

November 7, 2014

Dr. Jack A. Parton
Director of Schools
Sevier County School System
226 Cedar Street
Sevierville, TN 37862

Re: Complaint # 04-14-1459

Dear Dr. Parton:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Sevier County School District (District) on March 17, 2014, alleging discrimination based on disability. Specifically, the Complainant alleged that the District discriminated against XXXXXX (Student) when, during the 2013-2014 school year, the District:

1. Failed to implement the provisions of the Student's Section 504 plan (Plan), specifically, extra time on exams and homework assignments;
2. Failed to implement the Student's Behavior Support Plan (Behavior Plan) requiring teachers to XXXXXXXX XX XXXXXXXXXXXXXXXX XXXXXXXX when the Student informed them that XX XXX XXXXX XXXXXXX XX XX XXXXXXXX XXXXXXX;
3. Failed to conduct a manifestation determination meeting prior to suspending the Student and sending him to XX XXXXXXXXXXXX XXXXXXXX XXXXXXX XXX XXX XXXX; and
4. Failed to provide the Complainant with notice of her procedural due process rights.

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance; and, Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by public entities. The District is a recipient of Federal financial assistance from the Department and a public entity, and therefore is subject to the above-referenced statutes. Accordingly, OCR has jurisdiction over this complaint.

Based on the above, OCR investigated the following legal issues:

1. Whether the District denied the Student a free appropriate public education (FAPE), in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33(a) and (b), and the Title II implementing regulation at 28 C.F.R § 35.130;
2. Whether the District failed to conduct an evaluation for the Student prior to implementing a significant change in placement, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. 104.35(a) and (b), and Title II at 28 C.F.R. § 35.130; and
3. Whether the District failed to provide the Complainant with notice of her procedural safeguards, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.36 and Title II at 28 C.F.R. § 35.130.

OCR's investigation included a review of documents provided by the Complainant and the District, as well as interviews with the Complainant, the Complainant's spouse (Spouse), the Student, and District staff. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the District failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

After a thorough review of the evidence, OCR found insufficient evidence to support a finding of noncompliance with Section 504 and Title II, as alleged, with respect to Issue 3. However, OCR did find sufficient evidence to support a finding of noncompliance with Issues 1 and 2.

Additionally, OCR noted compliance concerns with regard to the District's Section 504 and Title II policies and procedures, as well as the District's grievance procedures.¹ The factual and legal bases for our determinations are set forth below.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. Section 104.33(a) and (b) requires a recipient to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with a disability as adequately as the needs of individuals without a disability are met and are based upon adherence to procedures that satisfy the requirements of subsections 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program developed in accordance with the IDEA is one means of meeting the standard established above.

Pursuant to 34 C.F.R. § 104.35(a), a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of that section of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial

¹ The District's grievance procedures were addressed in a Resolution Agreement in OCR complaint #04-13-1304, currently in monitoring; by resolving that issue pursuant to that complaint, the District will resolve this issue.

placement of the person in regular or special education and any subsequent significant change in placement. Pursuant to 34 C.F.R. § 104.35(d), a recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of that section, for periodic reevaluation of students who have been provided special education and related services.

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

Section 104.36 requires 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 disability, need to be 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 persons parents of guardian and representations by counsel, and a review procedure.

Findings of Facts

Background

The Student began attending the School in the sixth grade in the 2012-2013 school year and is currently in the XXXXX XXXXX. While in XXXXX XXXXX, XX XXXXXXXX XXXX, the Student was placed on a 504 Plan (Plan) after previously being on an IEP. The Plan provided for XXXX XXXX XX XXXXXXXXXXXXX/XXXX and a XXXXXXXX XXXX XXXX, both on an "XX XXXXX" basis, as well as a provision for a planner that the Student was to fill out with his assignments, bring to his teachers for their signatures, and return to his parents for their signatures. The Plan carried over into the Student's XXXXXXXX XXXX XXXXX (2013-2014 school year) and was reviewed and modified in XXXX XXXX for the Student's XXXXXXXX grade year to provide for XXXXXXXX XXXXXXXX and XXXXX as well as XXXXXXXX XXXXXXXX for better concentration.

