



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

May 4, 2018

Eric R. Dill  
Superintendent  
San Dieguito Union High School District  
710 Encinitas Blvd.  
Encinitas, California 92024

(In reply, please refer to Docket # 09-16-1553.)

Dear Superintendent Dill,

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the San Dieguito Union High School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.<sup>1</sup> Specifically, OCR investigated the following issues:

1. Whether the District failed to provide the Student with a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990, as amended (Title II) and their implementing regulations by:
  - a. Failing to provide the Complainant with procedural safeguards after the Principal determined the Student did not qualify for Section 504 services on March X, 2016; and
  - b. Denying the Student an evaluation for a Section 504 Plan, even though it had multiple reasons to believe that she needed special education or related services because of a disability.

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<sup>1</sup> OCR previously provided the District with the identity of the Complainant and Student. We are withholding their identities here to protect their privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

2. Whether the Section 504 meetings held for the Student were procedurally inadequate because the District incorrectly interpreted the definition of disability under Section 504, Title II and their implementing regulations.<sup>2</sup>
3. Whether the District's Section 504 procedural safeguards and grievance procedures are consistent with Section 504, Title II and their implementing regulations.
4. Whether the District terminated special education and related services for students with disabilities at the Student's School without conducting evaluations prior to changing the students' placements or used improper criteria to determine if students qualify for services under Section 504.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 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, as amended, 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 education system, 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. The applicable legal standard, the facts gathered by OCR, and the reasons for OCR's conclusions are summarized below.

### Legal Standards

#### *Definition of a Disability*

The Americans with Disabilities Amendments Act of 2008 (hereinafter ADA Amendments Act of 2008) amended both the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 definition of disability for Section 504. Under the ADA Amendments Act of 2008, Congress directed that the definition be construed in favor of broad coverage of individuals.<sup>3</sup> The term substantially limits shall be interpreted consistently with the findings and purpose of the ADA Amendments Act of 2008.<sup>4</sup> The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigation measures, except for ordinary glasses or contact lenses.<sup>5</sup> An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a

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<sup>2</sup> The Complainant raised this allegation during the investigation of the case. OCR notified the District in writing of this allegation on January 23, 2018.

<sup>3</sup> 42 U.S.C. §12102(4)(A).

<sup>4</sup> 42 U.S.C. §12101(4)(B).

<sup>5</sup> 42 U.S.C. §12102(4)(E)(i) and (ii).

disability.<sup>6</sup> An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.<sup>7</sup>

The Title II regulations, at 28 C.F.R. §35.108, defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Pursuant to 28 C.F.R. §35.108 (d) (1) (viii), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. 28 C.F.R. §35.104 defines a qualified individual with a disability as one who, with or without reasonable modifications to rules, policies, or practices, the removal or architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in the college or university's programs and activities. These definitions are incorporated into Section 504 through Section 7 of the ADA Amendments Act of 2008.

#### *FAPE Standard*

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a 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 non-disabled students 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.

#### *Evaluation and Placement*

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

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<sup>6</sup> 42 U.S.C. §12102(4)(C).

<sup>7</sup> 42 U.S.C. 12102(4)(D).

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.

### *Procedural Safeguards*

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.

*Issue 1: Whether the District failed to provide the Student with FAPE by: a) failing to provide the Complainant with procedural safeguards after the Principal determined the Student did not qualify for Section 504 services on March X, 2016; and b) denying the Student an evaluation for a Section 504 Plan, even though it had multiple reasons to believe that she needed special education or related services because of a disability.*

### Factual Findings

#### 2014-2015 School Year – 6<sup>th</sup> grade

The Student was initially identified as a student with a disability and placed on a Section 504 Plan on January XX, 2015, while she was in the sixth grade at her prior school district. The Complainant told OCR that the Student was diagnosed with ADHD and that her symptoms manifest in inattention, hyperactivity, and impulse control challenges. The accommodations the Student received in her Section 504 Plan were: 1) preferential seating; 2) access to notes, study guides and outlines; 3) audio recorded directions; 4) access to novels in advance; 5) access to headphones/music; 6) privacy board; 7) access to highlighter to break down and target key instruction; 8) build rapport; 9) auditory and visual directions; 10) ensure student is focused by looking directly at student when checking for understanding; 11) movement breaks; 12) extended time on tests; 13) chunk out assignments; 14) access to study guides and pretest to prepare; 15) encourage the quality of work; and 16) highlight main concepts.

