



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

August 11, 2021

**VIA ELECTRONIC MAIL**

Dana Trevethan  
Superintendent  
Turlock Unified School District

(In reply, please refer to case no. 09-18-1592).

Dear Superintendent Trevethan:

The U.S. Department of Education, Office for Civil Rights (OCR), has reached a resolution regarding the above-referenced complaint against Turlock Unified School District (District). The Complainant alleged that the District discriminated against the Student<sup>1</sup> on the basis of disability. Specifically, OCR investigated the following issues:

1. Whether the District failed to provide the Student with a free, appropriate public education (FAPE) by failing to timely evaluate the Student for special education or related services and failing to implement her individualized education program (IEP).
2. Whether the District responded promptly and equitably to Complainant's complaint that the Student was subjected to discrimination on the basis of disability.<sup>2</sup>

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. OCR also investigated the complaint pursuant to Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit 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 Complainant's and Student's identities. We are withholding their names from this letter to protect their privacy.

<sup>2</sup> OCR originally notified the parties of the following wording of the second issue: The Student was subjected to harassment by a Recipient employee based on her disability, and the Recipient failed to respond appropriately and effectively to notice of the harassment. OCR has revised the second issue to more accurately reflect the complaint filed with the District by the Complainant.

To investigate this complaint, OCR gathered evidence by reviewing documents provided by the District and the Complainant. OCR also interviewed the Complainant and the School Principal (Principal).

Based upon the preponderance of the evidence, with regard to allegation 1 OCR determined there was insufficient evidence that the District failed to implement the agreed upon placement for the Student. However, OCR identified a compliance concern that the District failed to timely identify and evaluate the Student for special education and related aids and services. With regard to allegation 2, OCR determined that there was sufficient evidence that the District failed to respond promptly and equitably to the discrimination complaint made by the Complainant.

### **Legal Standard**

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

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. Under § 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Sections 104.4(a) and (b) of the regulations, prohibit discrimination based on disability by recipients of 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. A public School District that receives federal funds is responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment based on disability can result in the denial or limitation of a student's ability to participate in or benefit from educational services, activities or opportunities.

A school district provides program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the District is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the District is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the District must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, and remedy the effects of the harassment. The District must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

### **Factual Findings**

The Student was in XXXXX grade at a District elementary school (School) when the events at issue occurred during the 2017-2018 school year. In the prior school year, the Student was diagnosed with complex partial seizures and epilepsy and was placed in home and hospital in the Spring 2017. At that time, the District did not refer the Student for an assessment and the Student did not have a Section 504 plan nor an Individualized Education Program (IEP).

On August XX, 2017, the Complainant emailed the Student's Teacher indicating that the Student may have medical conditions that require her to have access to the restroom. The Teacher indicated that the Student could use the restroom when needed and asked if the Student also needed accommodations for physical education (PE).

On August XX, 2017 the Complainant, Student's physician, and the School Nurse (Nurse) developed and signed a Health Plan for the Student due to the Student's "seizure disorder". The Health Plan provided accommodations to the Student such as being escorted when leaving the classroom, avoiding strikes to the head, being allowed to do light physical activities, and it also provided for steps the Student would take if she felt ill such as lying on her side, and notifying the health office and parents.

On September XX, 2017, the Complainant and Teacher exchanged emails regarding the Student struggling academically at School. The Complainant also informed the Teacher that earlier that day a substitute PE teacher told the Student she could not get a drink of water because she refused to run all of the laps. The Teacher apologized and indicated that documentation about the Student's accommodations should have been provided to the substitute. According to the Principal, Health Care Plans are shared with relevant

staff, copies are also kept in a binder in the office, and the Student's electronic file is flagged in the District's information system. The Student's Health Plan did not have a provision for accessing water during PE.

On September XX, 2017, in response to a request by the Student's parents and a letter from the Student's Physician, the School permitted the Student to arrive late on account of migraines. The District stated to OCR that at this time the Student and her parents were getting greater clarity on the Student's condition through consultation with specialists.

