

55 NDLR 16
69 IDELR 256
117 LRP 7678

**North East (TX) Independent School
District**
**Office for Civil Rights, Southern Division,
Dallas (Texas)**
06-15-1452
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Related Index Numbers

10.028 Diabetes
405.028 Diabetes
405.038 Evaluation
10.030 Discrimination
15.132 Public Entities, In General
37.045 Specific Conditions, Diabetes
Judge / Administrative Officer
Taylor D. August, Regional Director

Case Summary

A district that deferred to its blanket policy concerning medication storage in lieu of determining whether a student with Type I diabetes required a glucose monitoring kit in class engaged in discrimination, OCR found. The district violated Section 504 and Title II by failing to individually assess what aids and services the student required in order to receive FAPE. The 504 team rejected the parent's request to keep the kit in the classroom based on a district practice that required diabetes testing equipment to be kept in the school clinic. The student's father filed an OCR complaint alleging discrimination. OCR noted that the determination of what aids and services a student with a disability requires must be made by a group of knowledgeable people based on the student's specific needs. 34 CFR 104.33(b); 28 CFR 35.130. In this case, OCR observed, the district made its decision not based on the student's individual needs but, rather, based on a district practice. In reaching that conclusion, OCR pointed to the parent's and teacher's statements that

the school nurse told the parent that district policy barred glucose testing kits from classrooms. It was a safety hazard to the teacher and other children, the nurse reportedly informed the parent. OCR also remarked that in its interview with the nurse, the nurse confirmed that there was no other basis for the decision not to provide the kit in class. "Adherence to the practice seemingly substituted for or circumvented the requirement that a team of persons make the determinations based on the individual needs of the Student," OCR wrote. Once the parents asserted that a kit should be kept in class to ensure the student's safety, the district should have fully and carefully considered the matter, OCR stated. Instead, it allowed a district policy to dictate the decision.

Full Text
Appearances:

Dear Dr. Gottardy:

The U.S. Department of Education, Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint which was received in our office on May 4, 2015, and filed against the North East ISD (District or NEISD), in San Antonio, Texas. The Complainant alleged that the NEISD discriminated against his son (Student) on the basis of disability []. Specifically, the Complainant alleged that:

1. During the 2014-2015 school year, the NEISD discriminated against the Student, on the basis of his disability, when:
 - a. In April 2014 and thereafter, it failed to implement the Student's Individualized Education Program (IEP), related to his disability by not allowing a glucose testing kit to be kept in the Student's classroom;
 - b. In April 2014 and thereafter, it did not provide trained staff to enable glucose testing for the Student in an emergency or in a situation when the Longs Creek Elementary staff nurse is unavailable;
 - c. The NEISD discriminated against the Student by failing to provide the Student with an equal

opportunity to participate in nonacademic services (i.e. School field trip on or around May 14, 2015); and

d. The District failed to provide notice of the Section 504 and Title II procedural safeguards at the time of initial evaluation, on April 27, 2015.

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), 29 U.S.C. § 794 (amended 1992), and its implementing regulations at 34 C.F.R. Part 104, which 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. § 12132, 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. Prior to the initiation of the investigation, OCR determined that the NEISD is a recipient of Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

OCR investigated the following legal issues:

1. Whether the NEISD discriminated against the Student, on the basis of his 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. not allowing a glucose testing kit to be kept in the Student's classroom), 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;

2. Whether the NEISD discriminated against the Student, on the basis of his disability, by failing to provide the Student an appropriate public education designed to meet the Student's individual educational

needs (i.e. not providing trained staff to enable glucose testing for the Student in an emergency or in a situation when the Longs Creek Elementary staff nurse is unavailable), during the 2014-2015 school year in violation of Section 504 and its implementing regulations at 34 C.F.R. §§ 104.33(a), and 104.33(b)(1), and Title II and its implementing regulations at 28 C.F.R. § 35.130(a);

3. Whether on May 14, 2015, the NEISD discriminated against the Student on the basis of his disability by failing to provide the Student with an equal opportunity to participate in nonacademic services (i.e. a school field trip on or around May 14, 2015) in violation of Section 504 and its implementing regulations at 34 C.F.R. § 104.37(a)(1) and (2) and Title II and its implementing regulations at 28 C.F.R. § 35.130(a); and

4. Whether the NEISD discriminated on the basis of disability by failing to provide notice of procedural safeguards at the time of initial evaluation, on April 27, 2015, in violation of Section 504, at 34 C.F.R. § 104.36, and Title II, at 28 C.F.R. § 35.130.

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 or retaliation 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.

In reaching our compliance determination, OCR reviewed documents provided by the NEISD, as well as information obtained during OCR interviews with NEISD staff. In addition, OCR conducted multiple interviews with Complainant and the Complainant's spouse throughout the course of the investigation. Based on our review and analysis of the information obtained during this investigation, OCR has determined that there is sufficient evidence to establish a violation of Section 504 and Title II with

respect to Issue 1, but insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to Issue 2, Issue 3, and Issue 4. Provided below is an explanation of how this determination was reached.

