



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200  
SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

August 2, 2016

Jim Yovino  
Superintendent  
Fresno County Superintendent of Schools  
1111 Van Ness Avenue  
Fresno, California 93721

(In reply, please refer to case no. 09-15-1021.)

Dear Superintendent Yovino:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Fresno County Superintendent of Schools (County). The complainant alleged that the County discriminated against his son (Student)<sup>1</sup> on the basis of disability. OCR investigated the following allegations:

1. Whether the County denied the Student a free appropriate public education (FAPE) by failing to implement the Student's 504 plan and Behavior Support Plan; and
2. Whether the County subjected the Student to a significant change in placement without first conducting an evaluation.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction over the complaint under Title II of the Americans with Disabilities Act of 1990, as amended, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by certain public entities. The County receives Department funds, is a public education system and is subject to the requirements of Section 504, Title II, and the regulations.

OCR gathered evidence by conducting interviews with the complainant and County staff, as well as by reviewing documents and information provided by the complainant and the County. OCR determined that there was sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II and their implementing regulations with respect to the allegations investigated and identified several additional concerns. The applicable legal standards, relevant facts gathered during our investigation, and reasons for OCR's determination are summarized below.

---

<sup>1</sup> OCR notified the County of the identity of the complainant and the Student when the investigation began. OCR is withholding their names from this letter to protect their privacy.

### Student Background Information

The Student attended school in another district (District) between kindergarten and sixth grade. He spent a significant part of his sixth grade year (2012-2013 school year) in the court school located at the Fresno County Juvenile Justice Center (JJC). He was recommended for expulsion from the District in April 2013 and subsequently expelled from the District in July 2013.

Based on information from the County, after the Student was expelled from the District, he has cycled in and out of County-operated schools and in between the County and the District. Between December 2012 and at least February 2015, the Student has been primarily enrolled in two educational programs operated by the County: the court school at the JJC and the Kermit Koontz Educational Complex (KKEC), the community day school operated by the County. These two education sites are the focus of this complaint.

KKEC serves students in grades 7-12, and approximately 400 students attend the school during a given school year. The court school at JJC houses 15 to 20 middle school students and approximately 150 high school students.

OCR's investigation focused primarily on the Student's enrollment in the County from the end of 2012 to the end of February of 2015. With the exception of about 12 weeks when he was not enrolled in the County and about 8 weeks when he was enrolled at KKEC, from December XX, 2012 through at least February XX, 2015, the Student was primarily enrolled at JJC. Specifically, the Student was enrolled in the County at JJC on December XX, 2012, late January through April XX, 2013, and late April 2013 through the end of June, 2013. The Student was enrolled at KKEC from September XX, 2013 to October X, 2013. He later re-enrolled at KKEC for several weeks in 2014 (February XX to March X, 2014, and March XX to April X, 2014). He was enrolled at JJC again throughout the 2013-2014 school year with the exception of the weeks he was at KKEC and about 3 weeks at the District. He was again enrolled at JJC in the 2014-2015 school year from at least July 2014 through the end of February 2015.<sup>2</sup>

The County runs a third program called Violet Heintz Education Academy (VHEA), to which students on probation are also referred; according to County records, the Student enrolled in this program in March of 2016 but returned again to JJC in June of 2016.

### The Identification of Students with Disabilities at KKEC and JJC

- According to a KKEC administrator, when a student is expelled from a district in the County, the district notifies KKEC and KKEC requests student information from the district. Once a student enrolls at KKEC, the student's parents are required to attend an orientation class. The orientation class provides a review of student rights, dress code, behavioral expectations and rules, and academic credits. The orientation teacher, who was also the school's Section 504 coordinator (KKEC Coordinator) for the

---

<sup>2</sup> OCR only obtained and reviewed the Student's discipline and removal records through February XX, 2015.

2014-2015 school year, also obtains further information about the student's Section 504 plan or Individualized Education Program (IEP), if either exists. The orientation teacher fills out an Individualized Learning Plan (ILP) with the parent, which serves as a checklist to make sure that the necessary topics are covered, and also includes boxes that a parent may check to indicate that his/her child has a Section 504 plan or IEP. The Vice Principal served as the KKEC Coordinator during the previous three school years.

