UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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June 5, 2017

Tucson Unified School District
Attn: Superintendent Dr. Gabriel Trujillo
1010 E. Tenth St.
Tucson, AZ 85719

Re: **Tucson Unified School District**
OCR Case Number: 08-17-1092

Dear Dr. Gabriel Trujillo,

We are notifying you of our decision in this case. The Complainant alleged the Tucson Unified School District (District) discriminated on the basis of disability (XXX allergies). Specifically, the Complainant alleged the District failed to timely evaluate her daughter (Student) for a Section 504 Plan to address her XXX allergies.

We initiated an investigation of this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

In reaching a compliance determination regarding these issues, we reviewed documentation submitted by the Complainant and the District. We also interviewed the Complainant.

Legal Standard

According to the Section 504 regulation at 34 C.F.R. Section 104.33(a), a covered entity that operates an elementary or secondary education program, such as the District, must provide a Free Appropriate Public Education (FAPE) to each qualified individual with a disability in its jurisdiction. Section 504 defines a student with a disability as a student who has a physical or mental impairment that substantially limits a major life activity, and it defines an "appropriate" education as one that provides regular or special education and related aids and services that are designed to meet the individual education needs of a person with a disability as adequately as the needs of non-disabled persons are met.

As part of the FAPE obligation, pursuant to Section 104.35, a covered entity is required to evaluate students who need, or are believed to need, special education or related services, before taking any action with respect to a student's initial educational placement. OCR interprets Section 104.35 to obligate the District to evaluate a student under Section 504 where there is sufficient information to indicate that the student may have a disabling condition that requires special education or related services. The information that prompts this obligation to evaluate may come from staff, a parent, or other persons.

Additionally, Section 104.35(b) provides that a recipient is required to establish standards and procedures for the evaluation of students who need, or are believed to need, special education or related services. 104.36 provides that a recipient shall establish and implement procedural safeguards that provide notice, an opportunity for the student's parents or guardians to examine records, an impartial hearing with opportunity for the parents or guardians to participate and representation by counsel, and a review procedure.

The implementing regulation for Title II explicitly states that it does not set a lesser standard than Section 504. OCR interprets 28 C.F.R. Section 35.130(b)(1) to require covered entities to provide a FAPE to the same extent as is required under the Section 504 regulation. Thus, we conducted our investigation in accordance with the applicable Section 504 standards.

Complainant's Allegation & District's Response

Complainant's Allegation

The Complainant stated that during the 2015-2016 school year, the Student had been allergic to XXX. Subsequently, during the summer prior to the 2016-2017 school year at Magee Middle School (Magee M.S.), the Student developed additional allergies. In particular, the Student was now allergic to X – provision redacted – X. As a result, on the first day of school in August 2016 at Magee M.S., she informed the school's XXX (XXX) of the new allergies. Additionally, following the first day of school, the Complainant alleged that she informed a variety of other school staff of the allergies, and that she requested for the Student to be evaluated for a Section 504 Plan to "keep the Student safe" at school. This included the XXX (XXX), the school's XXX XXX (XXX), the Student's XXX, the Superintendent's office, and other school and District staff.

Despite her frequent requests for a Section 504 Plan, the school's cafeteria staff instead simply gave her a form for the Student's doctor to fill out and return to the school, which was returned to the school around August 31st. Following, the Complainant frequently complained and requested for a Section 504 Plan, but the school did not evaluate the Student for a Section 504 Plan.

As a result, the Complainant stated that she did not feel the Student was safe at the school and that she kept the Student out of school, only to send the Student to school for a few hours one day every nine days to keep her enrolled.

District's Response

The District neither denied nor admitted that it discriminated as alleged. Rather, the District provided that prior to enrolling at Magee M.S., the Student attended the Holladay Elementary School and had an Allergy Action/Emergency Care Plan and an Epi-Pen for XXX related allergies (XXX, XXX and XXX XXX). At the time the Student enrolled at Magee M.S., "there was no information from which to conclude that the Student had a XXX allergy that might create a substantial impairment to any life activity such as breathing or eating."