#### 2015-2016 School Year – 7<sup>th</sup> grade

On October XX, 2015, a Section 504 meeting took place for the Student when she started the 7<sup>th</sup> grade at a District middle school. The Complainant told OCR that the Principal determined that the Student no longer qualified for a Section 504 Plan because of her good grades. She also stated that the Principal made this decision while disregarding information she provided that the Student got good grades because she was taking ADHD medication and spent an extensive amount of time studying every day with the help of her parents to compensate for

her impairment. OCR did not interview the Principal or investigate this allegation because it was not timely filed.<sup>8</sup>

OCR, however, noted that the Student's Section 504/American Disability Act Student Eligibility/Accommodation Plan (Section 504 Plan) from the October XX, 2015 meeting included the wrong legal standard on item 6. The Section 504 Plan stated that the determination of whether a physical or mental impairment has a "significant impact" shall be based on factors, including "mitigating factors such as ... medication," however, the ADA Amendments Act of 2008 Section 4(a) (codified as amended at 42 U.S.C. § 12102) states the opposite, that in determining whether such impairment substantially limits a major life activity, the term substantially limits shall be interpreted "without regard to the ameliorative effects of mitigating measures such as medication, ... reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications."<sup>9</sup>

The Complainant told OCR that she and the Student's father signed the Section 504 Plan, even though they disagreed with the Principal's decision, because they were not familiar with the legal requirements under Section 504 and because the Principal promised to reinstate the Section 504 Plan if the Student had any problems in her classes. The Section 504 Plan also states and the Complainant confirmed that at the October XX, 2015 meeting she received a copy of the District's Section 504/ADA Procedural Safeguards and Grievance Procedures (September 2015) (hereinafter September 2015 Procedural Safeguards). The September 2015 Procedural Safeguards stated that a parent or guardian was required to engage in an internal District administrative review process before they would be permitted to exercise their right to an impartial hearing. In specific, they stated:

Step 1: Within 15 days of receiving the student's 504 plan, submit in writing his/her disagreement and request that the school site administrator and school 504 team members review the plan and attempt to resolve the disagreement. This review shall be held within 15 school days of receiving the parent/guardian's written request, and the parent/guardian shall be invited to attend the meeting at which the review is conducted.

Step 2: If disagreement continues, request in writing to have the District 504 Coordinator review the plan. This review shall be held within 15 school days of receiving the parents/guardian's written request, and the parent/guardian shall be invited to meet with the District 504 Coordinator.

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<sup>8</sup> OCR's Case Process Manual (CPM) at Section 106 states that OCR will take action only with respect to those complaint allegations filed within 180 calendar days of the date of the alleged discrimination, unless a waiver is granted. The CPM can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>. Based on the CPM, OCR will not make any determinations as to whether the District improperly terminated the Student's Section 504 Plan on October XX, 2015, as this meeting took place more than 180 days prior to the date the Complainant filed her OCR complaint on July XX, 2016 and there is no basis to grant a timeliness waiver under Section 107.

<sup>9</sup> As stated further in this letter under issues 2 and 4, the District is using a new Section 504 Eligibility Determination Form that has corrected this error.

Step 3: If disagreement continues, the parent/guardian may request in writing a section 504 impartial hearing.

On February XX, 2016, the Complainant sent an email to the Principal notifying him that the Student was having problems in her classes and needed accommodations due to her ADHD. The Principal responded by email on February XX, 2016 asking the Complainant to contact his secretary to schedule a meeting with him and the School Counselor.

On March X, 2016, the Complainant met with the Principal. According to the Complainant, in response to the Principal's request as to what accommodations the Student needed, the Complainant told the Principal that the accommodations were listed in the Student's sixth grade Section 504 Plan and specifically mentioned preferential seating, a quiet room to take her tests, and extra time on tests.

On March X, 2016, the Principal notified the Complainant by email that the Student's teachers would implement the three requested accommodations because those accommodations were allowed for any student who requested them. The email also stated that because the Student is currently earning above average grades and has access to the accommodations that the Complainant would like her to have, the Student does not currently qualify for a 504 Plan. The Principal also stated that the School could assess the Student's progress with the accommodations in several weeks and that if the Complainant still had concerns, discuss other possible options at that time. The email does not include a copy of the District's procedural safeguards and the Complainant told OCR that she did not know how to appeal the March X, 2016 decision.