On XXXXXXXXXX XXXXXXXX the Student was XXXXXXXX XXXXXXXX and sent to in school suspension (ISS) for three days. The following day, the School developed a Behavior Support Plan (Behavior Plan) for the Student, which indicated that the Student should XXXX XX XXX XXXXXXXXXXXX XX XXXXXXXX XXXX XXXXXXXX X XXXXXXXX XX XXXXXXXX X XXXXXXXX XX XXXXXXXXXXXX XXXXXXXX XX XXXXXXXX. While attending ISS for the XXXXXXXX incident, the Student was discovered XXXXXXXX X XXXXXXXX XX XXXXXXX X XXXXXXXXXXXX XXXXXXXXXXXX XX XXXX XXX XXXXXXX XXXX XXXX XXX XXXXXXX XXXX XXXX XXXXXXXX, and beginning XXXXXXXXXX X XXXX the Student was sent to Alternative School

XXX XXX XXX as a result. The last day of the Student's Alternative School assignment was XXXXXXXXXXXX X XXXX. On XXXXXXXXXXX X XXXX the Student was suspended out of school for two days. In total, for the 2013 – 2014 school year, the Student was sent to the Alternative school XXX XXX XXXX and suspended for XXXX XXXX for disciplinary issues (X XXX XXX X XXX) by XXXX XXXX.

The school year is divided into six, six-week academic terms, with grades being due at the end of each six-week period. A team of four Teachers (Teachers) taught the Student throughout the 2013-2014 school year: Teacher 1 (XXXXXXXX XXXXXXXX), Teacher 2 (XXXX), Teacher 3 (XXXXXXXX XXXX), and Teacher 4 (XXXXXXXX). According to the District, the Teachers, the XXXXX XXXXXXXX (XXXXXXXXXXXX), and the XXXXXXXXXXXX XXXXXXXXXXXX / XXX XXXXXXXXXXXX (XXXXXXXXXXXX) were primarily responsible for implementing the Student's Plan and Behavior Plan. During its investigation, OCR interviewed each teacher, the XXXXXXXXXXX, the XXXXXXXXXXX, and the School's XXXXXXXXXXX XXXXXXXXXXX XXXX XXXXXXXX (XXXX XXXXXXXX), as well as the Complainant, her Spouse, and the Student.

District Policies and Procedures

OCR reviewed the District's policies and procedures regarding identification, evaluation, and reevaluation of students with, or suspected of having, a disability. The policies provide assurance that the District will provide a FAPE to all students with disabilities in the school system and that the District will "carry out a comprehensive screening and assessment plan emphasizing the early identification and evaluation of disabled students." OCR, however, found that the policies fail to provide appropriate guidance regarding standards for annual review and reevaluations (including prior to a significant change in placement) for students with disabilities.

A. Issue 1: Whether the District denied the Student a free appropriate public education (FAPE)

Issue 1, Allegation 1: Failure to Implement the Plan

The Complainant alleged that during the 2013-2014 school year, the Teachers failed to implement the Student's Plan by failing to sign his planner and failing to provide additional time on exams/assignments. Specifically, Complainant alleged the Teachers required the Student to request his accommodations before granting them.

The Student was assigned a daily planner as part of his Plan. The plan identified the Student, the Teachers and Student's parents as responsible persons for the implementation of the Student's planner. In a written statement to OCR and reiterated during an interview, the XXXXXXXXXXX stated that the Student was responsible for bringing the planner to class each day and that this requirement was intended to teach the Student organizational skills. The XXXXXXXXXXX also stated that, during an annual Plan review on XXXX X XXXX this provision and the reasoning behind it was explained to the Spouse, who the XXXXXXXXXXX stated had no objections. Similarly, each teacher stated that the Student was responsible for bringing the planner to class but would often fail to do so. Teachers 1 and 3 stated that they would additionally allow the

Student to use a piece of paper in lieu of the planner when he forgot it, though Teachers 2 and 4 did not mention signing anything other than the planner itself. Teacher 3 stated that he signed the Student's planner when the Student had it, and would sometimes write the assignments down on a piece of paper when the Student could not find the planner. Teacher 4 told OCR that she would request that the Student provide his planner for her to sign and that she would sign it if the Student had the planner with him. During interviews, the XXXXXXXXXX, the XXXXXXXXXXXX, and the Teachers denied awareness of the Student's parents voicing any dissatisfaction with this provision of the Plan or its implementation. In a joint statement (Joint Statement) signed by the Teachers submitted to OCR, the Teachers indicated that they tried on several occasions throughout the school year to get in contact with the Student's parents to discuss the Student's progress and to get them to attend parent-teacher conferences, but were unable to do so.

