



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

November 13, 2018

VIA ELECTRONIC MAIL ONLY

Donald Evans, Ed.D.
Superintendent
Berkeley Unified School District
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

(In reply, please refer to OCR Docket Number 09-15-1502.)

Dear Dr. Evans:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the District. The Complainant, Disability Rights Education and Defense Fund (DREDF), alleged that the District discriminated against students with disabilities on the basis of their disabilities.¹ Specifically, OCR investigated the following issues:

Issue 1: Whether the District denied a free appropriate public education (FAPE) to two students (Student A and Student B) when it failed to follow adequate evaluation and placement procedures for them, and when it failed to provide their parents with procedural safeguards.

Issue 2: Whether the District excluded Student B and other students with disabilities from participating in the School's Independent Studies program.

Issue 3: Whether the District provided inferior testing facilities to Student C and other students with disabilities who received accommodations on advanced placement exams in May 2015, as compared to the facilities provided to other students.

Issue 4: Whether the District denied a FAPE to Student D when it failed to implement her Section 504 plan when she transitioned from middle school to high school in the District, and changed her placement without adequate evaluation and placement procedures.

Issue 5: Whether the District's failure to evaluate Student E for special education and/or related services within a reasonable period of time after parental request resulted in the denial of testing accommodations by the College Board on the SAT.

¹ OCR previously provided the District with the identity of the students. We are withholding their names from this letter to protect their privacy.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 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 and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR determined that Issues 4 and 5 are untimely. OCR also determined that the District did violate Section 504, Title II, and their implementing regulations with regard to Issues 1 and 2 to the extent the allegations concerned Student B. Prior to OCR completing its investigation and making a compliance determination as to the other issues and Student A, the District expressed an interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual (CPM), and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. 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 students without disabilities are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully

considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), 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 which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR first examines whether there is direct evidence of discriminatory treatment on the basis of disability. Absent that, OCR looks at whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

Under 34 C.F.R. §104.4(b)(5) and 28 C.F.R. §35.130(b)(4), a recipient school district may not, in determining the site or location of facilities, make selections with the effect of excluding individuals, denying them benefits, or subjecting them to discrimination on the basis of disability. Selections also may not be made with the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

Background

The Complainant alleged that the District denies FAPE to students with disabilities by failing to provide timely evaluations when it has reason to believe that students in its regular education program have a disability and need special education or related services, and raised other issues

of discrimination on the basis of disability. The complaint included specific information about six individual high school students. Based on an initial review of the complaint and supporting information, OCR determined that the complaint raised timely allegations, which had not been resolved, as to the five students listed above. Based on the date the complaint was filed with OCR, the timely period for allegations of discrimination giving rise to this investigation began on February XX, 2015. For background purposes, OCR has included some facts that extend beyond this date.²

Issues 1 and 2: Whether the District denied a FAPE to two students (Students A and B) when it failed to follow adequate evaluation and placement procedures for them and when it failed to provide their parents with procedural safeguards; and whether the District excluded Student B and other students with disabilities from participating in the School's Independent Studies Program.

Facts

The following facts are relevant to OCR's analysis:

Student A

Student A enrolled at the School as a XXXXX grader in fall 2014. According to documents provided by the District, a Section 504 plan had been developed for him in the previous district, based on a newly-diagnosed mental health condition and a history of teacher concerns about his behavior, attention, and comprehension. The Student transferred into the District during the middle of his XXXXXX grade year, shortly after the Section 504 plan was developed. The Student's mother informed OCR that she did not communicate with the District about his disability when he enrolled XX XXXXXX XXXXXX in the District. District records reviewed to date do not indicate whether the District was aware of Student A's prior Section 504 plan at the time he entered XXXX XXXXXX.

Student A's mother informed OCR that, soon after Student A entered the School, she informed his counselor (Counselor 1) that he was falling behind in school and had a previous Section 504 plan, and she requested that he be assessed for services under Section 504. She informed OCR that Counselor 1 suggested that Student A enroll in an academic support class before proceeding with an evaluation. Documents provided by the District confirm that the counselor scheduled a Student Study Team (SST) meeting and placed him in a support class during October 2014.

Student A completed the first semester of XXXXX grade with "D" grades in every course except the academic support class. According to his mother, he had begun experiencing stress-related migraines and nosebleeds. Student A's mother informed OCR that she contacted Counselor 1 in January 2015 to renew her request for an assessment, and was referred to a second counselor (Counselor 2), because Counselor 1 was on a leave of absence. She informed Counselor 2 that Student A had a learning disability and requested information about having him assessed.

² The regulations governing OCR's investigative procedures, at 34 C.F.R. § 100.7(b), require that complaints be filed within 180 days of an alleged act of discrimination. OCR's Complaints Processing Manual (CPM), at Section 106, permits OCR to consider allegations of continuing policies or practices to be timely filed. In evaluating such allegations, OCR considers whether there is evidence that the alleged policy or practice continued into the 180 day period.

Student A's mother informed OCR that Counselor 2 said she would contact Student A's teachers, but that she received no further follow-up to her request. She stated that she contacted Counselor 2 again in March and April 2015 to request special services, and was again told that Counselor 2 would contact the students' teachers and get back to her. She received no follow-up contact.

