



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

December 10, 2019

VIA ELECTRONIC EMAIL

Todd Lile  
Superintendent  
Madera Unified School District  
1902 Howard Road  
Madera, CA 936637

(In reply, please refer to case number 09-17-1328.)

Dear Superintendent Lile:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Madera Unified School District (District). OCR investigated the following allegations:

1. Whether the District failed to provide the Student with a free appropriate public education (FAPE) by failing to evaluate her in a timely manner even though it had reason to believe that she needed special education or related services because of a disability.<sup>1</sup>
2. Whether the District denied the Student an equal opportunity to benefit from her education by frequently removing her from her classroom for disability related behaviors.
3. Whether the District retaliated against the Student's teacher (Complainant) for her advocacy on behalf of the Student with a negative performance evaluation and a recommendation to not renew the Complainant's contract with the District.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

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

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and the Complainant. OCR also interviewed the Complainant, Principal, Vice Principal, Classroom Paraprofessional, and the Student's Parent.<sup>2</sup> OCR determined that the District was not in compliance with regards to allegation 1. The District also agreed to resolve OCR's concerns regarding allegation 2 prior to the completion of the investigation. Lastly, OCR determined that the District is in compliance with regards to allegation 3. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

*Allegation 1: Whether the District failed to provide the Student with a FAPE by failing to evaluate her in a timely manner even though it had reason to believe that she needed special education or related services because of a disability.*

### Legal Standards

#### *Qualified Individual with a Disability*

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 Requirement*

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*

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and

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<sup>2</sup> The Parent signed OCR's Consent Form authorizing OCR to reveal her identity to the District.

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.

### *Placement*

Section 104.35(c) of the regulations requires that placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

### Facts

During the 2016-17 school year, the Complainant was a XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXX teacher at a District elementary school. The Complainant told OCR that at the beginning of the school year, the Student exhibited behavioral difficulties that led her to believe that the Student needed special education services due to a disability. The Complainant told OCR that the Student used jargon and was not speaking “authentic” words, could not answer questions, repeated the last two words she heard, was unable to transition to other activities without having a tantrum (screaming and crying), did not return to class after recess on two occasions, and XXXX XXX XXX XX XXX XXXXXXXX while in the bathroom.

The Student’s Parent told OCR that the Student was unable to communicate when she entered XXXXXXXX. The Parent also told OCR that the Vice Principal notified her on September X, 2016 that the Student was found lying on the bathroom floor XXXXX XX XXX XXXXXXXX XXXXXXXX; she had never XXXXX XXX XXX XXXXXXXX at school before. The Parent also stated that she was worried about the Student because she did not return to class after recess and was found in the school yard by herself.

On September X, 2016, the Parent sent a letter to the District requesting a meeting to discuss the Student’s “communication difficulties” and her behavior. The Parent also requested a fulltime aide for the Student until she could express herself. The Parent told OCR that she did not ask the District to evaluate the Student for a disability because she did not know she could request such an assessment at that time.

In response to the Parent’s letter, the District held a Student Study Team (SST) meeting on September XX, 2016 with the Parents, Principal, School Psychologist and the Complainant. The SST form listed the following concerns for the Student: temper, nail biting, not talking/speech,

sometimes unresponsive, XXXXX XXX XX XXXX XX XXX XXXXXXXX XXX in the bathroom three times, requires a lot of individual attention to complete tasks, wets herself when asleep, and has accidents when awake at home.

The SST form also listed other information about the Student: frequently repeats words she hears others say, identifies all others as boy or girl in Spanish<sup>3</sup>, frequently repeats “who is it?” in Spanish at home, points with two to three word phrases to make requests. The form further indicated that the Parent was advised to pursue speech services at school by the Student’s prior physician. In addition, the form noted that the Parent was waiting for the county behavioral health department to schedule an appointment for the Student.

Based on the concerns raised about the Student, the team decided to screen the Student for speech. The team also developed a list of classroom interventions and scheduled a follow-up SST meeting was scheduled for March X, 2017.

The Principal told OCR that the Student was not referred for a special education evaluation during the SST meeting because the Parent did not request an assessment and the information the Parent and the Complainant provided regarding the Student was not sufficient to warrant the referral.

The Parent stated to OCR that the District should have assessed the Student based on the information she provided and that the District failed to follow through with the speech screening that was agreed to at the SST meeting.

The District’s website for special education department states:

Prior to referring a student for a Special Education assessment, schools must offer a variety of interventions to help reach students in the general education setting.... A Response to Intervention (RTI) model, matched to a students’ learning style is used to help students get caught up with their peers and reach grade level standards and beyond. When alternative methods of teaching through the RTI process have not resulted in a student making significant progress, a Student Study Team (SST) meeting is held and if determined necessary, an assessment plan to determine whether a student has a disability or not is developed by the Special Service team....

The Complainant told OCR that the Student continued to have behavioral issues in the classroom after the SST meeting (e.g., November XX, 2016, the Student had a meltdown and was screaming, crying, hurting herself and the Parent, and taking off her shoes).

On November XX, 2016, another SST meeting was held for the Student with her Parents, Principal, SST Coordinator, School Psychologist, Complainant, and the Paraprofessional. The SST form

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<sup>3</sup> The Complainant told OCR that the Student’s primary language is English. The SST notes state that the Student is developing both English and Spanish language skills.

states: administrators were called on four occasions to the classroom because the Student had difficulty with transitions; Parent notified the team that the Student was more aggressive in new environments; and Parent was waiting for an appointment to take the Student to the regional center and to the county behavioral health department to determine if she might be diagnosed with Autism or Pervasive Development Disorder. The SST form also states the Student would be assessed for special education and speech in January of 2017 and would receive additional accommodations.

On January X, 2017, the District provided the Assessment Plan to the Parent. The Parent signed the Assessment Plan on January XX, 2017 consenting to the evaluations. On February XX, 2017, the School Psychologist assessed the Student for Autism.

The Initial Psychoeducation Evaluation Report, dated March X, 2017, concluded that the Student met the eligibility criteria for Autism and noted that she was also diagnosed with Pervasive Development Disorder by the regional center.<sup>4</sup> The Speech and Language Assessment dated March X, 2017, states that the Student is approximately 50% intelligible and used jargon and delayed echolalia during the assessment. Based on the assessment, the report concluded that the Student met the eligibility criteria for Speech or Language Disorder.

On March XX, 2017, an IEP meeting was held for the Student. The IEP team determined that the Student qualified for special education under Autism and Speech or Language Impairment. The IEP notes state that the Student would be placed in an Autism program at a different school site and that she would receive extended school year services. The Parent consented to the IEP and was provided with a copy of the procedural safeguards.

The Student transferred to the Autism program after spring break on April XX, 2017. The Parent informed OCR that the Student is receiving the services she needs at her new school. The Parent believes that the District denied the Student with a FAPE by delaying its evaluation of her; however, the Parent does not feel that the Student will benefit from additional hours of schooling, to make-up for what she lost, because of her full school day and the extended school year services she is receiving.

### Analysis and Conclusion

The Section 504 regulation at 34 C.F.R. § 104.35(a) 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. Given that the Parent and the Complainant informed the District at the start of the school year, that the Student was substantially impaired in the major life activities of speaking, communicating and learning, the District had a reasonable basis to suspect a disability that triggered a duty to promptly initiate the evaluation process at that time. The notes from the SST meeting held on September XX, 2016 specifically state that the Student was

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<sup>4</sup> The School Psychologist who completed the report was not the School Psychologist who attended the Student's two SST meetings.

not talking, frequently repeated the last words she heard, identified others as boy or girl, frequently repeated the same phrase at home, and required a lot of attention to complete tasks. The District, however, did not evaluate the Student for special education or for speech and language until March of 2017. Thus, OCR determined that the District failed to fulfill its legal obligation to timely refer and evaluate the Student for a disability or suspected disability under Section 504.

The District also told OCR that the Student was not referred for a special education evaluation at the initial SST meeting because the Parent did not request an assessment. Section 504, however, places the legal responsibility on school districts to identify students with disabilities; this means that school districts are responsible for initiating the evaluation process when it reasonably suspects that a student may need special education or related services due to a disability. As previously stated, OCR determined that there was evidence at the start of the school year to suspect that the Student may have had a disability under Section 504.

The District further contends that it addressed the Student's needs by holding two SST meetings and developing accommodations to address the Student's needs. The District's website states that, prior to referring a student for a special education assessment, a school must offer a variety of interventions to help reach students in the general education setting. Although school districts may use regular education intervention strategies to assist students with difficulties in school, Section 504 requires districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student needs or is believed to need such services because of a disability.

For the reasons stated above, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with 34 C.F.R. § 104.35(a). To address the noncompliance, the District signed a Resolution Agreement agreeing to revise its website so that it is consistent with Section 504 requirements. The District also agreed to hold a training for administrators and school psychologists to review the requirements as to when the District is obligated to refer a student for an evaluation. The Resolution Agreement, however, does not include an individual remedy for the Student, because the Parent informed OCR that the Student is in the proper placement and will not benefit from compensatory education services due to her full schedule at school and therapy.

*Allegation 2: Whether the District denied the Student an equal opportunity to benefit from her education by frequently removing her from her classroom for disability related behaviors.*

#### Legal Standard

##### *Different Treatment*

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the

same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1)(i) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.

### Facts

The Complainant stated to OCR that whenever the Student had behavioral issues, she called the Vice Principal or Principal on a radio (provided by the school) for assistance. The Complainant alleged that once the administrators arrived, their solution for addressing the Student's behavior was to take her to the front office and have her sit there until she was ready to return to class. According to the Complainant, the Student was taken out of the class frequently and she stayed in the office for approximately one to two hours each time. The Complainant alleged that the Student was denied an equal opportunity to receive an education when she was removed from her class.

The Paraprofessional (Para) for the XXXX class informed OCR that the Student had behavioral incidents approximately three to four times a week and that administrators took the Student to the front office for about thirty to forty-five minutes until she could return to class. The Para also stated that there were times when the administrators were able to calm the Student in class and coax her back on task so that she did not need to go to the office.

The District did not keep records of when the Student was taken of the classroom due to her behavior. The District, however, provided OCR with a copy of a log dated November XX, 2016 to March X, 2017, which included a description of what took place when the Complainant and the Para radioed the administrators to assist with the Student. The logs include one entry on March XX, 2017, where it states that the Student was sent to the office from 1:10 PM to 2:20 PM after she refused to transition to afternoon recess. The Principal acknowledged taking the Student out of class a few times because of her behavior, but he did not document when or for how long. The Vice Principal stated that she rarely took the Student out of the classroom and was able to calm her down in class.

### Analysis and Conclusion

OCR's Case Process Manual (CPM) at section 302 states that an allegation under investigation may be resolved before OCR reaches a final determination based on an investigation. For this allegation, OCR was concerned that the Student was denied an equal opportunity to benefit from her education when she was removed from her classroom for disability related behaviors. Since the District did not keep a record of when the Student was taken out of her class, OCR was unable to ascertain how much class time she missed. The information provided by the witnesses varied as to how frequently and how long the Student was placed in the front office. In order to better ascertain the amount of class time the Student missed, OCR would need to interview all of the front office staff members from the 2016-17 school year. However, before proceeding to further investigate this allegation, the District offered to resolve this allegation by developing a system

to track students who are removed from their class for disability related behaviors as part of the Resolution Agreement. Since the Complainant informed OCR that compensatory education services are not currently necessary for the Student due to her full schedule, OCR determined that the District's actions will resolve allegation 2 under section 302 of the CPM.

*Allegation 3: Whether the District retaliated against the Complainant for her advocacy on behalf of the Student with a negative performance evaluation and a recommendation to not renew the Complainant's contract with the District.*

### Legal Standard

#### *Retaliation*

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

### Facts

The District uses the Teacher Evaluation Instrument (TEI) to evaluate teachers for their midyear and final evaluations. The TEI includes seven Performance Standards. Each Performance Standard has four to six components. For each component, teachers are rated as satisfactory, needs improvement, and unsatisfactory. If most of the component scores are unsatisfactory, then that Performance Standard will be rated as unsatisfactory. Based on what the teacher received on the Performance Standards, an overall rating of satisfactory, needs improvement, or unsatisfactory is given. For probationary teachers, the site administrators also make a joint recommendation to the Governing Board as to whether the teacher should be rehired or not.

The Principal and the Vice Principal told OCR that they equally divide the number of evaluations they conduct and alternate the teachers they assess every year so that they both have an opportunity to observe all of the teachers. For the 2016-17 school year, the Principal conducted the Complainant's evaluations because she was evaluated by the former Vice Principal during the prior school year. The TEI that was completed for the Complainant's mid-term evaluation on December X, 2016, showed that she received an overall rating of needs improvement.



For the Complainant's final evaluation, the Principal conducted informal classroom observations on January XX and February XX, 2017. The notes from these observations include a description of what the Principal observed along with comments and recommendations. The Principal also conducted a formal classroom observation on February X, 2017.

