November 25, 2014

Dr. Richard Fitzpatrick
Superintendent
Upper Freehold Regional School District
27 High Street
Allentown, New Jersey 08501

Re: Case No. 02-13-1241
Upper Freehold Regional School District

Dear Dr. Fitzpatrick:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the Upper Freehold Regional School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, when it rescinded its offer of admission into its Advanced Mathematics and Algebra Program at Stone Bridge Middle School for school year 2013-2014, on May 29, 2013.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

In its investigation, OCR interviewed the complainant and District staff. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

The District sponsors the Advanced Mathematics and Algebra Program (the Program), a program for students in grades five through seven, at Stone Bridge Middle School (the School) in

accordance with the New Jersey Interdistrict Public School Choice Program Act (the Act)[1]. Pursuant to the Act, school districts in New Jersey may develop full school-day specialized programs to which any student residing in New Jersey may apply. These specialized programs, many of which focus on subjects such as math, art, music, foreign languages, and technology, are referred to as Choice Programs. A school district must apply to the New Jersey Department of Education (NJDOE) in order to become a "choice district". In accordance with the Act, once a student is admitted into the choice district's program, that student becomes a student of that choice district and is not charged any tuition for the specialized program. The choice district is responsible for implementing an admitted student's individualized education plan (IEP) developed by the student's home district, and for conducting later re-evaluations of the student, and developing subsequent IEPs for the student, if warranted.

Applicants for the Program are required to submit a completed application, along with the following documentation: a transcript; a Notice of Intent to Participate Form, to be sent to the applicant's home district; a copy of the applicant's most recent New Jersey Assessment of Skills and Knowledge Exam score report; a recommendation from the applicant's prior school year's math teacher; and a copy of an IEP or Section 504 plan, if applicable.

During school year 2012-2013, the Student was a fifth grade student enrolled in his home district, the XXXXXX XXXXXXX Public School District. He was classified as a student with a learning disability, and received related aids and services pursuant to an IEP. On November 26, 2012, the complainant submitted the Student's application to the Program for school year 2013-2014, his sixth grade year; and provided all application materials with the exception of the Student's IEP. The secretary to the District's Assistant Superintendent contacted the complainant on November 30, 2012, to request that she send the Student's IEP. Later that day, the complainant submitted the first two pages of the Student's IEP for school year 2012-2013. The complainant asserted that the District requested only the first two pages of the Student's IEP. The District denied this assertion, and informed OCR that it requested a full copy of the IEP. The District acknowledged, however, that after it received the first two pages of the IEP, it did not request that the complainant provide the remaining pages of the IEP prior to the Student's acceptance into the Program.[2]

The Superintendent, Assistant Superintendent, and Principal reviewed all applications for the Program. In early December 2012, the Superintendent contacted the complainant to advise her that the District determined that it would not be able to accept the Student into the Program because his IEP required the provision of the Wilson Reading Program.[3] The Superintendent stated that the District did not have enough space in its existing Wilson Reading Program to accommodate the Student, nor the funds to expand this program to include the Student; however, the Student had otherwise qualified for admission into the Program. The complainant informed

[1] N.J.S.A. 18A:36B-16, et al.

[2] The Student's complete IEP was 13 pages long, and the header of the second page of the IEP received by the District stated, "Page 2 of 13". Therefore, it should have been clear to the District when it received only the first two pages of the Student's IEP that it was incomplete.

[3] The Superintendent informed OCR that the Wilson Reading Program was discussed on the second page of the Student's IEP. The Superintendent also informed OCR that the District was able to provide the other services identified in the first two pages of the Student's IEP, which included in-class resource support during his language arts, social studies, and science classes; and testing accommodations (the nature of the testing accommodations were not identified in the first two pages of the IEP).

the Superintendent that she would be willing to have the Student forego the Wilson Reading Program; and on December 21, 2012, submitted to the District an affidavit so stating. The District informed OCR that it therefore decided to admit the Student into the Program. By letter to the complainant, dated December 21, 2012, the District notified the complainant that it had accepted the Student into the Program.

On May 16, 2013, the complainant and District staff met during a Child Study Team (CST) meeting to discuss the implementation of the Student's IEP for school year 2013-2014.[4] The District informed OCR that during this meeting, the complainant first provided the remaining pages of the Student's IEP for school year 2012-2013 (pages 3-13); and a draft of his IEP for school year 2013-2014.[5] The District asserted that during this meeting, it learned for the first time that the Student's IEP required the provision of a scribe for the Student; and, that the complainant insisted during the meeting that the Student would need a scribe in order to participate in the Program. District staff informed the complainant during this meeting that it would not be able to provide a scribe to the Student because it lacked the resources to do so. By electronic mail message (email), dated May 17, 2013, a District Learning Disability Teacher Consultant, who attended the CST meeting on May 16, 2013, informed the complainant that the provision of a scribe would have to be removed from the Student's IEP in order for the Student to attend the Program. By email, dated May 20, 2013, the complainant informed the Learning Disability Teacher Consultant that she agreed for the Student to forego a scribe.

On May 24, 2013, the Superintendent and Principal contacted the complainant by telephone. The Superintendent informed the complainant that the District must honor the Student's IEP from his home district, even though the complainant was willing to forego the scribe and Wilson Reading Program. By email to the complainant, dated May 27, 2013, the Superintendent informed the complainant that providing a scribe to the Student would create an undue burden on the District and fundamentally change the Program. He stated that the complainant should see how the Student performs without a scribe in his home district before "significantly modifying his services simply to allow him to gain admission [into the Program]." The Superintendent added that the Student could re-submit an application for school year 2014-2015.

By letter, dated May 29, 2013, the District informed the complainant that it had revoked the Student's acceptance into the Program because the implementation of his IEP would require the District to fundamentally alter the nature of its program and create an undue financial burden. It cited the provision of the Program's application materials that stated that "Acceptance into the

[4] In the interim, the Student visited the School on March 20, 2013, and met Program staff and students.

[5] The Student's home district drafted his IEP for school year 2013-2014 on March 20, 2013. It included the following services: in-class resource support for his language arts, social studies, and science classes; in-class resource for his language arts class; Wilson Reading Program; provision of class notes; extra time for task completion; provision of books on tape, CD, or read-aloud computer software; assistance with organization of planner/schedule; directions repeated, clarified, or re-worded; directions read aloud; additional time to complete classroom tests/quizzes; small group administration of classroom tests/quizzes; modified tests/quizzes; number of choices on tests/quizzes modified; provision of word banks for recall tests; tests read aloud; access to accurate notes; modified homework assignments (modify content, modify amount, as appropriate); additional time to complete classroom tests/quizzes; edit written work with teacher guidance; and access to a keyboard for writing. For district-wide, state-wide, and classroom assessments, the IEP provided: tests administered individually in a separate room; addition of time as needed; provision of frequent breaks; directions read out loud; repeating, clarifying or rewording directions only; and recording responses on a word processor (all editorial functions must be disabled).

Choice Program is conditional upon the Upper Freehold Child Study team acceptance of the final 2012-2013 annual review/re-evaluation, if applicable." The letter also stated that the District only received the first two pages of the Student's IEP for school year 2012-2013, and that the remaining pages contained information that suggested that the Program would not be appropriate for the Student based on his disability.[6] The letter stated that the complainant's offer to remove services from the Student's IEP did not resolve his need for such services.

The District asserted that it had a legitimate, non-discriminatory reason for revoking the Student's acceptance into the Program; namely that providing the Student with the related aids and services outlined in his IEP would cause an undue financial burden on the District and fundamentally alter the Program. In support of this assertion, the District cited to N.J.S.A. 18A:36B-20, which provides that a choice district may decide to reject an otherwise qualified student with a disability if the provision of services pursuant to that student's IEP would require the district to "fundamentally alter the nature of its educational program, or would create an undue financial or administrative burden on the district".

The Superintendent informed OCR that after the complainant agreed to have the Student forego the Wilson Reading Program and the scribe, he became uncomfortable with the idea that the District would not be fully implementing the Student's IEP and providing all of the services deemed necessary by the Student's home district; therefore, on May 24, 2013, he conducted a cost analysis for the provision of a scribe and the Wilson Reading Program to the Student. The Superintendent informed OCR that this analysis consisted of speaking with the Director of Special Education; and calculating the cost of hiring a scribe for the Student. The Director of Special Education informed the Superintendent that there was no room in the District's existing Wilson Reading Program, and that the District would have to hire another special education teacher to teach an additional class of the Wilson Reading Program. The Superintendent informed OCR that he calculated that the cost of hiring a new teacher of a Wilson Reading Program would be approximately $68,139.00 per year.

With respect to the provision of a scribe, the Superintendent also estimated that it would cost approximately $42,489 per school year to hire a paraprofessional to serve as a scribe. The District cited the provision under the "Test Procedures Accommodations/Modifications" section of the IEP related to district-wide, state-wide, and classroom assessments that stated, "Response accommodations/modifications: recording responses on a word processor (all editorial functions MUST be disabled)." The District asserted that this provision indicated that the Student required a scribe; however, OCR determined that neither this provision nor any other in the Student's IEP for school year 2013-2014 states or implies that a scribe is an approved related service for the Student.

> The regulation implementing Section 504, at 34 C. F. R. § 104.33, requires a recipient to provide a free, appropriate public education (FAPE) to each qualified

[6] The letter stated that the Student's IEP, "contained rich data that suggests that [the Student's] learning needs and required modifications appear not to be compatible with the design of this academy. It appears that [the Student] would struggle with this aggressive math program and experience difficulty in the other core content areas surrounding this program as well. The IEP states that "[the Student] XXX XXXXXX XXXXXXXXXX XXXX XXXXX XXXX XXX XXXX XX XXXX XX XXXX XXX XXX XXX XX XXX XXXXX". This observation from the [Child tudy Team] evaluator suggests that this program could potentially be unsuitable for him."

> individual with a disability who is in the recipient's jurisdiction. The provision of a FAPE is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students are met. The regulation states that implementation of an IEP is one means of meeting this requirement.

OCR policy has long established that federal law does not prohibit states from requiring that responsibility for providing a FAPE to students with disabilities be transferred from the school district of the child's residence (resident district) to the non-resident school district of parental choice (choice district), as the Act currently does.[7] The effect of this allocation of responsibility, however, may not operate to deny any of the substantive rights and procedural safeguards guaranteed by the regulation implementing Section 504 to children with disabilities and their parents.[8] Accordingly, once the District admitted the Student, pursuant to the Act, the District was responsible for providing a FAPE to the Student. Notwithstanding the District's assertion that it was entitled under state law to rescind its offer of admission to the Student because the provision of services pursuant to his IEP would create an undue financial burden on the District, the regulation implementing Section 504 does not recognize an exception for providing a FAPE based on an argument of undue administrative or financial burden; neither does the regulation recognize an exception for fundamental alteration of the program.[9]

Moreover, the Act does not otherwise define what is meant by "fundamental alteration" or "undue financial or administrative burden." In the instant case, the District had already admitted the Student, so it did not "reject" the Student as contemplated in the Act. The District informed OCR that it had a legitimate, non-discriminatory reason to rescind its admission offer because N.J.S.A. 18A:36B-20 permitted it do so when implementing the Student's IEP would fundamentally alter the nature of the Program and cause an undue burden. Assuming that this provision of the Act also allows the District to rescind offers of admission for these reasons, OCR analyzed whether the District's reliance on N.J.S.A. 18A:36B-20 was pretextual.

Pursuant to the regulation implementing Section 504, at 34 C.F.R § 104.4(b)(i), a recipient may not, on the basis of a person's disability, deny that person the opportunity to participate in or benefit from any aid, benefit, or service. Further, pursuant to the regulation implementing Title II, at 28 C.F.R. § 35.130(a), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. Further, 28 § 35.130(b)(1)(i) states that a public entity may not, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from any aid, benefit or service.

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[7] If the parents opt out of the choice program, Section 504 requires the resident district to make a FAPE available to the student.

[8] *See* Letter to the Commissioner of Education of the Nebraska Department of Education, from Robert R. Davila, Assistant Secretary of the U.S. Department of Education, Office of Special Education and Rehabilitative Services, and William L. Smith, Acting Assistant Secretary of the U.S. Department of Education, Office for Civil Rights; dated March 15, 1990.

[9] If the responsible recipient is unable to offer an appropriate program, it is responsible for identifying an appropriate program pursuant to the regulation implementing Section 504, at 34 C.F.R. §104.35(c).

The District provided insufficient information to support that the provision of the Wilson Reading Program and a scribe to the Student would result in a fundamental alteration of the services or activities of the Program; or that it would cause an undue financial burden to the District. The District acknowledged that it already had the Wilson Reading Program in the School, and did not offer any explanation of how hiring an additional paraprofessional to serve as a scribe would fundamentally alter the Program. With respect to the cost of hiring staff to provide these services to the Student, OCR's review of District public records indicated that the District's projected operating budget for school year 2013-2014 was $34,243,479.00. Assuming that the District's projected costs of $68,139.00 to provide the Wilson Reading Program to the Student and $42,489.00 (for a paraprofessional) to serve as a scribe are accurate, these expenditures represent an insignificant portion of the District's over $34 million budget.[10]

Further, OCR determined that once the District concluded that it was too expensive to provide the Student with the Wilson Reading Program and a scribe, it did not request that its own Child Study Team evaluate the Student in order to determine if these services were necessary in order to accommodate his disability or if other alternatives were available. OCR also determined that there is no information indicating that the District consulted with the Student's resident district to better understand the extent of the services and why they were necessary.

In addition, as noted above, the District stated in its letter to the complainant, dated May 29, 2013, that it was concerned that the Student's IEP's stated that the Student "XXX XXXXXX XXXXXXXXX XXXX XXXXX XXXX XXX XXXX XX XXXX XX XXXX XXX XXX XX XXX XXXXX". The District further stated, "This observation from the [Child Study Team] evaluator suggests that this program could potentially be unsuitable for him." However, the Student's IEP did not state that this XXXXXXXXXXX impeded his ability to understand the course material or complete his work; nor did the IEP include any related aids and services regarding the Student's frustration. There is no evidence that the District made any efforts to evaluate the Student to determine whether the Student's alleged XXXXXXXXXXXXXXXXXX issues would make it difficult for him to successfully participate in the Program.

OCR determined that the District's reason for rescinding its admission offer to the Student, *i.e.*, that N.J.S.A. 18A:36B-20 permitted it to not admit the Student into the Program because doing so would fundamentally alter the Program and create an undue financial burden, was pretextual. OCR found insufficient evidence to determine that the provision of the services at issue would fundamentally alter the Program or create an undue financial burden in the context of the District's budget. In addition the District interpreted a provision in the Student's IEP to mean that he required a scribe, although it is unclear that this provision actually required this; and it misconstrued language in the Student's IEP to argue that the Student's alleged XXXXXXXXXXXXXXXXXXX XXXXX would make it difficult for him to participate in the Program. Further, the District did not conduct its own evaluation of the Student to confirm whether the services at issue were necessary; whether alternatives were available; or whether the

[10] As stated above, it is not clear whether the Student's IEP for school year 2013-2014 required the Student to have a scribe.

Student's alleged XXXXXXXXXXXXXXXXXX XXXXX issues would make the Program an inappropriate placement for him.

The regulation implementing Section 504 does not recognize an exception for providing a FAPE based on an argument of undue administrative or financial burden; neither does the regulation recognize an exception for fundamental alteration of the program. Based on the foregoing, OCR concluded that the District's actions in rescinding the Student's admission offer denied the Student an equal opportunity to participate in the Program and subjected him to different treatment on the basis of his disability.

On October 22, 2014, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to the allegation. OCR will monitor the implementation of the resolution agreement. If the District fails to implement the terms of the resolution agreement, OCR will resume its investigation of the complaint.

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

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant 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 law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination, please contact Crystal Johnson, Senior Compliance Team Investigator, at (646) 428-3821, or crystal.johnson@ed.gov; or Coleen Chin, Senior Compliance Team Attorney, at (646) 428-3809, or coleen.chin@ed.gov.

Sincerely,

/s/
Timothy C. J. Blanchard

Encl.

cc: Cherie Adams, Esq.