Issue I (Failure to Implement)

The Complainant alleged that the NEISD did not implement the Student's Individualized Education Program (IEP), as reflected in the Student's April 27, 2015 written Section 504 documents. Specifically, the Complainant alleged that although the IEP indicates that a "glucose kit" will be kept in the Student's classroom, in case of an emergency, the Student was not allowed to maintain glucose testing materials in the classroom. OCR opened issue 1 for investigation, to determine whether the NEISD failed to provide regular or special education and related aids and services deemed necessary to meet the Student's individual educational needs 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 28 C.F.R. § 35.130, respectively.

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 free appropriate public education (FAPE) to each qualified student with a disability 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.

Findings of Fact

Documentation provided by the NEISD indicates that a group of persons knowledgeable about the Student (Section 504 Committee) evaluated the Student, and determined that he was a qualified individual with a disability (Type I Diabetes). In reference to having a "testing kit" within the Student's classroom, the Section 504 Committee Plan states the following relevant information:

... the teacher will have snacks on hand as well as a Glucose Kit in case of an emergency. ... Parents expressed concern about having testing kit in the classroom in case of an emergency. School nurse stated that she would contact district office to check to see if this is a possibility.

OCR reviewed all the NEISD policies and documents provided by the NEISD relevant to diabetic testing kits. One of the NEISD's policies is

titled Medication Protocols. The Medication Protocols document indicates that medication must be kept in the clinic, medication may not be stored in a classroom, and that students who have physician and guardian permission to self-carry diabetic monitoring equipment may do so only after "specific NEISD requirements have been met." The Medication Protocols and other NEISD policy documents provided to OCR do not explicitly indicate what the NEISD requirements are concerning diabetic monitoring equipment, or indicate that diabetic testing equipment cannot be maintained in the classroom. OCR was unable to identify any other NEISD policy specifically indicating that diabetic testing kits cannot be maintained in a student's classroom.

The Complainant, the Complainant's spouse, the Student's teacher, the Longs Creek Elementary School Nurse (Nurse), and the Longs Creek Elementary Section 504 Coordinator (School 504 Coordinator) were present at the April 27, 2015 Section 504 meeting. OCR conducted telephonic interviews with the Complainant and the Complainant's spouse. OCR also conducted interviews with the Nurse, the Student's teacher, the School 504 Coordinator, the Longs Creek Elementary Clinic Assistant, the district-wide NEISD 504 Director (NEISD Section 504 Director), and the district-wide NEISD Section 504 Coordinator (NEISD 504 Coordinator).

During the interviews, OCR sought to clarify whether the 504 plan called for having a diabetic testing kit in the classroom. The Complainant indicated that, during the April 27, 2015 Section 504 meeting, the Nurse stated that district policy indicated that diabetic testing equipment could not be kept in the classroom and that maintaining diabetic testing equipment in the classroom would be a safety hazard to other children. The Complainant's spouse stated that after the Section 504 meeting, she and the Complainant were reiterated the same policy, and safety concern, regarding diabetic testing kits by the Nurse.

The Student's teacher corroborated that the School Nurse told the Complainant's spouse that a

glucose testing kit with needles would not be allowed in the classroom because it is a safety issue for students and their teacher. The Student's teacher also told OCR that the Nurse said, and the 504 committee agreed, that it was NEISD policy not to allow a testing kit to be kept in the classroom because it is a safety issue. When asked if there was any other basis for the decision that the Student could not have a glucose test kit in the classroom besides NEISD policy to not allow glucose test kits in the classroom, the Student's teacher stated "Nope. That was it." In OCR's interview, the Nurse indicated that when the Student's parents asked about maintaining a diabetic testing kit in the Student's classroom, the Section 504 Committee "said no, because [they] did not want the needles to be around the other students in which they could get injured." The Nurse further indicated that the decision concerning where to keep the Student's diabetic testing kit was based on "general district policy." When asked if there were any other reasons for the determination that the Student's testing kit could not be maintained in the school's classroom other than general district policy, the Nurse stated "Not to my knowledge."

The NEISD 504 Director indicated that "it's not really that the 504 meeting decides" where a diabetic student's testing equipment is maintained. When asked who decided where testing materials are maintained for a diabetic student, the NEISD 504 Director stated:

The procedures used by our nursing department determine where the medications and sharps are kept. Unless the doctor's order has something different for that, we follow those for all medications.

The NEISD 504 Director explained that an Accu-Chek quick click pen is a sharp. The NEISD 504 Coordinator indicated that standard procedures are to maintain testing equipment in the Nurse's office, but that she is not sure if there is a written policy that indicates this.