According to Student A's mother, she contacted Counselor 2 for a fourth time in May 2015, and was informed that Student A had been reassigned to a new counselor, Counselor 3, who told her it was too late in the year to request special services. On May XX, 2018, the Student's mother emailed all of the Student's teachers, stating that she had requested a Section 504 plan and IEP for the current school year, but had been informed that he must first take an academic support class. She requested information from them about the Student's behavior and academic success in their classes. Four teachers responded, identifying issues with attendance, focus and attention, comprehension, writing, mood, and perseverance. On June X, 2015, she also contacted the Special Education Department.

The school year ended on June XX, 2015. Student A again received low grades in most of his classes. His mother told OCR that she removed the Student from the District at the end of the school year because he was not getting the help and support he needed to be successful at the School. She also told OCR that, in response to her requests for assessments for Student A, she did not receive notice of her right to procedural safeguards and was not informed that she could challenge the counselors' decisions not to refer the Student for assessment or convene a Section 504 meeting.

School records show that on September X, 2015, the first day of the new school year, the District generated a notice indicating that the District intended to conduct psycho-educational and speech/language assessments for Student A.

Student A's mother told OCR that in October 2015, the Student's new school district implemented a Section 504 plan that included breaking up the Student's tests into sections, extra time for essays, one-on-one time with teacher, and up to 5 minutes to step outside when feeling overwhelmed. OCR has not obtained a copy of the Section 504 plan.

Neither Student A's mother nor the District provided OCR with documentation of any of the communications that Student A's mother described between her and Counselors 1, 2, and 3, prior to late May 2015. The Student A's mother informed OCR that she no longer had access to email systems that may include those communications, such as an internal District system email, which she could no longer access when the Student left the District. The District informed OCR that it did not have most documents concerning Student A, including SST documents, because he was no longer enrolled in the District. It also informed OCR that Counselors 1 and 3 are no longer employed in the District. OCR has not yet been able to identify Counselor 2.

The District stated in its narrative response to the initial data requests that Student A's mother and the relevant school employees were working together on identifying appropriate academic supports for the Student in a "rational progression," such as an academic support class, an SST,

and consideration of a Section 504 plan or IEP, but that before much progress could be made, Student A was removed from the School.

Student B

Student B first enrolled at the School in August 2014 as an XXXXXXXXX grader in the Independent Study Program (ISP). According to ISP informational materials, the ISP is a program with its own off-campus space and an ongoing application process, and ISP students fulfill the same course requirements as at the School and earn the same high school diploma by meeting weekly on an individual basis or in small groups with their instructors.

According to Student B's mother, in January and February 2015, Student B had a private neuropsychological evaluation and was diagnosed with ADHD-mixed type and visual memory deficits. The Student's doctor recommended several accommodations, including increased time for tests, a quiet space for test-taking, open-book/open-notes testing when appropriate, and some homework modifications.

On February XX, 2015, Student B's mother informed the ISP Coordinator, who also served as the Student's counselor, that a private doctor had evaluated the Student and had recommended a Section 504 plan with accommodations for increased testing time and open-book testing due to disability. The Student's mother noted that a final report would be forthcoming and inquired as to next steps for setting up a Section 504 plan. The Coordinator responded, stating that she would await the doctor's report. She also stated that she had never seen a student have an open textbook accommodation, and that nevertheless Student B had very good grades without having open textbook during tests. She also explained that some accommodations would be inapplicable in the ISP program, where students are not timed during tests (and, if they need more time to test, they usually receive that time) and where students receive minimal or no instruction and ISP staff therefore cannot observe study habits and classroom concerns. She noted that, if students' accommodations cannot be met in the ISP, they may return to the main campus. In a subsequent email, the Coordinator stated that Section 504 did not allow for the requested accommodations, except for extra time on tests and modified assignment, and the ISP already accommodated students individually.

On March XX, 2015, the Student's mother provided the Coordinator with a copy of the doctor's full report, including testing results and recommended accommodations, and again asked about next steps for pursuing a Section 504 plan for Student B. On March XX, 2015, the Coordinator communicated that Student B would need to return to the main campus to receive classroom accommodations. She explained that the ISP did not have the space to provide Student B with a quiet place to work free of distraction, did not have a person to check-in with Student B weekly, and could not provide her with the instruction and services available at the main high school campus. The Coordinator also asked the Student's mother to contact her so that the ISP could assist Student B in completing the school year and place her on the list to return to the main campus in the fall.

On the same day, Student B's mother responded. She stated that the family was not planning on moving Student B to the main campus, since she benefited from the unique services offered in the ISP program; rather, it planned on having her continue at the ISP with accommodations

relating to workload and testing only. She asked the ISP Coordinator to let her know when they could schedule a meeting to develop a Section 504 plan. In response to this email, the ISP Coordinator stated that the ISP did not have the ability or staff to provide “this service” for students with IEPs, students who registered for the ISP were told that services available at the main campus were not available at the ISP, and she had many students with learning disabilities who had resource teachers assigned by special education at the School. She concluded by stating that the ISP could not continue the Student’s enrollment, and the Coordinator would refer the matter to the main campus.

