

108 LRP 34398

**Stanislaus County (CA) Office of  
Education**

**Office for Civil Rights, Western Division,  
San Francisco (California)**

09-07-1110

**December 21, 2007**

**Judge / Administrative Officer**

**Mary Beth McLeod, Team Leader**

**Full Text**

**Appearances:**

Dear Superintendent Changnon:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced Complaint against the Stanislaus County Office of Education (County).<sup>1</sup> The Complainant<sup>2</sup> alleged that the County discriminated against the Student based on disability (cognitive and developmental impairments), and retaliated against the Student's mother for advocating on behalf of her son. The issues OCR investigated were:

1) Whether the County denied the student a Free Appropriate Public Education (FAPE) because it failed to implement the Student's November 2006 individualized Education Plan (IEP), as written, OCR investigated examples of noncompliance with the IEP alleged by the complainant. These alleged examples included a failure to provide occupational therapy services; a failure to provide an individual assistant to monitor and contain behaviors by the Student that risk injury; and, misuse or unsafe use on the Student of a prescribed "flex support belt."

2) Whether the County retaliated against the Student's mother, for having made complaints and advocating for her son in his educational program. The alleged examples of disparate adverse treatment investigated by OCR were: limiting the duration of the mother's classroom observation time and requiring her to be escorted to the classroom when such limitations were not imposed on other similar-situated

parents.

3) Whether use of the "Monitored Alternative Location (MAL)," including the procedures followed in placing students in the MAL, discriminated against children with disabilities.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The County receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

OCR gathered evidence through interviews with the Complainant, the Student's mother, and District and County administrators and staff. OCR also reviewed documents and records submitted by the Complainant, and the County. OCR conducted a site visit on June 4, 2007 and looked at several of the MALs.

In sum, the OCR investigation found the District/County and the Student's mother had reached an agreement that resolved the matters set out in issue 1. Accordingly the issue is "moot" and OCR reached no compliance determinations with regard to Issue 1. OCR made a finding that the County did not retaliate against the Student's mother as alleged in Issue 2. OCR determined that the County was out of compliance with Section 504, Title II and the implementing regulations with respect to Issue 3. Following these determinations, OCR and the County entered into a remedial agreement designed to resolve the noncompliance findings pertaining to Issue 3. OCR's noncompliance determination is based on the circumstances that existed at JFK School at the time of the investigation and prior there to, not current conditions. OCR appreciates that subsequent to its

investigation and determinations, the County has commenced several actions to address and correct the circumstances that lead to the noncompliance finding with regard to issue 3.

The applicable legal standards, the facts gathered during the investigation, and the reasons for the determinations are summarized below.

### **General Information**

- During the 2006-2007 school year, the Student attended a special day class for middle school-aged students with severe behavioral challenges at John F. Kennedy School (JFK). The school is a special education only campus operated by the Stanislaus County Special Education Local Plan Area (SELPA).

- JFK was described to OCR by the site principal as, "... [A] segregated public school site operated by the Stanislaus County Office of Education. The primary focus is to provide instruction and behavior intervention to students between the ages of 5 and 22 years of age, which (sic) are unable to be successful in an integrated environment due to aggressive behaviors toward self or others that cannot be properly managed in a less restrictive setting. Students are referred by their home district and placed through the IEP process. There are currently six classes on campus serving this population and one class that serves students who are Multiply Handicapped and Medically Fragile."

- The Student's cognitive, developmental, and behavioral profiles are known both to OCR and the District. The other students attending JFK are primarily students with developmental delays and/or autism. For privacy reasons, it is not necessary to state more about the students' profiles in this letter.

### **Issue 1: Whether the County Failed to Implement the Student's November 2006 IEP**

The Section 504 regulations, at 34 C.F.R. # 104.33, require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. 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. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require recipients to provide a FAPE at least to the same extent required under the Section 504 regulations.

OCR's responsibility under these regulation sections rarely encompasses identification of an appropriate placement. It is however within the scope of OCR's review to ascertain whether the agreed upon placement, as reflected in the IEP/Section 504 plan, is implemented as written. Accordingly, as to issue 1, OCR gathered facts in order to determine if the plan was implemented as written.

As subsequent to commencing the investigation, the County acknowledged that some aspects of the plan were not fully implemented but resolved these deficiencies through an IEP meeting with the parents, it is not necessary for OCR to recite all of the facts it gathered. It is sufficient to report that the County acknowledged to OCR that the OT services specified in the November 15, 2005 IEP were not provided to the Student and offered to provide make-up OT sessions. The parties reached an agreement on this issue at the March 15, 2007 IEP team meeting. However, in order for OCR to consider this issue fully resolved, the County was asked to commit to providing an accounting for the make-up OT sessions and present a report to the parents and to OCR. Consequently the County has agreed to conduct such an accounting and provide it to OCR, along with a make-up schedule to OCR.