In regards to providing additional time on exams/assignments, in the Joint Statement the Teachers indicated that they provided the Student with modified assignments, the opportunity to turn in homework until the last day of any six-week academic period, and additional time on exams. When asked during interviews whether the Student was required to request additional time on exams or assignments, each teacher stated that this accommodation was provided automatically. Although the Plan provided additional time on exams on an "as needed" basis, Teacher 1 stated that all the Teachers decided to provide this accommodation automatically throughout the 2013-2014 year and to allow the Student to turn in work late, up to the last day of any six-week grading period. Three of the teachers claimed that the Student was never docked points for turning in late work, while Teacher 2 stated that she would occasionally deduct points for late work. During interviews, both the XXXXXXXXXXXX XXXX XXXXXXXXXXXX stated they were aware of no instances of the Teachers failing to implement the Student's Plan.

OCR conducted additional interviews with the XXXXXXXXXX and Teachers 1, 2, and 4 for further clarification to discuss the Student's dropping grades throughout the year. Specifically, OCR analyzed whether the assignments marked late by Teachers 1, 2, and 4, as well as the ambiguity of the "as needed" standard used in the Plan were factors that may have amounted to a denial of FAPE for the Student. OCR expressly asked Teachers 1, 2, and 4 whether any of the Student's assignments marked as late resulted in the Student's grade being penalized and, if so, whether this penalization may have reduced his grade. Each Teacher indicated that they did not believe that the Student was ever penalized for assignments marked as late. For example, Teacher 1 indicated that he had likely made a mistake when he marked the Student's assignment as late, while Teachers 2 and 4 indicated that, though they were not certain, they believed that no points were docked from the Student's assignments they each marked as late.

With respect to the "as needed" language in the Plan, Teachers 1, 2, and 4 were asked how each implemented this standard. Teacher 1 stated he and the other teachers met with the XXXXXXXXXXXX to discuss the Plan and that they agreed to allow the Student to turn in work until the end of any six-week period with no points being deducted. Teacher 2 stated that she did not recall any conversation in which she was informed what "as needed" meant in terms of additional time on exams and assignments. Teacher 4 stated that she did not recall having had a conversation as to what "as needed" meant, but that she understood it to mean giving the Student

as much time as he needed on tests and assignments. With regard to modifying assignments, Teacher 4 stated that she did not believe there were any opportunities in her class for assignments to be modified and she did not recall ever doing so.

The XXXXXXXXXXXX stated that, in terms of additional time on exams and assignments, “as needed” entailed the Teachers allowing the Student to turn in assignments until the end of any six-week grading period. With respect to modified assignments, the XXXXXXXXXXXX stated that she could not specify to OCR what this standard entailed. The Complainant was under the impression that the Student was required to ask for his academic services, indicating a lack of understanding as to what services, specifically, the Plan provided.

Finally, the Complainant alleged that she experienced difficulty setting up a meeting to review the Student’s Plan with School personnel. In a written statement to OCR, the XXXXXXXXXXXX stated that in the first week of February 2014, she attempted to contact the Student’s parents in order to conduct an annual Plan review, but was told by the Spouse that Complainant XXXXXX XX X XXXXXXXXXXX XXXX and would be unable to attend until that night and that he was out of town for the next two weeks, but would call when he returned. The XXXXXXXXXXXX went on to say that in the third week of February, the Spouse called her and attempted to set up the annual review for the following morning, but the XXXXXXXXXXXX stated that she had replied that she had a meeting at the time and could meet at noon that day, to which the Spouse replied that he would be unable to attend because he would be leaving town again. The XXXXXXXXXXXX stated that they agreed to try again, but after not hearing from the Spouse by the end of March, she contacted the Spouse and the annual review was scheduled for (and conducted on) XXXX X XXXX.

On rebuttal, the Spouse stated that he and the Complainant did not become aware of the Exam Wizard software until after the 2013-2014 school year. The Complainant added that while she understood the Student bore responsibility for bringing the planner to class, she nevertheless felt that, especially at the end of the year, it became difficult to keep track of all the Student’s assignments because the planner was not up-to-date. The Student also confirmed his responsibility for bringing the planner to class and stated that he would often fail to do so, resulting in demerits. The Complainant stated that the School seemed to not care about the Student and should have contacted them more to review the Plan. Neither the Complainant nor the Spouse could offer additional details or documentation regarding their claims that the Teachers failed to implement the Student’s Plan by failing to sign his planner and failing to provide additional time on exams/assignments.

Issue 1, Allegation 1: Analysis and Conclusion

OCR generally finds that a school district’s failure to implement key aids, services or accommodations/modifications, identified in the IEP or Section 504 plan of a student with a disability denies the student a FAPE and, thus, violates Section 504 and Title II. Not every failure to implement an aid, service or accommodation/modification in a Section 504 plan, however, automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the

student's ability to participate in or benefit from a school district's services, programs, and activities. Except in extraordinary circumstances, OCR does not review educational decisions about the appropriateness of specific aids and services identified in a student's IEP or Section 504 plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

Based on the evidence, it appears the Teachers did not implement the Plan in the same manner (e.g., Teacher 2 occasionally docking points for late work and Teachers 2 and 3 allowing the Student to use a piece of paper when the Student forgot his planner), though each claimed that they implemented the Plan. Non-specificity in a 504 Plan does not necessarily equate to denial of FAPE so long as the student is appropriately and consistently provided his or her services and that the provisions of the Plan are understood by those who implement it as well as the student's parent/guardian.

However, in this instance, it appears the "as needed" standard, which was never explicitly defined to the Teachers, was too vague for the Teachers to properly implement the Plan. For example, there was uncertainty among the teachers whether the Student was docked points for late assignments, while Teachers 2 and 4 could not recall ever being instructed as to what "as needed" meant with regard to additional time. Moreover, the Teachers could not clearly articulate the meaning of "as needed," and in several instances, they interpreted this standard subjectively, which may have served to interfere with the Student's progress. For example, Teacher 4 stated that she did not believe that modifying assignments was possible in her class, yet she also indicated that she was never instructed regarding circumstances under which the Student may need an assignment to be modified or how an assignment may be modified.

The evidence does show the Plan developed in January 2013 was not reviewed with the Complainant or her Spouse until April 2014, though the Complainant and XXXXXXXXX provided conflicting explanations as to why. The XXXXXXXXX stated that she faced difficulty in finding a mutually-agreeable time and issues of non-communication from the Student's parents, while the Complainant alleged the School failed to appropriately contact her and her Spouse about the Plan review. The XXXXXXXXX stated that, although the Plan was not reviewed until April, the Student continued to receive his services from the first Plan until it was reviewed and modified in April 2014.

Based on a preponderance of the evidence presented above, OCR finds sufficient evidence that the District denied the Student a FAPE when it failed to properly implement his Section 504 Plan, in noncompliance with Section 504 and Title II.

Issue 1, Allegation 2: Failure to Implement the Student's Behavior Plan

The Complainant also alleged that the Teachers failed to follow a provision of the Behavior Plan in which they were required to intervene should the Student approach them regarding another student picking on the Student or otherwise aggravating the Student. After OCR began its investigation, the Complainant submitted additional documentation alleging that the provision of the Behavior Plan in which the Student was allowed to have a timeout in the

XXXXXXXXXXXXXXXX office was not followed because the Student had been placed in the School hallway several times throughout the 2013-2014 year, including for “well over two days” as punishment for a scuffle in which the Student XXXXXX X XXXXX XXX XX X XXXXX XXXXXXXX.

The Behavior Plan, which was developed on September 4, 2013, following a XXXXXX XXXXXXXX, indicated that the Student was to work on his behavior by: (1) walking away, (2) telling a teacher, or (3) having a timeout out in the XXXXXXXXXXXX office. The Behavior Plan also stated that the “environmental/curricular strategies/modifications to be used” by teachers included: (1) a timeout in another classroom or the XXXXXXXXXXXX office and (2) isolation in class from peers as needed.

The Teachers expressed no knowledge of the XXXXX XXXXXXX incident; however, the XXXXXXXX and XXXXXXXX stated that they responded to the incident. Each stated that the Student was not punished for XXXXXXXX XXX XXXXX XXX XX XXX XXXXX XXXXXXX and the XXXXXXXX stated that the Student chose to sit in the administrative hallway to read during the School’s unstructured testing time around the time of the incident. The XXXXXXXX stated that the administrative hallway is located near her office and has comfortable seating where students may choose to stay and is dissimilar to the classroom hallway. The XXXXXXXX stated that the Student would not always sit in her office but rather in the administrative hallway, which she stated was a comfortable place where she and the XXXXXXXX could keep an eye on students. The XXXXXXXX also stated that the Student would sometimes come to her office when he was upset.

Teacher 1 stated that on occasion, he would ask the Student to stand in the classroom hallway for as long as 10 minutes when the Student was misbehaving or seemed on the verge of doing so. When asked whether it was the Student’s decision to go out into the hall or Teacher 1’s, Teacher 1 stated that it could be either’s decision, depending on the situation. Teacher 1 went on to say that the Student was never in the hallway for more than a few minutes, that this was a technique he used for all students, and that he could count the number of times the Student was sent to the hallway throughout the year on his fingers. Teacher 2 denied having ever placed the Student in the hallway or being aware of any such incident. Teachers 3 and 4 stated that they permitted the Student to go to the administrative hallway, with Teacher 4 stating that it was entirely the Student’s decision when he would go.

During interviews, each teacher stated that they were not aware of any incidents where the Student had been picked on by another student in class. Furthermore, Teachers 1, 2, and 4 could not recall the Student exhibiting any significant behavioral problems during class and they could not recall having to write up the Student. Teacher 3 recalled an instance in which she wrote up the Student for making racial slurs against another student, but did not indicate the Student approached her about the other student picking on him.

On the rebuttal call, the Student stated that he would leave the classroom if he was feeling upset and go to the administrative hallway. He stated that the administrative hallway was comfortable and allowed for the XXXXXXXX and XXXXXXXX to keep an eye on him. The Student

also stated that he recalled the incident with the XXXXXX XXXXXXXXX but stated that he did not believe he was punished for the incident or ever being punished by going out to either hallway.

In a written statement to OCR submitted on May 12, 2014, and during a follow-up conversation with OCR, the Complainant stated that the Student had trouble gauging time and was unreliable in reporting how long an event takes place. During the rebuttal call, when asked whether the Complainant's allegation regarding the Student's placement in the hallway may have been influenced by the Student's misperception of time, Complainant stated that this was a possibility, but that she nevertheless felt that the Student had been punished for the XXXXX XXXXXXXXX incident. When asked how often the Student would go to the administrative hallway, the Complainant stated that she could not say for certain, but that she was not informed when he was sent there. Neither the Complainant nor Spouse could offer any additional documentation or details regarding this allegation.

Issue 1, Allegation 2: Analysis and Conclusion

Regarding the Complainant's allegation that the District failed to implement the Student's Behavior Plan, the Student's Behavior Plan specifies the XXXXXXXXXXXX office as the location the Student should go as a method of working on his behavior and as potential punishment from School staff. Based on the evidence, it appears the Student would often not go into the XXXXXXXXXXXX office itself but rather just outside in the administrative hallway, which both the Student and the XXXXXXXXXXXX stated is a comfortable place. Although the location of the Student's timeouts did not conform to the provisions of the Behavior Plan, in considering the goal of the timeout provision in the Behavior Plan (i.e., giving the Student a place to calm down or as punishment) and the context of the administrative hallway (i.e., comfortable and overseen by the XXXXXXXXXXXX and XXXXXXXXXXXX), based on a preponderance of the evidence, OCR finds that the Student going to the hallway does not constitute a failure to implement the Behavior Plan.

The Complainant alleged that the Student had been placed in the hallway for "well over two days" as punishment for an incident in which he scuffled with other students and XXXXX X XXXX XXXX X XXXXX XXXXXXXX in the process. The XXXXXXXXXXXX and XXXXXXXXXXXX each denied having punished the Student for the incident and stated that the Student chose to sit out in the administrative hallway during unstructured testing time. Furthermore, the Student claimed that he was not punished for the XXXXX XXXXXXXX incident. Although the Complainant claimed that the Student was punished for the incident by sitting in the hallway for several days, she also stated the Student has trouble gauging time and that she has no additional information or documentation to support the allegation.

With respect to the Teachers responding appropriately to the Student informing them that he XXX XXXX XXXXXXXX XXX only Teachers 1 and 3 recalled behavioral incidents involving the Student occurring in their classes. Teacher 1 indicated that the incident was resolved when he spoke with the two Students, and Teacher 3 stated the incident in her class involved the Student calling another derogatory names; neither teacher recalled the Student ever approaching them

about a XXXXXX XXXXXXXX XX XXX. During a rebuttal call, the Spouse clarified that the last incident regarding this allegation occurred at the beginning of the 2013-2014 school year when the Student approached a teacher's aide and informed him that another student was XXXXXX XX XXX, but was told to sit down. The Complainant added that she was not aware of the identity of the teacher's aide, did not have an incident report, and was uncertain whether the Behavior Plan was in place at the time. She further stated that, as a result of the ensuing fight, the School changed the Student's schedule so that the Student would not come in contact with the other student.²

Based on a preponderance of the evidence presented above, OCR finds insufficient evidence that the District denied the Student a FAPE when it failed to properly implement his Behavior Plan, in noncompliance with Section 504 and Title II.

UNALLEGED FAPE-RELATED CONCERN

One item in the Student's BIP is a strategy for the Student to use when another student is XXXXXXXX XX XXX. In her OCR complaint and clarifying call the Complainant did not allege that the Student had been subjected to harassment or bullying on any basis. However, the Student's file includes a report by the Student concerning name-calling. Teacher 1 recalled the Student reporting that he was called names and that he called both students in and "went from there;" he said that he never observed anything that caused him to think he needed to do more concerning the situation. Also, a document in the District's evidence describes a videotape showing another student shoving the Student after having apparently waited for the Student to walk to the area where the other student was standing. Bullying of a student with a disability – even if the bullying is not based on disability – may result in a denial of FAPE. OCR did not conduct a complete investigation concerning possible harassment or bullying of the Student and thus is not making a compliance finding concerning this unalleged issue. However, in light of the evidence noted above and the BIP's inclusion of a term related to how the Student responds when XXXXX XXXXXXXX XXXXX XX XXX, the proposed Resolution Agreement includes a term requiring the District to review whether the Student should receive compensatory services as a result of any bullying that occurred.

B. Issue 2: Whether the District failed to conduct an evaluation for the Student prior to implementing a significant change in placement

The Complainant alleged that the District failed to conduct an evaluation to determine whether the Student's behavior was a manifestation of his disability (manifestation meeting) prior to subjecting the Student to a significant change in placement. The evidence shows that while in ISS for XXXXXXXX, the Student was caught XXXXXXXX X XXXXXXXX in which a XXXXXXXX XXXXXXXXXXXX to XXXX the XXXXXXXX with whom he had been XXXXXXXX. Following the discovery of this XXXXXXXX, the School sent the Student to an alternative school for ten days. Although the data shows the District did meet with the Spouse prior to sending the Student to alternative school, the evidence indicates that this did not

² Based on the District's response, the Complainant considered this matter to be resolved.

constitute a manifestation meeting, as the Student was not reevaluated nor was there any consideration as to whether the Student's actions may have resulted from the Student's disability.

In the data submitted by the District, the District admits that it failed to conduct a reevaluation for the Student prior to a significant change in placement. When asked why a manifestation meeting was not conducted for the Student, the XXXXXXX and XXXXXXXXXXX each expressed uncertainty regarding when a reevaluation was necessary for students with Section 504 Plans. When asked if a manifestation meeting had been convened since the Student returned to the School from the alternative school, both stated that one had not. After returning from alternative School, the Student was suspended a total of XXXXX XXXXX throughout the school year by April 3, 2014.

Issue 2: Analysis and Conclusion

The District admits that it failed to conduct a reevaluation for the Student prior to a significant change in placement and that there was uncertainty regarding whether and when students with Section 504 plans, as opposed to IEPs, should receive reevaluations. Additionally, the evidence shows that a reevaluation for the Student was not conducted prior to any suspensions during the 2013-2014 school year following the Alternative School placement. Therefore, based on a preponderance of the evidence, OCR finds that the District was in noncompliance with Section 504 and Title II when it failed to conduct a manifestation meeting for the Student prior to sending him to alternative school and subsequently suspending him. Additionally, OCR finds that the District's policies and procedures fail to state anything regarding its responsibility to conduct reevaluations prior to subjecting a student to a significant change in placement, in noncompliance with Section 504 and Title II.

C. Issue 3: Whether the District failed to provide the Complainant with notice of her procedural safeguards

The Complainant alleged that the School failed to provide her or her Spouse with procedural safeguards throughout the 2013-2014 school year.

The District submitted a document to OCR entitled, "Receipt of Notice of Procedural Safeguards and Rights," that has the Student's name at the top and is dated April 7, 2014. There is a parent signature at the bottom of the page, and the Spouse attended the meeting. In a written statement to OCR, the XXXXXXXXXXX stated that the Spouse was provided a parent's rights packet during the April 2014 meeting, and during an interview, she stated that the Spouse received the due process rights during both the January 2013 and April 2014 meetings. The District submitted documentation detailing the procedural safeguards with its information regarding the Plan review in January, although there is no signature from either of the Student's parents on these forms.

On rebuttal, the Spouse stated that he may have signed the procedural safeguards form during the April 2014 meeting. The Complainant stated that she received the safeguards when the Student was in XXXXX XXXXX but did not receiving them throughout the 2013-2014 school year.

Neither the Complainant nor the Spouse could provide additional documentation or information pertaining to this allegation.

Issue 3: Analysis and Conclusion

Although the Complainant alleges that the School failed to provide her or her Spouse with procedural safeguards throughout the 2013-2014 school year, the evidence shows paperwork from an April 7, 2014, reevaluation, including its policies regarding procedural safeguards and a form entitled "Receipt of Notice of Procedural Safeguards" that appears to have the Spouse's signature at the bottom. Therefore, based on a preponderance of the evidence, OCR finds insufficient evidence that the District failed to provide the Complainant with notice of her procedural safeguards in noncompliance with Section 504 and Title II.

Compliance Concerns and Proposed Resolution

To remedy these noncompliance issues, the District has agreed to implement the provisions of the attached Resolution Agreement (Agreement) which, when fully implemented will resolve the findings. The proposed agreement will require the District to: (1) adopt policies that identify and delineate the District's responsibilities regarding the provision of FAPE and reevaluations for students with disabilities; (2) train District staff regarding the District's responsibility to provide a FAPE and to conduct these reevaluations as well as standards for the development and review of a Section 504 Plan; (3) immediately begin conducting manifestation meetings for students with disabilities prior to any significant change in placement and provide documentation indicating that such meetings occurred; (4) conduct a manifestation meeting for the Student comprised of individuals knowledgeable about the Student and his disability to determine whether his alternative school placement and subsequent suspensions may have been a manifestation of the Student's disability; and (5) conduct a meeting to develop and provide compensatory services for the Student for (a) improperly implementing the Student's Plan (b) any missed time from the School due to punishments for infractions that were the result of the Student's disability, and (c) any compensatory/remedial services deemed appropriate as a result of any denial of FAPE resulting from any bullying of the Student during the 2013-2014 school year.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation, and are consistent with applicable regulations.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact Ebony Calloway-Spencer, Esq., Compliance Team Leader, at (404) 974-9367.

Sincerely,

Cynthia G. Pierre, Ph.D.
Regional Director