The following information was obtained through interviews with the Complainant, the Complainant's spouse, and NEISD staff concerning the meaning of

the words "glucose kit" in the April 27, 2015 Section 504 Committee Report. The Complainant indicated that it is his understanding that the words "glucose kit," used in the April 27, 2015 Section 504 report refer to the Student's glucose testing equipment, including necessary lancets. The Complainant's spouse indicated that she believes that the use of the words "glucose kit," in the April 27, 2015 Section 504 report, includes the Student's monitor, testing strips, and Accu-Chek quick click pen. The Complainant's spouse indicated that she believed that reports kept by the Student's doctor listed glucose testing materials as part of a "glucose kit." The Complainant's spouse indicated that these reports were kept by the doctor only and had not been provided to the NEISD. The Complainant and his spouse indicated that although the April 27, 2015 Section 504 report indicates that a glucose kit would be kept in the Student's classroom for emergencies, the Student was not allowed to maintain diabetic testing equipment within his classroom during the 2014-2015 school year.

OCR's interviews with NEISD staff confirmed that the Student was not permitted to maintain his Accu-Chek quick click pen, needles, or other glucose testing materials within the classroom during the 2014-2015 school year. However, the NEISD staff members of the Section 504 Committee provided a different meaning for the term "glucose kit" used in the April 27, 2015 Section 504 report. The Nurse, the Student's classroom teacher, and School 504 Coordinator each indicated that the term "glucose kit" referred to glucose tablets, and that "glucose kit" did not include glucose testing equipment. The School 504 Coordinator indicated that the term "glucose kit" was used interchangeably with the words "glucose tablets", during the April 27, 2015 Section 504 meeting. Each NEISD staff member of the Section 504 Committee indicated that she did not have knowledge of any documents, information, or supporting evidence which explained or defined the meaning of "glucose kit."

The April 27, 2015 Section 504 plan does indicate that the NEISD Section 504 Committee

deemed maintaining a "glucose kit" in the Student's classroom in case of an emergency to be necessary in order to provide the Student a FAPE. Based on OCR interviews, however, there was no consensus as to the meaning of the term "glucose kit." Based on the Complainant's and the Complainant's spouse's understanding, the NEISD failed to provide a related aid or service in the form of a classroom testing kit in accordance with the Section 504 plan. Based on the NEISD staff's understanding of the words "glucose kit," the NEISD provided the glucose kit as stipulated in the Section 504 plan. OCR found that although the meaning of what constituted a "glucose kit" differed between the Complainant and the NEISD, there was no dispute that a testing kit, with any kind of lancet, sharp, or needle, was not provided in the classroom at any time during the implementation of the Section 504 plan.

Analysis and Conclusions

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 evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: first, 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; second, 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 third, 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.

In regards to step one of the aforementioned legal standard, based on a review of documentation provided by the NEISD, interviews, and all other information available to OCR, OCR has determined that a group of persons knowledgeable about the Student evaluated the Student, and determined that he

was a qualified individual with a disability (Type I Diabetes). In regards to step two of the aforementioned legal standard, based on the interviews and documentation provided, OCR finds that, in general, many of the needs of the Student were assessed and discussed on an individualized basis. However, with respect to the alleged need at issue in the complaint, that a diabetic testing kit be kept within the Student's classroom, OCR finds that the need was not assessed and determined on an individualized basis by the Section 504 Committee. Specifically, the evidence reviewed by OCR indicates that the NEISD did not consider, on an individual basis, whether the related aid and service of having a diabetic testing kit in the classroom for the Student was necessary to provide a FAPE. The evidence reviewed by OCR indicates that instead of considering the individual need of this Student to have a testing kit in the classroom, the NEISD staff adhered to an actual or perceived blanket District practice, or policy, that, according to the NEISD interviewees, does not allow needles or sharps to be in the classroom regardless of the individual needs of this or any other student.

The preponderance of the evidence indicates that the decision was made based on District practice which prohibits diabetic testing equipment to be maintained within a Student's classroom and which requires diabetic testing equipment to be maintained within the clinic. This practice was described during interviews with the Complainant, the Complainant's spouse, and some NEISD staff members as a "policy," but OCR was unable to find this practice written within any of the policy documents which the NEISD provided to OCR. The Nurse and the Student's teacher also indicated, during interviews with OCR, that maintaining diabetic testing equipment would present a safety concern for other students and the Student's teacher.

The NEISD's practice to not permit diabetic testing materials to be maintained in students' classrooms appears rule-like, and in this case, adherence to the practice seemingly substituted for or

circumvented the requirement that a team of persons make the determinations based on the individual needs of the Student. By failing to have the Section 504 Committee make a carefully considered determination concerning where the Student's testing materials would be kept based on the individual needs of the Student, the NEISD did not meet its obligations with respect to Section 504 and Title II. Once the NEISD became aware of the Student's need to have blood glucose testing during school hours, and particularly when the parents maintained that the blood glucose testing equipment should be maintained in the classroom for the Student's safety, it was obligated to ensure that a group of knowledgeable persons, using current information, fully and carefully consider the matter and, in doing so, make a determination. OCR recognizes that the NEISD views overall safety concerns in the classroom as a matter of importance and OCR concurs on the importance of classroom safety. However, Section 504 and Title II require that determinations with respect to aids and services are based on an assessment and evaluation of the needs of the specific disabled student. See 34 C.F.R. § 104.33(b); 28 C.F.R. § 35.130.