When the Complainant notified the school that the Student was allergic to XXX XXX, including XXX, the school provided the Complainant with a "diet modification form" for the Student's doctor to fill out and return to the school. The Student's doctor returned the form to the school on September 6, 2016. As a result, this diet modification was initiated and given to the school cafeteria.

The District added that there is no evidence that the Student "ever had an anaphylactic reaction to anything other than possibly a XXX XXX."

The District stated that no "decision" was made whether to evaluate the Student for a Section 504 Plan at the Magee M.S. However, when the Student transferred to the Dietz K-8 School, another District school, in February 2017, the school quickly evaluated and implemented a Section 504 Plan for the Student.

The District provided the link to its policies and procedures in response to OCR's Data Request. It provided its Section 504 policy at http://www.tusd1.org/contents/distinfo/sect504/index.asp, Policy IHB ("Exceptional Educational Programs") at http://www.tusd1.org/contents/govboard/SectI/IHB.html, and the regulations for Policy IHB. The District noted that it has no separate policy or procedures that specifically address food allergies. It explained that when a parent notifies the school of a possible food allergy, the parent is referred to the cafeteria to get a "Diet Modification Form" and the school health office initiates an Anaphylaxis Action Plan to be completed by the student's doctor.

The District provided a copy of various documents OCR requested which are discussed below in the Findings of Fact section.

Findings of Fact

District's Policy/Procedures

Policy IHB and its corresponding regulations at IHB-R essentially provide the District's obligations under Individuals with Disabilities Education Act (IDEA), Family Educational Rights and Privacy Act (FERPA), and AZ State statutes and regulations. They do not provide any guidance concerning compliance with Section 504. However, Policy IHBA provides that when a student does not qualify under IDEA, the student should be considered under Section 504.

The District's Section 504 policy at http://www.tusd1.org/contents/distinfo/sect504/index.asp provides, amongst other things, "If the school has reason to believe that, because of a disability as defined under Section 504, a student needs accommodations or services in order to participate in the school program, the school must evaluate the student. If it is determined that a student is disabled under Section 504, the school must develop and implement the delivery of all needed services and/or accommodations." Although it does not provide instructions on how to implement this policy, it provides the name and contact information for more information, as well as additional links, including to its "Section 504 Information & Guidelines," FAPs, forms, and Board Policy IHBA.

The District's "Section 504 Information & Guidelines" ("Guidelines") provide 25 pages of instructions, followed by an assortment of related forms, procedural safeguards, and a checklist. OCR notes that the Guidelines provide a general prohibition against discrimination on the basis of disability and also states, "A student who has a physical or mental impairment that substantially limits a major life activity must be provided with such accommodations as are necessary to ensure that the student has equal access to services, programs and activities offered by our schools." It provides a definition for "mental or physical impairment," "substantially limits," and "major life activities." The Guidelines also provides who may refer a student for Section 504 consideration (which includes parents and school staff), the process for reviewing eligibility, discipline of students with Section 504 plans, procedural safeguards, and other related items. In particular, it states, "504 team meetings should be immediately convened when a student presents with a noticeable and/or documented disability. In these cases the MTSS[1] process must not delay the convening of the 504 process." OCR notes that, although not required, nowhere in the Guidelines does it specifically address food based or any type of allergies.

Allegation: Failure to Timely Evaluate

The Student had previously attended the Holladay Elementary School, a District school during the 2015-2016 school year, and had an Allergy Action/Emergency Care Plan and an Epi-Pen for XXX related allergies (XXX, XXX, and XXX XXX).

Although OCR cannot establish the first date during the 2016-2017 school year the Complainant informed the District of the Student's additional allergies, it is undisputed that the Complainant informed the District of the Student's additional allergies in early August 2016. As explained below, OCR found that the District was aware of the Student's additional allergies by August 2016.

