



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

Ref: 06151268

Mr. Scott K. Sostarich, Superintendent
Devine Independent School District
205 W. College
Devine, TX 78016

Via first class mail

Dear Mr. Sostarich:

The United States Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, which was received in our office on February 18, 2015, and filed against the Devine Independent School District (DISD or District), in Devine, Texas. In the complaint, the complainants alleged that the DISD discriminated against [XXXX XXXX] (Student) on the basis of disability. Specifically, OCR determined that the complainants made the following allegations:

1. During the 2014-2015 school year, the DISD discriminated against the Student on the basis of disability when the District failed to provide regular or special education and related aids and services deemed necessary to meet the Student's individual educational needs as indicated in her Individualized Education Program (IEP) or medical plan, in the following specific manners:
 - a. On or about [XXXX XXXX, XXXX], the District failed to provide the Student with the specific aids or services listed in her IEP or medical plan, resulting in the Student experiencing [XXXX to end of sentence];
 - b. During the 2014-2015 school year, the District failed to provide the Student with the specific aids or services listed in her IEP or medical plan, resulting in the Student not being able to attend various field trips because [XXXX to end of sentence];
 - c. During approximately [XXXX XXXX], the District failed to provide the Student with the specific aids or services listed in her IEP or medical plan, resulting in the Student not being able to attend [XXXX to end of sentence]; and
 - d. During the 2014-2015 school year, the District failed to provide the Student with the specific aids or services listed in her IEP or medical plan, resulting in the Student not being able to attend school when [XXXX to end of sentence]; and
2. During the 2014-2015 school year, the DISD discriminated against the Student on the basis of disability when the District failed to properly evaluate the Student's need for regular or special education and related aids and services (i.e., [XXXX to end of parenthesis]).

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to the Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulations at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. Because the DISD is a recipient of Federal financial assistance from the Department and is a public entity, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

Because OCR determined that it has jurisdiction and that the allegations filed were filed in a timely manner, our office opened the following issues for investigation:

1. Whether the District discriminated against the Student on the basis of disability by failing to properly evaluate her need for regular or special education and related aids and services (i.e., by: (1) drawing upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establishing procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensuring 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; (4) ensuring that the placement decision is made in conformity with 34 C.F.R. § 104.34; and (5) interpreting the term “substantially limits” without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses), and thereby denied the Student a free appropriate public education (FAPE) during the 2014-2015 school year, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. §§ 104.33 and 104.35, and 28 C.F.R. § 35.130, respectively; and
2. Whether the District discriminated against the Student on the basis of disability by failing to provide regular or special education and related aids and services deemed necessary to meet the Student’s individual educational needs (i.e., failed to follow the steps mandated in the Student’s IEP or medical plan, resulting in [XXXX to end of parenthesis]), and thereby denied the Student a free appropriate public education during the 2014-2015 school year, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130, respectively.

During the course of the investigation, OCR received and reviewed data provided by the complainant and the DISD. OCR also conducted interviews with relevant District staff members.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). When there is a significant conflict in the evidence and

OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law. During the course of the investigation, the District expressed interest in voluntarily resolving this complaint under Section 302 of OCR's *Case Processing Manual* (CPM). Additionally, OCR acknowledges that the District made some efforts to support the Student and offer [XXXX XXXX] staff training during the 2015-2016 school year. However, because OCR determined that it had obtained sufficient evidence to support a finding under CPM subsection 303(b), OCR did not resolve the allegations pursuant to CPM Section 302. Based on OCR's careful review and analysis of the information obtained, we have determined that there is sufficient evidence to establish that the DISD is in noncompliance with Section 504 and Title II with regard to the issues investigated, as well as an additional technical violation. The basis for this determination is set forth below.

I. Issue 1 – Failure to Properly Evaluate the Student:

A. *Legal Standard:*

Under the Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.33(a) and 28 C.F.R. § 35.130, respectively, a public school district that receives Federal financial assistance from the Department (recipient) must provide a FAPE to each qualified student with a disability in the district's jurisdiction. The Section 504 regulations' evaluation procedures, at 34 C.F.R. § 104.35(a) and (b), state that a recipient must evaluate any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the student's initial educational placement and any subsequent significant change in that placement. The Section 504 regulations do not specify how quickly an evaluation must be completed after a recipient obtains notice that a student needs or is believed to need special education or related services. As a result, OCR applies a "reasonableness" standard to determinations regarding the timeliness of evaluations. Under Section 504 and Title II, at 34 C.F.R. § 104.3(j) and 28 C.F.R. § 35.104, respectively, a student is "disabled," and therefore entitled to individually prescribed special education or related aids and services, if the student has a physical or mental impairment that substantially limits a major life activity. As of January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008, the term "substantially limits" must be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses. Mitigating measures are things like medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment. These measures cannot be considered when determining whether a person has a substantially limiting impairment. Finally, the Section 504 regulations, at 34 C.F.R. § 104.35(c), provide that:

In interpreting evaluation data and in making placement decisions, a recipient shall (1) 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 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 [34 C.F.R. §] 104.34.

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

In addition to the legal standards presented in the regulations, OCR policy guidance contains authority relevant to the investigation of Issue 1. Specifically, OCR's *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (hereinafter the "ADA Q&A") provides that "a school district should not need or require extensive documentation or analysis to determine that a child [XXXX XXXX XXXX] has a disability under Section 504 and Title II." Additionally, the ADA Q&A explains that an individualized health plan may not be sufficient to comply with the FAPE requirements under Section 504:

Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation.

Further, the general Section 504 guidance on OCR's website provides that a medical diagnosis can neither suffice as an evaluation under the regulation, nor automatically entitle a student to receive services under Section 504. Rather, these guidelines reinforce the regulatory provisions requiring that evaluation data be drawn from a variety of sources, of which a medical diagnosis is only one piece.

B. Findings of Fact:

OCR opened Issue 1 for investigation based upon the complainants' allegation that, during the 2014-2015 school year, the DISD discriminated against the Student on the basis of disability when the District failed to properly evaluate the Student's need for regular or special education and related aids and services. With regard to Issue 1, OCR has determined that this office has enough information to substantiate a determination of noncompliance with Section 504 and Title II as alleged.

During the course of the investigation, OCR received and reviewed data provided by the complainant and the DISD, including the District's policies and procedures, the Student's regular and special education files, correspondence between the recipient and complainants, written statements from DISD staff, and selected DISD staff records. OCR also conducted interviews with [XXXX] DISD staff members, including [XXXX to end of sentence].

To date, OCR has determined that, at the beginning of the 2014-2015 school year, as well as for the [XXXX] previous school years in which the Student was enrolled within the DISD, the

District had placed the Student on an Individualized Education Program (IEP). These IEPs at various times pertained to the Student's [XXXX to end of sentence].

The facts show that, by the beginning of the 2014-2015 school year, the District had been aware for some time that the Student [XXXX XXXX]. First, the documentation provided by the DISD to OCR includes ample evidence indicating that the recipient had notice and had been aware since at least [XXXX XXXX XXXX] that the Student [XXXX XXXX]. Such evidence included notations and brief comments made in the Student's IEP and reevaluation documents dated [XXXX to end of sentence]. Importantly, none of these IEP or reevaluation documents identified the Student's [XXXX] as a condition for which her IEPs had been created. Additionally, the documentation provided by the DISD to OCR included multiple letters received by the District from the Student's Physician indicating that the Student [XXXX XXXX XXXX XXXX] and detailing the Student's resulting medical needs [XXXX to end of sentence]. Such letters were sent by the Physician and his staff to the District on or about [XXXX to end of sentence]. Second, in addition to these notices, interviews with the recipient's witnesses showed that in 2012, one of the complainants called a District staff member [XXXX XXXX XXXX XXXX XXXX] and requested that the District evaluate the Student pursuant to Section 504 for the Student's [XXXX]. The same interview record shows that the District responded to this request by informing the complainant that because the Student was in special education, the Student was already receiving the services she would have been provided under Section 504.

Regarding the actions the District took relative to the Student's [XXXX], OCR determined that in [XXXX XXXX XXXX], the DISD adopted a [XXXX XXXX XXXX XXXX XXXX] that continued to be in effect during the fall of 2014. The testimony offered by the recipient's witnesses indicates that the Student's [XXXX] was essentially a set of procedures developed by [XXXX to end of sentence].

However, despite the aforementioned notices and request the District received, the evidence shows that the recipient did not attempt to evaluate the Student regarding [XXXX XXXX] until approximately [XXXX XXXX XXXX]. The Student's IEP document from that date states that:

[XXXX to end of paragraph]

Additionally, evidence gathered by OCR in interviews with recipient's witnesses supports the conclusion that no attempt to evaluate the Student regarding her condition of [XXXX] was made until [XXXX XXXX XXXX XXXX] due to the District's requirement of [XXXX XXXX XXXX XXXX XXXX] form signed by a medical doctor. [XXXX to end of paragraph]

[XXXX to end of paragraph]

The source of the District's position that receipt of [XXXX XXXX] form completed by a medical doctor was necessary, prior to the recipient conducting an evaluation of the Student in compliance with Section 504 regarding [XXXX XXXX], appears to have been based on the recipient's perceived obligations under Texas law. [XXXX to end of paragraph]

in the district’s jurisdiction. The Section 504 regulations, at 34 C.F.R. § 104.33(b), define an “appropriate education” as the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met, and (ii) are based upon adherence to procedures that satisfy Section 504 requirements. Compliance with this provision is generally determined by assessing whether a district has implemented a student’s Section 504 plan, also known as an “individualized education program,” or “IEP.” When evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: (1) whether the district evaluated the student in accordance with Section 504 requirements and determined that the student was a qualified individual with a disability as defined by Section 504; (2) whether the student’s needs were determined on an individualized basis by a group of persons knowledgeable about the student and the information considered; and (3) whether the placements, aids, and services identified by the district through this process as necessary to meet the student’s individual needs were or are being provided. If they have not been provided, OCR will determine the district’s reason for failing to do so and the impact of the failure.

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

B. Findings of Fact:

OCR opened Issue 2 for investigation based upon the complainant’s allegation that the DISD discriminated against the Student during the 2014-2015 school year when the District failed to provide regular or special education and related aids and services deemed necessary to meet the Student’s individual educational needs as indicated in her Individualized Education Program (IEP) or medical plan.

The findings of fact as to Issue 1 of this investigation are incorporated herein. Of additional relevance to Issue 2, the recipient has provided to OCR both documentary and testimonial evidence regarding to the implementation of placements, aids, and services for the Student. [XXXX to end of paragraph]

C. Legal Analysis and Conclusions:

The first step in the legal analysis regarding a recipient’s alleged failure to provide regular or special education and related aids and services deemed necessary to meet the Student’s individual educational needs consists of determining whether the District evaluated the Student in accordance with Section 504 requirements. As detailed in Part I of this Letter, sufficient evidence exists demonstrating that the District did not conduct such an evaluation for the Student during the 2014-2015 school year. The factual findings do show possible implementation with respect to some services for the Student, such as [XXXX to end of sentence]. However, without an evaluation of the Student in accordance with Section 504, it cannot be concluded that such services met the Student’s individual educational needs as envisioned by the applicable law. The sufficient evidence demonstrating that the District failed to meet its obligation under the first

prong of the relevant legal standard proscribes analysis under the remainder of the failure to implement framework. Because the greater weight of the evidence supports the conclusion that the District failed to provide the related aids and services deemed necessary to provide the Student a FAPE, there is sufficient evidence to substantiate a determination of noncompliance as to Issue 2 in this investigation. Accordingly, OCR secured the enclosed resolution agreement from the DISD pursuant to OCR’s CPM Sections 303(b) and 304 to address the Section 504 and Title II compliance concerns implicated by Issue 2, and will monitor the DISD to ensure that the agreement is fully implemented.

III. Technical Violation – Title II Notice:

A. *Legal Standard:*

Under the Title II implementing regulations, at 28 C.F.R. § 35.104, “public entity” is defined in relevant part as follows: “(1) Any State or local government; (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government”

With respect to the application of the ADA to school districts, Appendix B to 28 C.F.R. Part 35 indicates that public school systems fall within the ADA’s definition of a public entity:

Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

Further, the Title II implementing regulations, at 28 C.F.R. § 35.106, require public entities to meet the following notice parameters:

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

B. *Findings of Fact:*

In addition to the issues investigated and addressed above, OCR has determined that this office has enough evidence to substantiate a determination of technical noncompliance with Title II. Specifically, Devine ISD is a public school district. Further, the District’s website contains the following non-discrimination statement:

It is the policy of Devine ISD not to discriminate on the basis of race, color, national origin, sex or handicap in its vocational programs, services or activities as required by Title VI of the Civil Rights Act of 1964, as amended; Title IX of the Education Amendments of 1972; and Section 504 of the Rehabilitation Act of 1973, as amended.

It is the policy of Devine ISD to support the campuses as they provide a free, appropriate education to all students, consisting of regular and special education and related aids and services in career and technology education programs that are designed to meet individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met and are based upon adherence to provisions set forth in 34 CFR 104.33-104.36; 34 CFR 104.31-104.40; (see also standards under V-C, V-D, V-E, V-F, V-G, and V-H).

It is the policy of Devine ISD not to discriminate on the basis of race, color, national origin, sex, handicap, or age in its employment practices as required by Title VI of the Civil Rights Act of 1964, as amended; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975, as amended; and Section 504 of the Rehabilitation Act of 1973, as amended.

Devine ISD will take steps to assure that lack of English language skills will not be a barrier to admission and participation in all educational and vocational programs.

For information about your rights or grievance procedures, contact the Superintendent of Schools, [Superintendent's name], at 205 West College Avenue, Devine, TX. 78016, 830-851-0795 and/or the Section 504 Coordinator and Title IX Coordinator: [Section 504 Coordinator and Title IX Coordinator's name], Assistant Superintendent/Personnel Director, at 205 West College Avenue, Devine, TX 78016, 830-851-0795, and/or [Special Education Director's name], Special Education Director at 830-851-0881.

Additionally, the District's 2014-2015 *Student and Parent Handbook* for the Devine Intermediate School, which the Student attended prior to her withdrawal, contains the following non-discrimination statement:

In its efforts to promote nondiscrimination, Devine ISD does not discriminate on the basis of race, religion, color, national origin, gender, disability, or any other basis prohibited by law in providing education services, activities, and programs, including vocational programs, in accordance with Title VI of the Civil Rights Act of 1964, as amended; Title IX of the Educational Amendments of 1972; and Section 504 of the Rehabilitation Act of 1973, as amended. The following district staff members have been designated to coordinate compliance with these legal requirements:

Title IX Coordinator, for concerns regarding discrimination on the basis of gender: [name of the Director of Special Programs], Director of Special Programs, 205 W. College, Devine, TX 78016, 830-851-0703.

Section 504 Coordinator, for concerns regarding discrimination on the basis of disability: [Special Education Director's name], Special Ed Director, 830-851-0881.

All other concerns regarding discrimination: See the superintendent at 205 W. College, Devine, TX 78016.

C. Legal Analysis and Conclusions:

Devine ISD is a public entity within the scope of Title II. Specifically, 28 C.F.R. § 35.104 and Appendix B to Part 35 clearly include public school districts such as the recipient within the regulation's definition of a public entity. Therefore, the District is required to comply with the notice provision within Title II. However, neither the non-discrimination notice on the District's public website nor within the District's *Student and Parent Handbook* reference or provide the requisite notice pursuant to Title II. Based upon the above-mentioned evidence, OCR has determined that the District failed to provide proper notice in accordance with 28 C.F.R. § 35.106. Accordingly, there is sufficient evidence to substantiate a determination of noncompliance with this regulation. As a result, OCR secured the enclosed resolution agreement from the DISD pursuant to OCR's CPM Sections 303(b) and 304 to address the Title II compliance concerns implicated by this additional technical violation, and will monitor the DISD to ensure that the agreement is fully implemented.

IV. Conclusion:

Based on the above findings of fact, and under a preponderance of evidence standard, OCR concludes that there is sufficient evidence to find that the DISD did not comply with Section 504 and Title II with respect to the issues investigated as well as Title II's notice requirement. As a result of the signed Resolution Agreement resolving the compliance concerns identified, OCR is closing its investigation of this complaint effective the date of this letter. OCR will monitor implementation of the Resolution Agreement. This determination should not be interpreted to address the DISD'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 complainants may have a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that a recipient 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, 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.

OCR appreciates the District's cooperation during the resolution of this complaint. If you have any questions or concerns regarding this matter, you may contact the attorney investigator assigned to this case, Cristin Hedman, by telephone at (214)-661-9647 or by e-mail at cristin.hedman@ed.gov. You may also contact Melissa Malonson, Team Leader, at 214-661-9637 or by email at melissa.malonson@ed.gov.

Sincerely,

Taylor D. August
Regional Director
Office for Civil Rights
Dallas Office

Enclosure: Signed Resolution Agreement

[XXXX to end of paragraph]