It appears there was a significant misunderstanding between the parents and the County/District concerning the amount of time and

the role of the paraprofessional acting as the Student's 1:1 aide. This matter also was discussed and resolved at the March 15, 2007 IEP. In addition, the daily log showing the Student's activities is now being sent home on a daily basis. OCR considers the issue of the 1:1 aide to be resolved and does not need further action.

The information obtained by OCR shows that use of the "flex-support belt" as a "pressure belt" was begun on a temporary basis without the express consent of the parents. Mistakes were made, including a failure to remove the belt when the Student left school for the day. This trial use of the belt as a classroom aid was temporary and led to the use of a "pressure vest" which was authorized by the parent and listed in the IEP. OCR finds that, under the circumstances of this case, such a temporary "off-prescription" use does not rise to the level of a denial of FAPE. However, by way of technical assistance, OCR suggests that, prior to conducting any such trials of devices the future, that the County informs the parents or guardians of the students involved and obtain their consent, in writing.

### **Issue 2: Whether the County Retaliated Against the Student's Mother, for Having Made Complaints and Advocating for Her Son in His Educational Program**

The Section 504 regulations, at 34 C.F.R. # 104.61, incorporate 34 C.F.R. # 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit educational entities from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. # 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the educational entity, under circumstances that suggest a connection

between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the educational entity can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Our investigation showed the following:

- Both the Student's mother and County gave OCR an unsigned letter with the name of the principal of JFK on the signature line dated December 19, 2003, addressed to parents and care providers. The letter states that all parents and care providers are welcome to visit the school anytime. In order to minimize classroom distractions, all visitors must follow certain expectations including reporting to the office upon entering the school and arranging in advance with the teacher if the parent/guardian wishes to visit the classroom. The letter does not contain a time limit. At the bottom of the letter, there is a reference to Education Code [EC] 32212 (Classroom interruptions) and Board Policy [BP] 6116.

- An entry in the Student's mother's communication notebook dated November 3, 2005, initialed by the classroom teacher states, "Ken [site principal] has informed me that school policy states that class visitation is limited to 45 minutes. Monday after 8:30 will be fine -- speech will be here then."

- In a letter to OCR dated February 5, 2007, the Student's mother stated, "Around November 2005, Principal Ken Daniel told me that I can no longer walk to Angel's classroom by myself, after I check in at the office. He told me that someone at the office has to call [Student's] classroom ... and have one of the aides come to the office, then escort me to [Student's] classroom."

- Prior to January 2007, Student's mother had made informal complaints and observations about Student's physical condition. In January of 2007 the District received both informal and formal notice of complaints of discrimination filed against it with both

OCR and the California Department of Education (CDE). Both agencies responded to these complaints and sought data from the District. CDE subsequently sustained some of the complainant's allegations, requiring the District to take corrective actions.

- In response to its data request, OCR received a copy of County's Administrative Regulation (AR) 1250. AR 1250 provides, in part, "Unless otherwise directed by the principal/program director or designee, a staff member shall accompany visitors while they are on school grounds."

- In the principal's response to OCR's data request dated March 23, 2007, it states, "All visitors are required to sign in at the front office. As a general rule a forty-five minute time limit is suggested unless there are extenuating circumstances or the teacher has made other arrangements. Due to the behavioral needs of the students and the necessity to minimize disruptions and distractions, every attempt is made to greet and escort all visitors to the classroom."

- In the same data request response the principal stated, "There have never been any restrictions imposed on the parent in question and as evidenced by the sign-in sheet, she has stayed in the classroom for over an hour on more than one occasion".

- The classroom teacher told OCR in her on-site interview that all parents who come to visit are greeted in the office and she, or one of the instructional assistants come up to escort them to the classroom; there are no time restrictions unless students (not necessarily the visiting parents child) become upset or agitated and then staff would ask parents to leave. None of the classroom Staff assigned to Student's classroom has asked the Student's mother to leave the classroom.

- One of the aides said in her on-site interview that the Student's mother was the only parent coming to the classroom, but she denied that the parent was restricted in her classroom visits. She was not aware of a time limit for parents to visit the classroom. She has not seen a sign limiting a parent visit to 45 minutes.

- Another classroom aide told OCR in her interview that some visiting parents were not met and escorted to the classroom, but also denied that the Student's mother was treated differently than the general policy and practice at JFK

- OCR reviewed the visitors' sign-in/out sheet for the 2005-2006 and 2006-2007 school years. Although there are some entries showing one-hour visits, such entries state "IEP/visit" or "visit/meeting," events that logically require more than an hour. There were some entries that show the time the Student's parent came into the school, but not the time the parent left. Since no entries showed class visit or observation, it is unclear as to how long the parent usually spent in hour visits occurred prior to the the classroom for observation. The one-hour visits occurred prior to the filing of the OCR complaint. The School did not provide any visitor's sign-in/out sheets after February 14, 2007.

- OCR also reviewed the visitors' sign-in/out sheet for the 2005-2006 and 2006-2007 school years for other parents/guardians/visitors visiting JFK. On September 26, 2006, one parent/guardian was in the classroom for observation from 11:15 a.m - 12:30 p.m... on October 31, 2006, one parent/guardian/visitor was in the classroom for observation from 12:30 - 2:00 p.m., and on December 14, 2006, one parent/guardian was in the classroom for observation from 9:15 a.m.- 11:00 a.m. All classroom visits/observation were over the JFK policy of 45 minutes.

### **Analysis and Conclusions**

Information received by OCR showed that there was a County policy in effect at JFK that all parents who visit their child's classroom at the school are required to go to the office, sign in and put on an ID badge before proceeding to the classroom. When the visit is completed the parent must return to the office to sign out.

OCR reviewed District Board Policy 1250 and County Administrative Regulation 1250 regarding Visitors/Outsiders and found that, while there was a

provision for escorting visitors to school sites, no 45-minute time limit for classroom observation appears in either of these documents.

The Student's mother was active in filing complaints with the California Department of Education (CDE) concerning rights protected under Section 504 and the ADA and the County was aware of her complaints as of January 2007. Clearly, the mother engaged in protected activities.

However; there is no documentary evidence that the complained of policies were actually applied to the Student's parent and only one limited witness statement raising the possibility that she was subject to a time limit not imposed on other individuals. (The Student's mother did not provide any examples of parents who received different treatment when they came to visit their child's classroom.)

Of course, it is possible for a district or county office of education (recipient) to adopt rules, even if not implemented, which may have the effect of discouraging an individual from engaging in protected activities. However, in this instance the evidence collected by OCR establishes that, at least from November 2005, policies at JFK School were in effect concerning the recommended time for observation and that visitors be escorted on the campuses. Consequently, it is clear these policies and practices were not created in response to the protected activities of the Student's parents. Thus, OCR found there was insufficient evidence to show that the Student's parent was subject to any adverse or disparate treatment or that the County took measures for the purpose of dissuading the parents from engaging in protected activities.

Absent evidence of adverse treatment, the preponderance of the evidence did not establish a prima facie case of retaliation. As a matter of law, OCR's inquiry into the retaliation allegation went no further. However, by way of technical assistance, OCR suggests that visitation policies be clearly posted in the front office and identified in information supplied to parents. The policies should also be applied consistently and in a fair manner.

### **Issue 3: Whether Use of the "Monitored Alternative Location (MAL)," Including the Procedures Followed in Placing Students in the MAL, Discriminated Against Children With Disabilities.**

There are multiple ways to determine whether a district (or county) is meeting its responsibility to provide students with disabilities with an equal educational opportunity. The legal standard (regulations and court established paradigms) that will apply vary with the nature of the form of alleged discrimination under scrutiny. OCR may inquire whether a district is treating students with disabilities differently than non disabled students and if so, whether the district has legitimate nondiscriminatory reason for this different treatment; a reason that is not a pretext for discrimination. 34 C.F.R. # 104.4 (b)(iv). (See also, 28 C.F.R. # 35.130(b)(1)(iv).) For example, a district is alleged to assign students with disabilities to inferior classroom facilities<sup>3</sup> or prohibit them from attending the district graduation ceremony on the basis of disability.

A related form of analysis applies to treatment by a district or county that raises an inference, that a student is subject to a hostile environment on the basis of disability.<sup>4</sup> Harassing conduct may take many forms, including threatening a student with harmful or humiliating treatment on the basis of his/her disability.

Another requirement for OCR to consider is that school districts must not create separate programs for children with disabilities unless the district can show the separation is necessary to provide students with disabilities with services that are as effective as those provided to others; 34 C.F.R. # 104.4 (b)(iv). Similar when deciding how to "place" (educate) a child with disability, the child must be placed with non-disabled children to the "maximum extent appropriate." 34 C.F.R. # 104.34(a).

A complex question arises as to when it is illogical to treat a student or students with disabilities the same as non-disabled students. In such an instance, the complainant's allegation is often that a

Child or children with disabilities are subject to discrimination because they are not receiving a "free appropriate education Public education (PAPE)." Within this type of allegation, the complainant is not seeking identical treatment as the matter at issue does not concern similarly situated disabled and non-disabled children. Rather the complainant is alleging that the unique needs of children with disabilities are not met as adequately as the needs of non-disabled children as required by 34 C.F.R. 104.33(b).<sup>5</sup>

Each of the above ways of testing for the presence or absence of discrimination is pertinent to the questions raised in issue 3.

Our investigation showed the following:

#### **Physical Characteristics of the MALs**

- At the time of the investigation, each of the seven classrooms at JFK School had an enclosed, partially covered, outside patio and play area accessible only through the Classroom. Within this outside space is a MAL, which is a fenced area enclosed with a chain-link metal fence attached to metal poles. Although each enclosure is slightly different, the area is approximately 14X14' and five feet high. Molded inverted u-shaped troughs made of plastic cover the top of the fence. Strips of an opaque plastic material have been woven vertically through the squares of the chain-link fence so that the view in or out of the enclosed area was quite restricted.

- The MAL doors were normally held shut by bungee cords in order to prevent the children from leaving the enclosure without authorization.

- The floor is concrete, but some of the enclosures had rubberized safety mats covering most of the floor area.

- There were no structures, desks, chairs or other furniture in the enclosures inspected by OCR: There were no "manipulatives" or other educational items to occupy the attention of any student placed in the MAL.

- Students placed in a MAL do not have access

to a toilet, water, or food.

- Each enclosure is located between 8 and 12 feet from the classrooms and can be observed through tinted glass windows and glass doors inside the classrooms.

#### **JFK School Written and Stated Rules for the Use of MALs**

- In the County's response to OCR's data request dated March 23, 2007, it states, "Students placed in the space have had the procedure written into their Behavior Plan at the IEP [meeting] and agreed to by the IEP team including the parents with very specific guidelines (see attached) since this procedure is not appropriate or recommended for students able to climb out, are self injurious, those whose behavior can be addressed through less intrusive means, or those whose parents object to its use."

- In the same response, the County provided OCR with an undated document on the letterhead of JFK School with the name of the site principal at the bottom entitled, "Monitored Alternative Location Guidelines", which states;

"Please be aware of the following procedures for use. In the event of an emergency, the M.A.L. could be used under these guidelines. However, an emergency report must be completed and an IEP scheduled as soon as possible.

Procedure for use:

1. Must be included in the behavior plan and approved during the IEP
2. Continuous visual surveillance of student
3. Thirty minute time limit
4. Documentation on behavior data sheets
5. Parents informed in a manner and frequency of their choice
6. May not be locked at any time"

- In his interview with OCR on June 4, 2007, the site principal stated that a student's stay in the MAL is limited to 30 minutes, then they allow the child to leave, but it could be less than 30 minutes. But, if the

behavior still continues after being checked at 30 minutes, the child could stay in the MAL for an additional period.

- In their interviews with OCR on June 4, 2007 both the site principal and the Behavior Intervention Case Manager (BICM) stated that staff from inside the classrooms monitored students placed in the MALs visually. Convex mirrors were used to see into all corners of the MAL

- The County did not provide OCR with any explanation as to how they are communicated to staff and/or parents/guardians.

### **Individual Findings for the Student**

- According to the Student's attorney, the Student's mother, and school site staff, the Student did not have a Behavior intervention Plan (BIP). The principal stated that the Student does not have a BIP because his behaviors are not aggressive. Although the Student came with aggressive behaviors to the School, the Student is not aggressive now and does not require a BIP. However, the Student has a Classroom Behavior Management Plan [CBMP]. The CBMP does not state that the Student can be placed in the MAL to control his behavior. In addition, the Student's mother did not agree to have her son placed in a MAL

- The principal at JFK stated that a copy of the CBMP was provided to the Student's mother at the beginning of the 2006-2007 school year. However, the CBMP is not dated and not signed by the parent. The Student's mother advised OCR that she was not given a copy of the Student's CBMP at the beginning of the 2006-2007 school year. The Student's mother stated that she and her attorney made repeated requests to get a copy of the CBMP and it was not provided to her.

- During a conversation on June 27, 2007 between the principal and OCR staff about the CBMP, the principal agreed to send the Student's mother a copy of the document. On July 5, 2007, the Student's mother advised OCR that she received a copy of the CBMP at the end of June 2007.

- The principal stated that all students at JFK have a CBMP, but the CBMP does not address the use of the MAL.

- The school site classroom teacher, the 1:1 aide, and the classroom aide deny placing the Student in the MAL area. Witnesses interviewed did not know what happened because they do not work during the summer.

- The Student's mother stated that her husband saw the Student in the MAL on February 14, 2007 and that neither she nor her husband were advised as to why he was placed in the MAL. The Student's father stated that the MAL door was open.

- OCR reviewed the Student's daily log for the month of February 2007 and did not find any entries showing that the Student was placed in the MAL. The February 14, 2007 daily log shows the Student going to the dance, returning to class and completing a job, and then going outside". It is unclear from reviewing the entry notes where the Student went after he left the classroom.

### **Use of the MAL in Practice**

- As of June 4, 2007, the site principal identified 14 students for whom the use of the MAL was a regular authorized part of their educational program, as reflected in their IEPs and BIPs and one student for whom the process was pending and eventually approved.

- Although JFK's written and stated guidelines for MAL use limit placement to 30 minutes or less at a time, OCR's review of the students authorized for placement in the MALs showed that some of their IEPs and/or BIPs allowed MAL placement for up to 60 minutes at a time (at least four of the students).

- Although JFK's stated guidelines restricted MAL seclusion for students with self-injurious behavior, OCR's review of the IEPs and BIPs of students authorized for placement in the MALs showed that several students (at least five students) with such behavior were authorized for placement in the MALs and were placed in the MALs.

- OCR's review of the IEPs and BIPs of students authorized for placement in the MALs also showed that some such students had health impairments which could be exacerbated by MAL placement, including diabetes, seizures, and asthma.

- In most cases, the IEPs of the students are signed by parents or guardians, and contain no specific reference to the use of the MAL as a behavior intervention. However, the IEP may make reference to a BIP, which is generally not signed by the parent or guardian that does call for MAL use. In only two instances did parents or guardians sign the student's BIP or an addendum to the BIP authorizing MAL placement.

- Some of the students' IEPs refer to "the use of the patio," not the MAL, and it is not clear the use of the MAL was fully explained to or approved by the parents.

- At least two parents have been identified as being non-English proficient, but the students' IEP and the BIP were not translated into the parent's primary language. In one instance, a qualified interpreter was not present at the IEP team meeting, but the parent signed the IEP.

- In two instances, MAL qualified students had IEPs indicating problem behaviors as "Oppositional Disorder" and "oppositionalism". No behaviors were identified to OCR for these students that might qualify as serious problem behavior.

- The IEP and/or BIP descriptions of behavior that may trigger MAL seclusion were vague, and generally did not provide specific descriptions of the type(s) of problem behavior that required MAL intervention (e.g., MAL intervention an option when student "engages in any form of physical aggression -- or attempts to physically aggress").

- The documentation of MAL seclusion by JFK staff often failed to describe the specific behavior that resulted in seclusion. Instead, there is a practice where staff often provide a letter (L = Low; M = Medium; or H = High) that corresponds to a list of a number of aggressive or otherwise problematic

behaviors, and any one or combination of these behaviors may have been exhibited by the student to trigger MAL seclusion.

### **Analysis and Conclusions Regarding Use of MALs**

#### **Class-wide concerns**

At the time of the investigation, the County did not educate or sanction non-disabled students in fully secluded environment. OCR initially considered analyzing this complaint under a basic disparate (unequal) treatment discrimination analysis.

When given the opportunity to articulate a nondiscriminatory reason for use of the MAL, the County rested its explanation on how use of the MAL eliminated the need to rely on more adverse practices such as restraining a student. The County did not cite any recent studies supporting use of in-school seclusion on this population, or a structured self-evaluation, or information showing that its practices were common to other school districts.

In order to accord deference to the educational decisions of school districts and at the same time fulfill its compliance determinations, OCR must be certain that the challenged decisions were reached through adherence to the evaluation, placement, and procedural safeguard requirements of the Section 504 regulations. A district or county that chooses to educate students in a highly restrictive placement, including seclusion under adverse conditions for extended periods of time, must meet the very highest standard of procedural adherence in order to receive deference and comply with Section 504.

Under this standard, the processes employed by the County at the time of the investigation, did not demonstrate compliance. A primary objective of the IEP/Section 504 Plan process is that parents become knowledgeable about the nature of their child's placement so that they may meaningfully consent to it or challenge it through procedural safeguards. Further, once a parent and team agree on a placement, the contents of the IEP will determine the operational parameters of the placement and provide criteria for a

continuation or change of placement. These expectations were not met. These facts lead OCR to conclude that MAL intervention practices, as applied at the time of the investigation, deprived some students placed in a MAL of a FAPE as required by 34 C.F.R. # 104.33-46.

For many students who were subject to use of the MAL, the critical question how, when, or whether they should be placed in a MAL was not addressed in the only document the parent signed, the IEP. Rather this critical question was discussed in BIPs, CBMPs, and the "MAL guidelines." In the case of some students subject to the MAL, it was not addressed at all. Rather they were placed there through use of an "emergency" exception. The only way in which parents would have had notice of how the MALS might be used in an emergency would have been to have read, discussed and understood the "MAL guidelines."

The label placed on the documents used to determine the terms of placement are not critical to OCR but the effect of using alternate documents must not obviate or diminish the procedural rights of parents and students. There was no consistency as to which document would be used or why for some students it was one document and for other students another. A preponderance of the evidence collected by OCR raises questions about whether the content of these documents was understood and consented to by the parents, whether English or Spanish speaking. In some instances, there is no evidence the parent even saw these documents. For example, there is no evidence that a seemingly critical document, the "MAL guidelines," was shared with parents at all or when the staff at JFK School implemented it.

There were occasions noted by OCR where behavior that was oppositional, not aggressive or violent, was the basis for initial or extension of placement in the MAL. It was sometimes difficult or not possible to correlate these recorded behaviors with behavior identified in the BIPs/IEPs as permitting MAL intervention.

There were also variances between the stated

policy and procedures of the County at JFK School regarding the conditions for the use of the MAL and specific provisions in particular students' IEPs and BIPs, and the actual application as evidenced by the daily behavior logs of the students. For example, students with a known history of seizures, diabetes, asthma and self-abusive behaviors (e.g. head banging) were placed in the MAL.

For the reasons stated above, OCR concluded that the methods employed by the County to decide on whether, when, and how the MAL would be used, critical and material questions given both the nature of the MALs and the students affected, in general, denied to these students the procedures intended to secure for them a free appropriate public education.

### **Treatment of the Student**

The Student named in the complaint does not have a BIP as part of his IEP and his IEP team did not authorize the use of the MAL as a behavior intervention methodology. There is no provision in the CMBP that authorizes the use of the MAL for the Student or any other student in his class. However, OCR finds that there was insufficient evidence to establish that the individual Student was placed in the MAL, either for behavior intervention, emergency intervention, or as punishment, by JFK School staff during the 180-day period preceding the filing of this complaint. This allegation by the parents is not sustained.

### **Resolution**

To resolve the issues raised in this complaint, the County, without admitting to any violation of law, agreed to take several steps described in the attached Resolution Agreement. These actions include: providing an accounting for make-up occupational therapy services provided to the Student; a temporary procedure for use of a MAL as a behavior and emergency intervention, pending consultation with an expert; using the services of the designated expert consultant to review the use of the MAL as a seclusion technique for behavior modification and provide recommendations in a written report; and

reporting provisions. In cooperation with OCR, the County will develop revised policies and procedures for MAL use in response to the expert's review.

Based on the above, OCR is closing the complaint as of the date of this letter and proceeding to the monitoring phase of case resolution.

Subsequent to entering into the remedial agreement the County has demonstrated a commitment to its implementation. OCR wishes to thank the County Superintendent and Counsel for the County, in particular, for their contributions to addressing OCR's noncompliance determinations. Because OCR refrains from making curricular or placement decisions, it also wishes to thank the PENT organization, consultants to the California Department of Education, for offering technical assistance to the County with regard to use of the MAL, in order to support the implementation of the remedial agreement. If you have any questions, please contact Nefertiti Sadat, Civil Rights Investigator, at (415) 486-5550, or David LaDue, Civil Rights Attorney at (415) 486-5528.

<sup>1</sup>Please note that OCR originally docketed this complaint against the Turlock Untied School District (District). Upon further review, OCR determined that the appropriate entity is the Stanislaus COE. Both entities will receive copies of this resolution letter concurrently.

<sup>2</sup>OUR notified the District, and the County of the identities of the Complainant, the Student, and the Student's mother when the investigation began. NCR is withholding the names of these individuals from this letter to protect their privacy.

<sup>3</sup>The duty to provide comparable facilities for disabled students is particularly important in settings such as those encountered in the matter. 34 C.F.R. # 104.34(c) provides, "If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the

recipient."

<sup>4</sup>When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program.

Other examples include:

- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability; with the result that the student tries to avoid school through increased absences.

- A school administrator repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required related to the student's disability.

<sup>5</sup>OCR interprets the Title II regulations, at 28 C.F.R. ## 35.103(a) and 35.130(b)1(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

### **Resolution Agreement**

#### **Stanislaus County Office of Education**

#### **OCR Case Number 09-07-1110**

Stanislaus County Office of Education (County) agrees to implement this Resolution Agreement to resolve the issues investigated by the U.S. Department of Education, Office for Civil Rights ("OCR"), under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 in the above referenced case number. In agreeing to this plan, the County is not admitting to any violation of State or Federal law.

#### **Occupational Therapy Make-Up Sessions**

- The County, through Stanislaus SELPA, acting in coordination with the Students LEA, provided an accounting of the number of hours of "make-up"

provided to Student in occupational therapy sessions after the amount of "make-up" sessions were identified in the March 15, 2007 IEP. Any make-up sessions still outstanding will be identified and a schedule for the sessions will be agreed to with the parents of the Student.

### **Use of Monitored Alternative Locations**

- The County recognizes that the Monitored Alternative Locations (MALs) at John F. Kennedy School (JFK) are among the most restrictive behavior interventions within the continuum of intervention available in the County's special education program and that under Section 504 of the Rehabilitation Act of 1973 and Title II of the ADA, MALs should be used only when necessary, effective, and all less restrictive interventions have been exhausted.<sup>1</sup> The County further recognizes that, even when necessary to seclude a student with a disability, it may not be appropriate or necessary to do so in a facility with the physical characteristics of a MAL.

- The provisions below, with regard to use of the MALs shall pertain until such time as the County has received technical assistance from the behavior modification expert chosen by the County, Ms. Denise Keller, Mendocino County Office of Education. Thereafter, following the timetable set forth at the end of this agreement, in consultation with the expert and OCR, the County will revise its standards and procedures for the use of the MALs and seclusion as behavioral intervention and behavioral emergency intervention tools, in a manner consistent with the advice of the expert and review by OCR.

- In order to use the MALs as little as necessary and appropriate, the County will use the MALs as a behavioral intervention tool only after all less restrictive alternatives have been utilized and then only as permitted by the Individualized Education Plan (IEP) and incorporated into the BIP of the individual student in question.

-- No such IEP/BIP will be developed or implemented without the signed consent of the appropriate parent or guardian. During the IEP/BIP

development process each parent shall be fully and effectively informed, through written notice and explanation in a language the parent/guardian understands, as to the use and nature of the MALs.

-- In developing standards for use of the MALs in individual IEPs and/or Behavior Intervention Plans (BIPs), the County will take into account the full range of less restrictive alternatives and the health and behavior needs of the individual students.

-- In developing standards for use of the MALs in individual IEPs and/or Behavior Intervention Plans, the County will consider whether the MALs should be modified or an alternate seclusion environment should be utilized to meet the needs of the student in a safer or more educationally appropriate manner.

-- Whenever a MAL is used as a behavioral intervention tool, the County will document the less restrictive alternatives attempted prior to placement in a MAL.

-- When using the MAL as a behavioral intervention tool, no student will be placed in a MAL for a greater period of time than specified in the IEP/BIP or for any reason not identified in the IEP/BIP.

-- Whenever a student is placed in a MAL, he/she shall be supervised by staff (i.e., supervision shall include a staff person to accompany the student to the MAL and such staff shall have clear sight into the MAL as well as audio supervision at all times). Staff will be trained in use of the MALs and will be familiar with such students' IEPs/BIPs.

- When a student is placed in a MAL, the door to the MAL may be closed and attended by a member of the County staff who may keep the door closed. However the door may only be locked or otherwise secured if this practice:

-- Complies with state and local laws including the California Education and Health and Safety Codes;

-- Is clearly explained in the IEP/BIP and has been agreed to by the student's parent(s)/guardian(s) and the IEP Team; and

-- During all such times that the MAL door is locked or secured it is monitored by a person in close proximity to the door of the MAL.

-- County staff will review all IEPs and BIPs for students authorized for placement in the MALs to insure they are consistent with County/JFK guidelines for MAL use and the provisions of this agreement.

- Notwithstanding the above paragraph, a MAL also may be used as a behavioral emergency intervention when a student presents a clear and present danger to his/her own safety or that of others and no less restrictive effective alternative exists. With regard to students placed in a MAL under the authority of this paragraph:

-- No student will be repetitively or routinely placed in a MAL.

-- Student's behavior will be monitored while in a MAL at least every 15 minutes and the Student be allowed to leave a MAL when they no longer present an imminent threat to their own safety or the safety of other students or staff.

-- No student will be placed in a MAL for more than 30 minutes.

-- No student will be placed in a MAL more than twice a day.

-- No student will be placed in a MAL, under the authority of this paragraph, more than twice in a semester without convening a new BIP meeting to ascertain whether less restrictive steps can be taken before using a MAL again.

-- Within one school day of each instance of the use of the MAL for behavioral emergency intervention, a written report will be made and included in the individual's file. The report will include the following information:

-- The age, classroom assignment, and name of the student;

-- Names of the county personnel or other persons involved;

-- A description of the behavior that led to use of the MAL;

-- A description of the injuries incurred by the student or others and property damage occurring prior to placing the Student in the MAL;

-- A log of the time the student was placed in and removed from the MAL, student's behavior in the MAL, and identifying the person responsible for monitoring the Student while they were in the MAL.

- The emergency MAL use reports will be sent to the parent or guardian of the student placed in the MAL within two school days of the incident that results in MAL use and the reports generated during the 2007-08 school year will be collected by the SELPA and provided to OCR on January 15, 2008 and June 15, 2008.

- The County will continually assess the use of the MALs or other seclusion environment as a behavior intervention in order to determine its effectiveness for each particular student. Such data regarding each student authorized for placement in a MAL will be reviewed regularly (at least twice a year) and alternative behavior interventions shall be adopted for any students for whom MAL placement is not an effective intervention.

### **Expert Technical Assistance**

- The County has chosen to obtain technical assistance and training from Denise Keller. The expert will review use of the MAL facilities, shall consider Section 504 and Title II of the Americans with Disabilities Act and other applicable laws, as well as best practices in behavior intervention to develop assessments and recommendations in a written report. This individual will provide technical assistance to the County in a number of areas including:

-- The use of seclusion as a behavioral intervention technique.

-- The use of seclusion as a behavioral emergency intervention tool.

-- A continuum of alternative or intermediate steps that should be employed prior to the use of seclusion.

- The design and use of seclusion environments.
- Whether the County should continue to use the MALs as a seclusion environment.
- Whether the County should modify the MALs as a seclusion environment.
- Behavioral evaluation of students for the use of seclusion.
- Development of IEPs/BIPs of students who may need seclusion as a behavioral intervention technique.
- Model policies and procedures for use of seclusion as a behavior modification technique.
- Evaluation of the effectiveness of seclusion, including the MALs, if maintained, with regard to individual children with disabilities at JFK.
- Staff training for all personnel involved with implementation of student behavior intervention plans, consistent with the provisions of this agreement.
- Staff training on the use of appropriate behavior and emergency intervention strategies.
- What documentation staff shall use in order to identify the specific behavior that led to each incident of MAL seclusion when used as a behavioral or emergency intervention.

### **Reporting Provisions**

- The County will send to OCR and the Student's parents a report documenting the make-up occupational therapy hours provided to Student and, if appropriate, a schedule for future sessions.

The County will provide this documentation by October 15, 2007.

- The County will provide OCR with documentation regarding all MAL behavioral interventions (per the provisions of this agreement), including all explanations of individual student needs and the appropriateness of MAL behavioral interventions for each such student (for students for whom the MAL is authorized); ongoing assessments of MAL effectiveness, and the specific behaviors

gering MAL behavioral interventions.

The County will provide this documentation to OCR by January 15, 2008 and June 15, 2008.

- The County will provide OCR with the expert's findings and recommendations as well as the County's proposed revised MAL policies and procedures developed in response to the expert's review. The County agrees to meet with OCR to discuss the expert's review and its proposed policies and procedures prior to implementation.

The County will provide this documentation to OCR by December 1, 2007. The County and OCR will meet regarding these materials and proposals by January 15, 2008.

- The County will maintain copies of the amended IEPs and BIPs of each student authorized for placement in the MALs in order to document that MAL placement will only be authorized in the IEPs and BIPs of such students as explained by this agreement.

The County will provide this documentation by January 15, 2008.

- The County will provide OCR with a copy of the IEPs and BIPs of any students for whom placement in a MAL is authorized as a behavioral intervention (and a copy of the Behavioral Emergency Report if used as a behavioral emergency intervention) for the 2007-2008 school year. These IEPs and BIPs shall include the following information:

- Any explanations of how the MAL intervention will be used.

- Guidelines for MAL intervention provided to the parent(s)/guardian(s)

- An explanation of alternatives to MAL intervention offered to parent(s)/guardian(s)

- A copy of the parent(s)/guardian(s) signed IEPs and BIPs authorizing MAL placement.

- The name and qualifications of any interpreter used in IEP meetings for non-English speaking parent(s)/guardian(s).

-- A copy of any translated IEPs and BIPs authorizing MAL placement.

The County will provide this documentation no later than the reporting date after the IEP is signed (January 15, 2008, or June 15, 2008).

- The County will provide OCR with all documents developed by the reviewing expert including all recommendations, and any JFK policies, practices, physical MAL layout, and/or trainings held, developed or changed as a result of such review.

The County will provide this documentation to OCR by January 15, 2008, and June 15, 2008.

<sup>1</sup>For purposes of this resolution agreement, physical restraint shall be considered a more restrictive intervention than MAL placement.