



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION IV

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September 26, 2012

Mr. Michael Harris  
Director of Schools  
Clarksville-Montgomery County School District  
621 Gracey Avenue  
Clarksville, Tennessee 37040-4012

RE: OCR Docket # 04-10-5003

Dear Mr. Harris:

This is to advise you of the resolution of the above-referenced compliance review that was initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR) on September 24, 2010. OCR had authority to initiate this compliance review under 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, and Title II of the Americans with Disabilities Act of 1990 (Title II), 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 in education programs and activities that receive Federal financial assistance (FFA) from the Department and public entities, respectively. As a recipient of Federal financial assistance and a public entity, the District is subject to Section 504 and Title II and their respective regulations.

The compliance review addressed the following legal issue:

- Whether the District is appropriately evaluating students with food allergies, diabetes, asthma, and other health impairments who have Individual Health Care Plans (IHCPs) to determine if the students are qualified students with a disability as defined by Section 504 and Title II.

**Applicable Legal Standards:**

The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(1)(i) and (iii), which OCR interprets to include the recently expanded definitions from the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), defines a disabled person as any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(2)(i), which OCR interprets to include the recently expanded

definitions from the ADA, defines physical or mental impairment as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulation implementing Section 504 at 34 C.F.R. § 104.3(j)(2)(ii), which OCR interprets to include the recently expanded definitions from the ADA, provides that the phrase “*major life activities*” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The ADA added the following examples of major life activities to this non-exhaustive list: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating, and functions of the immune system, normal cell growth, digestive, bowel, bladder, brain, circulatory, endocrine, reproductive, neurological, and respiratory functions.

The ADA also provided that mitigating measures cannot be considered when the school district assesses whether the student has a disability. For example, when determining whether a student has a disability, the school district must evaluate whether the medical or health condition would be substantially limiting without considering amelioration by medication or other measures. If the health condition is likely to substantially limit a major life activity, the child would be considered to have a disability.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a - c) requires a recipient to conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any actions with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services which ensure that: 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; 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 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). In interpreting evaluation data and in making placement decisions, a recipient 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; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; 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, ensure that the placement decision is made in conformity with the regulation implementing Section 504 at 34 C.F.R. § 104.34.

The regulation implementing Section 504 at 34 C.F.R. § 104.36 requires a recipient to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

The Title II implementing regulation at 28 C.F.R. § 35.104(1)(i) provides the same definition for “physical or mental impairment” and the regulation at 28 C.F.R. § 35.104(2) provides the same definition for “major life activities.” However, the Title II regulation at 28 C.F.R. § 35.104(1)(ii-iii), further defines physical or mental impairment as follows: “(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. (iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.”

Title II's general prohibitions against discrimination provide that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.” 28 C.F.R. § 35.130.

## **Background**

The Clarksville-Montgomery School District is located in Clarksville, Tennessee, between Fort Campbell, Kentucky and Nashville, Tennessee, serving a population of over 147,000 people. The District is the seventh largest district in Tennessee. The District serves 30,000 students and employs about 3,900 teachers, administrators and support staff. There are 36 schools in the district: one K-5 Magnet School, 20 elementary schools, seven middle schools, seven high schools, and one middle college.

## **Summary of Investigation to Date**

The documentation submitted by the District showed that during the 2010-2011 school year there were 1,206 students with IHCPs and 194 students with Section 504 plans or IEPs. For all of these students, the District had physicians' orders requiring medication or other medical interventions during the school day. OCR visited ten schools that had the highest and lowest numbers and percentages of students with IHCPs, Section 504 plans and IEPs: Barksdale Elementary, Byrns Darden Elementary, Cumberland Heights Elementary, Kenwood High, Montgomery Central Middle, Moore Magnet Elementary, New Providence Middle, Northeast High, Rossview Elementary, and Sango Elementary. In each school, OCR interviewed the administrators and the guidance counselor (who is generally the Section 504 coordinator in the school), as well as the school nurse, members of the student support team (S-team) and, in

several instances, the school psychologist. OCR also interviewed the District Section 504 Coordinator and Central Office staff, including coordinators of nursing, counseling and the high school and elementary school supervisors. The Section 504 coordinators in the schools visited, as well as Central Office staff, stated that a student's condition must impact learning before the student would be referred for evaluation. Several school staff stated to OCR that the District is reluctant to identify students as having a disability as defined by Section 504.