Also, OCR found that by August 2016 the District was aware of the Complainant's desire for a Section 504 evaluation. OCR notes in particular an August 22nd "Parent Concern/Complaint," which states, "(Complainant) also requested a 504 Plan and a healthcare plan for her daughter while in school. She said she has made several phone calls to Food Services requesting a special diet for her daughter and that so far nothing has been done about it." Additionally, internal emails suggest that school staff were aware of the Complainant's request for a Section 504 evaluation. For example, in an August 22nd email from the XXX to the District's XXX, the

[1] Multi-Tier System of Support

XXX stated, "I then spoke with our XXX,…, about setting up a 504 meeting with the parents for the individual health care plan. My XXX told me that 'we can't even have meetings on 504's' until they have a new training that is supposed to be coming up. I don't know if this is the case, but I have asked my XXX to set up this meeting sooner than later and to notify me when they are meeting." In response, the XXX for TUSD said, "No, that is not accurate. I verified with XXX before responding, just to make sure. XXX can schedule 504 meetings as usual." Additionally, in an August 26th email to the XXX and others, the XXX provided a sample Section 504 Plan for a different student from a different middle school with XXX related allergies as a possible guideline for the Student.

As a result of the Student's needs and as requested by the Complainant, the District faxed a Diet Modification form to the Student's doctor on August 31st. By September 6th, the Student's doctor submitted the form to the District. The submitted form shows that the Student tested positive on November 11, 2014 for allergies to X – provision redacted - X.[2] Additionally, the form states that the Student needs to avoid those foods.

Falling short of evaluating the Student for a Section 504 Plan, the District attempted to accommodate the Student's allergies. For example, correspondences on September 14th and 19th between the District's XXX indicate the District did a thorough analysis of all foods served in the Magee M.S. cafeteria to determine what may or may not be safe for the Student to eat. In addition, details regarding proper production, service, and storage of the foods were discussed to specifically address the Student's allergies. Additionally, in the District's response, it stated that it offered the Student the option to sit at a XXX-free table in the cafeteria and/or to sit at a table outside the cafeteria near the health office to eat her lunch. An October 28th email from XXX to various District administrators states, "As far as her daughter being isolated due to her severe food allergies, this was the mother's initial request after speaking with food services. The table that has been set up adjacent to my XXX's office for (Student) to eat was a direct response to the mother's request to prevent her daughter from having continuous reactions from food in the cafeteria. (Student) can choose not to sit at this table. We were only accommodating the mother's request."

The District's XXX emailed on November 3rd to the XXX and the XXX, stating, "I wanted to separately mention to the two of you that we should ensure the site is aware of their obligation to accommodate the allergy issue through the least restrictive means possible. The site's approach of "allowing but not requiring" the kid to go eat in the XXX's office is not the least restrictive means of compliance, and the USDOE Office of Civil Rights/ADE will hand our heads to us if that's the extent of our response to the accommodation request here. Typically, schools create (and OCR supports) allergen-free zones (e.g., peanut free zone) or tables in the cafeteria, so that students with allergies can still socially engage with their peers during lunch. The site may need some coaching on this, it sounds like." In response, the XXX clarified that it was the

[2] Internal email communications suggest that there was some confusion regarding the Student's allergies and its impact on her. There was discussion regarding that the allergy test was from two years ago and that the XXX typically accepts medical documentation that are within one year. Additionally, there was discussion regarding how a person may test positive for an allergen, but not have a reaction. As a result, because of the lack of doctor's note or interpretation or diagnosis, the allergy test did not provide sufficient information to understand what the Student required in terms of accommodations.

Complainant's desire that the Student be separated from the students in the cafeteria. However, the XXX noted that this arrangement was "now an issue."

Despite the school's attempts to accommodate the Student's allergies, the Complainant continued to complain about the lack of a Section 504 Plan for the Student. For example, on November 2nd, it appears the Complainant attempted to speak with the District's Board president, raising her concern again that the school has not addressed her request for a Section 504 Plan for the Student. Additionally, in a November 4th internal email, the XXX stated that the Complainant was concerned that the XXX had not taken care of setting up a Section 504 Plan for the Student. Additionally, in another November 4th internal email, the XXX stated that the Complainant was in the Health Office that day, complaining that school staff do not monitor the XXX-free table in the cafeteria and that students eat XXX products at that table. Additionally, the XXX stated that the Complainant was upset that the Section 504 process had not yet started for the Student. In another internal email, on November 9th, the XXX stated that the Complainant continues to complain that the school was not getting the Student on a Section 504 Plan, as well as the Diet Modification. XXX stated that she had provided the Complainant with the phone numbers to the Section 504 Coordinator, the cafeteria's manager, and to Food Services. The XXX also stated that she had also spoken "with these staff." She added that the Complainant has pulled the Student out of school as the school is not a XXX-free facility. Additionally, in a November 18th email to the XXX, the XXX stated that the Complainant had been in the Health Office that day and had brought a letter from the Student's allergist, and that the Complainant believed that the school and the District facilities needed to be XXX-free. The letter states in relevant part that the Student "has allergy to XXX, and XXX. We recommend that she totally avoids XXX, and any XXX componants [*sic*] in food."