- The Coordinator at JJC (JJC Coordinator) told OCR that students are booked upon their arrival. Booking generates a student list, which goes to the registrar. The registrar checks the student information system to ascertain the names of the schools a student has attended. The registrar then requests student information from these schools, such as the student's cumulative file, health records, grades, and any information about Section 504 plans or IEPs. If the registrar sees a Section 504 plan, she contacts the JJC Coordinator. Transcripts from the District also designate those students receiving special education. On their first day of school, students fill out a personal data sheet, which also includes boxes that students may check to identify that they have a Section 504 plan or IEP. This personal data sheet is completed the first time a student arrives at JJC and every time the student returns, as well as when a student transfers from detention to commitment. The JJC Coordinator maintains files of those students with current Section 504 plans.

**Allegation 1:** *Whether the County denied the Student a FAPE by failing to implement the Student's 504 plan and Behavior Support Plan.*

### Legal Standard

The Section 504 implementing regulation, at 34 C.F.R. §103.33, requires recipients that operate public elementary and secondary education programs to provide a FAPE to all students with disabilities in their jurisdiction. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35,193(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under Section 504 regulation.

### Findings of Fact

OCR's investigation and analysis showed the following:

- The Student had a Section 504 plan developed by the District, which was dated April XX, 2012. His disabilities were listed as Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Oppositional Defiance Disorder, and Asthma. The Section 504 plan was in

effect during the remainder of the 2011-2012 school year, 2012-2013 school year, and the 2013-2014 school year through May 15, 2014.

- The Student's school-based accommodations were as follows: 1) positive reinforcement to recognize positive behaviors; 2) preferential seating by Teacher to prevent classroom conflicts with other students; and 3) communication between administrators and parent, when necessary, regarding negative behaviors.
- On April XX, 2012, the District developed a new Behavior Support Plan (BSP), attached to the Section 504 Plan. The BSP described the behavior impeding the Student's learning as "escalating aggression pattern toward other students as shown by pushing, nudging/punking other students in the classroom, and getting in physical fights, and/or swearing and verbally challenging peers and adults." The BSP described the reason the behavior impeded learning as the Student is "unavailable for learning and disrupts other student[s] opportunity to learn." The box next to the word "moderate" was checked in response to the Student's need for a BSP. The frequency or intensity or duration of behavior was described as "daily in the classroom, more than 1x per day at school," both as reported by teachers and observed by staff.
- The BSP noted that environmental supports and/or changes were necessary for the Student and that in addition to positive reinforcement for good behavior, the Student needed to be taught new replacement behavior. The BSP outlined a series of interventions to be used, such as: rewarding the student with praise and/or tangible rewards; when the student is bullying other students, providing a space away from those he is engaged with will be provided; using a star chart each day at school with clearly defined behavior expectations and specific acceptable and non-acceptable behaviors in each class; and permission to quickly run to the school yard fence and back to release pent-up energy.

#### Student's Enrollment at KKEC

- When the Student was first enrolled at KKEC in September of 2013, the complainant referenced the Student's Section 504 plan at the KKEC orientation class. The Student was placed in a self-contained general education classroom.
- The Vice Principal told OCR that he contacted the complainant and met with him on September XX, 2013. The complainant brought a copy of the Student's BSP that day, and the Vice Principal notified the Student's teachers by e-mail that the Student had a BSP. The Vice Principal stated that the complainant stated that he would bring the Student's Section 504 plan to the meeting, but he did not.
- The Vice Principal stated that during the first seven-day period in which the Student was enrolled at KKEC, the Student had an extremely difficult time. He would yell and scream and jump over the fence. He was arrested and sent to JJC for allegedly assaulting a female student and stealing her bus tokens.