Pursuant to the Section 504 regulation, a district must conduct an evaluation of any individual who, because of a disability, needs or is believed to need special education or related services. However, a medical diagnosis alone does not necessarily trigger a district's obligation to conduct an evaluation to determine the need for special education or related services. Furthermore, even if, as a result of a properly conducted evaluation, the district determines that the student does not need special education or related services, the district is not required to provide aids or services.<sup>1</sup> Based on OCR's review of records in the above-referenced schools and interviews of school nurses, 235 of the students on IHCPs should, at a minimum, have been referred for evaluation by a knowledgeable team, but were not.

The District provided a copy of its policies for the evaluation and placement of students who have or are suspected of having disabilities. OCR found that the District's policy and procedures regarding the identification of students as students with disabilities, as defined by Section 504, track the definition of disability found in the Section 504 regulation. The process begins with a referral by a guidance counselor or another member of the school staff to the student support team ("S-Team," comprised generally of a guidance counselor, a teacher and a school administrator). The S-Team provides guidance to teachers for the implementation of interventions unless the student's condition merits immediate referral for evaluation. If the intervention strategies do not work, the S-Team can recommend a Section 504 evaluation. Parents are provided information about their rights, including the right to due process. The eligibility and placement determinations are made by a group of persons with knowledge of the student and the evaluation results. Parents are invited to participate in the eligibility and placement meetings. The District uses the requisite forms to capture referral, S-Team, evaluation and placement information. The document that results from the evaluation and placement process is called a "Section 504 Plan" by the District.

It is important to note that an IHCP may also comply with the provisions of Section 504, provided that, where appropriate, students with IHCPs, who are students with disabilities who may need related services, are provided evaluation, and, where appropriate, placement, and the procedural safeguards required by the Section 504 regulation. However, as noted above, OCR's investigation revealed that 235 students with IHCPs in the ten schools visited in the District who

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<sup>1</sup> For example, a student diagnosed with severe asthma has a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability; she fully participates in her school's regular physical education program and extracurricular sports, does not need help administering her medicine, and she does not require any modifications to the school's policies, practices, or procedures. The district is not obligated to provide the student with any additional services.

should have been referred for evaluation but were not evaluated pursuant to the process set forth in Section 504, nor were they provided procedural safeguards.

Generally, the school nurse learns of a student's medical condition when the student's parent completes a medical emergency card. If the student requires daily medical intervention such as administration of medication (including insulin) and breathing treatments or other interventions, the nurse requires the parents to obtain medical authorization for the treatments. The District has a form for medical authorization which is completed by the student's doctor. As noted above, a medical diagnosis alone does not necessarily trigger the obligation to conduct an evaluation pursuant to the Section 504 regulation. Upon receipt of the requisite form, the nurse develops an IHCP based on the student's doctor's orders. The process of developing IHCPs is conducted solely by the school nurse in collaboration with the student's parents and the student's doctor. The school nurse also has sole responsibility for ensuring the implementation of the IHCP. The development and implementation of the IHCP for a student does not include consideration of possible referral for an evaluation as set forth in the Section 504 regulation using a variety of sources and in consultation with a group of knowledgeable persons or notice of procedural safeguards. The most common conditions requiring the involvement of the school nurse are asthma, diabetes, seizure disorders, and severe allergies. With respect to students with food allergies, OCR learned that the nurse coordinates with the cafeteria staff and the student's teachers to insure that they are not exposed to certain foods.

Prior to the passage of the ADA, a student with a food allergy such as a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand-washing and bringing a homemade lunch) to minimize the risk of exposure. The district may have created an IHCP to address such issues without necessarily providing an evaluation, placement, or procedural safeguards. However, after the ADA, the effect of mitigating measures cannot be considered when the district assesses whether the student has a disability. If, because of the peanut allergy, the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards; an IHCP would not be sufficient if it did not incorporate these requirements as described in the Section 504 regulation.

The District provided no documentation showing that it provides ongoing Section 504 training for staff, including guidance counselors, who serve as the Section 504 coordinators in the schools.

Prior to the conclusion of OCR's investigation, the District requested to resolve the compliance review. Subsequent discussions with District officials resulted in the District signing the enclosed Resolution Agreement (Agreement), which, when fully implemented, will resolve the issues covered by the review. OCR will monitor the District's implementation of the Agreement.

Under the Freedom of Information Act, it may be necessary to release this letter 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 privacy.

Pursuant to OCR procedure, the District is reminded that no recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or participated in any manner in connection with a complaint.

OCR determinations are made on a case-by-case basis and are not formal statements 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 are made available to the public.

OCR wishes to thank you and your staff for the cooperation extended to OCR during the course of its investigation. If you or your staff have any questions regarding this matter, please do not hesitate to contact me at (404) 974-9331, or Arthur Manigault, Compliance Team Leader at 404-974-9376.

Sincerely,

/s/

Cynthia G. Pierre, Ph. D.  
Regional Director

Enclosure