UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202-_____

AUG 11 2000

Honorable J. D. Hayworth
U.S. House of Representatives
Washington, DC 20515-0306

Dear Mr. Hayworth:

This is in response to your letter dated January 26, 2000, written to Secretary of Education Richard W. Riley, concerning the application of Federal disability laws to a student with Attention Deficit Disorder (ADD) who attends the [redacted] in [redacted] Arizona. We apologize for the delay in responding.

Your letter indicates that during your visit to [redacted], several parents expressed their concern about a number of incidents that were described in your letter as involving unusual or threatening behavior on the part of a student. In your letter, you have asked for "an explanation of the child's rights under the [Americans with Disabilities Act] ADA requirements, and whether parents have the right to be notified when incidents of this nature occur at a school."

Let us say first that we appreciate and share your concerns and those of your constituents about school safety. There are a number of measures that school officials can undertake to ensure a safe learning environment for all students, and these measures can be properly applied to students who have been determined to have disabilities under Federal law. A student with a disability, which could include a student with ADD, is not automatically exempted from discipline procedures applicable to nondisabled students, simply by reason of disability status. While your letter references only the ADA, we would like to call your attention to other Federal laws that govern the education of students with disabilities, which may be relevant in disciplinary situations. Prior to addressing your specific questions, we believe it is important to explain the ways in which these laws can apply to a student with ADD.

The Department's Office for Civil Rights (OCR) enforces two Federal laws that prohibit discrimination on the basis of disability. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability in programs and activities receiving financial assistance from the Department. Title II of the ADA (Title II) prohibits discrimination on the basis of disability by public entities, including public elementary and secondary education systems and local governments, whether or not they receive Federal funds.

In order for a student with ADD to be covered by Section 504 or Title II, the ADD must substantially limit a major life activity. Under the Section 504 regulation at 34 C.F.R. § 104.33, a recipient that operates a public elementary or secondary education program must provide a free appropriate public education (FAPE) to each qualified person with a disability in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. FAPE under Section 504 means regular or special education and related aids and services that are designed to meet

the needs of individuals with disabilities as adequately as the needs of nondisabled individuals are met, and that are provided in accordance with the Section 504 requirements regarding educational setting, evaluation and placement, and procedural safeguards. With respect to FAPE, compliance with the requirements of 34 C.F.R. §§ 104.33-104.36 of the Section 504 regulation generally satisfies a recipient's obligations under Title II to elementary and secondary education students.

Another Federal law that is relevant to the education of students with disabilities is the Individuals with Disabilities Education Act (IDEA), which is administered by the Department's Office of Special Education Programs (OSEP). IDEA provides Federal funds to States, and through them to local school districts, to assist in making FAPE available to eligible students with disabilities in the least restrictive environment. IDEA also affords eligible students and their parents an array of procedural rights and safeguards.

For purposes of establishing eligibility for services under IDEA, the student must meet the eligibility criteria for one of the disability categories defined at 34 C.F.R. § 300.7(c) of the IDEA regulations. Under this regulatory definition, a child must be found to have an impairment and need special education and related services because of the impairment. The IDEA regulations specify that ADD and attention deficit hyperactivity disorder (ADHD) are conditions that may render a child eligible for services under IDEA as "other health impaired." To meet the eligibility criteria for the "other health impairment" category, the student's ADD or ADHD must be a chronic or acute health problem that results in limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, and adversely affects educational performance. 34 C.F.R. § 300.7(c)(9). A student with ADD/ADHD who does not meet the criteria for the IDEA "other health impairment" category may be found eligible for services under IDEA if the student meets the eligibility criteria for any of the other disability categories defined in the IDEA regulation at 34 C.F.R. § 300.7(c) and needs special education and related services by reason of the impairment.

In 1975, when Congress enacted the Education for All Handicapped Children Act, the predecessor statute to the IDEA, more than one half of our nation's children with disabilities did not receive appropriate educational services, and one million of those children were excluded entirely from a publicly-supported education. 20 U.S.C. § 1400(c)(2)(B)-(C). All too often, school officials used disciplinary measures to exclude children with disabilities from education simply because they were different or more difficult to educate than nondisabled children. It is against this backdrop that Congress enacted the predecessor statute to the IDEA in 1975. In the reauthorization of IDEA by the IDEA Amendments of 1997, Pub. L. 105-17 (IDEA '97), Congress recognized that in certain instances school districts need increased flexibility to deal with safety issues, while maintaining required due process and procedural protections for children with disabilities and their parents.

In brief, under IDEA '97, a student with a disability may be removed from school for up to ten school days at a time for separate incidents of misconduct in a given school year, provided that such removals would be applied to nondisabled students who engage in similar behavior, and

that the removals would not constitute a change of placement in the disciplinary context. School personnel may remove a student with a disability to an appropriate interim alternative educational setting for up to 45 days at a time for certain drugs and weapons offenses. 34 C.F.R. § 300.520(a)(2). They also may ask a hearing officer to place a student in such a setting if the school can demonstrate by a preponderance of evidence that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. 34 C.F.R. § 300.521. School officials may request subsequent extensions of these interim placements for up to 45 days at a time.

However, for disciplinary removals from the current educational placement for more than 10 school days at a time or for a series of disciplinary removals that constitute a change in placement, school officials must conduct a manifestation determination review. 34 C.F.R. §§ 300.519 and 300.523(a). The manifestation determination review to determine the relationship of the child's disability to the behavior that is subject to disciplinary action must be conducted by the individualized education program team and other qualified personnel immediately, if possible, but in no case later than 10 school days after the date on which the decision to take the action is made. 34 C.F.R. § 300.523(a) and (b). If the child's parents disagree with the manifestation determination review or with any decision regarding placement, they may request a hearing, which must be conducted in an expedited manner. 34 C.F.R. § 300.525.

In addition, school officials may seek to obtain a court order to remove the student from school or from the current placement if they believe that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. Honig v. Doe, 484 U.S. 343; 108 S.Ct. 592 (1988). This authority can be used regardless of whether the student's behavior is determined to be a manifestation of his or her disability.

We also would like to call your attention to the Preamble to the final IDEA March 12, 1999 regulations, a copy of which is enclosed. Beginning on page 12414, you will find a section entitled "Answers to Some Commonly Asked Questions about Discipline under IDEA." You may also find the explanation of the changes to the final regulatory provisions regarding discipline, beginning at page 12617, to be helpful in understanding the changes made in the final regulations. Compliance with the FAPE requirements of IDEA also would constitute compliance with the FAPE requirements of Section 504 and Title II. Therefore, in general, we believe that school officials have the same or more flexibility in responding to the above disciplinary situations under Section 504 and Title II as they have under IDEA.

Your letter also asks whether parents have the right to be notified of incidents such as the one described in your inquiry. We believe that parents can be notified about such incidents, but the manner in which parents are notified must be consistent with the requirements of Federal law. One of the Federal laws that is pertinent to this portion of your inquiry is the Family Educational Rights and Privacy Act of 1974 (FERPA) and its implementing regulation at 34 C.F.R. Part 99. FERPA is administered by the Department's Family Policy Compliance Office (FPCO). IDEA contains similar confidentiality of information requirements at 34 C.F.R. §§ 300.560-300.577, which cross-reference some of the requirements of FERPA. Both FERPA and IDEA prohibit the disclosure of personally identifiable information in education records without the prior written

consent of the parent, and in the case of FERPA, an eligible student over 18 years of age or in a postsecondary program. 34 C.F.R. §§ 99.30 and 300.571. In the situation presented by your inquiry, the school district would need to ensure that the disclosure of any information is made in a manner that safeguards the student's identity and is not personally identifiable or easily traceable to a particular student. Because each case must be analyzed based on specific facts, you or your constituents may wish to contact the Department's FPCO for further guidance regarding this matter at the following address and telephone number:

LeRoy Rooker
Director
Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-4605

We hope that this information is helpful to you. If you need any additional assistance with regard to this matter, please contact us or Eileen Hanrahan of the Office for Civil Rights at (202) 205-9707 or JoLeta Reynolds of the Office of Special Education Programs at (202) 205-5507.

Sincerely,

Jeanette J. Lim
Director, Program Legal Group
Office for Civil Rights

Kenneth R. Warlick
Director
Office of Special Education Programs

Enclosure

cc: Lillian Gutierrez
Office for Civil Rights

Lynn Busenbark, Steve Mischlove, Julie Cassaway
Arizona Department of Education

LeRoy Rooker
Family Policy Compliance Office