The Complainant stated and the attendance records show that the Student missed most days of school at Magee M.S. from the start of the 2016-2017 school year, until her official leave/withdrawal date of January 24, 2017. As a result, the Student received mainly "F's" in her classes, with a recommendation that the Student be retained for 6th grade.

In February 2017, the Student transferred to another District school, Dietz K-8 School. On February 21st, the District implemented a Section 504 Plan for the Student. Although the Section 504 Plan states the Student is allergic to the numerous previously listed items, it addresses mainly the Student's allergies to XXX, XXX, and XXX. It provides for a specified table in the cafeteria that is XXX and also XXX-free. Additionally, it provides for a specified meal plan for the Student's dietary needs. In the classroom, it provides for a communication code for the Student to use with her teachers to signal her need to go to the XXX or to be escorted, student choice for outside activities and extra-curricular activities, bathroom privileges, and signs on her classroom door stating that the room is XXX and XXX-free.

There is no evidence that, prior to the Student's transfer to the Dietz K-8 School, the District attempted to evaluate to determine whether the Student qualified for a Section 504 Plan. Additionally, there is no evidence that the District provided the Complainant with her Due Process rights.

Analysis & Legal Findings

OCR found the District has established standards and procedures for the evaluation of students who need, or are believed to need, special education or related services, including those students who do not qualify for an IEP under IDEA. Both the District's Section 504 policy and the Guidelines provide that when the school has reason to believe a student has a disability and needs special education or related services, the District is required to evaluate the student. The District's Guidelines, as referenced in the District's Section 504 policy, provide such standards and procedures. The Guidelines also provide procedural safeguards as required.

However, despite the District's established standards and procedures, the District did not utilize them while the Student attended Magee M.S. It is clear that in August 2016 the Complainant provided the District with sufficient information to indicate that the Student may have had a disabling condition that requires special education or related services. Additionally, it is clear that the Complainant specifically requested in August 2016, and many dates thereafter, for the Student to be considered for a Section 504 Plan. The evidence also indicates that the District was aware of its obligations to evaluate the Student for a Section 504 Plan. Although the school attempted to accommodate the Student's allergies, it did not dissolve the District's obligation under Section 504 to evaluate the Student for a Section 504 Plan. There is no evidence that the District attempted to evaluate the Student for a Section 504 Plan until February 2017, more than 6 months after the District first became aware of the disabling condition and the Complainant's request. Finally, the Student's February 2017 Section 504 Plan is strong evidence that the Student required a Section 504 Plan while enrolled in Magee M.S.

Thus, we determine, by the preponderance of the evidence, that the District failed to timely and appropriately evaluate the Student for disability-related services.

Conclusion

The District voluntarily entered into an agreement with OCR to resolve these issues. OCR is closing the investigative phase of this case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring phase of this case is complete, OCR will close Case Number 08-17-1092 and will send a letter to the District, copied to the Complainant, stating that this case is closed.

This letter addresses only the issues listed above and should not be interpreted as a determination of the District's compliance or noncompliance with Title II, Section 504, or any other federal law in any other respect.

This letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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 District is prohibited from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation.

Please also note that the Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact XXX XXX, Attorney and primary contact for this case, at (XXX) XXX-XXXX or by email at XXX.XXX@ed.gov, or me at (XXX) XXX-XXXX or by email at XXX.XXX@ed.gov.

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

Enclosure – Resolution Agreement