The Complainant continued to send the Principal emails regarding concerns related to implementation of the accommodations and the Student's progress in classes. For example, on March XX, 2016, the Complainant emailed the Principal and confirmed that the math teacher provided the Student with the three accommodations listed in his March X, 2016 email. However, when the Student asked her science teacher if she could take her quiz in a quiet room, the science teacher denied the accommodation and told the Student that it was a life skill to learn to take the quiz in class because she will not be able to do so when she goes to high school. According to the Complainant, the Student was very upset by this incident and stopped asking her science teacher for her accommodations after this incident took place.

On March XX, 2016, the Complainant sent emails to the Principal notifying him that the Student was struggling in her classes. On the same day, the Principal sent a responsive email to the Complainant stating that he would contact her after consulting with the Coordinator for Student Services. On April X, 2016, the Principal informed the Complainant by email that a Section 504 meeting for the Student was scheduled for April XX, 2016 to determine eligibility. On April XX, 2016, the District rescheduled the Section 504 meeting to April XX, 2016. Then, on

April XX, 2016, the Assistant Principal<sup>10</sup> sent a letter to the Complainant cancelling the meeting. The letter states in relevant part:

The District is canceling the initial Section 504 meeting scheduled for April XX, 2016 as it does not believe, at this time, that there is reason to suspect that [the Student] needs or is believed to need special education or related services pursuant to Section 504, as a result of her identified impairments. The District has made this determination without regards to the ameliorative effects of mitigating measures, such as medication, as required by Section 504.

[The Student] was determined no longer eligible under Section 504 in a team meeting on October XX, 2015. Since that time, she has maintained stellar grades across all courses, satisfactory attendance and excellent behavior. Specifically, her grades at this time are as follows: XXXXX XXXXXXXX A+, XXXX XXXXXXXX A+, XXXXXXXX X XXXXXXXX A+, XXXXX XX XXXXX A+, XXXXXXXXXXXX XXXX X XXXXXXXX B+.

The District has also considered information you have provided through meetings and various emails over the course of the past few months. You note that [the Student] does better with the general education accommodations in place for her in math (e.g. whiteboard, quite space for tests); however, those types of accommodations have not necessarily been utilized across other subjects, and her grades maintained in the "A" range across all courses. Even on days that the student has verbally indicated she may have "forgotten" to take her medication, she is still able to turn in homework in a timely fashion and performs adequately in class....

In addition, each of her teachers, who work with her on a daily basis, indicated that they have no concern relative to [the Student] at this time. For all these reasons, the District declines to evaluate [the Student] pursuant to Section 504 at this time, as there is no reason to suspect that her diagnosed impairments of ADHD or auditory processing disorder...would substantially limit any major life activity (such as learning, thinking, concentrating, communicating, etc.) without regard to the ameliorative effects of her mitigating measures. In addition, at this time, there is no reason to suspect that her diagnosed impairments require the provision of special education, related services, or supplemental support or services beyond that available in the general education setting.

A copy of the September 2015 Procedural Safeguards was also attached to this letter. On May X, 2016, the Complainant emailed the Assistant Principal stating:

I disagree with the District's April XX, 2016 Section 504 Notice of Action specifically, I disagree with the District's failure to identify [the Student]. The procedural safeguards the District provided on April XX, 2016 does not appear to apply to the situation (failure to identify). And, assuming that they do apply to failure to identify, based on the history of this case...I cannot determine what step (1, 2, or 3) is at issue. Please advise if I need to take

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<sup>10</sup> This Assistant Principal left the middle school at the end of the 2015-16 school year.

different or additional action to pursue [Student's] remedies at this time or if this email suffices...

The Assistant Principal responded to the Complainant in an email on May X, 2016 stating:

We are in the process of revising our 504 procedural safeguards to remedy and clarify situations such as the one you described...You may pursue any or all of these options, and please note that one is not dependent upon the other. 1) Request to meet with...the District's Section 504/ADA Coordinator to discuss your concerns to see if they can be remedied as noted in Step 2 of your safeguards; 2) File a request for an impartial hearing as noted in Step 3 of your safeguards; 3) File an OCR complaint....

