



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

October 9, 2018

SENT VIA EMAIL

Nancy Albarrán
Superintendent of Schools
San José Unified School District
855 Lenzen Avenue
San José, CA 95126

(In reply, please refer to OCR docket number 09-17-1511.)

Dear Superintendent Albarrán:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the District. The complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether the District denied the Student a free, appropriate public education (FAPE) by not following adequate procedures for evaluation and placement, and by not providing the Student's Mother (Complainant) with procedural safeguards when it refused a requested placement.

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.

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, based on a preponderance of the evidence, that the District violated Section 504 and Title II and their implementing regulations with regard to the issue OCR investigated. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

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

Issue: Whether the District denied the Student a FAPE by not following adequate procedures for evaluation and placement, and by not providing the Complainant with procedural safeguards when it refused a requested placement.

Legal Standards

FAPE, Evaluation and Placement

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.

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services.

Under § 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

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

Procedural Safeguards

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. 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.

Facts

The following facts are relevant to OCR's analysis:

Background

During the 2016-2017 school year, the Student was a XXXXXXXXXX and attended a school (School 1) in the District. Since near the beginning of his XXXXX grade year, October XX, 2015, the Student had a Section 504 plan (2015 Section 504 Plan) at School 1. The Student's 2015 Section 504 Plan stated that he had a disability related to body sensitivity to temperature and he may break out in hives due to high temperatures. The 2015 Section 504 Plan was based on information provided from the Student's doctor (Doctor 1).

The Student lived approximately XXX miles from School 1 and was ineligible for District provided transportation (according to District administrators, students who do not live more than 3 miles away from their school do not qualify for District provided transportation). According to the Complainant, the Student could not walk long distances because he cannot walk in the heat and cannot not ride the bus because he needs an air-conditioned space (68-72° F) when it is hot, which is not provided on the school bus. She told OCR that the District told her to bring a doctor's note regarding these needs. The Complainant alleged to OCR that she provided the requested medical documentation, however, the District still did not address the Student's disability related transportation needs. The Complainant also stated to OCR that she provided information regarding additional potential areas of disability of anxiety and depression, but the District also had not addressed these areas with respect to the Student's Section 504 plan, at the time she filed this complaint.

Relevant District Policies

The District's Student Handbook and websites include a notice of non-discrimination, which covers students with disabilities, and a provision regarding Section 504. The provision regarding Section 504 explains who is an individual with a disability, and states that any student may be referred for consideration as an individual with a disability. Such referrals should be made to the site principal, and a Section 504 evaluation will be completed within 50 days (excluding vacations of over five days and days school is not in session) of the request and consent for evaluation.

The District provided OCR with its *Rehabilitation Act of 1973 Section 504 Administration Manual* (Manual), dated August of 2013, which was in effect during the time period at issue.² The Manual discusses the provision of a FAPE, as well as the evaluation and placement of students who, because of a disability, may need regular or special education or related aids and services under Section 504. It explains that “[a] parent may be asked, but not required, to provide documentation of an impairment from the student’s doctors or other treating professionals” and further states that “[t]he district is obligated to provide an evaluation” of a student suspected of having a disability “whether or not the student’s parent has provided a medical diagnosis.” The Manual also requires that parent(s)/guardian(s) be provided procedural safeguards if their request for an evaluation is denied.

The Manual explains that the Section 504 team’s final determinations will be in writing and for students who are eligible, a written plan will describe (1) the nature of the concern; (2) the basis for the determination of disability; (3) how the disability affects learning; (4) how the disability affects access to learning; and, (5) the appropriate accommodations that are necessary which vary based on student need. It also explains that the “plan will specify how the accommodations will be provided, and by whom.” The Manual states that “[t]he parent(s)/guardian(s) shall be notified in writing of the final decision concerning the services to be provided, if any, and the Section 504 procedural safeguards, including the right to an impartial hearing to challenge the decision.”

