doctor.

- Student D's IEP required tube feeding to be given to the student daily. The XXXXX XXXXX XXXXX indicated she and teacher 1 had knowledge of the student D's medical condition and special health care procedures and that the Complainant provided the IEP team with a list of the student D's special health care procedures. She did not believe that it was necessary for the Complainant to participate in the meeting because there wasn't a reason for the Complainant to participate in the IEP meeting for Student D because she provided special health care procedures that the team included in Student D's IEP. The XXXXX XXXXX XXXXX stated that at the time the IEP was written all of the special health care procedures were implemented in the classroom by classroom staff.
- Teacher 1 stated that she and the XXXXX XXXXX XXXXX had knowledge of the Student D's medical condition and special health care procedures. She also stated that the student D's parent contributed information about the student's medical condition and special health care procedures. She stated the nurse provided the team with a list of special health care procedures that the team considered. Teacher 1 also stated that she did not believe the nurse's participation in the IEP meeting was needed because they discussed the student's functional and educational needs at the meeting and at that time they had all the information necessary to provide the student's health care services.
- Student E's IEP required tube feeding to be given to the student twice daily. The XXXXX XXXXX XXXXX stated that she and the teacher 1 participated in the student E's IEP meeting and were knowledgeable of the student's medical condition and special health care procedures. She stated that the Complainant provided the IEP team with a list of special health care procedures and the team incorporated those health care procedures into the IEP.
- Teacher 1 stated that both she and the XXXXX XXXXX XXXXX participated in the student E's IEP meeting and they both were knowledgeable of the student's medical condition and special health care procedures. She stated that the nurse's participation was unnecessary because they were aware of the student E's health care

procedure requiring tube feeding and those services were performed by the classroom staff.

Analysis and Conclusion

In analyzing the Complainant's allegations that the District denied students a FAPE by failing to have persons knowledgeable of students' medical conditions participate in the drafting and revision of IEPs, OCR reviewed information the Complainant provided, documentation from the State School, and information provided in interviews of State School staff.

The Section 504 regulation at 34 C.F.R. § 104.35(c)(3) states that in interpreting evaluation data and in making placement decisions, a recipient shall 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.

Section 300.321 of the IDEA states that an IEP Team for each child with a disability must include a parent, not less than one regular education teacher of the child, not less than one special education teacher of the child, a representative of a public agency, an individual who can interpret the instructional implication of evaluation results. The Missouri Department of Elementary and Secondary Education (MDESE) classifies the regular educator, the special educator, an individual to interpret instructional implications of evaluation results, and a local education agency representative as mandatory participants in an IEP meeting.

The State School's policy requires the parent, building administrator, MSSD representative, classroom teacher, homeschool coordinator (if available), local education agency representative, and the student (age 16 and over) to be invited to IEP meetings. The building administrator indicated that other individuals were also invited to participate if either the parent requested or the IEP team determined their presence would be beneficial.

Neither the regulations implementing Section 504 nor the IDEA require nurses to be participants in IEP meetings. §104.35(c)(3) of Section 504 requires that a student with a disabilities' placement be made by a group of person, including persons knowledgeable about the child. OCR reviewed the IEPs of ten State School students; five of the ten students' IEPs required the State School to administer special health care procedures. In all five cases the building administrator, the students' special education teachers, and a parent were part of the students' IEP teams. The XXXXX XXXXX XXXXX maintained that she was familiar with the medical conditions and the special health care procedures for each of the five students. Likewise, the special education teachers were also knowledgeable of each student's medical conditions and special health care procedures. The XXXXX XXXXX

stated that she has worked at MSSD dealing with students with disabilities for approximately 25 years.

OCR has determined a preponderance of the evidence establishes that each student's IEP team constituted a group of knowledgeable persons consistent with requirements of §104.35(c)(3), one of the regulations implementing Section 504. Specifically, this group included persons knowledgeable about each student's medical conditions and special health care procedures. Although, the Complainant wasn't included in the meetings; the preponderance of the evidence does not support a conclusion that the Complainant's absence from the meeting violated the regulation implementing Section 504.

Based on these finding, OCR determined there is insufficient evidence to conclude the State School denied students a FAPE by failing to have persons knowledgeable of students' medical conditions participate in the drafting and revision of student IEPs. Therefore, OCR is closing this allegation as of the date of this letter.

The Complainant alleged in allegation (b) that the State School failed to provide students with a free appropriate public education by failing to implement IEPs when the students missed instructional time to receive gastronomy tube feedings.

Prior to the completion of OCR's investigation into this allegation, the District submitted a signed Agreement (copy enclosed) to OCR on December 8, 2014, that, when fully implemented, will address this allegation. The Agreement requires the District to provide written notice to the student's parent or guardian, to convene IEP teams and determine whether the students are entitled to receive compensatory and/or remedial services as a result of the District's failure to provide instructional services.

OCR considers allegation b resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume its investigation into Allegation b of this complaint.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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.

If you have any questions, please contact Demetrius Peterson, Attorney, at (816) 268-0556 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at demetrius.peterson@ed.gov.

Sincerely,

Maria L. North
Supervisory Attorney

Enclosure

cc: Dr. Chris Nicastro
Commissioner of Education