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OFFICE FOR CIVIL RIGHTS, REGION IV

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October 18, 2016

Gary Houston
Director of Schools
Union City School District
408 S. Depot Street
Union City, TN 38261

Re: OCR Complaint #04-14-1564

Dear Mr. Houston,

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Union City School District (District) on May 12, 2014, alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District denied the Student a free appropriate public education (FAPE), by failing to provide him with a Section 504 Plan and related aids and services and by suspending him twice (10 and 20 days) without conducting a manifestation determination during the 2013-14 school year at Union City High School (School).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit recipients of Federal financial assistance from the Department from discriminating on the basis of disability, and Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In this matter, OCR investigated whether the District discriminated against the Student on the basis of disability, by denying him a FAPE during the 2013-14 school year, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.33(a) and (b)(1) and 104.35, and Title II and its implementing regulation at 28 C.F.R § 35.130.

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. In reaching a determination in this matter, OCR reviewed and analyzed documents submitted by the Complainant and the District, including documents OCR requested and received from the

District. OCR also interviewed the Complainant and the District's Section 504 Coordinator. Based on its investigation, OCR has determined that the evidence is sufficient to support a finding that the District denied the Student a FAPE, in noncompliance with Section 504 and Title II. In addition, based upon a preponderance of the evidence, OCR finds that there is sufficient evidence to support a finding of noncompliance with respect to the District's grievance procedures under Section 504 and Title II.

Legal Standards

Free Appropriate Public Education

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b) requires a recipient to provide a FAPE to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the student's disability. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the educational needs of individuals with a disability as adequately as the needs of individuals without a disability are met and are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36, regarding educational setting, evaluation and placement, and procedural safeguards.

The Section 504 implementing regulation at 34 C.F.R. § 104.35(a) requires a recipient that operates a public elementary or secondary education program or activity to conduct an evaluation in accordance with the requirements of § 104.35(b) of a student 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.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(b) requires a recipient to establish standards and procedures for the evaluation and placement of a student with a disability which ensure that (1) tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and that (3) tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

The regulation implementing Section 504 at 34 C.F.R. § 104.35(c) provides that, in interpreting evaluation data and in making placement decisions, a recipient (1) shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (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

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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 504's educational setting requirements.

The Title II implementing regulation at 28 C.F.R. § 35.130 is interpreted consistently with Section 504 with respect to the FAPE allegation in this complaint.

When the exclusion of a student with a disability is permanent (expulsion) or for an indefinite period or for more than 10 consecutive days, the exclusion constitutes a "significant change in placement." Additionally, a series of suspensions that are each 10 or fewer days in duration but exceed 10 days in the aggregate may create a pattern of exclusions that would constitute a significant change in placement. The determination of whether a series of suspensions creates a pattern of exclusions that constitutes a significant change in placement is decided on a case-by-case basis. Among the factors considered in determining whether a series of suspensions has resulted in a significant change in placement are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from school.

In some cases, OCR will treat in-school suspensions as suspensions that should be considered in determining whether a change in placement has occurred. In-school suspensions (ISS) typically are served in a classroom within the school setting, but the nature of such suspensions varies among recipients. Some ISS programs permit work on classroom assignments or provide Section 504 services while others do not. Generally, whether ISS should be counted towards a significant change in placement depends upon whether education and special services were provided during ISS. Where services identified in a student's Section 504 plan or Individualized Education Program (IEP) are not provided in the ISS setting, OCR takes the position that such exclusions from the student's educational program should be counted in determining whether a disciplinary change in placement has occurred.

Before taking disciplinary action that will result in a significant change in placement, a recipient must first conduct a reevaluation of the student. The first step in the reevaluation process is for the recipient to make a manifestation determination to determine, using appropriate evaluation procedures that conform with the Section 504 implementing regulation, whether the misconduct is caused by the student's disability.

Grievance Procedures

The Section 504 implementing regulation at 34 C.F.R. § 104.7(b) requires a recipient that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The Title II implementing regulation at 28 C.F.R. § 35.107 (a) and (b) contain similar provisions regarding grievance procedures for public entities with 50 or more employees.

In evaluating whether a recipient's grievance procedures comply with the regulations cited above, OCR reviews all aspects of a recipient's policies and practices, including whether the following elements are contained in the procedures:

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1. Notice of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints filed by students or on their behalf alleging discrimination carried out by employees, other student, or third parties;
3. Provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. Designated and reasonably prompt time frames for the major stages of the complaint process;
5. Written notice to the complainant and alleged perpetrator of the outcome of the complaint; and,
6. Assurance that the school will take steps to prevent recurrence of any discrimination/harassment and remedy discriminatory effects on the complainant and others, if appropriate.

Background

The Student was in the ninth grade in the District during the 2013-14 school year; his last day of enrollment with the District was April 23, 2014. The Student's exit records reflect that the Student transferred to Gateway Christian Academy on April 23, 2014. The Complainant alleges that during the Student's enrollment she repeatedly requested services from the District for her child pursuant to Section 504, but the services were denied.

Factual Findings and Analysis

FAPE

Initial Evaluation

The District's written Section 504 Procedures, contained in the Parent/Student Handbook, do not explicitly include standards and procedures for the identification, evaluation, placement and reevaluation of students who, because of disability, need or are believed to need special education or related services. The District's Section 504 Procedures provide generally that the District is committed to maintaining equitable employment and educational practices, services, programs and activities that are accessible and usable by qualified individuals with disabilities. While the Section 504 Coordinator stated that the District serves Section 504 students, and requests for Section 504 evaluations can come from parents, teachers and administrators, without reference to any terms of art, the preponderance of the evidence reveals that the District had

reason to suspect that the Student needed special education or related services due to a disability and, nonetheless, failed to conduct an initial evaluation of the Student pursuant to Section 504.

Specifically, the Student's May 2013 IEP eligibility report reveals that while the Student's Team determined that the Student was not eligible for special education services pursuant to the Individuals with Disabilities Education Act (IDEA), the Team agreed that the Student has a disability (Learning Disability and Attention Deficit Disorder (ADD)). In addition, while the evidence does not reveal that the Complainant specifically requested a Section 504 plan, the investigation reveals that, after the Student was found not eligible for an IEP, the Complainant repeatedly requested assistance for the Student and, as described by her, his ADD symptoms. The Section 504 Coordinator acknowledged that the Complainant, on various occasions, requested assistance for the Student and reconsideration of the need for an IEP. The District also acknowledged that it provided the Student a number of accommodations during his enrollment in the ninth grade, albeit outside of the formal Section 504 context. The Section 504 Coordinator stated that the District accommodated the Student's needs but did not conduct a Section 504 evaluation because the Complainant did not request the evaluation by name. In addition, the investigation reveals that the District suspected the Student needed special education or related services due to a disability when it agreed to conduct an Autism/Asperger evaluation, a functional behavior assessment (FBA) and pursue Other Health Impaired (OHI) eligibility for the Student. In sum, OCR finds, based upon a preponderance of the evidence, that the District had reason to believe, that because of a disability, the Student needed special education or related services and, in fact, treated the Student as needing special education or related services by providing him numerous accommodations outside of the formal Section 504 context. Accordingly, OCR finds that the District denied the Student a FAPE when it failed to conduct an initial evaluation of the Student.

Manifestation Determination

OCR's investigation reveals that the Student was excluded on several occasions from the education program pursuant to discipline imposed on the Student, resulting in a significant change in placement. During his enrollment in the ninth grade, the Student was disciplined on numerous occasions. Specifically, the Student received in-school-suspension (ISS) on the following dates: August 30, 2013; September 11-13, 2013; October 15-21, 2013; November 1-5, 2013; December 13-16, 2013; and April 11, 2014. The Student also received out of school suspensions (OSS) on the following occasions: October 16, 2013; January 10-27, 2014; and April 15-May 13, 2014. In particular, the disciplinary exclusions of 10 days OSS in January and 20 days OSS in April are unequivocally significant changes in placement.

The District does not dispute that it did not conduct manifestation determinations in connection with any discipline administered to the Student. The District acknowledged that it has never conducted a manifestation determination for a Section 504 student. In addition, the District produced no evidence of procedures regarding the reevaluation of students with Section 504 plans prior to a significant change in placement, including disciplinary exclusions.

Although the District did not conduct an initial evaluation of the Student pursuant to Section 504, OCR's investigation revealed, based upon a preponderance of the evidence, that the District had

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reason to suspect the Student, because of a disability, needed special education and related services, and, in fact, treated the Student as such. Accordingly, OCR finds that the District denied the Student a FAPE when it failed to conduct manifestation determinations in connection with the Student's disciplinary exclusions which were significant changes in placement.

Conclusion

Accordingly, based upon a preponderance of the evidence, OCR finds that the evidence shows that the District denied the Student a FAPE by failing to conduct an initial evaluation and reevaluation prior to a significant change in placement, in noncompliance with Section 504 and Title II.

Grievance Procedures

The District's grievance procedures, as contained in the Section 504 Procedures, provide notice of the grievance procedures, including where complaints may be filed. The procedures also provide for written notice to the complainant and alleged perpetrator of the outcome of the complaint. The procedures, however, do not reflect application of the grievance procedures to complaints filed by students or on their behalf alleging discrimination carried out by employees, others students, or third parties. In addition, the procedures do not reflect provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence. Further, while the procedures provide that the Section 504 Coordinator will respond to all complaints within 20 days or, if a hearing is requested, the hearing officer will issue a final decision no later than 45 days after receipt of a request for hearing, the procedures do not include designated and reasonably prompt timeframes for the major stages of the complaint process. Finally, the procedures do not include an assurance that the District will take steps to prevent recurrence of any discrimination/harassment and remedy discriminatory effects on the complainant and others, if appropriate. Accordingly, based upon a preponderance of the evidence, OCR finds that the District's grievance procedures are not in compliance with Section 504 or Title II.

Conclusion

Based upon a preponderance of the evidence, OCR finds that there is sufficient evidence to conclude that the District denied the Student a FAPE, in noncompliance with Section 504 and Title II. In addition, OCR finds that there is sufficient evidence to support a finding of noncompliance with respect to the District's grievance procedures under Section 504 and Title II.

The District has agreed to enter into a resolution agreement and take the following corrective actions: (1) revise the District's Section 504 Procedures to include (a) specific standards and procedures for initial evaluations, placement and period reevaluations, including reevaluations before a significant change in placement, of students who, because of disability, need or are believed to need special education and/or related services; and (b) grievance procedures for complaints alleging any action prohibited by Section 504 and Title II that include the following elements: (i) notice of the grievance procedures, including where complaints may be filed; (ii) application of the grievance procedures to complaints filed by students or on their behalf alleging

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discrimination/harassment carried out by employees, other students, or third parties; (iii) provision for adequate, reliable and impartial investigation of written and oral complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence; (iv) designated and reasonably prompt time frames for the major stages of the complaint process; (v) written notice to the complainant and alleged perpetrator of the outcome of the complaint; and (vi) assurance that the school will take steps to prevent recurrence of any discrimination/ harassment and remedy discriminatory effects on the complainant and others, if appropriate; (2) revise the discipline referral form used at the School, to include specific reference to a student's participation in Section 504, in addition to participation in special education, when determining whether to conduct a manifestation determination hearing; (3) for students who were evaluated for an IEP during the 2015-16 school year, identify all students whose teams determined had a disability but did not qualify for special education services because the student's disability did not adversely impact the educational performance in his/her learning environment; (4) for each student identified who is enrolled in the District currently and for whom the District did not conduct a Section 504 evaluation after the student was denied IEP eligibility, evaluate the student, in accordance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35, and determine the student's eligibility for regular or special education and related aids and services; (5) for each student who is found eligible to receive regular or special education and related aids and services, convene a placement meeting to determine whether the student requires compensatory and/or remedial services, dating back to the date the student was denied IEP eligibility; (6) conduct Section 504/Title II training for all teachers and staff involved in the evaluation/eligibility determination process pursuant to Section 504 and Title II on the revised Section 504 Procedures; and (7) include a letter in the Student's permanent record, executed by the Director of Schools, specifying that the District did not conduct a manifestation determination in connection with any discipline administered to the Student during the 2013-14 school year to determine if the Student's actions resulting in the discipline were a manifestation of the Student's disabilities.

These corrective actions are outlined in the enclosed resolution agreement which also contains monitoring provisions. When fully implemented, the agreement will resolve the identified compliance issues. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual

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for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions about this complaint, please contact Claudia Campo, Attorney, at (404) 974-9378, or Arthur Manigault, Compliance Team Leader, at (404) 974-9376.

Sincerely,

/s/

Melanie Velez
Regional Director

Enclosure