In regards to step three of the aforementioned legal standard, based on all interviews conducted and the totality of information available during investigation, the two different definitions for the term "glucose kit" asserted by the Complainant and the NEISD both appear to be reasonable understandings of the term. Although the Complainant's spouse indicated that an internal report used by the Student's doctor may support the Complainant's asserted definition of the term, this report was not provided to, or considered by the NEISD. This internal report, which was not considered by the Section 504 Committee, does not add sufficient evidentiary support to demonstrate the intended meaning of "glucose kit" in the Student's Section 504 Plan.

Based on the aforementioned, concerning step two of the legal standard applied by OCR, OCR has determined that the preponderance of the evidence

supports a conclusion that the NEISD failed to comply with Section 504 and Title II regarding the issue investigated. Accordingly, OCR secured the enclosed voluntary resolution agreement from the NEISD pursuant to OCR's Case Processing Manual (CPM) Sections 303(b) and 304 to address the Section 504 and Title II compliance concerns implicated by Issue 1, and will monitor the NEISD to ensure that the agreement is fully implemented.

Issue 2 (Failure to Provide Appropriate Education)

The Complainant alleged that during the 2014-2015 school year the NEISD did not provide trained staff to conduct glucose testing for the Student in circumstances in which the Longs Creek Elementary School Nurse was unavailable. On that basis, OCR opened issue 2 for investigation, to determine whether the NEISD discriminated against the Student, on the basis of his disability, by failing to provide the Student an appropriate public education designed to meet the Student's individual educational needs during the 2014-2015 school year, in violation of Section 504 and its implementing regulations at 34 C.F.R. §§ 104.33(a), and 104.33(b)(1), and Title II and its implementing regulations at 28 C.F.R. § 35.130(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, 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. 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.

Findings of Fact

The Complainant's spouse indicated that it was her belief that only the Longs Creek Elementary School Nurse was trained and able to perform glucose testing for the Student. The Complainant's spouse further explained that neither the written Section 504 documents nor the Student's individual health plan (IHP) indicated who would perform glucose testing for the student if the school nurse was unavailable. The written Section 504 documents were provided to OCR by the Complainant, and by the NEISD, in response to OCR's initial data request. The NEISD also provided a copy of the student's IHP, in response to OCR's initial data request. After reviewing the written Section 504 documents and the IHP for the Student, OCR determined that the written Section 504 documents do not specifically indicate that another individual at Longs Creek Elementary is able to perform glucose testing. However, the written Section 504 documents reference the Student's IHP, which does indicate that the Longs Creek Elementary Clinic Assistant is also able to perform glucose testing for the Student.

OCR conducted interviews with the Longs Creek Elementary Clinic Assistant, and all NEISD staff members of the Student's Section 504 Committee. The Clinic Assistant indicated if at any time, the School Nurse was unavailable, she would conduct glucose testing for the Student, and that if at any time the School Nurse was absent, a NEISD flex-nurse would take her place as a substitute. The Clinic Assistant explained that she is an Unlicensed Diabetes Care Assistant (UDCA), and has been trained to monitor diabetes. A Longs Creek Elementary Clinic record, provided, by the NEISD as part of OCR's initial data request, indicates that the Clinic Assistant did monitor and treat the Student on several days throughout the 2014-2015 school year. The School nurse confirmed that she and the Clinic Assistant

were able to administer glucose testing for the Student.

During interviews with the Complainant and the Complainant's spouse, a concern was expressed concerning availability of staff trained to administer glucose testing during a lockdown. The School nurse further explained that in the event of a soft lockdown, she would still be able to go to the Student and provide any needed assistance. In the event of a hard lockdown, the School Nurse indicated that snacks and glucose tablets were maintained in the classroom for use if the Student's sugar levels were low, and that if the Student's sugar levels were high, it was not dangerous and he would receive treatment after the lockdown was over. The School Nurse indicated that this was discussed and decided at the April 27, 2015 Section 504 meeting. The Student's classroom teacher and the school Section 504 Coordinator also indicated that this was discussed and decided at the April 27, 2015 Section 504 meeting.

Analysis and Conclusions

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). The information available to OCR generally indicates that the Clinic Assistant is trained to conduct glucose testing if the School Nurse is unavailable, a flex-nurse will take the School Nurse's place if the School Nurse is absent, and a decision was made during the April 27, 2015 Section 504 meeting concerning treatment of the Student by a trained staff member in the event of a potential school lockdown. Based on a careful review of the totality of information available to OCR, OCR has determined that there is insufficient evidence to establish that the NEISD violated Section 504 or Title II, as alleged.