On September XX, 2017, the Complainant emailed the Teacher inquiring about a Student Study Team (SST) for the Student. The Teacher responded by email that communication regarding the SST would likely come from the Assistant Principal.

On October XX, 2017, the Student's Teacher went on leave through March 2018. After October XX, 2017, a Long-Term Substitute Teacher (L-T Sub) was assigned to the Student's XXXXX grade class. On December X and X, 2017, two incidents happened (December 2017 incidents) involving the L-T Sub and the Student.

On December X, 2017, the Student arrived late to class. According to the Complainant, when the Student explained that her late arrival was because of her medical condition involving epilepsy and severe headaches, the L-T Sub stated, "if you have cancer you need to be at school and show up on time every day." The Complainant told OCR that the Student was upset when she arrived home and asked the Complainant why everyone "hated" her. Following this incident, the Complainant called the School Principal and the Principal said she would speak to the L-T Sub.

On December X, 2017, according to the Complainant, the L-T Sub refused to allow the Student to go to the Nurse after she indicated she was not feeling well and was experiencing a headache. According to the Complainant, the L-T sub told the Student that she also suffers from migraines, that the Student should just push through them, that the Student should stop coming to the School, that she did not "look sick", and that she believed the Student was lying to get out of doing work. According to the Complainant, the Student began to cry begging to go to the Nurse. The Student then left the class to attempt to go to the Nurse and was turned away by a health clerk and the school secretary. (The Nurse was not on campus that day.) According to the Complainant, the Student went to the bathroom and laid on the floor until her parents picked her up. The Student spent the remainder of the day suffering from vomiting, nausea and a massive migraine. Documentation from the health clerk office for that day indicates that the Student came in crying with a migraine, said that the substitute teacher said she was lying about the migraine, and that she had doctor's orders to see the Nurse if she wasn't feeling well. The health clerk left a message for the Student's parents asking them to bring the migraine medication to School. She then sent the Student back to class and informed her that she would let her know if she heard back from a member of her family. The Principal stated to OCR that at the time, the Health Plan was for the seizure disorder and

that the information they did have about the migraine headaches was that the Student would benefit from a later start to the school day.

Also, on December X, 2017 the Complainant, Student, Assistant Principal, Principal, and School Nurse convened an SST meeting and discussed the Student's diagnoses and possible accommodations. On December X, 2017 the Nurse emailed the Complainant a copy of an updated Health Plan to reflect the Student's diagnosis of migraines and provided for the Student to: go to the health office with a buddy if her head hurt; drink water, do breathing techniques; lie down and rest for 30 minutes in the health office with dimmed lighting; ask if the Student is nauseous and provide a snack; provide any prescribed medication needed to be taken at school; and to call the Complainant if the headache does not improve or the Student is unable to do work in class.

On December X, 2017, the Principal met with the L-T Sub about her refusal to allow the Student to go to the Nurse on December X. The L-T Sub stated that on December X, 2017 the Student said she could not do work, and when the L-T Sub asked her to do math, the Student stated that she had a migraine and wanted to go to the nurse. The L-T Sub permitted the Student to go to the restroom, but the Student instead went to the health tech office and called her parents. According to the Principal, although the L-T Sub denied making the alleged comments to the Student that the Complainant reported, the Principal counseled the L-T Sub to not make such comments. The Principal stated to OCR that the L-T Sub had been informed about the Student's Health Plan. The Principal decided to remove the L-T Sub from the classroom.

According to the Principal, she spoke with the Student on December XX, 2017 about the December X, 2017 incident. Also on December XX, 2017, the Complainant filed a police report against the L-T Sub regarding the December X, 2017 incident.

On December XX, 2017, the Complainant emailed a student support staff member in the District's Education Services Department describing the Student's diagnoses, experiences with the L-T Sub from the prior week, the impact of those experiences on the Student, and her concerns regarding the District's response to the same. Also, on December XX, 2017, the Complainant requested in writing for the Student to be evaluated for special education services and that same day the District informed her that an assessment plan would be ready for review and signature upon the District's return from winter break on January X, 2018. On January XX, 2018, the assessment plan was created and on January XX, 2018, the District received from the Complainant the signed assessment plan.