#### Analysis and Legal Conclusion

*Issue 1(a): Whether the District failed to provide the Student with FAPE by failing to provide the Complainant with procedural safeguards after the Principal determined the Student did not qualify for Section 504 services on March X, 2016.*

In relevant part, the implementing regulation for Section 504 at 34 C.F.R. § 104.36 requires a District to:

establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of [disability] need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to ... an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

The email the Principal sent to the Complainant on March X, 2016 did not include information as to how the Complainant could obtain review of the decision that the District had determined that the Student would not be identified as a Student who qualified for a Section 504 Plan or access the impartial hearing process, and the September 2015 Procedural Safeguards previously given to the Complainant on October XX, 2015 did not comply with Section 504 because they required a parent to participate in a District administrative review prior to being permitted to access the impartial hearing process. As such, OCR identified a concern that the District's actions on March X, 2016 may not be in compliance with the requirements of the regulation. However, in this specific case, OCR did not further investigate this allegation to determine if the District notified the Complainant about her procedural safeguards rights either orally or by other means when she received the March X, 2016 decision because OCR obtained credible information showing that the Assistant Principal resolved the concern by informing the Complainant of her right to file for an impartial hearing to contest the District's decision.

OCR found that since the March X, 2016 denial, the Principal reconsidered his decision and informed the Complainant on April X, 2016 that the District scheduled a Section 504 meeting to



review the Student's eligibility under Section 504.<sup>11</sup> Prior to the scheduled meeting, the Assistant Principal sent the Complainant a letter dated April XX, 2016, informing her that the District decided not to evaluate the Student along with the non-compliant September 2015 Procedural Safeguards. On May X, 2016, the Complainant sent an email to the Assistant Principal notifying her that she disagreed with the District's decision to not evaluate the Student and asked for clarification as to how she could appeal that decision. On May X, 2016, the Assistant Principal emailed the Complainant and told her that she could proceed to file for an impartial hearing without first having to participate in an administrative review. Since the Assistant Principal gave the Complainant the correct procedural safeguard information, OCR determined that this allegation is currently resolved and that there is insufficient evidence of current noncompliance with 34 C.F.R. § 104.36

*Issue 1(b): Whether the District failed to provide the Student with FAPE by denying the Student an evaluation for a Section 504 Plan, even though it had multiple reasons to believe that she needed special education or related services because of a disability.*

OCR found that from at least February XX, 2016 through late March 2016, the Complainant made multiple requests for accommodations, notified the Principal that the Student was struggling in her classes, and requested that the Principal reinstate the Student's prior Section 504 Plan with the accommodations that she had previously received in a prior District. The Complainant did not request that the District conduct a new evaluation for the Student under Section 504. As discussed previously, the Principal responded to the Complainant's request in an email dated March X, 2016 stating that he determined the Student did not qualify for a Section 504 Plan because she was earning above average grades and her teachers were willing to provide the three accommodations the Complainant requested for the Student. Subsequently, the Assistant Principal sent a letter to the Complainant dated April XX, 2016 stating that the District declined to evaluate the Student because the District does not suspect that her diagnosed impairments of ADHD or auditory processing disorder substantially limited a major life activity without regards to the ameliorative effects of her mitigating measures. The Assistant Principal attached a copy of the procedural safeguards with her letter and clarified to the Complainant in an email dated May X, 2016 that she could pursue a Section 504 impartial hearing to contest the District's decision.

OCR's review of the District's determination as to whether or not to conduct an evaluation focuses on whether the District has complied with the "process" requirements and procedural protections of Section 504 specified in the regulations concerning identification and location, evaluation. Here, because the Complainant did not request an evaluation, and the District notified the Complainant of its decision with respect to her eligibility within a reasonable time period after meeting with her and discussing her requests and ultimately provided her with the correct information about her right to proceed with an impartial hearing to contest that decision, OCR determined that the impartial hearing would have been the appropriate forum to

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<sup>11</sup> The Section 504 meeting was initially scheduled for April XX, 2016 then rescheduled by the District to April XX, 2016.

resolve the disagreement. Thus, OCR concluded that the District was in compliance with respect to this issue.