- The Vice Principal told OCR that KKEC implements a series of general interventions for all students, such as individual warnings, positive affirmations, time-outs, meetings with teachers and opportunities for reflection. In terms of interventions specifically for the Student, the Vice Principal discussed praise, structured time, and one-on-one time with the police officer, whom the Student was close to, and the school psychologist, as he liked positive attention from adults.
- The Vice Principal did not offer any specific information as to how the Student's BSP was implemented, stating that KKEC applied a generalized intervention system for all students, including those students who had BSPs. The Vice Principal acknowledged that the Student's behaviors continued.
- The Vice Principal stated that the complainant wanted to review the Student's Section 504 plan, so they scheduled a meeting for October XX, 2013. However, on October X, 2013, the Student was arrested.
- After the Vice Principal was notified on October X, 2013 that the Student had been arrested, he contacted the KKEC Coordinator on October X, 2013 to tell her that the Student was scheduled for a Section 504 meeting on October XX, 2013. Between October XX, 2013 and October XX, 2013, the Vice Principal forwarded the Student's Section 504 plan and BSP to the KKEC Coordinator, who e-mailed both to the school psychologist (Psychologist), the Program Manager, and the Student's classroom teacher (Teacher).
- The Vice Principal stated that the Student returned to KKEC on February XX, 2014. Of the eight days that he was enrolled at KKEC, before being arrested again on March X, 2014, he was tardy almost half the day on five of those days and missed most of a sixth day. He then reenrolled at KKEC on March XX, 2014, but did not attend school until March XX, 2014. He was enrolled at KKEC until April X, 2014 and attended three days. Of those three days, he was tardy one and missed half the day a second day.
- Pursuant to the complainant's request, the Vice Principal scheduled a Section 504 meeting on April X, 2014, but the Student was arrested on April X, 2014. The Student did not reenroll at KKEC until fall 2014.

#### KKEC - Evaluation and Implementation of the Student's Section 504 and BSP

- The Vice Principal told OCR that the Student's eligibility for an IEP or additional services was not assessed because the parent, teacher, and psychologist did not request an evaluation.
- With respect to training, the Vice Principal stated that he could not speak to training regarding IDEA and IEPs, but that KKEC provided training on the Section 504 process, implementation and forms on an annual basis. He also stated that he worked individually with teachers on implementing students' Section 504 plans and holding

Section 504 meetings and provided training to staff at JJC and VHEA regarding the same.

#### KKEC - Student's Behavior and School Removals

- Based on the County's data, examples of the Student's misconduct and the offenses he engaged in included: shoving a teacher; using vulgar and harassing language; slapping a student at a bus stop and attempting to take her tokens; and cursing and preventing the teacher from teaching.
- During the Student's enrollment at KKEC, the discipline records reflect that the Student was suspended for a total of 13 days during the 2013-2014 school year. Specifically, he received a four-day suspension beginning on September XX, 2013; a one-day suspension on October X, 2013; a three-day suspension beginning on March X, 2014; and a five-day suspension beginning on March XX, 2014.
- When asked whether a manifestation determination meeting was held for the Student, the Vice Principal said no because the student was not a special education student. However, if a student receiving special education services was suspended beyond ten days, then the school would conduct a manifestation determination.
- The Vice Principal told OCR that the Student was unable to "be successful" during his time at KKEC.
- Additionally, discipline records reflect that the Student was sent to another class at least once due to his behavior.

#### JJC - Implementation of the Student's Section 504 plan and BSP

- As discussed above, the Student spent part of the 2012-2013 school year and most of the 2013-2014 and 2014-2015 school years at JJC<sup>3</sup>, with the exception of the times he was enrolled at KKEC. In the 2013-2014 school year, the Student was enrolled at JJC from July 2013 to August XX, 2013, August XX, 2013 to September XX, 2013, October X, 2013 to February XX, 2014, and April X, 2014 to June XX, 2014. In the 2014-2015 school year, the Student was enrolled at JJC from July X, 2014 to August XX, 2014, and from August XX, 2014 to December 2014. The County's narrative response to OCR stated that after the Student was released in December 2014, he was again arrested and returned to JJC in December 2014 and remained through the rest of the school year.
- Even though the Student's first date of enrollment in the County and at the JJC was in the 2012-2013 school year, the JJC Coordinator told OCR that on or about October X, 2013, she became familiar with the Student after she heard of the difficulties he was

---

<sup>3</sup> OCR has included information regarding suspensions, "Returns to Pod", and HSC Teacher visits that reflect information provided to OCR by the County. OCR's investigation focused on the 2013-2014 and 2014-2015 school years. However, for context, information is included here that is outside of that time period with respect to the Student's enrollment, history of removals and HSC Teacher visits.

having in the Teacher's class. The County's documentation shows that the JJC Coordinator first requested his Section 504 plan and BSP from KKEC on October XX, 2013, and shared both with the Psychologist, the Program Manager and the Teacher by e-mail on October XX, 2013.