On December XX, 2017, the Complainant submitted a letter to the Superintendent regarding her concerns over the December 2017 incidents with the L-T Sub. In the letter to the Superintendent, the Complainant described the December X and X, 2017 incidents with the L-T Sub. According to the Complainant, she did not receive a response from the Superintendent about her concerns regarding the L-T Sub's alleged conduct.

In March 2018, the Teacher returned from leave.

On March XX, 2018, the District convened the Student's initial IEP meeting with the resource teacher, school psychologist, program specialist, the Nurse, the classroom Teacher and both of the parents in attendance. The IEP team noted that the Student struggled with math skills, lacked attendance, lacked foundational academic skills, and struggled with anxiety about her math skills. The IEP Team determined that further assessments were necessary with regard to social and emotional areas and that it would reconvene once those were completed. The Complainant alleged to OCR that the IEP team failed to consider all of the Student's medical records which were missing from the Student's cum file which resulted in the Team needing to do further evaluation. The Teacher, Psychologist, Nurse and Principal stated that the Team did not decide to reconvene at a later date because of the missing documentation but rather because they determined that more information was needed in the social and emotional areas. Also on March XX, 2018, the Complainant signed the Health Plan drafted on December X, 2017.

On March XX, 2018, the Complainant alleges that during a meeting between the Teacher, Complainant and the Student, the Teacher characterized the Student as defiant, disrespectful, unmotivated, unfocused and taking advantage of the situation and then questioned the Student about her medical condition. The Complainant explained to the Teacher that the Student had exotropia which causes the eye to move on its own or when she is nervous. The Student reported to the Complainant that prior to the start of the March XX meeting the Teacher, "grabbed her upper arm squeezing it and pressing her nails into her skin."

On April XX, 2018, the Complainant emailed the Teacher stating that earlier that day the Teacher told the Student, "I know you are different than all of us, but you still need to follow the rules." The Complainant also stated in her email that the Teacher and some of the School staff were discriminating against the Student. The Teacher forwarded the Complainant's email to the Principal the same day and denied making the alleged comment and stated, "If anything, I may have said something in the direction of 'you are 'NOT' any different than the rest of us, so you also need to follow the rules."

On May X, 2018, the IEP team reconvened, and determined that the Student qualified for special education services on the basis of "emotional disturbance and other health impairment." The IEP team agreed to provide the Student with a positive peer buddy; a separate setting for test taking; a non-disruptive fidget; coping materials (drawings); 1:1 corrective feedback; extended time to complete missing assignments with an option for sending work home to be completed; and in P.E. class, exemption from climbing, swimming, or participating in contact sports. The IEP also provided for parent and staff communication; the Teacher to monitor a daily agenda; breaks as needed, initiated by either the Student or Teacher. The Student was to receive 240 minutes of specialized academic instruction per week.

On May XX, 2018, the Complainant filed a written complaint pursuant to the District's Uniform Complaint Process (UCP) alleging disability discrimination against the Student when the Student was "harassed" by some School staff and when staff failed to comply with the Student's Health Plan. With regard to the harassment allegation, the Complainant

alleged that there was “constant harassment” from the L-T Sub which began in December 2017, and also from the Teacher who made negative comments about the Student being defiant during the March XX, 2018 IEP meeting and during another meeting on March XX, 2018, grabbing the Student’s arm on March XX, 2018, and making the alleged April XX, 2018 comment to the Student. The Complainant alleged that these incidents impacted the Student making her not want to go to school and feel shunned and bullied.

In a July X, 2018 document entitled “Uniform Complaint Procedure Report” (Report) the Director of Student Services (DSS) summarized the District’s investigation and determinations regarding the Complainant’s May XX UCP complaint. The Complainant was mailed a copy of this report on July XX, 2018.

According to the Report, the complaint alleged disability-based discrimination when staff did not comply consistently with the Health Care Plan and staff was not responding to parent concerns and requests for a special education assessment. As part of its investigation, the District reviewed the complaint documents, some health documents related to the Student, reports from four witnesses (the Teacher, Principal, Nurse, and Psychologist), correspondence from the Complainant, IEP related documents, Board policies, and the Complainant’s December XX, 2017 police report.

The four witness reports referenced in the Report consisted of a document written by the DSS to the four witnesses with some background information regarding the complaint and a request for each of them to answer the twelve questions in the document. Each of the four witnesses received the same twelve questions. The twelve questions covered the following topics/areas: Name; current position; information regarding the Student’s health plan; medical diagnosis; procedure for dissemination of the health plan; procedure for P.E. exemption notes; storage or filing of student medical records; the allegation that the L-T Sub did not allow the Student to go to the nursing office; the rationale for rescheduling the March XX, 2018 IEP meeting to May X, 2018; who is required to attend IEP meetings at the School site; and whether staff would find information from the Mayo Clinic about seizures and a training about signs and symptoms of the same helpful. The Principal stated to OCR that her participation in the investigation of the UCP included filling out the set of questions provided by the DSS and that each staff member who was asked to provide information for the investigation did the same.

According to the Report, the DSS held a meeting with the Student’s parents as part of the District’s Alternative Dispute Resolution effort on May XX, 2018 and as a result determined that further investigation would be required following that meeting. According to the Report, after the May XX meeting, the District found that “at no time was the child harassed or discriminated by the staff at [School ] on the basis of the disability,” but rather that, “the Health Care Plan may not have been clearly written...which resulted in a misunderstanding of disability and inconsistent compliance. “

The District’s Report stated that a preponderance of the evidence evidentiary standard was used, and it included a brief summary of information gathered from the four witnesses as part of its findings of facts, and brief conclusions that it found all staff credible, the

parents cooperative, no past instance of similar conduct by any alleged offenders or false allegations by Complainant. The Report determined that the allegations were “unfounded” based on witness interviews and documentation reviewed. The Report stated that the School was in compliance with the referral to Special Education; the Health Care Plan was developed and understood by the parties; no evidence was found that the Student was harassed or discriminated against by staff because of disability; and that the School was providing the Student with accommodations, intervention and support services. The Report included additional information about the services provided to the Student and the intention to schedule an IEP meeting for the start of the following school year. The Report nonetheless proffered suggested corrective actions including developing procedure to distribute Health Care Plans to all relevant staff; that School staff continue to respond to parent concerns in a responsible and caring manner; and that the School provide time for staff training on interventions and supports for “students’ fragile medical conditions.” Also, the District provided notice to the Complainant of the appeals process through the California Department of Education (CDE). The Complainant filed an appeal with the CDE on August X, 2018 which was dismissed by CDE as untimely.

## **Analysis**

With regard to Issue 1, OCR found that the parties agreed to address the Student’s needs through the creation of a Health Plan. OCR found insufficient evidence that the District failed to implement the Student’s Health Plan. The Complainant alleged that the Plan was not implemented when the Student indicated she had a migraine headache on December X. The Student’s Health Plan provided accommodations with regard to her seizures. There were no provisions in the Health Plan regarding migraine headaches until the Plan was updated during an SST meeting held after the incident on December X. Notes from the District’s online system indicated that the Student was seen in the Health office on that day and her parents were notified. In light of the above, there is insufficient evidence that the District failed to implement the Student’s Health Plan.

Although OCR found insufficient evidence that the District failed to implement the agreed upon placement for the Student, OCR identified a compliance concern that the District may have failed to conduct a timely evaluation of the Student. Given the information the District had since the prior school year that the Student was substantially impaired by her medical condition, OCR is concerned that the District had a reasonable basis to suspect a disability that triggered a duty to promptly initiate the evaluation process at that time. Specifically, the District was aware that in or about February 2017 the Student enrolled in its home and hospital program because she was unable to attend classes in-person due to her medical condition. Then, early on in the 2017-2018 school year, in August and September 2017, the Complainant spoke to the Teacher about the need for accommodations and again with other staff while creating the Student’s Health Plan. This evidence raises a compliance concern for OCR as it indicates that the District did not take actions to timely evaluate the Student although it had a reasonable basis to suspect that the Student needed special education or related aids and services because of her disability.



With respect to Issue 2, where the allegations filed with OCR have been investigated through a school district's internal grievance procedures, OCR thoroughly reviews all documentation of the district's investigation and resolution of the complaint to determine whether the district provided a comparable resolution process using legal standards that are acceptable to OCR. For the reasons stated below, OCR's review of the district's handling of the Complainant's internal grievance indicated that the process was not comparable to that of OCR and not consistent with the requirements of Section 504.

In regard to the Complainant's May XX, 2018 UCP, OCR evaluates the appropriateness of the District's response to notice of disability discrimination by examining reasonableness, timeliness, and effectiveness. What constitutes a reasonable response will differ depending upon the circumstances. OCR found that the District timely conducted its investigation, within 60 days of its receipt of the UCP, and provided the Complainant with notice of the outcome of its investigation.

However, in regard to the allegations regarding the failure to implement the Student's Health Plan and harassment of the Student by District staff, OCR found that the scope and method of the District's inquiry was not designed to reliably determine what occurred. In the UCP, the Complainant alleged a number of specific dates and actions taken which resulted in failures to implement the Student's Health Plan and disability-based harassment of the Student. However, the District's documentation of its investigation included written "reports" from four witnesses, the Teacher, Principal, Psychologist, and Nurse, but not the Student or L-T Substitute, one of the key staff against whom allegations were made. Furthermore, although each of these four individuals had information relevant to the allegations, their knowledge of and experience in the alleged events or actions varied. Nonetheless, the witnesses were all provided with the same written twelve questions, some of which sought information about implementation of the Student's Health Plan but, none of which asked for information about the conduct alleged to have constituted harassment on the basis of the Student's disability. In its July X Report, the District stated that it determined that the Student was not at any time harassed or discriminated on the basis of disability after meeting with the parents, which occurred prior to beginning any inquiry with relevant staff. Thus, by the District's own Report of its investigation it notes that it made its determination of the harassment issue before conducting any inquiry of that issue. Finally, the method of information gathering, by written response, to the same twelve questions, regardless of the interviewee's role and position, did not facilitate an effective investigation as it did not allow for follow-up questions tailored to the interviewee or the response. As such, the District's investigation was not reasonably designed, in scope or method, to reliably determine whether the disability discrimination allegations made by Complainant in her UCP of May XX, 2018 occurred.

With regard to the complaints made in the UCP, as described above OCR found insufficient evidence of a failure to implement the Student's Health Plan but, did identify a compliance concern with regard to the failure to timely evaluate the Student. OCR also found insufficient evidence that the Student was subjected to disability-based harassment by the L-T Sub or the Teacher. While the alleged comments by the L-T Sub would be

concerning, there was insufficient evidence to establish that the comments were made. Further, although in her meeting with the Principal regarding the December incidents the L-T Sub denied making any comments, she was removed from the Student's classroom. Furthermore, there is insufficient evidence to establish that the alleged conduct and comments alleged to have been made by the Teacher occurred, were due to the Student's disability, and would rise to the level to constitute discriminatory harassment.

Overall, with regard to issue 2, OCR found under Section 303(b) of OCR's Case Processing Manual that a preponderance of evidence supported the conclusion that the District violated Section 504 and Title II and their implementing regulations with respect to its failure to respond appropriately to notice of discrimination when it did not conduct an equitable investigation of the Complainant's May XX, 2018, UCP.

## **Conclusion**

On August 11, 2021, the District signed the enclosed resolution agreement to remedy the areas of concern and noncompliance, as described above. The Resolution Agreement requires that the District convene the Student's IEP team to determine what compensatory services, if any, are necessary to compensate for the delay in identifying the Student for Special Education aids and services and provide training to staff at the District and School regarding complaint investigation, identification and evaluation of students with disabilities.

Based on the commitments made in the agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of it. 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'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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Christina Gonzalez, Civil Rights Attorney at [Christina.Gonzalez@ed.gov](mailto:Christina.Gonzalez@ed.gov).

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosures