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October 28, 2016

Vaitinasa Dr. Salu Hunkin-Finau
Director of Education
American Samoa Department of Education
Utulei
Pago Pago, American Samoa 96799

Re: American Samoa Department of Education
OCR Reference Nos. 10141101, 10141165, 10141168 and 10141369

Dear Vaitinasa Dr. Salu Hunkin-Finau:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the four above-referenced complaints against the American Samoa Department of Education (ASDOE). The complaints alleged that ASDOE discriminated against students on the basis of disability, as described specifically below.

OCR Reference No. 10141101 alleged that ASDOE:

1. failed to convene a properly constituted team of individuals to make decisions about changes to a student's (Student A's) special education placement when a district administrator unilaterally decided he would not receive the mental health counseling services his Individualized Education Plan (IEP) team had previously decided he needed; and

2. failed to implement the behavioral services described in Student A's IEP since the fall of 2013.

OCR Reference No. 10141165 alleged that ASDOE failed to implement a student's (Student B's) IEP and provide necessary services, such as behavioral, occupational, and speech therapy, during the 2013-2014 school year.

OCR Reference No. 10141168 alleged that:

1. ASDOE failed to implement a student's (Student C's) IEP and provide necessary services, such as behavioral, occupational, and speech therapy during the 2013-2014 school year;

2. any special education and related services that were provided to Student C during the 2013-2014 school year were provided by untrained, unlicensed, and/or uncertified staff;

3. the district failed to conduct a necessary psychological evaluation of Student C during the 2013-2014 school year; and

4. the resource room for disabled students at XXXXXXXXXXXX was older, dirtier, and had dated furniture compared to classrooms for nondisabled students.

OCR Reference No. 10141369 alleged that ASDOE failed to implement a student's (Student D's) IEP and provide him necessary related aids and services, such as occupational therapy, physical therapy, speech therapy, and assistive technology devices during the 2013-2014 school year.

OCR enforces section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act of 1990. These laws prohibit disability discrimination in programs and activities receiving federal financial assistance from the U.S. Department of Education and by public entities, respectively. ASDOE receives federal financial assistance from the Department and is a public entity, and is therefore subject to these laws.

The legal issues investigated were:

1. Whether ASDOE discriminated against students A, B, C, and D, based on disability, by failing to provide services necessary for the students to receive a free appropriate public education, including behavioral services (Students A, B, and C); occupational therapy (Students B, C, and D); speech, language, and communication services (Students B, C, and D); psychological evaluation (Student C); physical therapy (Student D); and assistive technology (Student D) during the 2013-2014 school year, in violation of 34 C.F.R. 104.33 and 104.35(a).

2. Whether ASDOE failed to provide Student C with a free appropriate public education because special education and related services that were provided for the student were provided by staff members who were untrained, unlicensed, and/or uncertified to provide the services, in violation of 34 C.F.R. 104.33.

3. Whether ASDOE failed to convene a properly constituted team of individuals to make decisions about changes to Student A's special education placement when a district administrator unilaterally decided

Student A would not receive the mental health counseling services his IEP team had previously decided he needed, in violation of 34 C.F.R. 104.35(c).

4. Whether ASDOE discriminated against disabled students at XXXXXXXXXXXXXXXX by placing them in a classroom that was older, dirtier, and had dated furniture compared to classrooms for nondisabled students, in violation of 34 C.F.R. 104.4(b)(1)(iii).

OCR's findings of fact and conclusions, set forth below, are based upon information and documents provided by the complainants and ASDOE. With respect to issue No. 3, OCR determined that the evidence did not support a conclusion that ASDOE violated Section 504 or Title II with regard to the issue investigated. With respect to issues Nos. 1, 2, and 4, OCR determined that there was sufficient evidence to support a conclusion that ASDOE failed to comply with Section 504 and Title II. After notifying ASDOE of the identified violations, OCR entered into discussions with ASDOE regarding a Settlement Agreement (Agreement) that would serve to voluntarily resolve the identified violations for all four complaints. ASDOE has made a commitment in the enclosed signed Agreement to undertake actions that, when completed, will fully address the violation identified by OCR in all four related complaints.

ISSUE NO. 1:

Whether ASDOE discriminated against students A, B, C, and D, based on disability, by failing to provide services necessary for the students to receive a free appropriate public education, including behavioral services (Students A, B, and C); occupational therapy (Students B, C, and D); speech, language and communication services (Students B, C, and D); psychological evaluation (Student C); physical therapy (Student D); and assistive technology (Student D) during the 2013-2014 school year, in violation of 34 C.F.R. 104.33 and 104.35(a).

Findings - Issue No. 1:

Student A

1. During the 2013-2014 school year, Student A attended XXXXXXXXXXX. During the 2013-2014 school year, the student was identified by ASDOE as a student with a disability, XXXXXXXXXXXXXX and received special education services according to an IEP.

Behavioral Services

2. On September 4, 2013, ASDOE convened an IEP meeting to review Student A's IEP. Among other services, the IEP provided Student A

with behavioral services once a week for 45 minutes, to be provided by a resource teacher (Resource Teacher A).

3. In prior years, Resource Teacher A had been an acting behavior specialist, and had provided behavioral services to the student per the student's prior IEPs.

4. On October 21, 2013, Resource Teacher A sent an e-mail to the parent explaining that he would no longer provide behavioral services to Student A.

5. Resource Teacher A told OCR that in fall 2013, he requested a move back to a resource teacher position in a special education classroom because ASDOE had failed to officially change his position to that of a behavioral specialist during the years he had been acting in that capacity.

6. Resource Teacher A told OCR that as of fall 2013, he no longer provided behavioral services to students, including Student A. Resource Teacher A stated that he told the parent and Student A's teachers that if there were any severe issues he would help out, and also directed them to the school counselor.

7. Resource Teacher A told OCR that he was not aware of anyone providing behavioral services to Student A during the remainder of the 2013-2014 school year.

8. During the 2013-2014 school year, another resource teacher (Resource Teacher B) provided Student A with one-on-one academic services in the general education classroom. Resource Teacher B told OCR that to her knowledge, Student A did not receive behavioral services during the 2013-2014 school year. Resource Teacher B said she was told that ASDOE no longer had a behavior specialist and could no longer provide behavioral services to students beginning in fall 2013.

9. The XXXXXXXXXXX resource specialist told OCR that Student A did not receive any behavioral services during the 2013-2014 school year after Resource Teacher A stated he would no longer provide those services in fall 2013.

10. The XXXXXXXX vice principal told OCR that Student A did not receive behavioral services from Resource Teacher A during the 2013-2014 school year. She stated that he may have received behavioral services from someone else, though she did not know who that would have been.

11. The XXXXXXXXXXX school principal told OCR that she does not know of anyone providing behavioral services to Student A during the 2013-2014 school year.

Student B

12. During the 2013-2014 school year, Student B attended kindergarten at XXXXXXXXXXX. The student transferred to ASDOE from an out-of-state school. ASDOE identified the student as a student with a disability, Autism, based on his IEP from his previous school.

13. Student B's annual IEP review meeting occurred on October 24, 2013. On January 10, 2014, the district held an IEP meeting to follow-up on requests from the student's parent for services.

14. Student B's IEP included services such as behavioral support and counseling from an Applied Behavior Analysis (ABA) Therapist; speech, language and communication; and occupational therapy.

Behavioral Support and Counseling

15. Student B's 2013-2014 IEP provided for two 60 minute sessions a week of behavioral counseling and services, from an ABA Therapist. One 1-hour session was to occur on campus and the remaining hour was to be provided at the student's home each week.

16. Prior to the January 10th meeting with the IEP Team, the student received counseling from a special education teacher who had training in counseling, once a week for 45 minutes, according to the teacher. The student did not receive behavioral and counseling services from an ABA Therapist as stated in the IEP.

17. The ABA Therapist began providing services to Student B in January 2014 at the parent's expense. The IEP that was amended at the January 10th IEP meeting included a hand written note by the parent indicating that she would pay for the student's behavioral support services from January 10 to January 24, 2014; that ASDOE is responsible for providing the behavioral support services after January 24, 2014; and that she was requesting reimbursement from ASDOE for the behavioral support services she had paid for.

18. From January 2014 to April 2014, the parent compensated the ABA Therapist $50 dollars per week for 3 hours of behavioral support and counseling services. The ABA Therapist stated that ASDOE had committed to hiring her in January but had not offered her an employment contract.