On March XX, 2015, Student B’s mother replied, explaining why she felt the main campus would not be a good fit for Student B, and requesting a meeting to explore developing a Section 504 plan for Student B at the ISP. On March XX, 2015, the Coordinator sent a final email, stating, among other things, “We don’t and have never had the ability to serve [students with] 504’s or IEP’s.”

On April X, 2015, the ISP Coordinator placed Student B on the list of students who wanted to return to the main campus.

OCR confirmed with the Student’s mother that her communications with the Coordinator were limited to this email exchange, that no meeting was scheduled to consider an evaluation of the Student or to develop a Section 504 plan, and that she did not receive a notice explaining the Coordinator’s decision and explaining the procedural safeguards for parents and students.

According to the Student’s mother, Student B enrolled at an online charter school for her senior year due to the Coordinator’s response to her requests for a Section 504 meeting. District records show that Student B left the District on September X, 2015.

The ISP has application documents. The application checklist describes the admission process and states, “Legally, before applying, students with IEPs must have an IEP meeting – with a representative from [the ISP] present – to determine if [the ISP] is an appropriate placement.” The application form has a special education section; it asks if the student requires any special education and if the student has an IEP, a Section 504 plan, or another plan, and for a summary of what the Student does for special education, along with a thorough list of services.

According to Student B’s mother, Student B’s teachers told her that they were providing accommodations to other students, and they were happy to provide formal accommodations to her if a Section 504 plan was put in place for her.

In addition, the District stated in its narrative response to the initial data requests that Student B was accepted into the program and voluntarily withdrew when the family was advised that the requested accommodations and services were not offered through the ISP, which was designed for students who can work very independently.

OCR reviewed enrollment data at the ISP for the 2014-2015 through 2016-2017 school years and found that Students with IEPs made up 4.6 to 7.6 percent of the ISP enrollment and Students with Section 504 plans comprised 4.7% to 9.7% of ISP enrollment.

Policies and Procedures

The District's policies and procedures concerning services to students with disabilities under Section 504 are set forth in a Board Policy and Administrative Regulation (BP and AR 6164.6), which were adopted in 2004. These policies are included in a Section 504 Handbook provided to counselors, which explains the requirements of Section 504 and includes forms for notifying parents and guardians of their rights and initiating evaluations, as well as a Section 504 rehabilitation plan form. Information about Section 504 services is also included in the District's Parent-Student Handbook.

AR 6164.6 provides that any student may be referred by a parent/guardian, teacher, other certificated school employee, or community agency for consideration of eligibility as a student with a disability under Section 504. The referral should be made to the school site principal. It states that the school site committee shall promptly consider the referral and determine whether an evaluation under this procedure is appropriate. This determination shall be based on a review of the student's school records (including academic, social, and behavioral records) and the student's needs. Students requiring evaluation shall be referred to appropriate evaluation specialists. If a request for evaluation is denied, the school site committee shall inform the parents/guardians of this decision and of their procedural rights.

AR 6164.6 does not contain a statement as to the timeframe for when the Section 504 process will be initiated following a request for a Section 504 meeting. It also does not detail the process for determining whether a student has a disability, including who decides if the student has a disability. However, it states that once a student is identified as having a disability within the meaning of Section 504, the school site committee shall determine what services are necessary to meet the student's individual education needs, based on an evaluation that may include, but is not limited to, classroom and playground observation, performance-based testing, academic assessment information, and data offered by the parent/guardian. The school site committee shall develop a written plan describing the disability and specifying the services needed by the student.

AR 6164.6 states that parents/guardians will receive procedural safeguards in the event a request for evaluation is denied. It also sets forth procedures for a parent/guardian to follow if s/he disagrees with the identification, evaluation, or educational placement of the student under Section 504 and identifies receipt of the student's accommodation plan as the event that triggers the timeframe for these procedures.

The Section 504 Handbook includes additional guidance for determining whether a student has a disability, including consideration of information from various sources in the student's environment, and lists members of the Section 504 team, including the student's parent or guardian; representatives of the classroom teachers; and the principal, vice principal, counselor or designated administrator. The Section 504 rehabilitation plan form contained in the Handbook states that the purpose of a Section 504 meeting may include: determining eligibility by identifying an impairment that substantially limits one or more major life activities; developing a Section 504 service plan for qualified students; conducting an annual review; and

“before initiating a significant change in placement, a reevaluation must be completed to determine if the student’s behavior is a manifestation of his/her disability”.

The form includes the following list of questions for determining whether a student has an impairment that substantially limits a major life activity:

- On District outcome assessments, are the students skills markedly below the standard;
- On grade reports, is there an overall pattern of poor grades (significantly below average D’s and F’s);
- On standard achievement tests, does the student score 2 or more grade levels below placement;
- Has the student received disciplinary action for inappropriate behavior;
- Does the student have special health care needs during class activities, including lunch;
- Does the student have a pattern of excessive absences and/or tardies; and
- Other: impact on major life activity other than learning (if applicable).

The form also includes a list of classroom modifications among which the team must select. The form does not provide an option for choosing “other services” or services not specifically listed as possible modifications or related services. .

Additional information regarding Section 504 eligibility is provided on the District’s webpage on Special Education under “504 Plan Information” and its webpage for the Office of Student Services under Menu of Student Services, Section 504. Both webpages state that students with disabilities, either temporary or permanent, that substantially limit their ability to succeed in school may be eligible for accommodations under Section 504.