Issue 3 (Failure to Provide an Equal Opportunity to Participate in Nonacademic Services)

The Complainant alleged that the Student was

not provided with an equal opportunity to participate in nonacademic services. Specifically, the Complainant alleged that the Student was not provided with an equal opportunity to participate in a school field trip in May 2015. On that basis, OCR opened issue 3 for investigation, to determine whether on May 14, 2015, the NEISD discriminated against the Student on the basis of his disability by failing to provide the Student with an equal opportunity to participate in nonacademic services in violation of Section 504 and its implementing regulations at 34 C.F.R. § 104.37(a)(1) and (2) and Title II and its implementing regulations at 28 C.F.R. § 35.130(a).

Legal Standard

Under the Section 504 and Title H implementing regulations, at 34 C.F.R. § 104.37 and 28 C.F.R. § 35.130, respectively, a public school district that receives Federal financial assistance from the Department (recipient) must provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford qualified students with a disability an equal opportunity for participation in such services and activities.

Findings of Fact

The Complainant and the Complainant's spouse indicated that there was not a plan in place to provide the Student with diabetic testing and treatment during transportation to and from school field trips. The Complainant's spouse indicated that she had raised this concern verbally at the April 27, 2015 Section 504 meeting and in May 2015, and she provided an email sent to the school Section 504 Coordinator, which requested that the Student ride with her, or have a trained professional on the bus during field trips. The Complainant's spouse indicated that before the second field trip of the 2014-2015 school year, she told the Student's classroom teacher that the Student would not be attending the second field trip¹ because she did not feel comfortable with him riding the bus without her or a trained professional.

During interviews with OCR, the School Nurse and the Student's classroom teacher indicated that the

Student's parents had expressed concerns about transportation during field trips, it had been discussed during the April 27, 2015 Section 504 meeting, and that a decision had been made by the Section 504 Committee. The School Nurse and the Student's classroom teacher both explained that the decision made by the Section 504 Committee was that either of the parents could follow the bus during field trips and the bus would stop if there were any issues, or if the parents did not attend, the School Nurse, a flex-nurse, or a UDCA would ride the bus with the Student. The school Clinic Assistant also indicated that either the School Nurse, herself, or a flex-nurse would attend school field trips with the Student. In response to OCR's initial data request, the NEISD provided an email sent to the Student's classroom teacher by the Complainant's spouse on May 27, 2015 which indicated that the Student would not be attending the second field trip because he had follow-up with a diabetic educator.

Analysis and Conclusions

When considering the totality of the information available to OCR, OCR finds that there is a disagreement between the NEISD and the Complainant, concerning whether a plan was in place to provide the Student with an equal opportunity to attend the second field trip during the 2014-2015 school year, as well as other field trips. There also appears to be conflicting information for the basis of the Student's nonattendance at the second field trip. 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 (i.e., between the complainant's assertions and the recipient's assertions) 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 specific issue investigated. Based on a careful review of the totality of

information available to OCR, OCR has determined that there is insufficient evidence to establish that the NEISD violated Section 504 or Title II, as alleged.

Issue 4 (Failure to Provide Notice of Procedural Safeguards)

The Complainant alleged that the NEISD failed to provide notice of procedural safeguards at the time of the Student's initial evaluation on April 27, 2015. On that basis, OCR opened issue 4, to determine whether the NEISD discriminated on the basis of disability by failing to provide notice of procedural safeguards at the time of initial evaluation, on April 27, 2015, in violation of Section 504, at 34 C.F.R. § 104.36, and Title II, at 28 C.F.R. § 35.130.

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. 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. 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 ...

Finally, the Section 504 regulations, at 34 C.F.R. § 104.36, provide that:

[a] recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, 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.

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.

Findings of Fact

The Complainant's spouse initially indicated that the Complainant and she had not been provided by the NEISD with notice of procedural safeguards, information about due process, or their right to an impartial hearing, and that the Complainant had not been provided with information concerning what the Complainant could do if he disagreed with a decision made by the Section 504 Committee. In response to OCR data requests, the NEISD provided a Notice and Consent for 504 Evaluation form, dated April 1, 2015. The form is signed by the Complainant's spouse and indicates that she received notice of Section 504 parent rights. The NEISD provided OCR a copy of the document provided to the Complainant and the Complainant's spouse, in reference to the

Complainant's spouse's signature. The document, titled Notice of Parent and Student Rights Under Section 504, provides notice of procedural safeguards, including that the Complainant has a right to an impartial hearing. During an interview with OCR, the School Section 504 Coordinator indicated that the Complainant and his spouse had been provided with notice of procedural safeguards prior to the April 27, 2015 Section 504 meeting and that the Complainant's spouse had signed to indicate she received it. During follow-up interviews, the Complainant and the Complainant's spouse indicated that they believed they had received the Notice of Parent and Student Rights Under Section 504 document.

