UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

March 7, 2017

Dr. George Mannon
Superintendent
Torrance Unified School District
2335 Plaza Del Amo
Torrance, California 90501-3420

(In reply, please refer to OCR Case Number 09-16-1101.)

Dear Superintendent Mannon:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Torrance Unified School District (District). The Complainant alleged that the District discriminated against his daughter (Student A) and his son (Student B) on the basis of disability.[1] Specifically, OCR investigated the following issue:

Whether the District is denying the Complainant's two children a free appropriate public education (FAPE) by not providing them with any regular or special education and related aids and services since their reenrollment in the District in November 2015.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 (ADA), as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the 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 concluded that the District violated Section 504 and Title II with regard to the issue investigated. OCR also identified an additional compliance

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

concern during the course of the investigation. The applicable legal standard, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

Background

The Complainant has two children named in the OCR complaint. At the time the complaint was filed on November 27, 2015, Student A was eight years old and Student B was 16 years old. The District's denial of the Complainant's request to enroll Student A and Student B back into a special education program during the 2015-16 school year was based upon assessment disputes that resulted in two separate Office of Administrative Hearing (OAH) orders issued in the 2012-13 school year. Even though the following background facts relate to events that are not timely[2] in terms of the scope of this OCR complaint, they are included to provide context for the District's and Complainant's current positions.

Prior to January 2013, Student A was identified as an individual with a disability, Autism, and was enrolled in the District's home and hospital instruction (HHI) program receiving some special education services under an individualized education program (IEP). Her most recent assessment prior to January 2013 was dated January X, 2009. The District and the Complainant were involved in an ongoing dispute about the District conducting a triennial reassessment of Student A. The Complainant would not allow Student A to be assessed without he or Student A's mother being present. The District ultimately filed for a due process hearing with OAH on January X, 2013.

A full hearing was conducted and the resulting OAH order, dated March XX, 2013, concluded that the District was entitled under the Individuals with Disabilities Education Act (IDEA) to assess Student A without the presence of her parents at any assessment session. District staff testified that Student A's record included no doctor's recommendation that her parents must be present during assessments and no IEP reflected that, as an accommodation, the parents could attend her assessment sessions. In addition, a District psychologist testified that the presence of parents during assessments of students of Student A's age (then seven years old) could confound the assessment, violate the testing procedure, and invalidate the results. The OAH order determined that the District would not be obligated to provide a FAPE under IDEA to Student A until the parents requested an assessment, consented to the assessment plan the District provided in response, presented Student A for the assessments as set forth in the assessment plan, and allowed assessments outside the presence of the parents.

The Complainant provided OCR with a copy of a medical prescription from Student A's physician, dated March XX, 2013. The prescription states that Student A "has autism. She needs one of her parents present during testing or evaluations to provide physical and emotional reassurance."[3]

[2] The OCR complaint was timely filed as to events that took place on or after May 31, 2015.

[3] The Complainant told OCR that both the District and OAH had a copy of this prescription prior to the OAH order. However, the Order is dated the day before the prescription date.

Prior to March 2013, Student B was identified as an individual with a disability, Autism, and was also enrolled in the District's HHI program receiving special education services under an IEP. His most recent assessments prior to March 2013 occurred in February 2010, June 2010, and June 2011. The District and the Complainant also became involved in an ongoing dispute about the District conducting a triennial reassessment of Student B. The Complainant would not allow Student B to be assessed without one of his parents being present. The District filed for a due process hearing with OAH on March XX, 2013 concerning Student B.

Another full hearing was conducted and the resulting OAH order, dated September X, 2013, concluded that the District was entitled under IDEA to assess Student B without the presence of the parents. Student B was 15 years old when the OAH order was issued. The OAH order noted that on April XX, 2013, the Complainant obtained a document from Student B's physician on a medical prescription pad form which stated that due to Student B's disability "a parent needs to be present during any assessment(s) or testing situations because of his anxiety." The OAH order noted that the District subpoenaed the physician, but he did not comply with the subpoena.