According to two School counselors interviewed by OCR, parents requesting formal assessment or an IEP are referred to the Special Education Department, while counselors handle requests for services under Section 504. Counselors are responsible for deciding whether to grant requests for Section 504 eligibility meetings, and they typically grant such requests. Both School counselors stated that requests cannot be honored before the beginning of a school year, and that Section 504 meetings generally cannot happen during the first few weeks of the year because of counselor schedules and the need to observe students in school before developing a plan for them.

The counselors also stated that they do not generally refer students for formal testing, but that many parents obtain private assessments. They stated that students who are not “struggling” in school are typically not considered eligible for Section 504 services without testing or a “stronger” statement from a psychologist discussing the issues creating a need. The counselors further stated that in determining whether a student is eligible for Section 504 services, they rely on the District’s checklist which appears on the form described above.

Analysis

The regulations implementing Section 504 require that when a student needs, or is believed to need, special education or related services because of a disability, the student’s school district must conduct an evaluation and ensure that any placement decision is made by a group of

persons who are knowledgeable about the student, the evaluation data, and the placement options. Districts must also provide parents with procedural protections which include notice of decisions regarding their students' identification and placement, and an opportunity to challenge such decisions through a hearing process. These requirements apply when a parent informs a school district that he/she believes a student has a disability and needs special education or related services, including when a parent requests an assessment or a Section 504 plan. Under these circumstances, the school district must either conduct an evaluation within a reasonable amount of time or provide the parent notice of its determination that an evaluation is not necessary and of the parent's right to challenge this determination.

Student A

According to documentation provided by the District, Student A entered the District with a Section 504 plan and a history of teacher concerns regarding behavior, attention, and comprehension. The records do not reveal when the District became aware of this history. However, Student A's mother stated that she requested an assessment, a Section 504 plan, or special services at least five times during the 2014-15 school year. In its response to the complaint, the District contended that Student A's mother and the relevant school employees were working together on identifying appropriate academic supports for the Student in a "rational progression," such as an academic support class, an SST, and consideration of a Section 504 plan or IEP, but that before much progress could be made, Student A was removed from the School.

The evidence reviewed to date establishes, however, that the SST and the support class placement occurred in October 2014. Despite Student A's low grades at the end of the fall 2014 semester, there is no evidence of further action by the District until late the following May. At that time, four of his teachers reported concerns with his ability to concentrate and comprehend instruction. The Student's mother states that, in the interim, she repeatedly contacted his counselors without receiving either information about initiating an evaluation of Student A or notice of the District's determination that an evaluation was not necessary and of her right to challenge that determination through procedural safeguards. This information, if confirmed, would raise concerns that the District had not conducted an evaluation of a student who needed, or was believed to need, special education or related services within a reasonable time after receiving information that such an evaluation was necessary. Review of the District's policies and procedures suggests that this may be due in part to there being no statement as to the timeframe for when the Section 504 process will be initiated following a request for a Section 504 meeting.

In order to complete the investigation of this allegation, OCR would need to take further steps to obtain data regarding the contacts between Student A's mother and his counselors during the 2014-15 school year, including by requesting a search of the District's internal communication system, taking further steps to identify and interview the Student's former counselors, and obtaining the Student's files from the district that he attended after leaving the School.

Student B

In Student B's case, in February 2015, the Student's mother provided the ISP Coordinator with an evaluation stating that the Student had a disability and needed accommodations, and

repeatedly asked that a Section 504 plan be created. Instead of convening a group of knowledgeable people to consider the evaluation and decide what services the Student should be provided, the Coordinator unilaterally decided that the Student could not receive the services as a participant in the ISP and required that her placement be changed to the regular high school at the end of the semester. The Coordinator's emails indicate that she had concluded that the Student had a disability that required special education or related services. Without following the procedures required by the section 104.35 and 104.36 of the regulations, the Coordinator decided that the ISP was not an appropriate placement for the Student. Based on this evidence, OCR concluded that the District did not follow appropriate evaluation and placement procedures with respect to Student B in violation of Section 504, Title II, and their implementing regulations.

OCR notes that in an email exchange, the ISP Coordinator told Student B's mother that students were not timed during exams, and if they needed extra time when they tested, they usually received that time. Even if true, the provision of this accommodation to students generally did not absolve the District of its obligation to evaluate a student with a suspected disability, such as Student B, who had a diagnosis of ADHD-mixed type and visual memory deficits. The provision of a service on an informal, ad hoc, basis is not an adequate substitute for a determination as to whether a student needs the accommodation or service under Section 504 because of the attendant protections for implementation and other procedural safeguards under the statute and its regulations.

In addition, a review of the email exchange between Student B's mother and the ISP Coordinator demonstrates that Student B's mother was not provided notice of procedural safeguards. The email exchange did not contain information concerning the steps Student B's mother could take if she disagreed with the Coordinator's determinations. OCR confirmed with Student B's mother that her communications with the District regarding disability-related services for Student B were limited to this email exchange. OCR notes that the District's failure to provide procedural safeguards in connection with its decision to deny Student B's request for a Section 504 meeting is also inconsistent with AR 6164.6, which states that if a request for evaluation is denied, the District will inform the parent of its decision and procedural safeguards. Thus, the evidence also shows that the District is not in compliance with Section 504's requirements for providing procedural safeguards in connection with the evaluation and placement of Student B.

OCR also found that AR 6164.6 states that reevaluation is required when a significant change in placement occurs, but does not define the term "significant change in placement," which may create confusion for staff implementing the provision. The District's Section 504 rehabilitation plan form sets forth a standard for a "significant change in placement," but that standard is incomplete in that it suggests a "significant change in placement" can only occur when a student is disciplined, rather than including circumstances where a student is transferred from one type of program to another (as with Student B) or where a service is terminated or significantly reduced.

The District's policies, procedures, and internal guidance also suggest that counselors apply a more restrictive definition of "disability" than that provided for under the ADA Amendments Act of 2008 and of "appropriate education" than provided for under Section 504 regulations.

The Amendments Act clarifies that extensive analysis is not required to determine if a student has a disability and specifies that an impairment need not prevent or severely restrict a major life activity to be considered substantially limiting,³ and the term “substantially limits” must be interpreted without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. However, the District’s Section 504 rehabilitation plan form lists eligibility criteria for students with impairments that substantially limit the major life activity of learning that potentially overlooks high-performing students who have been diagnosed with a disability like ADHD, such as Student B. Here, the Coordinator’s response to Student B’s mother’s request for a Section 504 plan was, in part, that the Student was getting good grades on tests without accommodations.

Similarly, Section 504 regulations at 34 C.F.R. 104.33(b) define “appropriate education” broadly as consisting of regular or special education and related aids and services, and designed to meet the individual needs of students with disabilities to the same extent as the needs of students without disabilities are met. Yet, the District’s Section 504 rehabilitation plan form includes a list of classroom modifications among which the team must select, with no “other services” option available. Here, the Coordinator’s response to the Student’s mother’s request for a Section 504 plan was, in part, that some of the requested services were unavailable to students with Section 504 plans.

Accordingly, OCR identified a concern that the District’s policies and procedures suggest that requests for assessments and services need not be considered under the evaluation procedures required by Section 504, where, as here, a staff member does not believe requested accommodations are available, and/or that a student with a disability or suspected disability is doing well academically without them.

Exclusion from ISP

Section 504 and Title II regulations prohibit exclusion from participation in school district programs and activities on the basis of disability. To determine whether an individual has been discriminated against on the basis of disability, OCR first considers whether there is direct evidence of discriminatory treatment, and absent that, whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. OCR next considers whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination.

As to Student B, the evidence shows that in fall 2014, she enrolled in the ISP, and remained in the program for the remainder of the 2014-15 school year. However, the evidence also shows that the ISP Coordinator declined to continue the Student’s enrollment in the program for the 2015-16 school year, once she was informed that the Student had a disability and needed special education or related services. The ISP Coordinator explained her decision by stating that the program did not serve students with Section 504 plans or IEPs, except perhaps when the students

³See 42 U.S.C. § 12102(4)(b) (“The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”).

had resource teachers assigned to them at the School before they enrolled in the ISP. Thus, OCR concluded, based on a preponderance of the evidence, that the District improperly excluded Student B from participating in the ISP because of disability in violation of Section 504, Title II, and their implementing regulations.

The evidence gathered to date is inconclusive as to whether the District improperly excluded other students with disabilities from participating in the ISP. Program data indicate that students with disabilities participated in the ISP during the 2014-15, 2015-16, and 2016-17 school years. Also, the ISP Coordinator stated in an email to the Student's mother that she had many students with learning disabilities. However, the ISP Coordinator also stated in that email that ISP students with learning disabilities had resource teachers assigned by special education at the School, suggesting that these students came to the program already with accommodations that would be provided at/by the School during their participation in the ISP. Finally, on March XX, 2015, the ISP Coordinator stated in another email to the Student's mother that the ISP did not have the ability to serve students with IEPs or Section 504 plans. The latter evidence raises a concern that the District excludes students with disabilities from participating in the ISP due to their disability status and related need for accommodations more generally before conducting an appropriate evaluation and following Section 504 placement procedures.

In order to complete its investigation and reach conclusions as to whether the District excluded other students from the ISP on the basis of their disabilities (as opposed to on the basis of an IEP or Section 504 team determination that a particular placement was not appropriate), OCR would need to interview the ISP Coordinator and review records concerning the experiences of other students who had, or were believed to have, disabilities and who were enrolled in the ISP or wished to enroll in the program. Prior to completing its investigation of this allegation, the District expressed an interest in voluntary resolution and OCR agreed it was appropriate to do so.

Issue 3: Whether the District provided inferior testing facilities to Student C and other students with disabilities who received accommodations on advanced placement exams in May 2015, as compared to the facilities provided to other students.

Facts

The following facts are relevant to OCR's analysis:

The Complainant alleges that Student C and other students with disabilities who had accommodations for the May 2015 advanced placement (AP) exams took their exams in the gymnasium locker rooms and the women's and men's lounges at the community theater. The Complainant further alleges that these spaces were cramped, cold, and poorly lit, and that the restrooms in the locker rooms and adjacent to the lounges remained in use throughout the exams, which was distracting to test-takers.

The AP program, and the administration of AP exams, is regulated by the College Board. The College Board's 2015-16 and 2016-17 AP Coordinator Manuals (manuals) state that most AP exams are given in a school's classrooms, gymnasium, or cafeteria. The manuals set forth several testing room requirements, including avoiding disturbances and making sure rooms have adequate lighting and ventilation. The manuals also state that community facilities may be used

if the rooms are appropriate in size and configuration and all security procedures can be followed, and that some schools test in community centers, church halls, hotels, public libraries, or local colleges.

Student C had a Section 504 plan including extended time on tests as an accommodation for his disability. According to Student C's parents, because of his disability, Student C struggled with missed information, and extended time on tests was intended to help him with this by giving him the time needed to process information.

In May 2015, Student C took three AP exams at the School for which he received extended time as an accommodation. For each exam, all students received instructions in one location. After initial instructions, students without accommodations remained in the main room of a gym to complete the exam, while students with accommodations relocated to either a locker room of a different gym or a lounge adjacent to the Community Theater restroom. Student C's mother, who previously was an AP exam proctor, told OCR that relocating took about 20 minutes, and that the delay added to the total testing time for students with extended time accommodations.

The AP Testing Coordinator told OCR that students with accommodations tested in a different location than other students because they tested on a different schedule, which included timed sections and breaks, or because they needed special equipment. She also told OCR that all students received instructions together so that they received the same information from an experienced supervisor, rather than a parent proctor.

Student C described the locker room as small and the setup as four or five tables, two folding chairs to a table, with students facing the lockers and urinals/bathroom stalls to their backs. Although the AP Testing Coordinator and the former school facilities manager (Facilities Manager) told OCR that no students were allowed to use the restrooms in the locker room while students tested there, Student C reported that a few students who tested in another part of the gym used the locker room restrooms during testing, and the toilet flushing and handwashing sounds were distracting. Student C also told OCR that students with accommodations could hear students testing in another part of the gym while they were on break, and whenever they received new instructions from their proctor, and that he found this noise distracting. Student C also reported that: the ventilation was poor, the room felt stuffy, and there was a bad smell; and the room was dimly lit, with no windows, and with no natural light, though there were two or three fluorescent ceiling lights above the area where students sat. According to Student C, these conditions distracted him and created stress and anxiety for him.

Student C described the lounges as larger than the locker room and as setup with four or five tables, two chairs to a table, and lounge furniture (a couch, chair, and small table) pushed up against the walls. Student C told OCR that: the ventilation was adequate, but the lighting was poor; there was one open doorway; and there were no windows, though some natural light came in from glass doors near a stairway above the lounge; there were ceiling lights above the area where students sat; and he could hear other students who were testing elsewhere in the theater while they were on breaks, and those sounds were distracting. Student C also told OCR that during one of his AP exams, two students who were testing elsewhere in the theater used the restroom adjacent to the lounge in which he was testing, and because the students were loud, the

proctor tried to quiet them, but there was some back and forth before the students finished using the restroom and left. According to Student C, this incident was very distracting, and he was unable to focus for 10 or 15 minutes afterward. The AP Testing Coordinator, however, told OCR that the lounges were quiet and had good, florescent lighting, though they could get chilly and had no windows. She also told OCR that students were allowed to use the adjoining restrooms during testing because there was a door separating the lounge from the restrooms.

Student C reported to OCR that the main room of the gym where students without accommodations tested was much larger than the locker room and lounges in which he tested and had much more natural light, and the students who tested there sat further apart from each other than the students in the locker room or lounges.

A list of tests and testing locations for AP exams administered in May 2015 shows that students with accommodations took nine out of 22 different AP exams, and they took all of these exams in either a gym locker room or a restroom lounge in the Community Theater, while students without accommodations took the same exams in a gym's main room. It also shows that four of the 22 different AP exams administered were administered to small groups of students without accommodations, in either a gym locker room or a restroom lounge in the community theater. The remaining eighteen exams were offered in spaces such as the School's three gyms, other larger parts of the Community Theater, and in one instance, a classroom.

The District told OCR that in May 2015, the testing rooms were selected by the School's AP Testing Coordinator and the Facilities Manager. The AP Testing Coordinator told OCR that: AP exams take place on the same day nationwide, during the school day; the number of students who test varies widely, from about 20 to 250 students per exam; typically, no more than 12 students with accommodations take a given exam; each AP exam is a 3-hour, timed exam and take about three and a half to four hours to administer; and students with extended time accommodations typically receive 50% extra time, so these students take a 4.5-hour timed test. The Facilities Manager told OCR that the room selection process involved figuring out where to seat all students within testing requirements, placing the largest groups in the largest available spaces. He told OCR that he recognized that the gym locker rooms were the least desirable spaces to use as testing rooms, and that he tried to use them as little as possible, because they seemed claustrophobic, and because "a locker room is as far from a classroom as you can get." He told OCR that the locker rooms were used in May 2015 because they were the only available space.

The AP Testing Coordinator told OCR that in May 2016, essentially the same facilities were used for the administration of AP exams as in the previous year. Student C told OCR that in May 2016, he took one AP exam for which he received extended time as an accommodation, and he tested in a gym locker room once again.

OCR did not visit the School and view the gym locker room and lounges where Student C and other students with accommodations took AP exams in May 2015.

Analysis

The evidence reviewed during OCR's investigation raises a compliance concern that the District discriminated against Student C and other students who received accommodations on the May 2015 AP exam with respect to testing facility conditions based on evidence showing that these students tested in gym locker rooms and restroom lounges exclusively, while students without disabilities typically tested in larger facilities with fewer distractions and better lighting and ventilation, such as a school gym.

Specifically, the evidence obtained suggests that students with disabilities who received accommodations on AP exams tested under notably different conditions than those offered to students without disabilities. OCR confirmed that students with accommodations tested in either a gym locker room or the lounge adjacent to a downstairs restroom of the theater exclusively, while for the most part students without disabilities took the same exams in the main room of a gym. The locker rooms were not comparable to the main rooms of the gyms in that the locker rooms were small with lockers to the front of students and urinals and bathroom stalls behind them. As described by one District's witness, the locker rooms were the least desirable spaces to use because they seemed claustrophobic, and because a locker room is as far from a classroom as you can get. The gyms, on the other hand, were large with more open space and more space between testing tables. Students with accommodations also experienced disruptive noise from students who used the restrooms in the same room. In addition, Student C told OCR that the lighting and ventilation in the locker rooms, which had florescent lighting, no windows, and in-room restroom facilities, was deficient when compared to the gyms, which were large with natural lighting and no in-room restroom facilities. Student C was able to make the comparisons because he witnessed the set-up in the gyms while being in the gym for the instruction portion of the exam prior to being moved to the locker room or lounges. Student C identified that the lounges adjacent to the downstairs restrooms to the community theater had similar deficiencies. Although larger than the locker rooms, the lounges were smaller rooms with furniture pushed up against one wall. The District's witnesses told OCR that the lounges were quieter and had good lighting. However, the lounges were also adjacent to restroom facilities, which the District acknowledged remained in use during testing, and Student C described this as a source of noise and distraction. In addition, the District required students with accommodations to receive initial instructions in the main testing room and then relocate to the locker rooms or lounges to take the exam. As a result of relocation, according to Student C and his mother, the students with accommodations began their exams later than students without disabilities.

The evidence gathered to date raises a concern that for Student C these different conditions may have resulted in increased stress and anxiety overall, and a loss in focus or concentration from distractions, while he took his AP exams. For instance, Student C told OCR that in one instance student use of the restrooms adjacent to his test-taking facility caused him to lose focus for 10 to 15 minutes after it occurred.

The District informed OCR that students with accommodations were treated similarly to other small groups of students, and that their placement in the locker rooms and lounges resulted from their small group size. The evidence, however, suggests that students with accommodations are not similarly situated to students in small classes. First, students who do not require additional time are required to use the locker rooms or lounges only if they are enrolled in one of only four low-enrollment AP classes. It is therefore likely that students without disabilities who, like

Student C, are enrolled in multiple AP classes, will take most of their tests in large, well-lit and well-ventilated spaces. By contrast, students with disabilities who require extended time will take all of their AP exams in the locker rooms or lounges. Second, there is no evidence that students without disabilities are required to receive test instructions in one room and subsequently move across campus to take their tests.

OCR also found a potential concern with respect to the provision of a FAPE to Student C, who could only receive the accommodations that had been found appropriate for him in settings that were not comparable to those provided to students without disabilities. Pursuant to Section 104.33 of the 504 regulations, an appropriate education is one includes regular or special education or related services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. The evidence suggests that, in order to receive extended time on the AP test, Student C was required to take the tests in settings that did not meet his needs as adequately as those of students without disabilities were met and which, in fact, included extra distractions and delays that may have been more problematic for him than they would be for students without disabilities.

The above-described evidence also raises a concern that the District's AP exam room assignments for students receiving accommodations in May 2015 may have violated 34 C.F.R. §104.4(b)(5) and 28 C.F.R. §35.130(b)(4), which prohibit making facility decisions in a manner that ... subjects individuals to discrimination on the basis of disability, or with the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

Issue 4: Whether the District denied a FAPE to Student D when it failed to implement her Section 504 plan when she transitioned from middle school to high school in the District, and changed her placement without adequate evaluation and placement procedures.

Student D received services in elementary school under an IEP, and accommodations in middle school pursuant to a Section 504 plan. During a Section 504 meeting convened during her freshman year at the School, in October 2014, Student D was found ineligible for continued Section 504 services and accommodations. Her mother disagreed with the decision, but she did not pursue a hearing, even though she was informed of her right to procedural protections.

In January 2015, the Student's mother emailed the Student's counselor to inquire about services for students with dyslexia. The Student's counselor informed her that such services were not available under a Section 504 plan. On January XX and XX, 2015, the Student's father emailed the District program manager regarding how to have the Student's Section 504 Plan or IEP reinstated. He stated that the Student had been tested and needed help, took a long time to complete her work and had difficulty with language and reading. On January XX and XX, 2015, the Program Manager informed him that he could request an assessment. OCR's review of emails and the Student's mother's statement indicated that the Student's family did not follow up until several months later on May X, 2015.

On May X, 2015, Student D's mother forwarded the January email chain to the Program Manager and stated that the family wanted to request a special education assessment for the

Student, and asked how to proceed. That same day, the Program Manager replied, stating that the Student's mother was required to write a letter of request, and that it would be helpful for her to state what disability she suspected the Student had and why she believed that the Student needed Section 504 services. About three weeks later, on May XX, 2015, the Student's mother sent a lengthy email to the Program Manager in which she expressed disagreement with the October 2014 Section 504 ineligibility determination. She said that she was not informed of her right to a special education assessment until January 2015.

On May XX, 2015, the Program Manager forwarded this email to District employees and others. She stated, among other things, that if there was ever a case not to assess, this was one, since Student D had straight As with no grade below a 97%. In September 2015, after the completion of some testing, the Student's mother and the District agreed to convene a Section 504 meeting. In November 2015, the meeting was held, and the Student was placed on a Section 504 plan.

Analysis

OCR opened for investigation allegations concerning Student D's transition from middle school to high school and her subsequent change in placement. The evidence shows that these events occurred from August 2014 to October 2014 – several months outside of 180-day timeframe of February XX, 2015 to August XX, 2015. Thus, absent a continuing violation or a basis for OCR to grant the Complainant a waiver of the 180-day, OCR cannot take action as to these allegations. OCR considered whether the facts concerning Student D established a continuing violation or a pattern or practice of discrimination and concluded that they did not. The evidence showed that after January 2015, the Student's family made no attempt to obtain a special education assessment or a Section 504 plan for the Student until May 2015. Thus, OCR concluded that the allegation that the District failed to implement Student D's Section 504 plan when she transitioned from middle school to high school, and changed her placement without adequate evaluation, occurred more than 180 days before the Complainant filed this complaint, and there is insufficient evidence of a continuing violation or a pattern or practice of discrimination, rendering the allegation untimely.

Issue 5: Whether the District's failure to evaluate Student E for special education and/or related services within a reasonable period of time after parental request resulted in the denial of testing accommodations by the College Board on the SAT.

Facts

The following facts are relevant to OCR's analysis:

Student E entered the District in XXXXX grade in fall 2013. During the 2013-14 school year, in response to her mother's request for academic accommodations, Student E was found ineligible for services under Section 504. The Complainant alleged that the circumstances of this denial violated Section 504. On October X, 2014, the District convened a Section 504 meeting and placed Student E on a Section 504 plan that included extended time on tests. That Section 504 plan remained in effect, unchanged, through April 2017. Student E's mother told OCR that it appeared to be effective.

Student E applied to the College Board for extended time as an accommodation on the Preliminary Scholastic Aptitude Test (PSAT) to be administered in fall 2014, and on July X, 2014, the College Board denied her application. On May XX, 2015, the College Board denied Student E's renewed application for accommodations on the SAT. Student E's mother told OCR that, based on a conversation with a College Board representative, she believed that Student E's applications were denied because Student E did not have accommodations during XXXXX grade. Early in the 2015-2016 school year, Student E was reevaluated privately. She submitted information from this evaluation in support of a renewed application to the College Board for extended time as an accommodation. The College Board granted this request on October X, 2015.

Analysis

OCR concluded that none of the allegations regarding Student E are timely. Under 34 C.F.R. § 100.7(b) and Section 106 of OCR's Case Processing Manual (CPM), complainants generally must file their complaints with OCR no later than 180 days from the date of the alleged discrimination. The Complainant filed the OCR complaint on August XX, 2015. Thus, absent a continuing violation or pattern or practice of discrimination, any incidents occurring before February XX, 2015 are untimely and fall outside of the scope of OCR's investigation.

Although Student E's mother alleged that the District improperly denied her request for a Section 504 evaluation for Student E during the 2013-14 school year, she confirmed that a Section 504 plan that effectively met Student E's needs was put in place on October X, 2014. Any alleged failure to evaluate Student E therefore ended on October X, 2014, before the timely period began.

The Complainant alleged that the District's refusal to create a Section 504 plan for Student E before October 2014 had the effect of depriving her of SAT accommodations during the timely period. This alleged continuing effect, by itself, does not bring the District's actions into the timely period. For this reason, OCR concluded that the allegations as to Student E are untimely.

Overall Conclusion

This concludes the investigation of this complaint. To address the issues alleged in the complaint, the District entered into the enclosed resolution agreement, which is aligned with the complaint allegations and the information obtained by OCR during its investigation. Under the resolution agreement, the District agrees to: revise its Section 504 policies and procedures; provide written guidance and training to District employees regarding these revisions; adopt a system to track Section 504 requests for students at the School; provide guidance to District employees on how to review and respond to applications to the ISP submitted by students with disabilities who have an IEP or Section 504 plan, and to requests for disability-related services made for students participating in the ISP; and end the practice of using locker rooms and lounges directly adjacent to restroom facilities as locations for administering AP exams to students with disabilities who receive testing accommodations.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address the

complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

OCR's determination in this matter 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Monique Raco Fuentes at 415.486.XXXX or Monique.RacoFuentes@ed.gov.

Sincerely,

/s/

Ava DeAlmeida-Law
Acting Team Leader

cc: Marleen L. Sacks, Atkinson, Andelson, Loya, Ruud & Romo, Counsel for the District,
via e-mail (XXXXXXXXXXXXXXXXXXXX)

Enclosure