- The JJC Coordinator stated that a Section 504 meeting was held for the Student on May XX, 2014 and attended by the JJC Coordinator, Program Manager, the Teacher, the complainant and the Student. The Section 504 plan developed provided for all of the same accommodations as in the 2012 Section 504 plan, with only the following three additions:
  - [Student] will partner-up w/another positive student as a role model
  - Use study [carrel] as needed
  - Teacher will establish non-verbal cues between teacher & student to get his attention & redirect focus on task at hand.
- The JJC Coordinator told OCR that staff did not review the Student's BSP at the May 2014 Section 504 meeting because they did not have the document at the time of the meeting. However, as discussed above, documentation from the County shows that the JJC Coordinator e-mailed both documents to the psychologist, Program Manager and Teacher at JJC on October XX, 2013.
- The Program Manager told OCR that the accommodations offered to the Student were preferential seating, extra time on assignments, point system, and verbal encouragement. She stated that while she had a copy of the applicable BSP, she and the JJC Coordinator determined that they could not implement some of the accommodations, such as permitting the Student to exit the class to cool down, because JJC was a controlled environment.
- The Program Manager stated that no written document or amended BSP was created to reflect the changes implemented by the JJC Coordinator and Program Manager.
- When asked whether the Student had been considered for further evaluation, additional services, or for an IEP, the JJC Coordinator told OCR that she did not know if the Student had been assessed for special education and that assessment for special education services was not part of her job responsibilities. She stated that JJC continues the services that students are receiving from their district of residence, and that a teacher would need to ask the psychologist to evaluate a Student for an IEP and the psychologist would make the ultimate determination.
- Both the Program Manager and JJC Coordinator told OCR that special education services are not available to students with Section 504 plans and that only students with IEPs have access to such services.
- With respect to training, the JJC Coordinator told OCR that she did not think that staff at JJC had received training on implementing students' Section 504 plans, IEPs or BSPs. The Program Manager stated that a training on Section 504 procedures had

occurred three years prior and that Resource Specialist Program (RSP) staff attend SELPA meetings and provide assistance to staff based on what they learn.

- As to implementation, the Program Manager stated that during teacher meetings, she had notified staff that Section 504 plans and IEPs were legal documents and that staff should ask RSP teachers if they had any questions about implementing classroom accommodations.

#### JJC - Student's Behavior and School Removals

- On October X, 2013, the Student's Teacher e-mailed the Program Manager. The e-mail stated, in relevant part:

I would like to schedule a meeting with you [and additional staff], anyone else you can think of to come up with a plan to help [the Student] succeed while he is in the JJC. I would like for this to happen as soon as possible because I do not want him back in my classroom due to his constant disruptions that make it impossible to teach the other students.

I have tried everything I know to try to keep [the Student] in my class, but he has done everything possible to keep disrupting. Today is when I realized that I am not going to be able to help [the Student] without interventions and/or consequences that have meaning to [the Student].

For now, he needs to remain out of class and see [the High Security Contract Teacher (HSC Teacher)] for his schooling; the rest of the class needs to have my attention and I am not able to give them much of it when dealing with [the Student]. I would like Mental Health to do an assessment to determine appropriate adult responses to [the Student's] class behaviors. Isolate in class, use of a cubby, and RTPs [Return to Pods] have no effect on the [Student].

- The Program Manager responded to the Teacher on October X, 2013, and copied the psychologist on her e-mail. She stated, in part:

I've contacted [staff member] and Mental Health for their availability to meet and will soon contact parents for a meeting to support improved behavior for [Student].

The Program Manager added that the HSC Teacher would see the Student that day or the next day.

- The Program Manager told OCR that the role of the HSC Teacher was to meet with students who have demonstrated behavior that harms themselves or others and are kept out of the classroom as a result. She stated that the HSC Teacher meets with students for up to an hour to provide personal development and facilitate a return to the classroom.



- The Program Manager stated that when a student is placed on HSC, the goal is to return the student to school within twenty-four hours. She stated that the actual date that the student is returned to school is a determination made by the mental health and/or probation departments.
- The records provided by the County do not reflect how long the Student was removed from class and placed on HSC after the Teacher's e-mail was sent. The logs provided show only the following:
  - On October X, 2013, the HSC Teacher met with the Student for 12 minutes. During those 12 minutes, the HSC log reflects that the HSC Teacher met with the Student for Personal Social Development and for Social Studies.
  - On October X, 2013, the HSC Teacher met with the Student for 45 minutes for Language Arts.
  - On October XX, 2013, the HSC Teacher met again with the Student for 30 minutes for Social Studies.
- There are no additional logs regarding the provision of instruction during the remainder of the month of October 2013 or for the month of November 2013.
- The County also removes students from class through something it calls, "Return to Pod (RTP)." In a document titled *Fresno County Office of Education Court School Staff Handbook, 2014-2015*, the County states that:

If a student exhibits behavior that negatively impacts the classroom environment that did not cease after classroom management interventions by the teacher, the teacher may return the student to the pod (RTP) for the remainder of the class period. The student will go to his/her next scheduled class (block) at the appropriate time if on a rotating schedule. For self-contained classrooms, the teacher, depending on the nature of the infraction, may request the student to be retained in the pod until after the next break or lunch.
- In addition, a student may be removed through a suspension. County policies state and County staff reported that when a student is suspended, notice is provided to the parent and the Student stays in the pod.
- As detailed further below, the County provided OCR with incomplete and inconsistent information about the dates and times for the Student's school removals, including suspensions, Returns to Pod (or RTPs), and HSC placements. Further, when the Student was placed on HSC, the reasons for the Student's placement were not consistently provided in applicable records.
- The County's discipline records and HSC logs show the following for the Student during his enrollment at JJC:

- In the 2012-2013 school year (from February through June 2013), he was suspended for 2 days and returned to his pod 36 additional times. He was visited by the HSC Teacher just two times, one of which coincided with a day that the County documented a Return to Pod; for the other HSC Teacher visit, the County did not document that the Student had been removed from class. One visit was for 45 minutes and the other was for 25 minutes.
- In the 2013-2014 school year (from July X, 2013 through June XX, 2014), he was suspended six times. Only one of those suspensions listed the length (one day). The others were identified in the Discipline records as a suspension with a date of when he was suspended, but did not identify the suspension's length of time. He was returned to his pod 73 additional times. He was visited by the HSC Teacher six times for visits ranging from 12 to 55 minutes. These visits did not take place on the same days as the Student was returned to his pod from class or suspended, reflecting additional days of classroom removal that were not in the County's other records.
- In the 2014-2015 school year (from July X, 2014 through February XX, 2015, an incomplete school year), he was suspended five times.<sup>4</sup> Three of the suspensions identify the length of time (2 days, 2 days, and 3 days). The other two suspensions do not identify the length of the suspension in the County's Discipline records provided to OCR. He was returned to his pod from class an additional 24 times. He did not receive any visits from the HSC Teacher according to the logs provided to OCR.
- Of the 133 times that the County documented that the Student had been returned to pod from February X, 2013 through February XX, 2015 (not counting the HSC removals and suspensions), on 21 days the Student was returned to pod twice in the same day.<sup>5</sup> The documentation kept by the County, while sometimes showing when he was sent to the pod, does not show the length of time he spent in the pod on any of these days.
- According to the HSC logs, the HSC Teacher provided some limited instruction to the Student, between twelve and fifty-five minutes in those eight visits. The Student's discipline records reflected that, with the exception of one of those visits, as discussed above, the HSC Teacher's visits did not coincide with the times that the Student was suspended or "returned to pod" due to his behavior. For example, on January XX, 2014, the Student's Teacher wrote a note in the Discipline Record stating that the Student was "[u]nable to attend school due to HSC in Pod" but this removal is not otherwise documented in the Discipline Record as a "Return to Pod" or suspension.

---

<sup>4</sup> OCR only obtained records through February XX, 2015.

<sup>5</sup> For the 2013-2014 and 2014-2015 school years (up to February XX, 2015), the total number of Returns to Pod is 96 and the total number of days with two Returns to Pod is 14.

**Number of Suspensions, RTPs, and HSC Minutes at KKEC and JJC<sup>6</sup>**

	Number of suspensions	Number of <u>Reported</u> Days Suspended	# of RTPs	HSC Minutes
2012 – 2013	1	2 days	36	2 HSC visits totaling 70 min.
2013 – 2014	5	14 days	73	6 HSC visits totaling 177 min.
2014 – 2015 (until February XX, 2015)	3	7 days	23	0 min.
<b>TOTALS</b>	<b>9 suspensions</b>	<b>23 days</b>	<b>133</b>	<b>247 minutes</b>

- The Student was referred to the Special Needs Task Force (Task Force) and discussed at approximately five meetings held between October XX, 2013 and November XX, 2014. The Program Manager told OCR that the Task Force was the place where JJC staff, including the Program Manager, the Psychologist and RSP teachers, could convene for an hour every other week to discuss JJC students with high level needs. The Program Manager stated that none of the discussions included an inquiry into whether the Student should receive further evaluation in all areas of suspected disability.
- At a Task Force meeting on December XX, 2013, the attendees noted that the Student was placed on High Security by the County Probation Department (Probation) and was not allowed to leave the pod to attend class. The County identified this removal in its Discipline Record as a suspension and did not identify the length of time of the suspension. The notes stated that the HSC Teacher was directed to meet with the Student in the pod and provide direct instruction per Probation procedures.