Analysis and Conclusions

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). Since the evidence available to OCR during investigation indicates that the Complainant and the Complainant's spouse were provided with notice of procedural safeguards prior to the April 27, 2015 Section 504 meeting, OCR has determined that there is insufficient evidence to establish that the NEISD violated Section 504 or Title II, as alleged.

Conclusion

On November 16, 2016, OCR secured a Resolution Agreement (Agreement) from the NEISD to address the above-referenced compliance concern. In the Agreement, the NEISD will review and, if necessary, revise its Section 504 policies and procedures to ensure compliance with Section 504 and Title II. The NEISD will conduct an OCR-approved training session regarding the NEISD's obligation under Section 504 and Title II to provide a FAPE to all qualified students with disabilities attending its schools, including its duty to fully implement students' IEPs and its obligation to ensure that students' needs are determined on an individualized basis. Additionally, the NEISD

Superintendent will issue a statement to all NEISD staff indicating that when evaluating a student pursuant to Section 504 and Title II, a student's needs must be determined on an individualized basis by a group of persons knowledgeable about the student and the information considered. Finally, the NEISD will notify the Complainant, and the parent(s) or guardian(s) of similarly situated students of its willingness to reevaluate the students individually.

OCR has determined that the Agreement, when fully implemented, will resolve the compliance concern identified during the investigation. Accordingly, as of the date of this letter, OCR is closing its investigation of this complaint; however, OCR will actively monitor the District's implementation of the Agreement. Please be advised that if the District fails to take the action required under the Agreement, OCR will immediately resume its compliance efforts.

This concludes OCR's investigation of the complaint and should not be interpreted to address the NEISD'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. There may be a right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that the NEISD 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, an individual 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.

If you have any questions about this letter, you may contact Michael J. Pillera, Civil Rights Attorney, at (214) 661-9614, or by email at Michael.Pillera@ed.gov, or you may contact Adriane P. Martin, Supervisory Attorney/Team Leader, at 214-661-9678 or by email at Adriane.Martin@ed.gov.

¹The Complainant provided the date of May 14, 2015 for the second field trip. Based on data provided by the NEISD and interviews of NEISD staff, OCR determined that the second field trip took place on May 29, 2015.

North East Independent School District (NEISD)

Resolution Agreement

The North East Independent School District (NEISD or District) agrees to implement this Resolution Agreement (Agreement) to resolve a compliance issue identified during the investigation of the above referenced complaint, which was opened for investigation by the U.S. Department of Education (Department), Office for Civil Rights, (OCR). The NEISD will take the following actions to ensure that the District is in compliance with Section 504 or the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 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 at 28 C.F.R. Part 35.

Action Item 1: Section 504 Policies and Procedures

1.1 The NEISD shall review and, if necessary, revise its Section 504 policies and procedures to ensure that they include established standards and procedures for the evaluation and placement of individuals who, because of disability, need or are believed to need special education or related services, including:

(a) Evaluation Procedures that ensure that:

(i) 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;

(j) 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;

(ii) 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).

(iii) Students who have been provided special education and related services are periodically reevaluated. A reevaluation procedure consistent with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this requirement.

(b) Placement Procedures that ensure that in interpreting evaluation data and in making placement decisions, the NEISD shall:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(ii) Establish procedures to ensure that information obtained from all such sources is documented and carefully considered (e.g., evaluation data);

(iii) 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;

(iv) Ensure that students' needs are determined on an individualized basis; and

(iv) Ensure that the placement decision is made in conformity with § 104.34.

Reporting Requirements

1.2 By February 1, 2017, the NEISD will submit to OCR, for its review and approval, a copy of the revised draft Section 504 policies and procedures it has developed pursuant to Action Item 1, or a narrative indicating that current District Section 504 policies and procedures have been reviewed, and are in compliance with Section 504, and its implementing regulation at 34 C.F.R. Part 104, and Title II, and its implementing regulation at 28 C.F.R. Part 35. If the NEISD determines that current District policies and procedures are in compliance, the NEISD will provide an explanation or supporting bases.

1.3 If necessary, within 30 days of receipt of written notification from OCR of its approval of the revised Section 504 policies and procedures, the NEISD will provide documentation to OCR evidencing that the policies and procedures developed in accordance with Action Item 1.1. have been published, fully implemented and that informative communications have been provided to all NEISD staff notifying them of said policies and procedures.

Action Item 2: Training

2.1 The NEISD will provide training, by a qualified individual,¹ to the Section 504/Title II District-wide NEISD Director(s) and Coordinator(s), and the Section 504/Title II Director(s) Coordinator(s), administrators, teachers, and aides responsible for implementing and/or ensuring compliance with Section 504² at the Longs Creek Elementary School. The training shall address, at a minimum:

(a) The NEISD's policies and procedures for carrying out its responsibilities under Section 504 and Title II to provide a free appropriate public education (FAPE) to each qualified disabled person who is within the NEISD's jurisdiction, regardless of the nature or severity of the person's disability (including any revised Section 504 policies and procedures for evaluation and placement referenced in Action Item

1.1 following their review and approval by OCR);

(b) The NEISD's obligation to conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services before (1) taking any action with respect to the initial placement of the student in regular or special education and (2) any subsequent significant change in the student's placement, consistent with the Section 504 regulations, at 34 C.F.R. § 104.35;

(c) The NEISD's obligation to ensure that students' needs are determined on an individualized basis;

(d) The NEISD staff members' obligation to fully implement any Section 504 Plan that has been developed for a qualified student with a disability;

(e) The development of a system to ensure that Section 504 services related aids and services that are identified as necessary are implemented;

(f) The NEISD's obligation to effectively notify parents of (1) placement decisions, including reevaluations, and (2) the NEISD's system of procedural safeguards, in accordance with the Section 504 regulations, at 34 C.F.R. § 104.36; and

(g) Provision of a FAPE to students with Diabetes.

Reporting Requirements

2.2 By March 1, 2017, the NEISD will submit to OCR for review and approval its proposal for complying with Action Item 2.1, above. Specifically, the NEISD will provide to OCR the name(s) and credentials of the individual(s) who it proposes to conduct the training session(s), and copies of the proposed materials the NEISD intends to use at the training session(s).

2.3 By no later than March 15, 2017 of the 2016-2017 school year, and in no event later than August 31, 2017 of the 2017-2018 school year, following OCR's approval of the individual(s) and materials referenced in Reporting Requirement 2.2, the NEISD will provide the training listed in Action

Item 2.1.

2.4 Within 10 calendar days of the completion of the training referenced in Reporting Requirement 2.3, the NEISD will provide OCR with documentation demonstrating that it has timely completed Action Item 2.1 above. Specifically, the NEISD will provide to OCR the names of all individuals who attended the training session(s) provided pursuant to Action Item 2.1, the date(s) and time(s) the training session(s) occurred, the name(s) and credentials of the individual(s) who conducted the training session(s), and copies of the materials disseminated at the training session(s).

Action Item 3: Statement Concerning Individualized Determinations

3.1 By January 15, 2017, the Superintendent will issue a statement to all District staff indicating that when evaluating a student pursuant to Section 504 and Title II, a student's needs must be determined on an individualized basis by a group of persons knowledgeable about the student and the information considered. The statement shall additionally indicate the following:

(a) Adherence to a District or school policy or procedure cannot circumvent the requirement that a team of persons make determinations concerning a student's needs, based on the individual needs of a student; and

(b) With respect to students with Diabetes, decisions concerning where to maintain diabetic testing materials must be made based on the individuals needs of a student.

Reporting Requirements

3.2 Within 10 calendar days of issuing the statement, the NEISD will provide OCR with documentation demonstrating the issuance of the statement and indicating the content of the statement.

Action Item 4: Individual Student

4.1 By January 15, 2017, the NEISD will notify the Complainant in writing (via certified mail, return receipt requested) of its willingness to conduct a

Section 504 placement meeting to determine the individual needs of the Student pursuant to Section 504, at 34 C.F.R. § 104.35. The NEISD will provide the Complainant with a minimum of thirty (30) calendar days to respond to its offer to evaluate the Student.

4.2 If the Complainant accepts the NEISD's offer to conduct a Section 504 placement meeting to determine the individual needs of the Student, the NEISD will conduct the Section 504 placement meeting within thirty (30) calendar days of the Complainant's acceptance. Pursuant to Section 504, at 34 C.F.R. § 104.35, the Section 504 placement meeting should be conducted by a group of persons who are knowledgeable about the Student, the meaning of the evaluation data, and placement options within the NEISD. Based on the Student's evaluation, the NEISD will:

(a) Assess and determine the Student's needs on an individualized basis;

(b) Determine which regular or special education aids and related services should be provided to the Student and in what educational setting;

(c) Make placement decisions in compliance with 34 C.F.R. § 104.33-35; and

(d) Notify the Complainant in writing (via certified mail, return receipt requested) of the NEISD's determinations made pursuant to this Action Item and provide the Complainant notice of the NEISD's system of procedural safeguards.

4.3 By February 1, 2017, after providing proper written notice to the Student's parent/guardian, a group of knowledgeable persons, including the parent/guardian, will determine whether the Student needs compensatory and/or remedial services as a result of the District's failure to provide appropriate regular and/or special education or related services from April 1, 2014 to the date of this signed Resolution Agreement. If so, within 1 week of its determination, the group will develop a plan for providing timely compensatory and/or remedial services with a completion date not to extend beyond

January 27, 2017. The District will provide the Student's parent/guardian notice of the procedural safeguards including the right to challenge the group's determination through an impartial due process hearing.

Reporting Requirements

4.4 By January 15, 2017, the NEISD will provide OCR with a copy of the written notification sent to the complainant and Student in accordance with Action Item 4.1.

4.5 By February 5, 2017, the NEISD will submit to OCR a narrative report and documentation evidencing whether the Complainant accepted the NEISD's offer conduct a Section 504 placement meeting to determine the individual needs of the Student and the scheduled date of the placement meeting.

4.6 If a Section 504 placement meeting to determine the individual needs of the Student occurs, in accordance with Action Items 4.1 and 4.2, within 2 weeks, of the placement meeting, the NEISD will submit to OCR all documents pertaining to the placement meeting and placement decision.

4.7 Within 2 weeks of the decision as to whether compensatory and/or remedial services are needed, the District will submit to OCR documents supporting the group's decision. The documentation submitted shall include documentation showing the participants in the meeting, an explanation for decisions made, the information considered, and a description of and schedule for providing any compensatory and/or remedial services (if any) to the Student. OCR will, prior to approving the District's decision and plan for providing the proposed services, review the documentation to ensure that the District met the procedural requirements of the regulation implementing Section 504, at 34 C.F.R. §§ 104.34, 104.35 and 104.36, in making these determinations.

Action Item 5: Similarly Situated Students

5.1 By February 1, 2017, the NEISD will identify all similarly situated diabetic students within

the District³, who require diabetic testing during the school day and who have been determined to be a qualified student with a disability by the NEISD. For each student identified, the NEISD shall do the following:

(a) Notify the parent(s) or guardian(s) of the student in writing (via certified mail, return receipt requested) of its willingness to conduct a Section 504 placement meeting to determine the individual needs of the student pursuant to Section 504, at 34 C.F.R. § 104.35. The NEISD will provide the parent(s) or guardian(s) with a minimum of thirty (30) calendar days to respond to its offer to evaluate the Student;

(b) If the parent(s) or guardian(s) of the student accept the NEISD's offer to conduct a Section 504 placement meeting to determine the individual needs of the Student, the NEISD will conduct the Section 504 placement meeting within thirty (30) calendar days of the parent(s) or guardian(s)' acceptance. Pursuant to Section 504, at 34 C.F.R. § 104.35, the Section 504 placement meeting should be conducted by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and placement options within the NEISD. Based on evaluation, the NEISD will:

- i. Assess and determine the student's needs on an individualized basis;
- ii. Determine which regular or special education aids and related services should be provided to the student and in what educational setting;
- iii. Make placement decisions in compliance with 34 C.F.R. § 104.33-35; and
- iv. Notify the parent(s) or guardian(s) of the student in writing (via certified mail, return receipt requested) of the NEISD's determinations made pursuant to this Action Item and provide the parent(s) or guardian(s) of the student notice of the NEISD's system of procedural safeguards.

Reporting Requirements

5.2 By February 17, 2017, the NEISD will provide OCR with a list of all similarly situated

students as identified in Action Item 5.1.

5.3 By February 17, 2017, the NEISD will provide OCR with a copy of the written notification sent to the parent(s) or guardian(s) of any students as identified in Action Item 5.1.

5.5 By March 19, 2017, the NEISD will submit to OCR a narrative report and documentation evidencing whether the parent(s) or guardian(s) of any students as identified in Action Item 5.1. accepted the NEISD's offer conduct a Section 504 placement meeting to determine the individual needs of the Student and the scheduled date of the placement meeting.

The NEISD understands that OCR will not close the monitoring of this agreement until OCR determines that the recipient has fulfilled the terms of this agreement and is in compliance with Section 504 and Title II. The NEISD understands that by signing this agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the NEISD understands that during the monitoring of this agreement, if necessary, OCR may visit the district, interview staff and contract staff, students, or others and request such additional reports or data as are necessary for OCR to determine whether the district has fulfilled the terms of this agreement and is in compliance with Section 504 and Title II, which are at issue in this case.

The NEISD understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the NEISD written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

¹A person knowledgeable about the laws and issues pertaining to the identification, evaluation and placement of students who are, or are believed to be, disabled.

²The Agreement uses Section 504 for brevity purposes; however, the Title II regulatory requirements are equally applicable.

³For purposes of Action Item 5.1, similarly situated diabetic students within the District means NEISD students who meet all of the following factors: (1) Require diabetic testing during the school day; (2) Have been determined to be a qualified student with a disability by the NEISD; and (3) Maintain personal equipment necessary for diabetic testing in the campus nurse's office only (i.e. the respective student does not maintain equipment necessary for diabetic testing on his/her person or within his/her classroom).

Regulations Cited

- 34 CFR 104.33
- 28 CFR 35.130
- 34 CFR 104.33(a)
- 34 CFR 104.33(b)(1)
- 28 CFR 35.130(a)
- 34 CFR 104.37(a)(1)
- 34 CFR 104.37(a)(2)
- 34 CFR 104.36
- 34 CFR 104.35(a)
- 34 CFR 104.35(b)