19. The ABA Therapist stated that she was hired by a private practice located on the island in April 2014. From April 2014 through June 2014, she did not provide behavioral therapy services to Student B or any other ASDOE student. Student B did not receive behavioral services from an ABA Therapist from April 2014 to June 2014.

20. The parent stated that ASDOE did not reimburse her for the payments made to the ABA Therapist for behavioral counseling and support for Student B.

21. The ABA Therapist was hired by ASDOE in June 2014. The hiring process took approximately six months.

Occupational Therapy

22. The student's IEP provided that Student B would receive occupational therapy "30 minutes a day, three times a week in the classroom or to be pulled out into a private classroom when requested by service provider."

23. During the 2013-2014 school year, ASDOE did not have an occupational therapist on staff to provide services.

24. Student B's IEP noted that the student's parents requested occupational therapy services. The IEP further stated that ASDOE did not have an occupational therapist but that they would "tap into" other government agencies to check on occupational therapy services for students. The IEP stated that, in the meantime, the ABA Therapist would work closely with Resource Teacher A to provide training and occupational therapy services for Student B.

25. The ABA Therapist stated that she had shadowed a couple of occupational therapy sessions in the past, but was not trained in occupational therapy and did not have the experience to train someone else to provide occupational therapy. The ABA Therapist stated that she was not aware of Student B receiving any occupational therapy services.

26. The XXXXXXX resource specialist stated that Student B did not receive occupational therapy during the 2013-2014 school year because ASDOE did not have an occupational therapist.

27. Student B's special education teacher (Resource Teacher A) stated that he helped the student with certain skills such as helping him hold a pencil and trace letters but that he is not an occupational therapist.

28. ASDOE did not assess Student B to determine what type of occupational therapy services he required.

Speech, Language, and Communication Services

29. Student B's 2013-2014 IEP stated that speech and language services were requested by the parents, but that ASDOE did not have a speech and language pathologist (SLP), so the services would be provided by Student B's teacher with assistance from the ABA Therapist. The IEP stated that the ABA Therapist shared in the meeting that she had experience and received training for speech therapies, and would provide assistance while ASDOE waited for a licensed SLP. ASDOE did not conduct a speech and language evaluation of Student B to determine what type of speech and language services the student needed.

30. ASDOE did not have a licensed SLP on staff to provide speech therapy to students during the 2013-2014 school year.

31. ASDOE had contracted sporadically with a licensed SLP located in Hawaii for the 2013-2014 school year, and during at least four prior years. ASDOE had recently amended the SLP's contract to provide for the SLP to visit American Samoa quarterly. Staff reported varied lengths of the SLP's visits, generally ranging from two to four weeks. During the SLP's visits, she evaluated some students and provided training to some teachers regarding how to provide speech and language services to students. The SLP did not evaluate Student B, provide services to him, or train teachers to provide him services during the 2013-2014 school year.

32. The ABA Therapist stated that she had previously shadowed a SLP but that she was not specifically trained in that area, so she could not provide a full range of speech and language services for students.

33. Student B's speech and language services were provided by Resource Teacher A. Resource Teacher A stated that ASDOE was to provide speech and language therapy training, but the only training he received was from

the ABA Therapist, who herself was not a trained SLP. He also supplemented his training by researching online different activities to help Student B communicate. Resource Teacher A worked with the student on vocabulary, the Samoan alphabet, and identifying pictures on cards. Because an SLP never evaluated the student's needs, Resource Teacher A used his own judgement to determine what services may be beneficial for the student.

34. The parent stated that because Student B was not receiving services during the 2013-2014 school year, the family moved back to the mainland in June 2014.

Student C

35. During the 2013-2014 school year, Student C attended third grade at XXXXXXXX. The parent stated that Student C was not diagnosed with a specific disability, but she assumed that the disability was XXXXXX. Student C's IEP in use during the 2013-2014 school year did not identify Student C's disability.

36. Student C's annual IEP review meeting occurred on October 3, 2013. Student C's IEP included services such as behavior support and counseling; speech, language and communication; and occupational therapy.

Behavioral Support and Counseling

37. Student C's IEP provided for two hours of behavioral support and counseling services a day from the ABA Therapist. Student C's IEP noted that the student's parent requested a licensed certified behavior pathologist to work with the student. During the 2013-2014 school year, ASDOE did not have an ABA Therapist on staff to provide behavioral services and counseling.

38. Student C's parent told OCR that she compensated the ABA Therapist privately to provide services to the student. The ABA Therapist stated that she worked with Student C three hours per week based on what the student's parent could afford to compensate her.

39. The Assistant Director of ASDOE Special Education Division stated that before the ABA Therapist was hired in June 2014, the ABA Therapist was providing services to Student C and billing ASDOE.

40. The ABA Therapist stated that she was hired with a private practice in American Samoa in April 2014. From April 2014 through June 2014, she did not provide behavioral therapy services to Student C or any other ASDOE student.

Occupational Therapy

41. Student C's IEP provided that the student would receive occupational therapy three hours a week from an occupational therapist.

42. During the 2013-2014 school year, ASDOE did not have an occupational therapist on staff to provide services. As a result, ASDOE did not provide Student C with any occupational therapy services during the 2013-2014 school year.

Speech, Language and Communication

43. Student C's IEP provided that the student would receive speech therapy three hours a week from an SLP and teacher. The student was not evaluated by a SLP to determine the type of speech and language services the student needed.

44. Student C's IEP noted that the parent requested a licensed certified SLP to work with Student C. ASDOE did not have a licensed SLP on staff to provide speech therapy to students during the 2013-2014 school year.

45. Similar to Student B, above, ASDOE contracted with a licensed SLP to come to American Samoa four times a year for two to four weeks, but the SLP did not evaluate, provide services, or train staff to provide services for Student C.

46. Student C's special education teacher told OCR that she would spend about five to ten minutes per day working with Student C on speech and language. The teacher stated that she had not received training on providing speech and language services, and was not aware of any evaluation or plan that identified the type of speech and language services Student C needed.

Psychological Evaluation

47. Student C's 2013-2014 IEP stated that the student required a psychological evaluation by a licensed psychologist during the 2013-2014 school year.

48. On March 3, 2014, the student received a Psycho-Educational Assessment by ASDOE assessment officer for special education. The assessment officer is responsible for administering certain tests when a student is referred for special education. The assessment officer is not a psychologist. The assessment officer stated that the Psycho-Educational Assessment is an academic test, not a psychological evaluation.

49. ASDOE did not have a psychologist on staff to conduct psychological evaluations during the 2013-2014 school year, and did not contract with a psychologist to evaluate Student C. The student did not receive a psychological evaluation during the 2013-2014 school year.

Student D

50. During the 2013-2014 school year, Student D attended XXXXXXXXXX. ASDOE identified Student D as a student with a disability, XXXXXXXX, in need of special education services according to an IEP.

51. ASDOE developed an IEP for Student D which indicated it was in effect October 28, 2013, to October 28, 2014. The IEP provided for, among other services, speech, language and communication services twice a week, to be provided by the speech provider and the resource teacher; assistive technology (AT) services twice a month provided by an AT service provider, with additional help from the resource teacher; and physical therapy (PT) twice a month provided by the physical therapist and the resource teacher. The IEP stated that Student D will use low tech devices and communication boards.

Speech, Language, and Communication

52. The XXXXXXXX resource teacher and resource specialist told OCR that the school had a designated speech provider who was not an SLP but who had attended ASDOE-provided trainings to learn how to provide speech services to students. The resource teacher told OCR that the school's designated speech provider worked collaboratively with her and other resource teachers on how to provide Student D's speech, language, and communication services.

53. According to the resource specialist, the school's designated speech provider worked with Student D one-on-one twice a week for about 45 minutes during the 2013-2014 school year. The resource specialist stated that the resource teachers watched the designated speech provider work

with Student D so that they could continue the work she did with Student D on a daily basis.

54. The resource teacher told OCR that the school's designated speech provider worked with Student D for about 30 minutes at a time on the days the student attended school. ASDOE did not document the number of minutes of speech, language, and communication services the student received, so OCR was unable to determine the exact amount of time the student received such services, but the resource specialist's and teacher's testimony indicate that the student received such services twice a week as contained in Student D's IEP, unless he was absent from school.

55. The resource specialist and the PT told OCR that, beginning spring 2014, ASDOE contracted with an SLP to provide training to ASDOE's designated speech providers and conduct speech/language assessments, on periodic visits to American Samoa.

Assistive Technology

56. The resource teacher and the resource specialist told OCR that the AT referenced in Student D's IEP consisted of low-tech communication devices, including a board for communication through eye-gazing, and button and switch devices the student could use to respond.

57. The resource teacher told OCR that the AT specialist at the main district office came to the school and showed the teachers how to use the AT devices for communication with Student D.

58. The resource specialist told OCR that they used flash cards on the computer, and she also provided her own electronic devices to download apps and audiobooks for Student D, and created an ebook for the student.

Physical Therapy

59. Student D's parent's position is that the student was not provided all of the physical therapy services (PT services) the student needed during the 2013-2014 school year because ASDOE employs only one physical therapist (PT) to serve all ASDOE students on the five islands of American Samoa, and his time is spread too thin. The parent also stated that Student D did not get adequate PT services because the standing frame he used in his classroom was missing a part that was not replaced until near the end of the school year.

60. ASDOE employs one PT who is responsible for providing PT services to all ASDOE students who need PT services to access their education. The PT told OCR that during the 2013-2014 school year, he was responsible for providing PT services to approximately 41 students across American Samoa, requiring a lot of driving and making it impossible to provide daily PT services to students.

61. The PT told OCR that he provided the direct PT services identified in Student D's IEP, and the resource teacher provided the student indirect PT services on a daily basis. The PT stated that the direct services he provided Student D included working with the student XXXX

66. The resource teacher told OCR that during the 2013-2014 school year, Student D attended school about half of the total school days. The parent did not give a reason why the student missed school, and told OCR that she believed that student D attended school regularly during the 2013-2014 school year.

67. The PT stated that he would attend Student D's school at least twice a month to provide services to the student but that sometimes the student was not at school the day he visited. According to the resource specialist, the PT attended XXXXXXXXXXXXXXXXX 25 times total (two or three times each month) from September 4, 2013, to May 29, 2014. The PT did not keep a regular schedule for his services, but instead provided services on the days he was able to visit the student's school.

68. According to the resource teacher, Student D and the PT were at school at the same time approximately once a month during the 2013-2014 school year. The resource specialist estimated that the PT was able to provide direct services to Student D 6 or 7 times during the 2013-2014 school year, because the student was absent during the PT's other visits.

69. The PT told OCR that he is not able to see all the students he serves as much as they need to be seen, because of the traveling he must do to visit them all.

Occupational Therapy

70. The PT told OCR that Student D had received occupational therapy services (OT services) when ASDOE employed an occupational therapist but that Student D had not received any OT services since the occupational therapist left American Samoa, prior to or at the beginning of the 2013-2014 school year.

71. The resource teacher and the resource specialist told OCR that ASDOE used to have an occupational therapist who provided services to Student D but that ASDOE did not have an occupational therapist for the 2013-2014 school year, and therefore could no longer provide OT services to students.

72. The resource teacher and the resource specialist stated that the reason Student D's IEP does not contain a provision for OT services is because ASDOE does not have an occupational therapist to provide the services, and other ASDOE personnel do not have the training to provide OT services to Student D. The resource specialist stated that she and Student D's IEP team agreed that Student D needed OT services but

that they cannot provide OT services without an occupational therapist. The resource specialist stated that ASDOE is trying to find an occupational therapist.

Conclusion - Issue No. 1

The issue OCR investigated was whether ASDOE discriminated against students A, B, C, and D, based on disability, by failing to provide services necessary for the students to receive a free appropriate public education, including behavioral services (Students A, B, and C); occupational therapy (Students B, C, and D); speech therapy (Students B, C, and D); psychological evaluation (Student C); physical therapy (Student D); and assistive technology (Student D) during the 2013-2014 school year, in violation of 34 C.F.R. 104.33 and 104.35(a).

The regulation implementing Section 504 at 104.33(a) states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation at 34 C.F.R. 104.33(b)(1) states that the provision of an appropriate education is 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 upon adherence to procedures that satisfy the Section 504 regulation requirements. The Section 504 regulation at 34 C.F.R. 104.35(a) states that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of that section of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Title II is interpreted consistently with the requirements of Section 504.

The evidence established that: (1) Student A did not receive behavioral services that were contained in his IEP and necessary for him to receive a free appropriate public education (FAPE); (2) Student B did not receive behavioral, occupational therapy, and speech therapy services that were contained in his IEP and necessary for the student to receive a FAPE; (3) Student C did not receive behavioral, occupational therapy, and speech therapy services that were contained in his IEP, and did not receive a necessary psychological evaluation, all of which were necessary for the student to receive a FAPE; and (4) Student D did not receive communication services, physical therapy services, and occupational therapy services that were contained in his IEP and were necessary for the student to receive a FAPE.

The investigation established that ASDOE has continuing and systemic failures to provide special education students with necessary services due to a lack of professionals to provide those services. ASDOE had no occupational therapist or school psychologist on staff. While ASDOE had recently contracted with a speech language pathologist (SLP) from Hawaii, the SLP comes to ASDOE quarterly to conduct some evaluations and do some training and her schedule was insufficient to meet the needs of ASDOE's disabled students with speech and language service needs. ASDOE had a physical therapist (PT) on staff, but one PT is not sufficient to provide services for all of ASDOE's disabled students who require physical therapy.

Based on these findings, OCR has determined that ASDOE has violated Section 504 and Title II with regard to issue No. 1.

ASDOE has voluntarily agreed to resolve the above described violation as set forth in the enclosed Agreement which, when fully implemented, will resolve the identified violation. OCR will monitor ASDOE's implementation of the Agreement and will close the complaints when OCR determines that the terms of the Agreement have been satisfied.

ISSUE NO. 2:

Whether ASDOE failed to provide Student C with a free appropriate public education because special education and related services that were provided for the student were provided by staff members who were untrained, unlicensed, and/or uncertified to provide the services, in violation of 34 C.F.R. 104.33.

Findings - Issue No. 2

1. CR incorporates the findings regarding Student C in issue No.1, above, at Nos. 35 - 49.

2. Student C's 2013-2014 IEP included behavioral services two hours a day from an ABA Therapist. ASDOE did not provide an ABA Therapist to provide the services for Student C during the 2013-2014 school year, although the parent paid for those services during part of the school year. Before and after the parent provided those services, any informal behavioral services that were provided to the student were not provided by a trained ABA Therapist as required in the student's IEP.

3. Student C's 2013-2014 IEP included occupational therapy services three hours a week from an occupational therapist. ASDOE did not have an occupational therapist on staff during the 2013-2014 school year. Any

informal occupational therapy services that were provided to Student C were not provided by an occupational therapist as required in the student's IEP.

4. Student C's 2013-2014 IEP included speech therapy three times a week from an SLP and teacher. ASDOE did not provide an SLP to evaluate the student, train the teacher, or provide speech therapy for the student. Student C's special education teacher spent five or ten minutes a day working with the student on speech and language issues. The teacher is not trained, licensed, or certified in speech and language services, and was not provided an evaluation or other plan to guide her with the speech therapy the student needed. The teacher told OCR that she has not received training regarding speech and language pathology.

Conclusion - Issue No. 2

The issue OCR investigated was whether ASDOE failed to provide Student C with a free appropriate public education because special education and related services that were provided for the student were provided by staff members who were untrained, unlicensed, and/or uncertified to provide the services, in violation of 34 C.F.R. 104.33 (see issue No. 1 for Section 504 regulations related to a free appropriate public education).

While Section 504 does not contain training, licensure, or certification requirements for disability services providers, the providers must have sufficient training, licensure, or certification to be able to carry out the responsibilities contained in the IEP. Student C's IEP specifically contained services that were stated to require an ABA Therapist, an occupational therapist, and speech therapy from a SLP and teacher. Student C did not receive the required services from an ABA Therapist, occupational therapist, or SLP. While Student C's special education teacher provided some informal assistance with speech and language issues, those services were not planned or provided by someone trained in speech and language pathology.

The evidence, therefore, established that ASDOE violated Section 504 and Title II with regard to this issue.

ASDOE has voluntarily agreed to resolve the above described violation as set forth in the enclosed Agreement which, when fully implemented, will resolve the identified violation. OCR will monitor ASDOE's implementation of the Agreement and will close the complaints when OCR determines that the terms of the Agreement have been satisfied.

ISSUE NO. 3:

Whether ASDOE failed to convene a properly constituted team of individuals to make decisions about changes to Student A's special education placement when a district administrator unilaterally decided Student A would not receive the mental health counseling services his IEP team had previously decided he needed, in violation of 34 C.F.R. 104.35(c).

Findings - Issue No. 3

1. Student A's September 2013 IEP states that the student would receive mental health services for 45 minutes once a week. The IEP stated that the mental health support the student would receive was to be informed, and stated, "waiting on [ASDOE's Special Education] office for an update on a certified individual to provide the services; however, the determination of the amount of compensatory MH counseling services was by the IEP team per settlement agreement from Office for Civil Rights shared by mother in meeting. (To be updated)." The IEP summary stated, regarding extended school year services, "[t]he mental health [services] will also be provided for the student based upon the agreement within the IEP meeting on 9/4/2013." Part of the settlement agreement in a previous OCR complaint (OCR Reference No. 10121042) was for Student A's IEP team to determine the amount of mental health support services the student needed, if any, and to provide compensatory mental health support services.

2. In response to this OCR complaint, the ASDOE Director of Education wrote that ASDOE has been unable to match Student A with a certified professional who could provide the mental health counseling services he required due to numerous obstacles, including: (1) the local procurement office's concerns that one local professional who had other contracts with other local government agencies may not have enough time to devote to the student; (2) efforts to seek assistance from professionals located outside of American Samoa were unsuccessful; and (3) professionals who had worked in the past with ASDOE were either unavailable or were no longer interested in working with ASDOE.

3. The resource specialist told OCR that at Student A's September 4, 2013, IEP team meeting, the team decided to provide the student with 45 minutes of mental health counseling services per week after discussing an OCR letter the parent brought indicating that ASDOE was required to provide compensatory mental health counseling services to the student. The resource specialist stated that the program director and the parent coordinator were responsible for sharing the IEP team's decisions with

the special education office, and the IEP team then waited for the special education office to provide the mental health counseling services.

4. In September 2013, following the student's IEP team meeting, the parent provided consent for a hospital to release to ASDOE a note from Student A's psychiatrist dated June 14, 2012. The note stated that Student A "does not exhibit evidence of a psychiatric disorder," and recommended that "suicide risk assessment form part of regular school counseling for [Student A]."

5. In March 2014, ASDOE called a meeting to discuss the June 14, 2012, note from the psychiatrist, but then cancelled the meeting because some invitees did not show up for the meeting.

6. In a response to a different OCR complaint, ASDOE's Deputy Director of Education stated that sometime prior to the March 2014 meeting, special education officials met with ASDOE Career and Guidance counseling administrators to review the psychiatrist's June 14, 2012, note. The deputy director's letter stated that ASDOE had not implemented mental health counseling by a mental health professional for the student. The deputy director stated that ASDOE offered Student A the opportunity to be evaluated by a school psychologist who was a consultant for ASDOE, but Student A's parent refused. Parent A stated that she thought ASDOE was asking for the evaluation as a delay tactic, and did not believe it was necessary to start providing the service.

7. The resource specialist told OCR that she was told by her supervisors that the psychiatrist's June 14, 2012, note indicated that Student A did not need the mental health counseling services the IEP team had decided to include in his IEP.

8. ASDOE did not provide information indicating that it held an IEP meeting, or modified the September 2013 IEP that provided for 45 minutes of mental health services once a week for Student A.

9. Resource Teacher B, the XXXXXXXXXXXXX vice principal, and the XXXXXXXXXXXXXXX parent coordinator told OCR that they believe the reason Student A did not receive any mental health counseling services is because ASDOE does not have access to personnel who are qualified to provide that service due to limited resources.

Conclusion - Issue No. 3

The issue OCR investigated was whether ASDOE failed to convene a properly constituted team of individuals to make decisions about changes to Student A's special education placement when a district administrator unilaterally decided Student A would not receive the mental health counseling services his IEP team had previously decided he needed, in violation of 34 C.F.R. 104.35(c).

The section 504 regulation at 34 C.F.R. 104.35(c) states that, in interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources…; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with section 104.34 (educational setting). Title II regulations are interpreted consistently with Section 504 FAPE regulations.

The evidence indicated that the IEP team determined Student A required 45 minutes a week of mental health counseling services. While the evidence indicated some of the staff believed that a note from Student A's private psychologist indicated he did not need the services as part of his IEP, the evidence did not indicate that ASDOE held an IEP meeting or changed his placement with regard to the mental health counseling services.

Because the evidence did not establish that ASDOE unilaterally changed Student A's placement with regard to mental health counseling services, and ASDOE's failure to provide such services is already being addressed as part of the monitoring in another OCR settlement agreement, OCR has determined that the evidence does not support a violation of Section 504 or Title II with regard to the alleged unilateral placement.

OCR is monitoring an agreement reached with ASDOE in OCR Reference No. 10121042 regarding related concerns, including providing the necessary mental health counseling services for Student A.

ISSUE NO. 4:

Whether ASDOE discriminated against disabled students at XXXXXXXXXXXXXXXX by placing them in a classroom that was older, dirtier, and had dated furniture compared to classrooms for nondisabled students, in violation of 34 C.F.R. 104.4(b)(1)(iii).

Findings - Issue No. 4:

1. The parent of Student C told OCR that the resource room at XXXXXXXXXX was older, dirtier, and had dated furniture compared to the classrooms for nondisabled students.

2. ASDOE indicated in its written data response that the resource room was renovated during spring and summer 2013 to include: ceiling repair; new walls; re-tiled floors; and a new air conditioner. Additionally, a sink and additional electrical outlets were installed in the room. ASDOE provided photos of the resource room.

3. The school's resource specialist stated that a parent raised a concern during the 2013-2014 school year that the furniture in the resource room was not appropriate for the students, and the room was dirty. The resource specialist stated that ASDOE responded by moving the resource room to a bigger classroom prior to the beginning of the 2014-2015 school year. ASDOE cancelled classes for the students in the resource room because the new room was not ready for use at the beginning of the 2014-2015 school year. Students in the resource room missed one week of school.

4. The school's special education teacher told OCR that the ceiling of the new resource room was damaged. The teacher said that the damaged ceiling was not confined to the resource room, but affected the entire building. The teacher stated that all the rooms at XXXXXXXXXXXXXX, including the resource room, were in poor condition, and that the resource room's age, cleanliness, and furniture were not worse than the other classrooms at the school.

5. In follow-up e-mails, the parent stated that the current resource room was "much improved" and "much cleaner." The parent stated that when the resource room is compared to other rooms in ASDOE, the resource room is probably better than the other rooms now because classrooms in American Samoa are generally poorly equipped and maintained.

Conclusion - Issue No. 4

The issue OCR investigated was whether ASDOE discriminated against disabled students at XXXXXXXXXXXX by placing them in a classroom that was older, dirtier, and had dated furniture compared to classrooms for nondisabled students, in violation of 34 C.F.R. 104.4(b)(1)(iii).

> The Section 504 regulation at 34 C.F.R. 104.4(b)(1)(iii) states that a recipient, in providing any aid, benefit, or service, may not…, on the basis of disability, provide a qualified disabled person with an aid, benefit, or service that is not as effective as that provided to others.
>
> The evidence failed to establish that the resource room for disabled students was in worse condition than classrooms for nondisabled students at XXXXXXXX. However, as part of the investigation of this issue, OCR found evidence that the district failed to provide students in XXXXXXXXXXX resource room with any educational services for a week at the beginning of the 2014-2015 school year while the new resource room was being prepared. ASDOE did not offer the students an alternative location in which to receive their educational program. OCR concludes that ASDOE treated these disabled students differently than their nondisabled peers when it failed to provide them with an educational program during this time period, in violation of Section 504 and Title II.
>
> ASDOE has voluntarily agreed to resolve the above described violation as set forth in the enclosed Agreement which, when fully implemented, will resolve the identified violation. OCR will monitor ASDOE's implementation of the Agreement and will close the complaints when OCR determines that the terms of the Agreement have been satisfied.

This letter sets forth OCR's determination in individual OCR cases and should not be interpreted to address ASDOE's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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. You may have the right to file a private suit in court regardless of OCR's determination.

Please be advised that ASDOE may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainants 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 bringing this matter to our attention. If you have any questions, please contact Emily Hazen, equal opportunity specialist, by telephone at (206) 607-1615, or by e-mail at emily.hazen@ed.gov.

Sincerely,

/ s /

Paul Goodwin
Supervisory Attorney

Enclosure: Settlement Agreement