The Student’s Transportation Request & 504 Plan

As far back as October XX, 2015, the Student’s Health Contact Log indicated that staff from his school made requests for an updated doctor’s note regarding the Student’s skin condition. On October XX, 2015, School 1 held a Section 504 meeting for the Student, and developed a Section 504 plan for him, the 2015 Section 504 Plan, based on his skin condition and sensitivity to heat. The 2015 Section 504 Plan stated that the “Student may break out in hives” due to the temperature. The plan included a number of accommodations, including that the Student could: (1) carry a small spray bottle in case he gets overheated; (2) can sit near the exit or a “cool spot” in class when needed; (3) use a medical towel when needed; (4) have a pass for the nurse; (5) no physical education classes; (6) classroom range of temperature of 68°-72° should be arranged; (7) wear a medical headband; and, (8) take work with him if he leaves class due to the temperature. The only basis for the 2015 Section 504 Plan listed on the written plan was a diagnosis from a center for dermatology, cosmetic, and laser surgery.

OCR’s investigation showed that the District had a process that required every student qualified under Section 504 to have a medical diagnosis. The District’s Section 504 Coordinator, who took over the position in August 2016, has worked to change this practice since the spring of 2017. However, some site administrators have continued to require medical diagnoses for Section 504 qualification/placement. In addition to the practice of requiring medical diagnoses, the District also only conducted assessments such as psychoeducational assessments for students suspected of having a disability that qualified under IDEA, but did not consider such assessments for students suspected of having a disability under Section 504, and if the District did not have enough information to determine eligibility for a student suspected of having a disability

² In December 2017, the District told OCR that it was in the process of updating its manual.

qualifying under Section 504, it had a practice of instead requiring SST meetings for the student, rather than initiating an assessment. The District also required parents of students suspected of having a disability under IDEA to submit a letter specifically requesting an assessment.

2016-2017 School Year

According to the School's Health Contact Log, at the beginning of the 2016-2017 school year, as early as September X, 2016, the Complainant called to request transportation for the Student due to his skin condition. In response, the School requested an updated doctor's note with a diagnosis and reason the Student needed transportation so the School nurse could "complete the transportation request." The School nurse followed up with the Student's doctor on October XX, 2016, to ask how far the Student could walk, but Doctor 1 did not answer the nurse's question. On October XX, 2016, the Complainant provided a note from Doctor 1 and was, according to the District, asking for bus passes/tokens for the public bus (the District says her request later changed to door-to-door District transportation). On November XX, 2016, the Complainant requested an update from the District regarding her transportation request. However, school staff were suspicious of the validity of the new note, and they believed it still did not answer how far the Student could walk. Therefore, the School 1 nurse followed up with Doctor 1 on November XX, 2016, to find out how far the Student could walk, but again was unsuccessful in getting an answer from the doctor. On January XX, 2017, the District informed the parent that it required more information regarding the doctor's diagnoses, and on January XX, 2017, the parent provided copies of Doctor 1's note, again. The District did not offer to assess the Student to gather the additional information it needed.

On April XX, 2017, the School nurse met with the District 504 Coordinator and the parent to plan for the upcoming Section 504 meeting. According to notes regarding the meeting, the Complainant raised concerns regarding several health issues "impeding [the Student's] academic success." Specifically, the parent raised the Student's skin condition, as well as concerns regarding the Student's mental health including obsessiveness and depression. The notes also state that the Student exhibited anxiety and other possible areas of disability, and the Student has had academic difficulties since middle school.

On or about April XX, and XX, 2017 (April 2017 Section 504 Plan), the School held Section 504 meetings for the Student.³ At the Student's April 2017 Section 504 team meetings, the Complainant requested door-to-door transportation for the Student and that anxiety and depression be included as eligibility bases for the Student's Section 504 plan. With regard to transportation, the District told OCR that it offered the Student bus tokens (this is not reflected in the signed Section 504 plan), but the Complainant refused because this would require the Student to walk to a bus stop .75 miles from his home. The District Section 504 Coordinator and other School staff were skeptical as to whether the Student needed door-to-door transportation for a FAPE. In addition, the District Section 504 Coordinator did not know if the District could provide this service for the Student, so the 504 Team referred the request to the District Nurse to consider. (This was consistent with the District's practice of having the District Nurse decide

³ The District's narrative provided to OCR states that these meetings were held on April XX and XX, 2017. However, the written 504 plan lists April XX, 2017 as the date of the initial meeting, and April XX, 2017 is handwritten on the signature page in the participant signature box and the parent signature box.

any requests for transportation for Section 504 students.) The District also requested the Complainant provide an updated exchange of information release with Doctor 1. With regard to the Student's reported anxiety and depression, the District told the Complainant that they would add these areas of disability to the Student's Section 504 plan if the Complainant provided a diagnosis from his doctor. District documents also showed that on April XX, 2017, the School nurse spoke to Doctor 1 and requested information about the Student's anxiety and depression diagnoses in writing. The District did not offer to evaluate the Student with respect to these areas of reported disability or related to the transportation placement request.

According to the written April 2017 Section 504 Plan, the Section 504 team determined that the Student still qualified for a 504 plan, and the 504 plan reiterated the Student's disability of "Urticaria: Body Sensitivity to temperature." The plan listed the major life activities impacted by the Student's impairment as "[t]emperature [c]oncern," and stated that the "Student may break out in hives," and he needed "[m]odified [e]xercise." The plan further explained that the impairment limited the Student's major life activity because the Student could not participate in physical education due to overheating. The Section 504 form allowed the team to check various boxes regarding the basis for the plan; the only box checked was "medical information."⁴

The April 2017 Section 504 Plan listed a number of accommodations/supports for the Student related to body temperature, including that the Student could sit near a cool spot in class when needed, carry a spray bottle, carry a medical towel/head band, have a pass for the nurse, no physical education classes, leave a classroom if the room temperature was too hot, and have a quiet place to take tests/quizzes when needed. The plan did not include a transportation provision. The meeting notes stated "Transportation request (need distance info . . . Doc has reported to only seeing him once" and "Transportation concern" "ref[er] to [District Nurse]." With regard to concerns the parent raised regarding the Student's anxiety and depression as possible areas of additional disability, the 504 meeting notes stated, "[n]eed anxiety diagnosis" and "[n]eed diagnosis for depression." The "procedural Safeguards/Parent Rights provided" box was checked. According to the notes, the Complainant, the Student's XXXX teacher, District 504 Coordinator, School nurse, and the Student were present.

The District's written response to OCR also explained that since 2015, the Student has had a Section 504 plan in place, but has not needed to use the nurse's office or recorded a loss of class time because of his skin condition. And, with the exception of one course, the Student had passed all of his classes during the 2016-2017 school year. Therefore, the District asserted that the Student's Section 504 plan had been successful in providing him a FAPE without the provision of transportation services. Because District staff were skeptical about the connection between the Student's skin impairment and the request for door-to-door transportation, and because of the lack of detail in the information provided by the Student's doctors, they continued to request additional medical information.

⁴ Eight boxes that could be checked regarding various sources of information, as follows: "record review," "observation(s)," "medical information," "tests, reports," "parent information," "academic tests," "current grades," and "other" (with a blank space for clarification next to "other). The only box checked for the Student was for "medical information."

The District told OCR that it also suspected the Student may have a disability related to processing that may qualify the Student under IDEA. And, during the April 2017 Section 504 meetings, the District told OCR it proposed an IDEA evaluation of the Student for a suspected disability related to processing. However, no written assessment proposal was provided to the Complainant in writing at, before, or after the Section 504 meetings. According to the District, the Complainant refused the verbal offer to evaluate the Student under IDEA. The District told OCR that identification for services under IDEA would have been necessary for the District to provide door-to-door transportation for the Student, because this would be a special education service and would not be available for students only eligible under Section 504 (except through a separate request process through the District Nurse). OCR found that certain services, such as transportation and Resource Specialist Program (RSP) services were viewed in the District as “special education services,” and therefore were not available to or considered as placement options for students with Section 504 plans. Such services were only available for students on IEP plans. District administrators explained that if the Complainant had been open to a special education evaluation, they would have helped her write a letter to request such an evaluation which the District requires for an evaluation under IDEA. With respect to requiring a medical diagnosis for eligibility under Section 504, OCR found that the District 504 Coordinator has taken steps to end this District practice, including through written materials and by working directly with site Section 504 Coordinators. However, the practice has continued at some schools, including School 1, as described here.

On May XX, 2017, the District received a letter regarding the Student from another doctor (Doctor 2), stating that she was writing on behalf of the Student’s primary provider, Doctor 1, and that the student needed a “few extra support services to succeed, such as door-to-door transportation.” The letter explained that the Student’s “skin condition is exacerbated by heat and high temperature,” so it would be helpful if the school administration could help him coordinate transportation,” as he would “medically benefit from door-to-door transportation under hot weather conditions that would worsen his skin condition.” Doctor 2 instructed the District to direct any questions to Doctor 1. According to the District, it attempted to follow-up with Doctor 1 to get more information, but was unsuccessful.

On or about May XX, 2017, the Complainant again requested the District provided transportation for the Student in the fall. In response, the Section 504 Coordinator again told the Complainant that she needed to provide a doctor’s note to the District (she later learned that the Complainant had provided a doctor’s note on May XX, 2017). The 504 Coordinator then asked the District Nurse to follow-up with the Complainant regarding the request. On June X, 2017, the School nurse contacted Doctor 1 again seeking clarification about the Student’s transportation needs in “hot weather” as referenced in the May XX, 2017 note. According to the District’s written response to OCR, the District Nurse and Director of Student Services agreed to deny the transportation request.

According to the District Nurse, the requests for transportation for the Student seemed like a moving target and the District did not have enough information about his impairment to justify what was requested, so they denied the request for door-to-door transportation. The District did not provide the Complainant with anything in writing formally denying the request, explaining

the basis for the denial, or providing procedural safeguards with respect to this decision until October 2017.

The District's practice is for the District Nurse to address requests for transportation from students who do not qualify for the District's regular transportation (they live too close to a school; students are eligible for District transportation if they live more than three miles from school) or who are not receiving transportation services through their IEP plan. Through this process, a parent goes to their school site nurse and provides information about the student's medical needs which would support transportation services. The site nurse then interviews the parent and completes a Bus Service Request. If the request/need is straight-forward, the District Nurse approves the request and the District will provide the bus. According to the District Nurse, sometimes they ask whether the student can walk a block or two, and that determines whether the transportation is door-to-door.

There is a different process handled by the Special Education Department for students with IEPs, but the District Nurse handles several requests each year from non IEP students, such as students with 504 plans and students with medical issues, such as broken legs. If a transportation request comes up with the Section 504 team and they are considering transportation services, they ask the District Nurse if there is a medical justification, and the nurse decides whether the requested service is appropriate. If there is no Section 504 plan in place and the parent makes a request for transportation, it would go through the site nurse who would gather the relevant information and decide if transportation was appropriate. If the site nurse determined it was, s/he would complete a request, which would go to the District Nurse for review to determine what kind of bus would be appropriate based on the medical/disability need. The site nurse could also deny the request or simply not submit the request if s/he did not think there was adequate information from the parent. The site nurse could also request more information from the parent, or attempt to speak with the doctor to get more information. According to the District Nurse, when she has determined there is a valid medical need for transportation services, the transportation department always provides such services.

The District Nurse stated to OCR that a medical need related to a transportation request could trigger a Section 504 evaluation. However, it was unclear as to how this process would work. In addition, OCR found that a student with a mobility impairment, who the District provided as an example of a student receiving transportation services, did not have an IEP or 504 plan. According to the District, the student was on prolonged home instruction due to medical needs related to the impairment, yet she had not been assessed under IDEA or Section 504, as no assessment had been requested for the student.

2017-2018 School Year

On or about August XX, 2017, the Complainant requested that the Student be permitted to change to a new school in the District (School 2) for the 2017-2018 school year, and the District agreed. The Student therefore enrolled at School 2. Shortly after the school year began, on September X, 2017, the Complainant sent a letter to the Principal of School 2. The Complainant's letter requested a new Section 504 meeting to discuss the "door-to-door temperature controlled transportation" request for the Student "based on his health issues." The

Complainant wrote that she believed the Student was entitled to transportation services pursuant to his 504 plan. She requested that the District confirm in writing “whether the transportation I am requesting is indeed available pursuant to a 504 plan.” The Complainant also included two doctor’s notes, dated December XX, 2016 and May XX, 2017, which she said she had previously provided to the District. The Complainant requested that any requests for additional information from the Student’s doctor(s) be made in writing and that she be included in any communications with the Student’s doctor(s).⁵

On September XX, 2017, the District’s Section 504 Coordinator sent a letter to the Complainant, in response to the Complainant’s September X, 2017 letter. The District’s letter offered to hold a Section 504 meeting for the Student and explained that transportation services and supports were “available under Section 504 to the extent they are needed to enable the District to meet the education needs of students with disabilities as adequately as it meets the needs of nondisabled students.” The District’s letter stated that “the District has attempted to work with you and your son’s medical providers for the purpose of obtaining the necessary information about your son’s health related needs under his Section 504 plan.” However, the District’s letter explained that the information the District had received thus far regarding transportation and the Student’s disability related needs was “inconsistent and/or incomplete” and therefore the District was requesting “to conduct a health related assessment of your son’s needs under his Section 504 plan to determine how his health affects his school performance.” The District requested the Complainant provide her consent to such an assessment in writing. In addition, the District also reiterated its request to assess the Student for special education under IDEA, enclosing a special education assessment plan and requesting the Complainant’s consent. The District also requested any additional medical documentation that the Complainant had regarding the Student’s disability, and provided procedural safeguards.

The Complainant responded in writing to the District’s September XX, 2017 letter, and the District sent another letter to the Complainant on September XX, 2017. The September XX, 2017 letter from the District explained that as part of the proposed assessments, the District sought a “free flow” of information between the District’s assessor and the Student’s doctor. The District’s letter also stated that it was denying the Complainant’s door-to-door transportation request “[p]ending the completion of the . . . district assessment and resulting discussion”, as “[t]he District does not believe that transportation is necessary in light of the information that is known and understood at this time”, including based on information shared at the Student’s last 504 meeting and his ability to “successfully attend school in the past” without door-to-door transportation. The letter included a copy of the Student’s procedural safeguards under Section 504 and IDEA.

The District held another 504 meeting for the Student on October XX, 2017 (October 2017 Section 504 Plan), where the Complainant declined to provide consent for either assessment

⁵ As discussed above, relevant to the Complainant’s request for transportation, the December XX, 2016 doctor’s note stated that the Student “needs to be at a room temperature [less] than 72° F until otherwise medically cleared.” The May XX, 2017 doctor’s note stated that the Student “needs a few extra support services to succeed, such as door-to-door transportation” that the Student’s “skin condition is exacerbated by heat and high temperature” and that he “would medically benefit from door-to-door transportation under hot weather conditions that would worsen his skin condition.”

(under IDEA or Section 504). Without permission to conduct such an evaluation, the District did not approve the transportation request for the Student. The District informed the Complainant that if she provided consent for an assessment, it would reconsider the transportation request.

October 2017 Section 504 Plan

The October 2017 Section 504 Plan listed the Student's skin condition, as well as depression and anxiety as areas of Student "need/concern." The plan stated it was based on a record review, observation, medical information, tests, reports, parent information, academic tests, and current grades. The "Accommodations/Supports" listed in the plan included that the Student:

1. will be allowed to sit near a cool spot in class when needed;
2. may carry a small spray bottle to use in case of overheating;
3. may carry a medical towel/head band to use when needed;
4. will have a pass to the nurse for a small break/walk as needed and related to diagnosis;
5. may leave room if room temperature gets too hot;
6. will be seated near supportive peers; and,
7. will chunk XXXX assessments into shorter segments if possible and with teacher agreement.

The Student's October 2017 504 Plan was signed by the District 504 Coordinator, the School's Assistant Principal, the Student and the Complainant, as well as the Student's XXXXXXXX, XXXX, XXXXXXXX, XXXXXXXX, and XXXX XXXXXXXX teachers. The notes stated that the District proposed to evaluate the Student for Special Education, and this offer was also declined.

The District sent the Complainant a letter on the same date as the Student's 504 Meeting, October XX, 2017. The letter was in response to a letter from the Complainant dated October X, 2017, and stated that the District was not disputing that the Student had a disability under Section 504, but was "seeking additional information through the proposed assessment for the purpose of determining the exact impact and nature of [the Student's] condition on his education, including his ability to safely access school." The letter further explained that "[a]s previously explained to you," the District's "denial of your transportation request is subject to the results of the requested assessment and [the Student's] Section 504 process." The letter included an assessment plan for the Complainant to sign to consent to the assessment. The Complainant did not give such consent.

Analysis

OCR found that with respect to the Complainant's request for disability related transportation services for the Student during the 2016-2017 school year, rather than evaluate the Student as required by 34 C.F.R. § 104.35, the District repeatedly requested a medical diagnosis from the Complainant and/or requested clarifications regarding the doctor's diagnoses previously provided. This included District requests for such information on or about September X and X, 2016, November XX and XX, 2016, April XX and XX, 2017, and June X, 2017. At the Student's April 2017 Section 504 meeting and via phone with the Student's doctor on April XX, 2017, the District also requested medical diagnoses for his reported additional disabilities related

to anxiety and depression. The Complainant requested disability related transportation services as early as September X, 2016. And, after months of back-and-forth regarding doctor's notes, the Complainant again requested a placement that included transportation services, as well as additional areas of disability eligibility of anxiety and depression, at the Student's April XX, and XX, 2017, Section 504 meetings. The District told OCR it needed more information to determine the appropriate placement and eligibility of the Student with respect to these issues, and therefore repeatedly requested medical documentation and/or clarifications from the Student's doctor, during the 2016-2017 school-year and into the fall of 2017. However, the District did not propose or offer to evaluate the Student in order to obtain the additional information it needed, even after its repeated requests for medical information were unsuccessful, until the fall of 2017. And, although the District told OCR it verbally proposed to evaluate the Student for a suspected processing disability under IDEA in April 2017, the District also provided no written record of such a proposed assessment, such as an assessment plan.

Consistent with its repeated requests for medical information to determine placement and eligibility for the Student, OCR found that the District had a practice of requesting a medical diagnosis to make eligibility and placement determinations for Students under Section 504. However, under Section 504 at 34 C.F.R. 104.35(a)-(b)-104.36, the District was obligated to either propose to conduct any evaluation(s) necessary to determine these placement and eligibility decisions, or to refuse any such evaluation(s) and provide the parent/guardian with procedural safeguards under § 104.36, so that the parent/guardian could evaluate the basis of the decision and appeal it, if s/he chose. Although the District may request a medical diagnosis from a parent/guardian if one exists, a District may not refuse to conduct or unnecessarily delay conducting such an evaluation, as required by § 104.35(a), if a parent/guardian either is unable or unwilling to provide medical information. If a district determines that it needs additional information to make a determination as to whether a student qualifies under Section 504, or to determine what special education or related aids and services a student needs to receive a FAPE, under §§ 104.33-104.35 a District must propose to conduct any such assessments or evaluations, and may not pass the cost of such assessments or evaluations onto students and parents by requiring that the parent/guardian obtain a medical diagnosis. However, throughout the fall of 2016, as well as the spring, summer and early fall of 2017, the District made at least seven requests for additional medical diagnosis information from the Complainant and/or the Student's doctor, effectively transferring the burden to evaluate – which is the District's obligation under Section 504 – to the Complainant, in violation of the regulations implementing Section 504 and designed to provide the Student with a FAPE.

OCR also found that the District's practice of requiring a medical diagnosis to determine eligibility and/or placement of students under Section 504 was not limited to the Student, and the District had also imposed other unnecessary barriers to the evaluation of students who the District may have reason to suspect have a disability. During the investigation, the District's Section 504 Coordinator provided OCR emails and documents showing her efforts to get sites to stop this practice during the 2017-2018 school, but these practices continued despite these efforts, as reflected in the treatment of the Student, here. In addition, OCR found the District required the medical diagnoses from the Student (and other students), because it had a practice of not conducting or considering psychoeducational or other evaluations for students suspected of qualifying under Section 504. The District only considered conducting such evaluations for

students suspected of having a disability under IDEA – and the Complainant had refused an evaluation under IDEA, and therefore the District required a medical diagnosis. OCR also found additional barriers to evaluation of students who may have a disability, as even if the Complainant had been agreeable to the IDEA evaluation, it would have required the Complainant to send a letter requesting such an evaluation, rather than simply proposing such an evaluation based on the information it had on-hand that gave it reason to suspect the Student had a disability.⁶ Requiring SST meetings for students suspected of having a disability under Section 504, prior to evaluating such students and holding a meeting with knowledgeable people to determine identification and placement, also unnecessarily delays the identification and delivery of FAPE to such students with disabilities. OCR determined that these District practices were in violation of the District’s obligations under Section 504 at 34 C.F.R. § 104.33-104.36 including 104.35 “Evaluation and Placement” and the District’s obligation to provide timely evaluation and placement under 104.35 in order to provide a FAPE for students with a disability as required by § 104.33.

Relatedly, under § 104.35(c), all placement decisions must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options and must be based on information from a variety of sources, with information from all sources being carefully considered and documented. However, with respect to what transportation services were necessary to meet the Student’s disability related needs, the District removed the placement decision from the Section 504 team when it referred this decision to the District Nurse on April XX, 2017. The District Nurse did not participate in the Section 504 group decision-making process. Rather, sometime between the April 2017 Section 504 meeting and July XX, 2017, the District Nurse and Director of Student Services decided to deny the door-to-door transportation request. This placement decision was made outside of the Section 504 team process, without documenting the information considered, and in violation of Section 504 at § 104.35. The District’s practice to have the District Nurse make decisions about transportation unilaterally (or in consultation with the Director of Student Services) and outside of the Section 504 team process, is in violation of the regulations implementing Section 504 at 34 C.F.R. § 104.33-104.36, including § 104.35(c) and § 104.36. Section 104.35(c) specifically requires that placement decisions must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options – the Section 504 team, and not unilaterally by any one or two individuals outside of the 504 team, and § 104.36 requires the provision of procedural safeguards for such decisions. Relatedly, OCR found evidence of other students in the District who were provided transportation services through this separate process based on District reported health impairments. The District confirmed for OCR that at least one such student had not been evaluated under Section 504 or IDEA, as required by 34 C.F.R. § 104.35(a).

The regulations implementing Section 504, at 34 C.F.R. § 104.33(a) state that school districts “shall provide” a FAPE “to each qualified” individual with a disability in their jurisdiction. An “appropriate” education is defined at 34 C.F.R. § 104.33(b) as “the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of [disabled] persons as adequately as the needs of [nondisabled] persons are met and (ii) are based on adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.” Thus, in determining the appropriate placement of a student under Section

⁶ During negotiations, the District informed OCR it has taken steps to end this practice.

504, school districts must consider regular or special education and related aids and services. However, based on interviews and documents reviewed and for the Student in this matter, OCR found that the District had pre-determined that students with disabilities who may have only been eligible for a Section 504 plan could not be evaluated with tools such as psychoeducational evaluations deemed to be for “special education” as discussed above, and could not receive and were not eligible for certain services, such as transportation or RSP because these were considered “special education services,” and were therefore only available to students with IEPs. Thus, OCR found evidence that certain services would not be considered by the District for a student with a disability and a Section 504 plan, even if such a service was necessary for such a student to receive a FAPE, in violation of the regulations implementing Section 504, including at § 104.33.

Moreover, § 104.36 requires that with respect to any action taken by a district regarding the identification, evaluation or placement of a student, it will provide procedural safeguards including 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. However, OCR’s investigation showed that after the District Nurse and Director of Student Services made the decision to deny the door-to-door transportation request after the April 2017 Section 504 meeting, the District did not provide such procedural safeguards as required by § 104.36, including by not providing written notice of its decision regarding the transportation request and the basis for the decision, until at least the next semester, in the fall of 2017. Relatedly, the District also failed to provide notice through the provision of procedural safeguards of an opportunity to examine relevant records or request an impartial hearing with respect to this decision until the issue was considered further during the next Section 504 meeting on October XX, 2017.

With respect to the October XX, 2017 Section 504 meeting for the Student, and District’s proposals to evaluate the Student under Section 504 and related to possible identification under IDEA in order to further consider door-to-door transportation, OCR determined that the District made important aspects of this placement decision outside of the Section 504 process/team. Specifically, the District’s September XX, 2017 letter to the Complainant, stated that it had determined, prior to holding a 504 team meeting (which was held on October XX, 2017), that the District had determined “that transportation [wa]s [not] necessary in light of the information that is known and understood at this time” and that therefore it was denying the Complainant’s door-to-door transportation request unless the Complainant agreed to have the Student evaluated. As explained above and pursuant to 34 C.F.R. §§ 104.33-104.36, this decision to deny the request for door-to-door transportation, unless the Complainant agreed to additional evaluation was a decision that should have been made and documented by the Section 504 team at its meeting, and not prior to the Section 504 meeting and outside of the Section 504 team’s group process.

Conclusion

This concludes the investigation of this complaint. To address OCR’s noncompliance determination, the District, without admitting to any violation of law, entered into the enclosed resolution agreement (Agreement) which is aligned with the complaint allegations and the information obtained by OCR during its investigation. Pursuant to the Agreement, the District

will: (a) hold a new Section 504 meeting to determine the appropriate placement for the Student if the Student returns to the District; (b) revise relevant aspects of its policies and procedures with respect to evaluation and placement under Section 504 and issue related written guidance; (c) provide training for District and site employees regarding its revised policies and procedures; and, (d) identify students who the District has reason to suspect may have a disability and offer to evaluate and place such students consistent with the regulations implementing Section 504 at 34 C.F.R. §§ 104.33-104.36.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement . Upon completion of the obligations under the Agreement, OCR will close the case.

OCR's determination in this matter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank the District for its cooperation in resolving this case. If you have any questions regarding this letter, please contact OCR Senior Attorney Brian Lambert at 415-486-XXXX or Brian.Lambert@ed.gov.

Sincerely,
/s/

Rhonda Ngom
Acting Team Leader

cc: Rodney L. Levin, McArthur & Levin, LLP (email)