*Issue 2: Whether the Section 504 meetings held for the Student were procedurally inadequate because the District incorrectly interpreted the definition of disability under Section 504, Title II and their implementing regulations.*

### Finding of Facts

#### 2016-2017 School Year – 8<sup>th</sup> grade

On September XX, 2016, a Section 504 meeting was held for the Student. The meeting was attended by the Complainant, Student's father, the District's Attorney, Counselor, Assistant Principal, Student's former 7<sup>th</sup> grade Math Teacher, Student's former 7<sup>th</sup> grade Science Teacher, Student's 8<sup>th</sup> grade U.S. History Teacher, District Nurse, and the Complainant's Advocate.

OCR reviewed the audio recording of the meeting and a copy of the Student's 504 Eligibility Determination Form (Form) that was completed by the District to document what took place during the meeting. The team listed ADHD and auditory processing deficit in item 1 (a) as a mental or physical impairment for the Student and as "Impairment A" on item 3 of the Form.

During the meeting, the Complainant informed the team about the Student's ADHD medications; how her ADHD medications keep her awake at night and the additional medications she takes to try to sleep; what she is like when her medications wear off at home (unable to follow oral direction, cannot remember things); the long hours she spends studying each night in an un-medicated state; and the parental support she needs from educated parents to maintain her grades.

The Student attended part of the Section 504 meeting and told the team that she studies until 1:30 AM every night by going on Quizlet.com, doing online study guides on the District's website, and completing extra credit work to learn the materials. She also told the team that the accommodations that help are: having a quiet place; obtaining a copy of the class notes because she zones out and has a hard time absorbing oral information due to her auditory processing disorder; movement breaks; headphones; and study guides.

During the meeting, the team listed the following "mitigating measures" on item 2 of the Form: a) ADHD medications; b) daily parent support on homework including parent texting photos of homework, bringing work, frequent reminders; c) ability to take math test in hallway behind classroom with headphones; d) written reminders on tests, quizzes (including the use of Quizlet.com, extra study and practice).

The Complainant also informed the team that the Student was diagnosed with Non-celiac gluten intolerance, Raynaud's phenomenon, and Mycoplasma. These impairments were listed under item 1(b)-(d) and added as Impairments B through D under item 3 of the Form. Due to

the length of the meeting, the team did not reach any conclusions and scheduled a second meeting to continue the evaluation process.

On October XX, 2016, a second Section 504 meeting was held with all of the team members, except the Student's father. OCR reviewed the audio recording of the meeting. The Complainant pointed out to the team that the Form states on item 2, where the Student's mitigating measures are listed, that the team will consider the effects of the mitigating measures in making its eligibility determination.<sup>12</sup> The District's attorney clarified to the team that the eligibility determination will be made without regard to the ameliorative effects of mitigating measures.

During the meeting, the Complainant stated that all of the major life activities listed on the Form were affected by the Student's impairments. The list on the Form included: learning, eating, sleeping, standing, functions of bodily system, lifting, bending, breathing, reading, concentrating, thinking, and communicating. The Complainant also stated that the Student has difficulty with social interactions and recalling things in a linear fashion. The Complainant further described how the Student continues to turn in wrong assignments, forgets to do assignments, and has memory issues when her medication wears off at home. In addition, the Complainant stated that the Student is embarrassed at school because she is disciplined for forgetting her homework and for requesting to have a quiet room to concentrate in.

The team then considered if the Student was substantially limited in any of the major life activities listed by the Complainant without regards to mitigating measures in and out of school. The Student's 7<sup>th</sup> grade Math Teacher stated that she could only speak to what she sees at school and did not know what the Student would be like without her medication; that the Student worked exceptionally hard during the last school year and was successful. The Teacher also stated that a couple of times the Student said she forgot to take her medication and took it later during break, but that she was able to sit through class, participate, and take notes during the short times she was not on her medication.

The Student's 7<sup>th</sup> grade Science Teacher and her 8<sup>th</sup> grade U.S History Teacher stated that they felt the Student could access the curriculum and achieve without mitigating measures. One teacher also stated that she only knows what the Student is like in class and that she can access everything in class. Both teachers did not provide any information about working with the Student when she was not on her medications.

The Assistant Principal stated that the Student is able to come to school and access her education even if she is unable to sleep. The Counselor stated that the Student's teachers had not expressed any concerns about her and that she has observed that she is able to access her education.

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<sup>12</sup> The District subsequently revised item 2 of the Form to state, "[t]he team will disregard the ameliorative effects of the following mitigating measure in making its eligibility decision."

The District team members then concluded that the Student was not substantially impacted by her ADHD and auditory processing deficit and marked “mildly” as the degree of limitation on the Form. The Complainant disagreed with the District team members’ conclusion and stated that they disregarded the information provided by her, the Student, and her father about the many mitigating measures in use and based their decision on the Student’s good grades and good attitude. The advocate stated that the team did not interpret the definition of a disability properly.

On November XX, 2016, the District held a third Section 504 meeting for the Student. OCR reviewed the recording of this meeting; all team members from the prior Section 504 meetings were present. During the meeting, the District staff members reviewed a letter from the Student’s physician. The District staff members determined that the letter did not change their prior conclusion. In making this decision, they interpreted the physician’s letter to state that the Student is taking a low dose of medication. The team then discussed the Student’s other impairments, Non-celiac gluten intolerance, Raynaud’s phenomenon, and Mycoplasma. The Student also joined the meeting and spoke to the team while showing a PowerPoint presentation describing how she is affected by her ADHD and auditory processing diagnosis.

At the end of the meeting, the District staff members determined that the Student was not a student with a disability under Section 504. The Complainant signed the 504 Eligibility Determination Form disagreeing with the District’s determination.

The Complainant alleged to OCR that the Section 504 meetings were procedurally inadequate because the District team members incorrectly interpreted the legal definition of a disability in determining that the Student was not a disabled individual under Section 504 with respect to her impairment of ADHD and auditory processing deficit. According to the Complainant, the District team members did not consider what the Student was like without her medications and without the other mitigating supports in place to assist here and only considered her good grades, attendance, and attitude during the school day in making its determination.

#### 2017-2018 School Year – 9<sup>th</sup> grade

The Student is currently attending X XXXXXXX XXXXXX for the 9<sup>th</sup> grade in a different school district. The Complainant told OCR that the Student plans to return to a District high school for her junior year.

#### Analysis and Legal Conclusion

The definition of disability is the same under Section 504 and Title II. Under these laws, a student with a disability is defined as a person who: 1) has a physical or mental impairment that substantially limits a major life activity; 2) has a record of such an impairment; or 3) is regarded as having such an impairment. Under the ADA Amendments Act of 2008, Congress directed

that the definition of disability be construed in favor of broad coverage of individuals.<sup>13</sup> The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigation measures, except for ordinary glasses or contact lenses.<sup>14</sup>

As part of the investigation, OCR listened to the tape recordings of the Section 504 meetings to determine if the team correctly interpreted the meaning of disability under Section 504, Title II and the ADA Amendments Act of 2008 in reaching its determination. In listening to the recordings, OCR found that the Complainant, the Student and her father notified the team about the mitigating measures the Student utilized. The measures included: a) ADHD medications; b) daily parent support on homework including parent texting photos of homework, bringing work, frequent reminders; c) ability to take math test in hallway behind classroom with headphones; d) written reminders on tests, quizzes (including the use of Quizlet.com, extra study and practice).

These mitigating measures were listed on the Student's 504 Eligibility Determination Form on item 2(a)-(d) under the directing sentence, which stated: "[t]he team will consider the effects of the following mitigating measures in making the determination [of whether the student has a disability]..." The Complainant pointed out during the Section 504 meeting that item 2 of the Form incorrectly required the effects of mitigating measure to be taken into account, and the District's attorney orally clarified at least once to District team members that the positive effect of any mitigating measures needed to be disregarded in deciding if the Student had a disability under Section 504.

Based on this clarification, the District team members determined that the Student did not qualify as student with a disability that impacted a major life activity based on statements from teachers, Assistant Principal, and the Counselor who identified the Student's ability to access the curriculum while she was on a low-level of medication, good attendance, and her ability to achieve. One teacher also noted that the decision was based on the Student's ability to sit in class, take notes and participate on a couple of occasions when she forgot to timely take her medication. None of the teachers or the Counselor had worked with the Student without the mitigating measure of medication. However, the ADA requires the District to assess how the Student's major life activities, which, here, include thinking, concentrating, learning and reading, would be impacted without any medication, not just a lapse in medication or low medication. As such, OCR concluded that the District relied on an impermissible basis, the use of the mitigating factor of low-level medication, in reaching its conclusion about the impact of the disability.

The Complainant also described what the Student's behavior was like when her ADHD medications had worn off after school. In addition, the Student described in detail the various strategies she used to study at home, the assistance she received from her parents, and the

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<sup>13</sup> 42 U.S.C. §12102(4)(A).

<sup>14</sup> 42 U.S.C. §12102(4)(E)(i) and (ii).

amount of time and effort she expended each day studying at home due to her ADHD and auditory processing deficit diagnosis. Although the Complainant and the Student provided this information, the team participants did not discuss and OCR did find any documentation on the Student's 504 Eligibility Determination Form showing that the team reached a determination as to whether the Student was substantially limited as to the condition, manner or duration under which she performed her major life activities of thinking, concentrating, learning and reading as compared to non-disabled students without regard to the ameliorative effects of mitigating measures. The condition, manner or duration analysis is described on item 1 of the Form and such an analysis might have included whether the Student spent additional time or effort to complete homework and prepare for class and exams that was not spent by her non-disabled peers to attain similar results. Because the District did not conduct this analysis and relied on an impermissible factor in reaching its decision, OCR determined that the District's assessment process was not in compliance with Section 504 and Title II and their implementing regulations.

In order to address the noncompliance, the District agreed as part of the Resolution Agreement (Agreement) to revise its 504 Eligibility Determination Form to ensure that Section 504 teams complete the condition, manner or duration analysis when relevant and to document the facts that were reviewed and/or describe the team's analysis in reaching its determination as to whether a student is or is not substantially limited in performing a major life activity. The District also changed the directive sentence under item 2 of the Form from "[t]he team will consider the effects of the following mitigating measures in making the determination [of whether the student has a disability]..." to "[t]he team will disregard the ameliorative effects of the following mitigating measures in making its eligibility decision" during the investigation of this case.

Although the Student is not currently attending a District high school, the Complainant told OCR that the Student is planning on returning to a District high school when she is a junior. Thus, as part of the Agreement, the District will evaluate the Student to determine if she has a disability under Section 504 if she returns. As part of this evaluation, the District will also conduct a condition, manner, or duration analysis and document its conclusions on the revised 504 Eligibility Determination Form. The District will not be required to conduct this evaluation if the Complainant states that she does not want the Student evaluated at that time. The District further agreed to have OCR conduct a training at the Student's former middle school and the high school she will be attending, on the expanded definition of disability under the ADA Amendments Act of 2008.

*Issue 3: Whether the District's Section 504 procedural safeguards and grievance procedures are consistent with Section 504, Title II, and their implementing regulations.*

#### Factual Findings

The Complainant alleged to OCR that the District's September 2015 Procedural Safeguards did not comply with Section 504 and Title II because it does not allow a parent to contest the District's denial of an initial evaluation for a student who has not yet been identified as a

student with a disability under Section 504. In this regard, the first sentence of the September 2015 Procedural Safeguards stated, “The following is a description of the rights granted by federal law to *Section 504 students*.” (emphasis added). Based on this sentence, OCR understands why a parent would think that the District’s procedural safeguards only applied to students who were already identified under Section 504. As discussed previously, OCR also found that the procedures improperly required a parent or guardian to engage in an administrative process before they could exercise their right to an impartial hearing.

During the investigation of the case, the District revised the September 2015 Procedural Safeguards and gave OCR a copy of its updated documents entitled, Section 504 Procedures – Identification, Evaluation, and Education Under Section 504 (August 2016) (hereinafter August 2016 Notice of Rights) and the corresponding one page notice that is given to parents and guardians entitled Procedural Safeguards (September 2016) (hereinafter September 2016 Procedural Safeguards). OCR found that the documents now state that parents and guardians can request an impartial due process hearing related to decisions or actions regarding their child’s identification, evaluation, educational program or placement. The documents also do not require parents and guardians to participate in an administrative review prior to exercising their right to an impartial due process hearing.<sup>15</sup>

The Complainant also told OCR that she was concerned that any Section 504 hearing will not be impartial because the hearing officer will be hired and paid for by the District. The District’s August 2016 Notice of Rights states that to ensure impartiality, hearing officers:

shall not be employed by or under contract within the District or the County of Education in any capacity other than that of hearing officer and shall not have any professional or personal involvement that would affect their impartiality or objectivity.

### Analysis and Legal Conclusion

OCR found that the September 2015 Procedural Safeguards did not comply with 34 C.F.R. § 104.36 because they required the parent or guardian to participate in an administrative review before exercising their right to a Section 504 due process hearing. The procedures also did not

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<sup>15</sup> The Complainant confirmed to OCR that the District gave her a copy of the September 2016 Procedural Safeguards. She also stated to OCR that the revised document is unfair to parents because it no longer allows parents to resolve disagreements informally with the District. However, OCR found that the August 2016 Notice of Rights includes a provision which states that the District may offer the parent or guardian an optional alternative dispute resolution process within 15 calendar days of receiving the parent or guardian’s request for a hearing, which includes mediation by a neutral third party or review of the Section 504 Plan by the Section 504 Compliance Coordinator. The Complainant, however, would not have known about the optional alternative dispute resolution (ADR) process because this information was not included in the one page September 2016 Procedural Safeguards. However, the District has since posted the September 2016 Procedural Safeguards and a document entitled “Section 504 Due Process Appeal Procedures” which describes the ADR process and the timelines associated with the Section 504 impartial hearing on its website.

clearly state that a parent/guardian, who disagreed with the District's decision to not evaluate a child not yet identified with a disability, could contest that decision under these procedures.

During the course of OCR's investigation, the District corrected the violation by revising its Section 504 procedures. The August 2016 Notice of Rights and the corresponding one page September 2016 Procedural Safeguards, no longer require the parent or guardian to participate in an administrative review before filing for an impartial hearing and both documents clearly state their application to decisions regarding a student's initial identification and evaluation. In addition, OCR found that the revised Section 504 procedures and safeguards meet the requirements of 34 C.F.R. §104.36 by requiring notice of any 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. Although Section 504 does not contain specific requirements regarding the appointment of hearing officers, OCR has interpreted the impartiality requirement to mean that school districts may not use their own employees, board member, or employees of a district that shares a contractual arrangement for the provision of services to students with disabilities. The District's procedures are consistent with this requirement. Thus, because the District corrected the violation, OCR determined that there is insufficient evidence of current noncompliance with 34 C.F.R. § 104.36.

*Issue 4: Whether the District terminated special education and related services for students with disabilities at the Student's School without conducting evaluations prior to changing the students' placements or used improper criteria to determine if students qualify for services under Section 504.*

#### Factual Findings

The Complainant alleged to OCR that the School administrators systematically exited students from Section 504 eligibility and also failed to identify students as being eligible for services under Section 504. During the time period under review, OCR found that there was one seventh grade student (Student 1) who was found ineligible for services in October of 2015 and was re-evaluated on March X, 2016. OCR reviewed Student 1's Section 504 Plan and found, as previously discussed, that the legal standard written on the Form was not consistent with the ADA Amendments Act of 2008 and the current Section 504 and Title II implementing regulations because it stated that "significant impact" must be determined in part based on "mitigating factors". As previously stated, the ADA Amendments Act of 2008 requires that the ameliorative effects of mitigation measures, other than ordinary glasses or contacts lens, cannot be considered when making a disability determination. In addition, the Act states that an impairment does not need to significantly restrict a major life activity to be considered substantially limiting. During the investigation, the District provided and OCR reviewed a new eligibility Form that corrected these errors.



### Analysis and Legal Conclusion

OCR concluded that the District was not in compliance with Section 504 and Title II as it did not evaluate Student 1 using the correct definition of a disability. To address this noncompliance, the District agreed to convene a Section 504 meeting for Student 1 to re-evaluate him using the correct legal standard. As discussed above, the District has also revised the Form to correct the noncompliant definition.

### Conclusion

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as 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 Resolution Agreement until the District is in compliance with the Resolution Agreement. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

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

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

Please be advised that the District may not harass, coerce, intimidate, 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, 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.

OCR thanks Meredith Wadley (Director of School & Student Services) and Alefia Mithaiwala (Attorney at Law) for their assistance during the resolution of this complaint. If you have any questions regarding this letter, please do not hesitate to contact the case team.

Sincerely,

/s/

James Wood  
Team Leader

cc: Meredith Wadley  
Alefia E. Mithaiwala

Attachment