Various District personnel testified that parental presence in the testing room would invalidate the results of all standardized assessments. The OAH order states that medical orders or prescriptions are informative but not automatically binding on the educational decisions of the IEP team. The Administrative Law Judge (ALJ) found that the evidence did not support a requirement that one of the parents be present in the assessment room, and that the note from the doctor, without more, was not automatically dispositive. The ALJ found that the professional assessors' opinions that valid assessments could be administered safely, without a parent present, and that the presence of a parent would invalidate the data obtained, were more persuasive on this issue than the parents' testimony and the medical note.

The OAH order concluded that the District could conduct a triennial reassessment of Student B and provided that the parents may not be present during the assessments. The OAH order specifically stated that if the Complainant failed to cooperate with the triennial reassessment process as required by the OAH order, the District may terminate its delivery of special education and related services to Student B under IDEA.

By several letters dated September XX, 2013, the District informed the Complainant that it was complying with the OAH order by providing assessment dates and times for Student B. It stated that assessments must be completed and an IEP team meeting be convened in order to review the assessments and offer appropriate services and placement for Student B. The Complainant did not confirm the dates and did not present Student B for assessment.

The District held an IEP for Student B on September XX, 2013. A range of District educational personnel participated, but the parents did not attend.

Following the OAH order for Student A, the Complainant also did not allow the District to assess Student A outside of their presence. On October X, 2013, the District held an IEP meeting to exit Student A from the special education program, based on the Complainant's failure to abide by the OAH order. It notified the Complainant of this decision in writing by letters dated October X and XX, 2013. The October XX, 2013 letter from District counsel acknowledged receipt of the March XX, 2013, medical prescription from Student A's physician, but reiterated the OAH determination that the District was relieved of its obligation to provide the student with a FAPE under IDEA if the Complainant did not present her for assessments and remain outside of her presence during the assessments.

On October XX, 2013, the District attempted to hold another IEP meeting to review with the Complainant its offer of FAPE for Student B. Again, the parents declined to attend. By letter dated October XX, 2013, District counsel also informed the Complainant that Student B was being exited from the District special education program based on the OAH order stating that the District may terminate delivery of special education and related services under IDEA if the Complainant failed to cooperate with the triennial assessment process.

In the fall of 2014, the Complainant enrolled both students into an online charter school program, the California Virtual Academy (CAVA).

In October and November 2014, the District again wrote to the Complainant and attempted to schedule assessments for Student B. It enclosed an assessment plan for signature, and clarified that the parents could not be present during the assessments. The Complainant did not return a signed assessment plan nor present Student B for assessment by the District.

In October 2014, the Complainant consented to CAVA conducting special education assessments of Student A under IDEA. These assessments were completed by January 2015.

- The speech and language assessment indicated that the Complainant was present during testing. The speech and language assessment concluded that Student A exhibited a disorder in the areas of articulation and language morphology, syntax, semantics and pragmatics.

- The Occupational Therapy (OT) assessment noted that the Complainant was present during testing. The assessor concluded that Student A exhibited difficulties in the area of sensory processing in comparison to same age peers.

- The Psychoeducational Report stated that both parents were present in a nearby room during testing which was conducted in their home. The assessor determined that Student A had autism and a speech and language impairment. The assessor noted that all measured academic skills were substantially below her grade level with notable delays in math skills. It was also noted that Student A had significant difficulties with any tasks involving auditory and language processing and in working memory and sequencing.

The Complainant also provided consent for CAVA to reassess Student B under IDEA. His assessments were conducted between December 2014 and February 2015.

- The OT assessment report noted that the mother was present during testing. The assessor concluded that Student B presented with limited self-regulation and sensory modulation skills to complete a classroom task without self-stimulatory behaviors impacting his participation.

- The Psychoeducational Report stated that Student B was assessed at his home with the parents present in a nearby room. The assessor concluded that Student B presented with a cognitive profile that was consistent with many individuals with autism. The assessor noted that there was significant variability in his performance, depending upon the task. It was noted that his adaptive skills were significantly delayed and that his academic skills were also significantly delayed in all areas and much below the expected level.

- The adaptive physical education (APE) assessment was unclear about whether the parents were present during testing. The assessor concluded that Student B performed significantly below average when compared to peers of his age, noting that he was able to demonstrate most skills but lacked the distance and consistency for each skill.

- The speech and language assessment is unclear as to whether either parent was present during the assessment. The assessor concluded that Student B demonstrated severe speech and language delays consistent with a diagnosis of autism in the areas of voice, semantics, syntax, morphology, and pragmatics.

An IEP was convened by CAVA for Student B on December XX, 2014, but was postponed because the parents did not attend. The CAVA IEP team for Student B reconvened on January XX, 2015, and again the parents did not attend. The team stated in part that CAVA had received notice that Student B had previously been enrolled in an HHI program in the District. The team decided to refer Student B back to the District to receive HHI services because CAVA did not offer that type of program but then continued the Student at CAVA and offered services as detailed below.

An IEP was completed by CAVA in March 2015 for Student A. The mother was present. The team agreed that Student A was eligible for special education services under the categories of autism and speech and language impairment. Her placement included specialized academic instruction (SAI) 90 minutes per week, OT 60 minutes per week, and speech and language services 120 minutes per week.

CAVA IEP amendment meetings were held for both students on June X, 2015. The mother was present at both meetings, and the Complainant attended Student A's meeting by telephone.

The IEP team concluded that Student A was eligible for special education services under the primary eligibility of autism and the secondary eligibility of speech or language impairment. The team determined that Student A would receive SAI via an online classroom for 30 minutes three times weekly, speech and language therapy for 60 minutes twice weekly, OT for 60 minutes once a week, and an SAI/Resource Specialist Program (RSP) consultation for 60 minutes twice a month in person.

The IEP team for Student B concluded that he was eligible for special education services under the category of autism. The team determined that Student B would receive SAI in person for 60 minutes twice per month, SAI via an online classroom 300 minutes per day, speech and language therapy 90 minutes per week, OT 30 minutes once per month, APE 60 minutes once per month, and transition services.

CAVA personnel on both teams expressed concern about whether the students needed a more restrictive setting than an online independent study program such as CAVA.

Issue: Whether the District is denying the Complainant's two children a FAPE by not providing them with any regular or special education and related aids and services since their reenrollment in the District in November 2015.

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a FAPE to all qualified students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that: (i) are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met; and (ii) 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 IEP developed in accordance with the IDEA is one means of meeting the standard established in §104.33(b)(i). 34 C.F.R. §104.33(b)(2).

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 Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. 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 §104.35(c)(1) and (2), in interpreting evaluation data and in making placement decisions, a district must draw upon information from a variety of sources, and establish procedures to ensure that information obtained from all such sources as documented and carefully

considered by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Section 104.35(d) requires school districts to establish procedures for the periodic reevaluation of students who have been provided special education and related services, and notes that a reevaluation procedure consistent with the IDEA is one means of meeting this requirement.

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.

When a District knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, they have an affirmative obligation to provide effective communication under Title II. Under Title II, districts must provide appropriate "auxiliary aids and services" where necessary to provide effective communication that is, schools must provide appropriate auxiliary aids and services so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district. Title II requires covered entities, including public schools, to give "primary consideration" to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.[4]

The Title II regulations require that when a public school is providing auxiliary aids and services that are necessary to ensure equally effective communication, they must be provided in "accessible formats, in a timely manner, and in such a way as to protect the privacy and independence" of a student with a disability.[5] The auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. For the auxiliary aid to be provided in a timely manner, it means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it as soon as possible. If the student is waiting for the auxiliary aid or service, districts should keep the student (and parent) informed of when the auxiliary aid or service will be provided. This requirement is separate from the provision of special education and related services under the IDEA or Section 504. Where the student or his or her parent requests auxiliary aids and services for the student under Title II, the appropriate aids and services must be provided as soon as possible, even if the IDEA or Section 504 evaluation and placement processes are still pending.

School districts should provide auxiliary aids and services that would allow the student to go through the material independently, at his or her own pace, and with the ability to revisit passages as needed.[6] A District must ensure that it meets both its FAPE obligations as well as

[4] 28 C.F.R. § 35.160(b)(2).
[5] 28 C.F.R. § 35.160(b)(2).
[6] *Id.*

its obligation to provide effective communication under Title II and that none of the student's rights under either law are diminished or ignored. If the special education and related services provided as part of FAPE are not sufficient to ensure that communication with the student is as effective as communication with other persons, the Title II obligations have not been met.

Factual Findings

By letter to the District Director of Special Education dated July X, 2015, the Complainant informed the District that both students had been enrolled in CAVA and had been reassessed there. He requested to meet with the Director to discuss both students returning to the District and receiving special education services in the HHI program.

By letters dated July X and X, 2015, the District sent the Complainant assessment plans and requested the assessment reports generated by CAVA. The letters reminded the Complainant that both students had been exited from the District special education program because of his failure to abide by the 2013 OAH orders. The District stated it must now reassess the students, requested written consent to assessment plans, and asked that the Complainant return the plans to the District along with the CAVA assessment reports.

The Complainant replied to the District Special Education Department by letter dated July XX, 2015. In part, the letter stated that the OAH order was void and the ALJ did not have jurisdiction to decide if an "ADA right" was allowed or not, referring to the Complainant's position that both students, because of their disabilities, needed their parents to be present during assessments. The Complainant stated that he did not grant consent for the District to reassess either student, and wanted the District to reenroll both students into the HHI program based on the assessments and IEPs completed by CAVA.

The District reported to OCR that the Complainant did not sign and return the assessment plans or present either student for assessments to be conducted outside of the parents' presence.

The mother filled out District Enrollment Forms for Student A and B, dated October XX, 2015. The Complainant brought the forms to the District's Enrollment Center on November X, 2015. Under the section completed by the District, the forms state that neither student's IEP had been received and that enrollment staff were told by the parent that the IEPs had already been submitted to the Special Education Department. The forms also noted that both students had been referred to HHI.

The Complainant told OCR that when he reenrolled the students he provided copies of their CAVA assessments, IEPs, and HHI orders from the physician. However, the Enrollment Technician told OCR that the Complainant did not provide IEPs or any assessments for the students, but told her that he had already been working with the Special Education Department. She said that she officially enrolled both students back into the District as of November X, 2015.

The completed Enrollment Forms noted that Student A was enrolled into a District elementary school and Student B was enrolled into a District high school. The Enrollment Technician also sent emails to various District personnel, stating that the students sought to enroll in the HHI program, and that the parent told her that the IEPs and assessment paperwork had already been submitted to the Special Education Department.

The Director of Special Education at the time told OCR that the Complainant had not, in fact, provided the CAVA assessments or IEPs to the Special Education Department when he reenrolled the students.

The District provided OCR a request for records that was sent to CAVA on November X, 2015, for each student. The Director of Special Education reported to OCR on May X, 2016 that the District did not receive the CAVA assessments and IEP for Student B in response to this request for records. However, a CAVA representative communicated to OCR that the assessments and IEPs for both students were first provided to the District on November X, 2015. The District confirmed that it did at some point receive copies of the CAVA assessments and IEP for Student A, but was not able to articulate when and how it received these documents.

The Staff Secretary for the HHI program told OCR that if a student is returning to the District from an outside program, they must complete the reenrollment process before being referred to HHI. Then, once a parent provides her with a signed Physician Recommendation form, she contacts the District nurse who must then speak with the physician and verify the information on the form. The nurse then writes a summary report and sends it back to the Staff Secretary. All the documents are then submitted to the HHI Program Specialist for review and approval or disapproval. During this process, students are expected to attend their assigned school.

The Staff Secretary reported to OCR that the first notice that she had that Student A and Student B had been reenrolled in the District was when she received signed Physician Recommendation forms for the students from the Complainant on November XX, 2015. The forms state that the physician certifies that the students are unable to attend school and need the services of a home hospital teacher. The forms note that, by law, this must be viewed as the placement of last resort and is to be utilized for the shortest time necessary. The form states that the HHI program "should be considered a <u>temporary placement for medically homebound students</u> and is not meant to take the place of the educational program provided at school." However, when the forms asked when the students may return to school, the physician wrote "permanent placement."

The Complainant told OCR that he provided the Staff Secretary with a packet of information attached to the Physician Recommendation forms, including each student's CAVA assessments, CAVA IEP, and doctor's note stating that one of the parents needed to be present during any assessments. The Complainant provided OCR with a copy of medical prescriptions from the students' physician, dated November XX, 2015. The prescriptions state that both students had moderately severe autism and "would greatly benefit from the presence of one or both parents during testing or assessments."

The Staff Secretary told OCR that she did not receive any of these documents except for the Physician's Recommendation forms. She also stated that it was her assumption that, because they had been reenrolled, the students would attend their home schools in the District pending the HHI request being approved. However, neither student attended any school while the HHI requests were being processed.

On November XX, 2015, the Staff Secretary sent an email request to the District nurse to contact the physician as soon as possible and verify the information provided in the Physician's Recommendation forms for Student A and Student B. She noted in the email that the physician had stated that the placements would be permanent, and stated that the District did not place students in the HHI program permanently.

Between November XX, 2015, and March XX, 2016, the District nurse made numerous repeated requests, by phone and in writing, for the physician to contact her, with no success. She spoke with his assistant by telephone on November XX, November XX, and December XX, 2015, as well as on January XX and February XX, 2016. The District nurse also sent requests by fax to the physician's office on November XX and November XX, 2015, as well as January XX, March X, and March XX, 2016. In addition, the Staff Secretary sent the parents letters dated November XX and December X, 2015, as well as January XX, February XX, and March XX, 2016. She informed them that the District nurse had not been able to contact the physician in order to verify the medical information necessary to complete the review of the students' HHI requests. She noted that the District would continue to attempt to contact the physician, but requested that the parents also contact him and let him know how important it was that he call the District nurse so that they could continue the review process.

The physician finally responded and spoke to the District nurse on March XX, 2016. The nurse's report for each student states that she informed the physician that instruction in the home was one of the most restrictive educational placements available, and by law must be viewed as the placement of last resort and utilized for the shortest time necessary. She told the physician that this program should be considered a temporary placement for medically homebound students and was not meant to take the place of an educational program at school. As to Student A, the report states that the physician recommended a gradual transition, to reduce anxiety, back to a school setting in an appropriate program for her needs. Regarding Student B, the report notes that the physician recommended temporary HHI services until there was an assessment to determine an appropriate classroom setting and to address safety concerns.

According to the Staff Secretary, the District nurse's report was reviewed and approved on the same day as her conversation with the physician. The Staff Secretary told OCR that she informed the Complainant by telephone on March XX, 2016, that the students had been approved to receive HHI services effective March XX, 2016. The Staff Secretary noted that the Complainant told her then for the first time that neither student had attended their home school while the HHI requests were being processed.

By letters dated November XX, 2015, April XX, 2016, and April XX, 2016, the Complainant again requested that the students be reenrolled into the District's special education program so that they could receive special education supports in the HHI program. He reiterated his position that the District should accept the CAVA assessments and IEPS, and requested that IEP meetings be scheduled to discuss the matter. The April XX letter specifically stated that he wanted to discuss any and all accommodations for the students under IDEA, Section 504, and the ADA.

By letter dated April XX, 2016, District counsel wrote to the Complainant, stating that he had asserted that he had provided the District with IEPs and assessments for Student B from CAVA, but counsel maintained that the District had not received them and requested the documents. The CAVA representative told OCR that it re-sent the assessments and IEPs for both Student A and Student B to the Director of Special Education on or about May X, 2016. The District reported to OCR that it received these documents on or about May X, 2016. It provided a letter from the CAVA representative, dated May X, 2016, stating that she was providing the District with another complete copy of Student B's CAVA records.

The Special Education Director confirmed to OCR that, since they were approved for HHI services, Student A and Student B received general education services only for the remainder of the 2015-16 school year. She stated that this was because both students were exited from special education services under the OAH orders before they left the District to enroll in CAVA, and when they returned the District requested consent to assess them and the Complainant did not provide consent. The Director of Special Education noted during her OCR interview that the District was willing to consider the CAVA assessments as long as the parents were not present when they were being conducted, but she did not provide any evidence that the District had ever done so. The Special Education Director told OCR that the District was not going to convene an IEP or enroll the students in a special education program without first being allowed to assess them under the parameters ordered by OAH in 2013.

The Complainant confirmed that both students completed the 2015-16 school year in general education HHI. However, he informed OCR that the 2016-17 school year began on September X, 2016, and neither student's general education HHI services were resumed. The Complainant met with the new Director of Special Education and another administrator in the Special Education Department (SE Administrator) on September XX, 2016. The Complainant told OCR that he notified the District personnel that neither student had received any educational services from the District since the beginning of the school year. The District reported that the administrators informed the Complainant that in order to receive HHI services for the 2016-17 school year each student would need an updated doctor's note because the previous doctor's notes expired at the end of the 2015-16 school year.

The Staff Secretary sent an email to the Complainant on October X, 2016, attaching the HHI request form. She stated that the form needed to be filled out completely by a licensed physician for each student, and the original signed form needed to be brought to her office. She wrote that once she received the signed original forms she would send the requests up for

review. The Complainant wrote back the same day, and stated that he would forward the forms to the students' primary physician. He noted that the doctor wrote in the last HHI request document that the HHI placement for the students should be permanent.

By email to District Counsel, copied to the SE Administrator, dated October X, 2016, the Staff Secretary stated that the Complainant was very familiar with the HHI request process, and knew that HHI must be requested each and every school year. As noted above, the HHI request form, which the Complainant had repeatedly used, specifically states that HHI placements are temporary. In late October 2016, the parents and the students moved out of the District's attendance area. The Complainant confirmed to OCR that he never provided the District with an updated HHI request from the students' physician.

Analysis

The preponderance of the evidence supports a conclusion that the District denied the Complainant's two children a FAPE since their reenrollment in November 2015 because it had reason to suspect that they were both disabled and in need of special education or related aids and services and did not initiate an evaluation process under Section 504 and Title II FAPE standards, including reviewing and considering the CAVA assessments and IEPs.

The District is obligated under Section 504 and Title II to provide a FAPE to all qualified students with disabilities within its jurisdiction. A FAPE is defined, in part, as regular or special education and related aids and services developed in accordance with the evaluation requirements of the Section 504 regulations. The District is required to evaluate any student who needs or is believed to need special education or related aids and services because of disability. As a part of this process, the District must draw upon information from a variety of sources and ensure that the information is carefully considered by group of persons knowledgeable about the student, the evaluation data, and the placement options.

After having unilaterally placed the students in CAVA for the 2014-15 school year, the Complainant consented to have them assessed there. CAVA conducted full psychoeducational, speech and language, and OT assessments for both students, as well as an APE assessment for Student B. In addition, CAVA conducted IEP meetings for both students based on the assessments and determined that both needed a range of special education and related aids and services.

The Complainant requested in writing that the Students be reenrolled into the District's special education program in July 2015. The District responded by providing assessment plans for the Complainant's signature and reminding him that the students must be reassessed by the District in accordance with the OAH order before they could re-enter the special education program. After the students were reenrolled into the District, the Complainant again requested in November 2015 and April 2016 that the students be reenrolled into the special education program, that the District accept the CAVA assessments and IEPs, and that a meeting be

convened to discuss their educational placement, including accommodations under Section 504 and the ADA. However, the District took none of these steps in response.

OCR acknowledges that the Complainant and the District were involved in assessment disputes that culminated in 2013 OAH orders concluding that the District was not obligated to provide the students a FAPE under IDEA unless and until the Complainant consented to a District assessment plan, presented the students for assessment, and allowed assessment outside of the presence of the parents. The Complainant did not meet those requirements. However, even though the OAH orders may have absolved the District of providing the students a FAPE under IDEA under these circumstances, OAH did not have jurisdiction to rule on the District's responsibility to evaluate the students under Section 504 and Title II FAPE standards.

Once the students were reenrolled into the District in November 2015 the District had reason to believe that both students were disabled and in need of special education and related aids and services based on their history in the District and, once received, the CAVA assessments and IEPs. At that point in time the District was obligated to initiate a Section 504 and Title II evaluation process, including drawing upon information from a variety of sources and convening a group of knowledgeable individuals to carefully consider that information. The District was not obligated to adopt the CAVA assessments or IEPs as its own, but was required to carefully consider them. As a part of this process, the District may have concluded that one or more of those assessments or IEPs were invalid or inappropriate. If so, it should have then conducted its own assessments under Section 504 and Title II standards, including consideration of the November XX, 2015, doctor's notes requesting that the parents be present during assessments. In addition, if the District then found that either student was disabled and in need of special education and related aids and services, it was also responsible for completing a placement process that met the requirements of 34 C.F.R. §104.35(c).

Further, the District was also on notice once the students reenrolled that, based on their history and the CAVA assessments and IEPs, both have speech and language delays. As a result, the District also had an affirmative obligation to provide effective communication under Title II, in addition to its Section 504/Title II FAPE responsibilities. OCR did not investigate or reach a determination as to this issue. However, OCR identified it as a compliance concern because the evidence gathered during the investigation does not reveal that the District went through any process to consider whether either student needed auxiliary aids and services to have an equal opportunity to participate in, and enjoy the benefits of, the District's services, programs, and activities.

During the course of the investigation, the Complainant raised a concern to OCR that the students were not provided access to any educational program, even in the general education setting, from the date of their reenrollment in November 2015 to the date they were approved to begin HHI services in March 2015, a period of over four months. However, the evidence shows that both students were actually assigned to District schools as of the date they were reenrolled into the District, but the Complainant chose not to send them to these schools while the HHI requests were being processed. In addition, the facts show that the delay in

assignment to the HHI program during the 2015-16 school year was not caused by inaction or delay by District personnel, but instead resulted from the students' physician being unresponsive to repeated attempts by the District nurse to verify the medical information supporting of the HHI request. The Complainant also raised a concern that neither student received even general education HHI services from the beginning of the 2016-17 school year up until the time they moved out of the District in October 2016. However, the evidence again shows that the District did not cause this lapse in services. Rather, the HHI program requires parents to submit an updated HHI request form signed by a licensed physician annually and the Complainant did not do so for either student. Again, the Complainant chose not to send the students to their assigned schools during this time. Accordingly, OCR identified no compliance concern with respect to the delay in assigning the students to HHI in either the 2015-16 or 2016-17 school year.

Conclusion

For the reasons outlined above, OCR found the District out of compliance with Section 504 and Title II requirements with respect to its failure to evaluate both students under Section 504 and Title II FAPE standards. OCR also identified a compliance concern because the District did not appear to consider whether each student needed communication-related auxiliary aids and services as a matter of equal opportunity.

To address the identified area of noncompliance and the compliance concern, the District, without admitting to any violation of law, entered into the enclosed Resolution Agreement which is aligned with the complaint allegation and the findings made and information obtained by OCR during its investigation. Under the Resolution Agreement, the District agreed to take the following actions if the students return to the District: if the parents agree, convene a group of knowledgeable persons to determine whether additional evaluations are necessary to determine whether Student A and Student B are disabled and in need of special education or related aids and services under Section 504 and Title II standards; if the group concludes that additional evaluations are not necessary, it will also determine, based on existing information, whether the specified student is disabled and in need of special education or related aids and services and, if so, develop an appropriate placement for the student.

If the group concludes that additional evaluations are necessary and the parents present the student(s) for evaluation, the District will evaluate the student(s). If the parents agree, the District will convene another group of knowledgeable persons to determine, based on the new evaluations, whether the specified student is disabled and in need of special education or related aids and services, develop an appropriate placement for the specified student, as well as decide whether the student needs compensatory and/or remedial services because they received no special education or related aids and services from the District when enrolled during the 2015-16 school year. If the students return to the district, the District also agreed to the following: if the parents agree, engage in an interactive process to consider whether Student A or Student B needs auxiliary aids or services because of their speech and language impairments in order to have an equal opportunity to participate in, and enjoy the benefits of,

the services, programs, and activities of the District; convene a group to determine what auxiliary aids or services are necessary, if any; and provide the parents with written notice of the basis of any denial and a right to appeal.

Based on the commitments made in the Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter and is notifying the Complainant concurrently. When fully implemented, the Resolution Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Resolution Agreement until the District is in compliance with the statute(s) and regulations at issue in the case with respect to the issue investigated.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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, 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, 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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Julie Baenziger at (415) 486-5502, or me at (415) 486-5555.

Sincerely,

/s/

Kendra Fox-Davis
Team Leader