The TEI that was completed for the Complainant's final evaluation on February XX, 2017, showed that she received an unsatisfactory final rating on four Performance Standards. Her overall rating was needs improvement and she was not recommended for rehire. On March X, 2017, the Superintendent sent the Complainant a letter stating that the Governing Board decided not to reemploy the Complainant for the 2017-18 school year.

The District informed OCR that the Governing Board released the Complainant from her probationary position because she did not perform at the level of District standards. The District also informed OCR that five of the 15 probationary teachers at the Complainant's elementary school were also released based on their performance. OCR reviewed the evaluations for all of the probationary teachers, who were not rehired, and found no deviations from District policy with respect to teacher evaluation.

The Complainant stated to OCR that the final evaluation she received from the Principal did not reflect her teaching skills. The Complainant alleged that both site administrators began treating her in a hostile manner after she notified them about the Student's behavioral issues. The Complainant also alleged that the Principal evaluated her unfairly by giving her unsatisfactory ratings, because she insisted that the Student was exhibiting Autistic behaviors and needed special education services.

The Principal stated to OCR that the Complainant's advocacy on behalf of the Student was not the reason why she received unsatisfactory ratings and was not recommended for rehire. The Principal informed OCR that he acknowledged the Complainant's work with the Student and included commendations in her midterm and final evaluations specifically noting how she assisted the Student. OCR's review of the Complainant's evaluations confirmed this.

The Principal and the Vice Principal told OCR that they did not recommend the Complainant for rehire because she received unsatisfactory marks on four Performance Standards. The Principal and Vice Principal further stated that they will recommend XXXX XXX probationary teachers for permanent hire if they see that their skills have grown from the prior year. According to the administrators, the Complainant was inconsistent in demonstrating growth in the areas that needed to be improved as professional educator.

As evidence of her skills, the Complainant provided OCR with a copy of three letters of recommendations from staff members praising her work as a teacher. The letters mention that she is a dedicated teacher, worked to obtain educational supports for her students with challenges, supported a student diagnosed with Autism, collaborated with grade level teachers, tutored migrant students, used data to drive instructional decision, and received additional

training in a balanced literacy program. The Complainant also provided a copy of a note from the Parent praising her work with the Student.

OCR noted that the Complainant's midterm and final evaluations reflected what was written in her letters of recommendation.

### Analysis and Conclusion

The Complainant engaged in a protected activity by advocating on behalf of the Student. Subsequently, the District subjected the Complainant to an adverse action by not rehiring her for the following school year. A causal connection can be inferred because the adverse action occurred sufficiently close in time to the protected activity.

The District's nondiscriminatory reason for not reemploying the Complainant was based on her evaluation. The Complainant alleged to OCR that her evaluation did not reflect her teaching skills and was a pretext for retaliation. As evidence of her teaching ability, the Complainant provided OCR with letters of recommendations and a note from the Parent commending her work with the Student.

OCR found that what was described in the letters and in the Parent's note were also included in her midterm and final evaluations. Although there was no dispute as to the Complainant's skills in this regard, the Complainant was not rehired because she received unsatisfactory ratings on four other Performance Standards. The Complainant's TEI included specific comments as to why she received the unsatisfactory ratings. OCR also found that the classroom observation notes, which were part of the evaluation, were very detailed. In reviewing all of the notes and the comments in the TEI, OCR was unable to find any evidence to suggest that what the Principal documented was inaccurate since the information that the Complainant provided as evidence for her skills was also included in her evaluation.

OCR also reviewed the final evaluations of the other probationary teachers, who were not rehired, and found that those teachers had a lesser number of unsatisfactory ratings on their Performance Standards than the Complainant (between two and three) and were still not recommended for rehire. Thus, OCR was also unable to find any evidence to suggest that the Complainant was treated differently from other similarly situated probationary teachers. For all of these reasons, OCR concluded that the preponderance of the evidence showed that the unsatisfactory ratings the Complainant received were not a pretext for retaliation. Thus, OCR concluded that the District did not retaliate against the Complainant by opting not to rehire her for the next school year.

### Conclusion

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. 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.

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.

The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

The Complainant has a right to appeal OCR's determination regarding allegation 3 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

OCR thanks you for your assistance during the resolution of this complaint. If you have any questions about the letter, please feel free to contact the case resolution team.

Sincerely,

/s/

James Wood  
Team Leader