Policies and Procedures

Relevant to this matter, the County’s Administrative Regulation (AR) 6164.6 provides the following:

Section 504 team shall monitor the progress of the student and the effectiveness of the student’s Section 504 services plan to determine whether the services are appropriate and necessary and whether the student’s needs are being met as

---

<sup>6</sup> As described above, OCR did not receive documentation regarding the Student’s disciplinary record after February XX, 2015. As such, data provided in this chart does not encompass all the removals that may have occurred in the 2014-2015 school year.

adequately as the needs of nondisabled students. The team shall review the student's plan annually. In addition, the student's eligibility under Section 504 shall be reevaluated at least once every three years.

A reevaluation of the student's needs shall be conducted before any subsequent significant change in placement. (34 CFR § 104.35)

### Analysis

When the Student enrolled at KKEC in Fall 2013, the April 2012 Section 504 plan, developed while the Student was enrolled in the District, was in effect. It had minimal interventions. However, the April 2012 BSP, which was part of the Section 504 plan, provided specific behavioral interventions, such as use of a star chart with clearly defined behavior expectations, a highly-structured on/off task schedule with dense, immediate reinforcement, and permission to quickly run to the school yard fence and back to release pent-up energy.

When asked about the manner of implementation of the Student's accommodations in his Section 504 plan, the Vice Principal at KKEC stated that the Student's Section 504 plan was implemented in a self-contained general education classroom. He referenced preferential seating and structured time but could not provide specifics or details as to how these accommodations were implemented, or how the Student's specific accommodations and strategies in his BSP were implemented or enforced. Moreover, he told OCR that he did not receive the Student's BSP until September XX, 2013, which was eleven days after the Student enrolled at KKEC.

Similarly, the Program Manager at JJC stated that the Student's Teacher offered preferential seating, time on assignments, and verbal encouragement, but also did not offer any specifics as to how these accommodations were implemented, or how the specific accommodations and strategies in his Section 504 plan and BSP were implemented. Both the Vice Principal and the Program Manager told OCR how KKEC and JJC provided interventions in general for their students, such as individual warnings, positive affirmation, time outs at KKEC, and a point system designed to manage student behavior at JJC. Neither the Vice Principal at KKEC nor the Program Manager at JJC referenced any of the Student's interventions in his BSP when asked to describe the behavior interventions applied in the classroom.

In addition, the Program Manager told OCR that the Student's BSP was revised outside of the procedural requirements of the Section 504 team process due to limitations present at the JJC. The Program Manager and the JJC Coordinator did not convene a team of knowledgeable persons, such as the JJC psychologist, KKEC staff, District staff, or other professionals knowledgeable about the Student, prior to amending the BSP. In addition, although staff at both KKEC and JJC implemented behavioral interventions that were not in the Student's BSP, there was no evidence that staff at either facility discussed these interventions with the Student or the complainant. JJC staff also told OCR that they did not discuss the BSP at the Section 504 meeting held for the Student on May XX, 2014 or document any revisions or amendments.

OCR found that in the absence of implementation of the Student's BSP and Section 504 plan, the routine response to the Student's behavior, both by KKEC and JJC, was to remove the Student from class for short and long periods of time. This took the form of suspensions, Return to Pod (RTP), and HSC placement on the pod. As discussed above, during 2013-2014 school year and the 2014-2015 school year up to February XX, 2015, based on even the incomplete records provided, OCR found that County staff at JJC returned the Student to pod 96 times, placed him on HSC six times for an undefined period, and suspended him for at least 15 days. In addition, at KKEC, the Student was suspended for 13 days and removed from class for a short-term removal on at least one additional day.

Further, OCR found that key staff at KKEC and JJC reported that the County had not provided adequate training on implementing BSPs or Section 504 plans. OCR found that key KKEC and JJC staff did not know that students may receive special education and related services and procedural safeguards under a Section 504 plan, as well as an IEP. The Vice Principal incorrectly stated that the Student was not eligible for a manifestation determination because he was not a special education student, even though, as discussed in relation to allegation 2, the same protections are available for students with a Section 504 plan.

Consequently, OCR finds that the County denied the Student a FAPE by failing to implement the Student's BSP attached to the Section 504 plan and by amending the BSP without providing the complainant with notice of the amendments, his procedural safeguards, and evaluation or a meeting of knowledgeable persons in violation of Section 504, Title II and their implementing regulations.

OCR's investigation also raised concerns regarding a lack of training by staff related to Section 504 and its requirements, which, as discussed further below, may have contributed to the failure to evaluate in all areas of suspected disability, provide a manifestation determination meeting and evaluation before a significant change in placement, and to provide the student with special education and related services.

**Allegation 2:** *Whether the County subjected the Student to a significant change in placement without first conducting an evaluation.*

#### Legal Standard

Section 104.35(a) of the Section 504 regulations requires recipients to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent change in placement. Under Section 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. Recipients must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Section 104.36 requires recipients to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. The regulations prohibit a recipient from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require recipients to act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than ten consecutive days, or for a total of more than ten cumulative days under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, recipients must evaluate whether the misconduct was caused by, or was a manifestation of the student's disability. If so, the recipient may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

### Analysis

OCR's investigation and analysis showed the following:

#### *1. Removal from KKEC*

The Student had a long, well-documented history, beginning in 2007 when he was in first grade, of serious behavior issues along with medical diagnoses of conditions that impact behavior, including ADHD, mood, anxiety disorder, and conduct disorder. He was later identified as having Bipolar Disorder. The Student continued to have significant behavioral difficulties during the 2011-2012 and 2012-2013 school years, while enrolled at a school for students with significant emotional and behavior disabilities.

KKEC staff was aware that the Student continued to have significant behavioral challenges. The Vice Principal told OCR that the existing Section 504 plan did not adequately address the behaviors he demonstrated, so the behaviors continued. The lack of improvement in the Student's behavior, along with the frequency with which he was removed from class, resulted in a loss of instructional time and should have been an indication to the County that

the interventions being applied to the Student were not successful and that there was a need to re-evaluate the Student.

Furthermore, OCR found that in the 2013-2014 school year, KKEC suspended the Student for more than 10 days in one school year. The suspensions were due to a pattern of behavior that the Student consistently demonstrated (physical aggression, being disrespectful, making vulgar comments, and disrupting class). They are consistent with behavior that the Student's teachers note repeatedly in his disciplinary record and that were discussed in his BSP.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, the County must evaluate whether the misconduct was caused by, or was a manifestation of, the student's disability. If so, the school may not take the disciplinary action and should determine whether the student's current placement is appropriate. In this regard, the Student was suspended for thirteen days between September 2013 and March 2014. As discussed above, the Vice Principal at KKEC seemed unclear about the requirements for conducting evaluations and reevaluations of students with disabilities, including that such steps need to be taken not only when students' eligibility for services under IDEA or Section 504 is first considered, but also periodically, when reviewing the efficacy of students' Section 504 plans or IEPs, and prior to any significant change in placement. 34 C.F.R. § 104.35.

*2. Suspensions and removals from the classroom at JJC and placement in the pod with the HSC Teacher*

On October X, 2013, shortly after the Student was sent back to JJC following a brief enrollment period at KKEC, the Teacher e-mailed the Program Manager and stated in part that she did "not want him back in [her] classroom due to his constant disruptions that make it impossible to teach other students. I have tried everything I know to try to keep [the Student] in my class, but he has done everything possible to keep disrupting." She also stated, "For now, he needs to remain out of class and see [the HSC Teacher] for his schooling..." She also requested that he be assessed by the department of Mental Health.

OCR's investigation revealed several areas of non-compliance. First, the Teacher specifically requested a mental health evaluation for the Student. This standing alone triggered the County's obligation to timely assess the Student after obtaining consent from the parent. Further, the Teacher stated that she would not allow him to return to the classroom and that he must see the HSC Teacher for school. County records reflect that the Program Manager had contacted the Department of Mental Health and that the HSC Teacher did see the Student on the pod for several days for a total of 87 minutes. As such, because the County followed the Teacher's directive in the e-mail, the Student was subjected to a significant change in placement from a general education classroom to minimal instruction by himself on the living unit/pod. Pursuant to 34 C.F.R. §104.35.(a),

the County was required to conduct a manifestation determination meeting with a group of knowledgeable persons and take the necessary steps to proceed with an evaluation.

Second, while the Program Manager acknowledged receipt of this e-mail, and contacted other staff to schedule a meeting to discuss the Student's behavior, neither she nor her colleagues, either at JJC or in the Special Needs Task Force, identified that the disability-related accommodations and behavioral interventions in place for the Student were ineffective, necessitating further evaluation. The Student was never evaluated and a manifestation determination meeting was not held. Moreover, the County's policies and procedures state consistent with Section 504's implementing regulations that an evaluation must be conducted prior to a significant change in placement. 34 CFR § 104.35. OCR further notes that the JJC Coordinator told OCR that staff had not received training regarding Section 504 or the requirements of Section 504 evaluation and placement.

Third, during the 2013-2014 school year at JJC, the Student was suspended six times – however, only one of those times identified the length of time (one day). (These six times are in addition to the 13 days he was suspended while at KKEC.) In addition, he was returned to his pod 73 times. In the portion of 2014-2015 school year reviewed by OCR (from July X, 2014 to February XX, 2015, only eight months of the school year), the Student was suspended for seven days at JJC, and an additional two times in which there is no description regarding length of the suspension in his record. Additionally, he was returned to his pod an additional 23 times.

Overall, for the 2013-2014 and 2014-2015 school years up until February XX, 2015, at County programs, the Student was removed from the classroom for at least 21 days that are documented as suspensions, and at least seven additional times in which he is listed as suspended without a description as to length. During that same period of time, he was sent to his pod 96 times. The HSC Teacher logs show that the Student received a total of 177 minutes of either counseling or instruction during this period during six visits; however, the logs also reflect that the Student was removed from school and on the pod for at least seven additional days that were not tracked by the County in either its Return to Pod log or suspension notifications.

As such the County subjected the Student to a significant change in placement in both the 2013-2014 and 2014-2015 school years but failed to conduct a manifestation determination meeting or evaluate the Student's behavior and the appropriateness and effectiveness of his Section 504 plan and BSP. For all of these reasons, OCR determined that County violated Section 504 and Title II and its implementing regulations.

OCR's investigation revealed additional concerns, including that removals to the pod, the reason for such removals, total time out of the classroom, and whether special education instruction and services are provided is not fully, accurately, or consistently documented. In addition, the Program Manager reported to OCR that students may be kept out of school for longer than 24 hours based on a decision made by the probation or mental health departments, even when the initial referral is from the classroom for student conduct and made by a County school official. The County did not provide OCR with any policies or procedures that would establish whether the students will receive special education or any



education during such time, and whether procedural and other protections under Section 504 and Title II and their implementing regulations were being followed during such removals.

### Conclusion

To address OCR's findings of noncompliance and concerns, the County, without admitting to any violation of law, entered into the enclosed resolution agreement, which is aligned with the complaint allegations and the information obtained by OCR during its investigation. Pursuant to the agreement, the County will, within specified timeframes:

- Develop an assessment plan to assess the Student in all areas of specific educational need, conduct a functional behavior assessment of the Student and refer the Student for an educationally related mental health services assessment;
- Convene a group of knowledgeable persons to review the assessment data and determine whether the student is eligible for special education and related services, review the existing behavior support plan and develop a Behavior Intervention Plan;
- Provide the Student with 90 hours of compensatory and remedial education and mental health services;
- Develop a guidance memorandum regarding the process the County is to follow if students are removed, as well as the ways in which such removals are to be documented in the County's data system;
- Provide training to staff on implementing Section 504 plans, Behavior Intervention Plans (and behavior support plans, if titled as such), and other responsibilities under Section 504, including identification, evaluation and placement of students with disabilities; and
- Ensure that there is a central location and data collection system to ensure that all removals are accurately collected and documented with respect to significant changes in placement and a system to document the special education and related services provided to students during removals.

When fully implemented the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the agreement until the County is in compliance with Section 504, Title II and the regulations at issue in the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the County's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. 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 County 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, 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.

OCR thanks the County for its cooperation and courtesy during this investigation. If you have any questions about this letter, please contact Nancy Sablan, Investigator, at (415) 486-5549, or Shilpa Ram, Civil Rights Attorney, at (415) 486-5565.

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosure