



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

September 26, 2016

Mr. Joe Maimone  
Headmaster  
Thomas Jefferson Classical Academy  
2527 Highway 221A  
Mooresboro, NC 28114

Re: OCR Complaints Nos. 11-16-1253, 11-16-1254  
Letter of Findings

Dear Mr. Maimone:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of two complaints we received on March 23, 2016 against Thomas Jefferson Classical Academy (the School). The Complainant filed the complaints on behalf of her son (Student A) and daughter (Student B), who are former students at the School.

In Complaint No. 11-16-1253, the Complainant alleged that the School discriminated against Student A on the basis of disability. Specifically, the complaint alleged that:

1. The School failed to provide Student A with a free appropriate public education (FAPE) by failing to evaluate him for special education services or services under Section 504.
2. School staff harassed Student A on the basis of disability during the 2015-2016 school year:
  - a. Teachers reprimanded him for not being able to complete his classwork and stated at a meeting in October 2015 that it was not worth their time to teach him.
  - b. The Headmaster insisted at the October 2015 meeting that Student A was clearly not trying in school and that he enroll in an online charter school so that he did not cost the School money by taking a spot that a healthy child could use.
3. The second story of the School is not accessible to students with mobility impairments.

In Complaint No. 11-16-1254, the Complainant alleged that the School discriminated against Student B on the basis of disability. Specifically, the complaint alleged that:

1. The School failed to provide Student B with FAPE by failing to evaluate her for special education services or services under Section 504.
2. The Headmaster harassed Student B on the basis of disability when he insisted at the October 2015 meeting that she enroll in an online charter school so that she did not cost the School money by taking a spot that a healthy child could use.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in

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by fostering educational excellence and ensuring equal access.*

programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the School receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed hundreds of pages of documents provided by the Complainant and the School and interviewed the Complainant and the following School staff members:

- The Headmaster of the School;
- The middle school guidance counselor; and
- Student A's XXXX grade XXXX teachers.

After carefully considering all of the information obtained during the investigation, OCR identified a violation regarding allegation 1 of Complaint 11-16-1253 and a compliance concern regarding allegation 1 of Complaint 11-16-1254, both of which the School agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support allegations 2 and 3 of Complaint 11-16-1253 and allegation 2 of Complaint 11-16-1254.

OCR's findings and conclusions are discussed below.

## **Student A**

### **Background**

The School is a public charter school that opened in 1999 and currently serves about 1300 students in grades K-12. Student A enrolled in the School in the fall of XXXX as a XXXX grader. In January 2014, Student A was diagnosed with a Stage 4 XXXX, and due to multiple XXXX sessions, he was unable to return to school the remainder of that school year. Student A was placed on a limited homebound plan, but because his illness prevented him from being able to complete much of his schoolwork, his parents requested, and the School agreed, that he repeat the XXXX grade. Student A remained on the limited homebound plan for the 2014-2015 school year due to frequent hospital visits and complications from the XXXX. However, he was able to perform well on his grade level state-wide achievement tests at the end of the 2014-2015 school year and was promoted. He returned to the School on a half-day schedule at the beginning of the 2015-2016 school year as a XXXX grader, but had a significant number of excused and unexcused absences before being placed on homebound on November 19<sup>th</sup>, 2015. In XXXX, Student A withdrew from the School and transferred to his local school district.

### **Allegation 1**

The Complainant alleged that the School failed to provide Student A with FAPE by failing to evaluate him for special education or related services. More specifically, the Complainant alleged that from January 2014, when Student A was hospitalized with a XXXX, until Student A

withdrew from the School in XXXX, the School knew that Student A had a disability but did not evaluate him for special education or related services and did not provide services under the Individuals with Disabilities Education Act (IDEA) or Section 504,<sup>1</sup> resulting in a denial of FAPE.

### *Legal Standards*

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with IDEA is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

### *Analysis*

Student A had XXXX. He was discharged from the hospital in XXXX and was placed on homebound through the end of the 2014-2015 school year because he was still recovering from XXXX; he also had XXXX. The homebound teacher was scheduled to spend one to two hours per week with Student A. The Complainant told OCR that the homebound teacher mainly transported assignments to and from Student A's teachers. The School's Hospital/Homebound Services Policy states that the purpose of homebound services is to provide a teacher liaison between the school and home for students who are unable to attend school for medical reasons for three weeks or longer. The service "is not intended to teach the child at home at the same level the student would be taught it in school" and is "not a right the school system is bound to provide."

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<sup>1</sup> OCR enforces Section 504 and Title II but does not enforce the IDEA. Our analysis will therefore only include whether the School violated Section 504 and/or Title II.

On August 6, 2015, the Complainant emailed the Headmaster regarding a potential return to the School from homebound for the 2015-2016 school year. She stated that Student A would “need an IEP . . . as he will need accommodations.” She described a number of impairments, including decreased motor function, partial hearing loss, use of a wheelchair, and slurred speech. An August 11, 2015 note from Student A’s doctor also stated that Student A would need accommodations, including half days for stamina issues, additional time to travel to class and a wheelchair for gait/balance difficulties, a second set of textbooks for his home, and preferential seating for hearing loss.

The Headmaster scheduled a meeting with the IEP team on August 14, 2015, “to discuss what we will need to do for [Student A].” On August 13, 2015, the EC Coordinator emailed the Complainant, copying the other members of the IEP team, stating that state law gives the School ninety days from the time a request for an IEP has been made to complete the process, which gave the School “the time to meet for the initial DEC 1<sup>2</sup> meeting to determine if what current evidence [they] have will start the assessment process which will then determine if he qualifies for an IEP.” The Headmaster told OCR that at the meeting, the team decided that Student A would attend half-days at the School and School staff would gather information regarding Student A’s abilities so that they could create a plan at a future date. The team verbally decided on multiple accommodations for Student A, including early arrival in class and assistance from classmates. However, these accommodations were not put in writing or recorded in any other way. The Complainant was not informed of any procedural safeguards regarding any of the decisions or recommendations discussed at the meeting.

School staff met with the Complainant on October 13, 2015, to update Student A’s “return to school plan” and to discuss staff concerns about the amount of class time Student A was missing. School staff told OCR that since the beginning of the semester, Student A had been at school approximately 10 days, and Student A’s attendance records confirmed a significant number of absences. The guidance counselor’s handwritten notes from the meeting provide that the team discussed homebound, homeschool, and online learning, and everyone, including the Complainant, agreed that Student A would need an alternative placement in order to work at a pace he could handle. The guidance counselor wrote that Student A was significantly behind and that make up work was “not being show[n] as a priority despite repeated attempts to work with [Student A] and his mother around the days he would be in school.” The Complainant signed a new homebound plan for November 18, 2015 through June 2, 2016.

In January 2016, Student A began attending a different school, where the Complainant provides he was evaluated and found eligible for an IEP. According to the Complainant, he began receiving services at school and four hours a week of homebound tutoring and one hour a week of Exceptional Children (EC) services at home, which resulted in a swift and significant improvement in his grades.

School staff confirmed in interviews with OCR that the School did not evaluate Student A for special education or related services under the IDEA or Section 504 at any time during his enrollment at the School. The Headmaster told OCR that the School considered Student A’s

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<sup>2</sup> The DEC 1 is the special education referral form. <http://ec.ncpublicschools.gov/policies/forms/statewide-forms>.

homebound plan to be equivalent to a 504 plan, but that the School did not document that plan on specific 504 paperwork and did not give the parents a statement of rights as required by Section 504. And, according to the Headmaster, once Student A returned to school in August 2015, the School wanted to see how his half-day schedule went before developing a Section 504 plan or IEP but that the team could not complete the process because of Student A's absences.

OCR has determined that the School knew that Student A needed special education or related services due to a disability beginning in January 2014, when Student A underwent surgery for a brain tumor. Student A had significant impairments that prevented him from participating in the regular education environment, to the extent that he stayed home from school for the next year and a half. The School acknowledged these impairments, providing homebound services from January 2014 through June 2015 and implementing informal accommodations when Student A attempted to return to the regular education setting in August 2015. Further, by stating that he considered the homebound plan to be equivalent to a 504 plan, the Headmaster acknowledged that the School considered Student A to be a student with a disability in need of special education or related services.

According to the School's own policy, homebound is "not intended to teach the child at home at the same level the student would be taught it in school" and is "not a right the school system is bound to provide." Thus, although Student A was receiving some level of homebound services for much of the time period in question, without an IEP or 504 plan to dictate the appropriate level of services and accommodations that Student A needed, the Student was not guaranteed FAPE. The School did not conduct evaluations or develop a plan designed to meet the individual educational needs of Student A as adequately as the needs of students without disabilities were met. Instead, School staff explained that they repeatedly put off creating a formal educational plan so that they could see how Student A proceeded through his medical issues. Although OCR recognizes the School's efforts to ensure that Student A was medically safe, the actions they took to provide services from January 2014 through December 2015 should have been done in compliance with Section 504. This compliance includes providing the Complainant with notice of all the procedural safeguards required under Section 504, including an opportunity for her to examine relevant records, an impartial hearing with opportunity for participation by counsel, and a review procedure. There is sufficient evidence to conclude that the School failed to provide the parent with procedural safeguards and failed to secure FAPE for Student A and thus violated Section 504.

### Allegation 2

The Complainant alleged that School staff harassed Student A on the basis of disability during the 2015-2016 school year when teachers reprimanded him for not being able to complete his classwork and stated at a meeting on October 13, 2015 that it was not worth their time to teach him and when the Headmaster insisted at the October 13, 2015 meeting that Student A was clearly not trying in school and that he enroll in an online charter school so that he did not cost the School money by taking a spot that a healthy child could use.

### *Legal Standards*

A school's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A school may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the school had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the school's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

### *Analysis*

The Complainant told OCR that Student A's teachers complained that he was far behind and told her that if he could not keep up with his work, he should not be at the School. She also said that at the October 2015 meeting, Student A's teachers said in front of Student A that it was not worth their time to help him and that they did not want to take time away from their other students to help Student A catch up. She also told OCR that at the October 2015 meeting the Headmaster said that Student A was obviously not trying and that it would be better if the Complainant unenrolled Student A and Student B because they were costing the School money by using enrollment slots.

As part of its investigation into the alleged harassing statements, OCR reviewed relevant contemporaneous emails and social media posts from the time period at issue. In a September 4, 2015 email to the School's EC Coordinator<sup>3</sup> and guidance counselor, the Complainant expressed concern that Student A's XXXX teacher was unaware of his special needs and that the teacher was displeased that the Complainant was serving as a reader and scribe to Student A when he needed help at home. According to the email, the Complainant felt that the XXXX teacher did not accommodate Student A when he was absent and needed extra time and that she lectured the Complainant on the importance of attendance. The Complainant wrote, "[Student A's] other teachers have been absolutely fantastic, I cannot give them enough praise for their efforts in making this a positive experience for [Student A]. [The English teacher] has him stressed and in tears." Similarly, in a September 8, 2015 email to an outside provider, the Complainant wrote that Student A's teachers "have been great," but that Student A's XXXX teacher did "not care that [he] had XXXX or is in a wheelchair."

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<sup>3</sup> The School's EC Coordinator during the 2015-2016 school year was no longer employed by the School at the time that OCR conducted staff interviews and thus was unavailable to speak with OCR.

As discussed under allegation 1, on Tuesday, October 13, 2015, the Complainant and Student A met with school staff to discuss Student A's progress. The next day the Complainant posted the following on Facebook:

The meeting with the school was horrible, I thought we were meeting to discuss accommodations and modifications and to finish setting up an[] IEP, well the school wants me to withdraw [Student A] and homeschool him or enroll him in a virtual school and make room for a healthy child who won't be absent as much and will bring more money into the school, since as he put it, the more butts in seats the more money they have . . . . He says when [Students A and B] are healthy enough to be here then I can re-enroll them. He also said since [Student A] was absent and not getting the work (a normal healthy kid would do) made up and in to the teacher he felt [Student A] was not even trying . . . . They had all [Student A's] teachers go around and say how they had hundreds of kids and they didn't have time to catch him up and seriously doubted they could and him coming to school was a waste of time. The science teacher even said she wasn't even trying because she knew it would be impossible. . . . They lied and made [Student A] feel bad, like he wasn't trying or wanted at the school. The headmaster recommended some virtual schools and e-mailed them to me and he wanted me to call them and take care of it before I left the school, before I talked to my husband or our Social Worker/advocate. . . . He even meanly said, well, you better get this done soon, we will leave them enrolled as a "courtesy" because legally they have to be enrolled in school.

According to an October 16, 2015, email from the Complainant to an outside provider, the Headmaster saw this post and called the Complainant's husband on October 15, asking him to tell her to write a retraction, saying she was overly emotional and misunderstood what happened at the meeting, as the School had done nothing wrong. The Headmaster also reportedly told the Complainant's husband that the post was hurtful since the Headmaster was only doing what he felt was best for Students A and B and that he did not mean that he did not want the students to be at the School.

On Sunday, October 18, 2015, the Complainant sent an email to the Headmaster, EC Coordinator, and guidance counselors that she, her husband, and her advocate agreed that it is in Student A's best interest to be schooled at home until he is better. According to the email, the Complainant looked into the online charter schools but they had waiting lists and may not have been able to meet Student A's needs. She therefore opted for a program run by the hospital that coordinates with patients' schools to create a virtual school in which the children can progress at their own rate. The Complainant ended the email by stating that Student A's teachers "have been very caring" and thanking the Headmaster for being patient as the family worked things out.

On Monday, October 19, 2015, the EC Coordinator emailed the guidance counselor a copy of the Complainant's Facebook post from the week before. The guidance counselor responded that "[a] lot was taken out of context." The EC Coordinator then emailed the guidance counselor a copy of a Facebook post that the Complainant wrote on Sunday, October 18, that showed a "complete

180 in attitude.” That post was mostly about the health of the Complainant’s mother but it included an update regarding Student A as well. The Complainant posted the following:

We are “keeping [Student A] at home and waiting for the Compass program, a virtual school program, people to get [Student A] set up. I am feeling good about that, I knew he was not ready to be in school yet, even though he misses people. His teachers were really great and the students were amazing with helping [Student A] and so kind. The kids at that school are really amazing. The teachers at the school are really good, I can not compliment them enough.

Lastly, later that week, the Complainant emailed the outside provider again and stated in part that the Headmaster had called her the day before and “apologized profusely” and explained that he wanted what was best for the students’ education.

In addition to reviewing contemporaneous documentation, OCR interviewed the Headmaster, the guidance counselor, and four teachers who worked with Student A. The staff said that in their regular interactions with the Complainant and Student A, while they expressed that they wanted the Student to attend class more often and were confused as to why he would sometimes attend afternoon club meetings but not morning classes, they did not reprimand Student A for not completing his classwork nor did they recall hearing any of their colleagues reprimand Student A. Staff reported that they were supportive of and sympathetic to Student A and that when he attended school, he completed his work and was an excellent student. The XXXX teacher said that multiple times he offered to go to Student A’s home to help him with his work but that the Complainant never took him up on the offer. Staff said that they were concerned about the family’s long-standing pattern of absences with regard to Student A and his two siblings, but that they were frustrated with the Complainant, not with Student A.

OCR also asked these staff members about their interactions with the Complainant and Student A during the October 13<sup>th</sup> meeting. They recalled discussing the fact that Student A was falling behind in his classes because of his absences but all adamantly stated that no teachers commented that it was not worth their time to teach Student A. The Headmaster also denied saying anything about the students wasting money and said that such a statement would have been “ludicrous” because schools are funded based on the enrollment on a date in mid-September, so the School would not get more money if the students left after that date. The Headmaster and the other staff members recalled discussing an online program as possibly a good option for Student A since it would allow him to go at his own pace, but they said that the Headmaster did not insist on an online program; rather he presented it as one of multiple options available for Student A. They said that the Complainant and Student A seemed to be pleased with the meeting and that they did not know the Complainant was upset until they saw her social media posts.

Viewing all of the evidence, OCR has determined that there is insufficient evidence to support the allegation that School staff harassed Student A on the basis of disability. First, there is insufficient evidence that any of the teachers harassed Student A by reprimanding him for not completing his work. The Complainant stated in several emails that aside from the XXXX teacher, the other teachers were supportive. Regarding the XXXX teacher, OCR finds that even assuming what the Complainant stated in her emails is true, these actions show a lack of



understanding as to the accommodations that Student A needed and may constitute a lack of empathy toward the Complainant, but they do not rise to the level of severe or pervasive disability-based harassment directed at Student. Looking at the context and nature of the comments, it appears as though the English teacher might have been rigid on the requirements for class performance and due dates for assignments, but OCR does not view these incidents to constitute a hostile environment.<sup>4</sup>

Second, because the Complainant made conflicting statements regarding the October 13<sup>th</sup> meeting and because the staff provided consistent descriptions of what transpired during the meeting, OCR finds that there is insufficient evidence to conclude that the teachers and the Headmaster engaged in disability-based harassment during the meeting. There seems to have been miscommunication between the Complainant and the School staff with regard to the teachers' and Headmaster's concerns regarding Student A's ability to keep up with his schoolwork. With regard to the discussion of online programs, everyone involved agreed that the Headmaster posed online programs as an option for Student A. This alone cannot be considered disability-based harassment, especially since the Complainant later agreed that a virtual program would be best for Student A. Further, although the Complainant may have interpreted the Headmaster as having ill intentions in suggesting the online option, there is insufficient evidence to substantiate this.<sup>5</sup>

### Allegation 3

The Complainant alleged that because there is no elevator, the second story of the School is not accessible to students with mobility impairments. She stated that the EC teacher's room, art classes, and eighth grade classes are on the second floor and that the School offered to exempt Student A from art class, but that there was no discussion as to how he would be accommodated in eighth grade had he continued to be enrolled in the School.

### *Legal Standards*

The Section 504 regulation, at 34 C.F.R. § 104.21, and the Title II regulation, at 28 C.F.R. § 35.149, provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in a school's programs or activities because the school's facilities are inaccessible to or unusable by individuals with disabilities.

The regulations implementing Section 504 and Title II each contain two standards for determining whether a school's programs, activities, and services are accessible to individuals with disabilities. One standard applies to facilities existing at the time of the publication of the regulations and the other standard applies to facilities constructed or altered after the publication

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<sup>4</sup> OCR notes that if Student A had an IEP or Section 504 plan as discussed under Allegation 1, all teachers, including the English teacher, would have had a clear understanding as to whether the Student needed accommodations such as extra time, modified assignments, and help with reading and transcribing information.

<sup>5</sup> While OCR finds that there is insufficient evidence to support disability-based harassment, had the October 13<sup>th</sup> meeting been a formal IEP or Section 504 meeting, the issue could have been properly framed as a placement decision discussion; the Complainant would have received Prior Written Notice and procedural safeguards, which perhaps would have made it less likely for the discussion to be interpreted as disability-based harassment.

dates. The applicable standard depends on the date of construction and/or alteration of the facility. Under the Section 504 regulation, existing facilities are those for which construction began prior to June 4, 1977; under the Title II regulation, existing facilities are those for which construction began prior to January 27, 1992. Facilities constructed or altered on or after these dates are considered newly constructed or altered facilities under Section 504 and Title II standards.

For existing facilities, the Section 504 regulation, at 34 C.F.R. § 104.22, and the Title II regulation, at 28 C.F.R. § 35.150, require a school to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. The school may comply with this requirement through the reassignment of programs, activities, and services to accessible buildings, alteration of existing facilities, or any other methods that result in making each of its programs, activities and services accessible to persons with disabilities. In choosing among available methods of meeting the requirements, a school must give priority to methods that offer programs, activities and services to persons with disabilities in the most integrated setting appropriate.

### *Analysis*

At the start of the 2015-2016 school year, the Complainant and School staff agreed that Student A would only be in school from 8 a.m. to 1 p.m. and he would only attend core academic classes. The Student did not attend art class, computer class, or any other classes that are held on the second floor. Therefore, in our analysis, OCR looked at whether the School is generally accessible to students with mobility impairments, not specifically whether the School was accessible to Student A.

The School conceded that the building has no elevator or ramps to the second floor and that the second story of the building is not accessible to students with mobility impairments. The School provided a letter from the Rutherford County Code Enforcement staff verifying that the building was built in 1920 and that there have been no upgrades nor has there been a change in occupancy. The School explained that its consistent response to the mobility issue is to shift all relevant instructional programming to the first floor as necessary. When asked specifically how the School would handle access to a computer class which is typically held on the second floor, the Headmaster explained that the whole class would be moved down to the first floor and would use Chromebooks. Further, the Headmaster explained that the School has multiple buildings on its campus and only one has a second floor; only six classrooms are on the second floor out of thirty total classrooms, so classes can easily be shifted to the downstairs level.

OCR has determined that because the building was constructed in 1920 and no alterations have been made since, it is considered an existing facility under the Section 504 and Title II regulations. The obligation of the School is thus to ensure that each service, program, and activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. The School stated that they reassign classes to the first floor whenever they have a student who cannot access the second floor. Since there is no evidence to contradict the School's statement, OCR finds that the School is in compliance with the Section 504 and Title II

regulations that allow a school to meet its legal requirement through the reassignment of programs, activities, and services to accessible buildings.

## **Student B**

### Background

Student B enrolled in the School in the fall of 2013 as an XXXX grader. The Complainant told OCR, and School staff agree, that Student B is a very bright and ambitious student who diligently tried to complete all of her work and earned high grades despite her many absences. Beginning in spring XXXX when Student B was a XXXX grader and continuing throughout the following school year, the Complainant wrote several emails to the School explaining that Student B had periodic episodes of pain along with XXXX and that the family was working with doctors to get an accurate diagnosis. The School held a 504 meeting on March 18, 2016, and determined not to evaluate Student B for a 504 plan. The School held an IEP meeting on April 8, 2016, and determined not to evaluate Student B for an IEP. At the end of the 2015-2016 school year, Student B withdrew from the School and transferred to her local school district.

### Allegation 1

The Complainant alleged that the School failed to provide Student B with FAPE by failing to evaluate her for special education or related services. More specifically, the Complainant alleged that from as early as the beginning of the 2014-2015 school year until Student B withdrew from the School at the end of the 2015-2016 school year, the School knew that Student B had a disability but did not evaluate her for services under the IDEA or Section 504 and did not provide services under the IDEA or Section 504, resulting in a denial of FAPE.

### *Analysis*

The Complainant and Student B's doctors frequently communicated with School staff regarding Student B's health impairments as early as May XXXX. Emails on XXXX and XXXX, described Student B's XXXX and medications and the effects they were having on her ability to complete her schoolwork.

In November 2015, the Complainant submitted a 504 form to the School to request a 504 plan for Student B. A Section 504 form completed by one of Student B's doctors on November 23, 2015, stated that Student B had been diagnosed with involuntary movements six weeks prior to the completion of the form and lower extremity XXXX sensation,<sup>6</sup> six months prior. The form further provided that the condition was acute and chronic, and would create involuntary movements that would prevent Student B from reading, sitting still, and gripping her pencil. Although doctors did not know the underlying cause of Student B's symptoms, various accompanying medical reports described Student B's impairments. A report from May 2015 concluded after a battery of tests that Student B had XXXX. . . are likely psychological in nature without obvious underlying pathology." A July 23, 2015, neurology visit note confirmed problems with XXXX. An August 2015 report diagnosed Student B with spells XXXX.

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<sup>6</sup> <http://www.ninds.nih.gov/disorders/paresthesia/paresthesia.htm>.

<XXXX PARAGRAPH REDACTED XXXX>

School staff asserted multiple times that they did not have enough information to indicate that Student B was a student in need of special education or related services due to a disability. On December 1, 2015, the School Counselor faxed the doctor who completed the 504 form, stating that they could not proceed with an evaluation because the form was not sufficient medical documentation. On December 14, 2015, the Complainant emailed the School Counselor to see if she received a 504 form from Student B's doctor. The School Counselor forwarded the email to the Headmaster, the School nurse, and the EC Coordinator, stating that they received a 38-page report from Student B's doctors outlining tests they had done, but not finding anything wrong, so there was no real justification for a 504 plan.

On March 3, 2016, Student B's father emailed the Headmaster, School Counselor, and Dean of Students to ask whether Student B had to attend Saturday detention, since he believed that Student B had a 504 plan and the detention policy did not apply to students with 504 plans. The School Counselor responded to the Headmaster, Dean, and EC Coordinator, stating that Student B "is not under a 504 plan. I know the parents (mom) requested one, but given the 'documentation' we received, I don't think [the EC Coordinator] was able to justify a plan." The EC Coordinator responded, stating that "I have not been involved in any of the meetings with the parents of this student." The Headmaster then responded to the father's email, stating in part that:

As you should know, [Student B] does not have a formal 504 plan in place, as it was determined by our 504 team that the medical form completed by the doctor in December does give us flexibility in supporting her with the excessive absences, as we have . . . . However, the conditions cited do not give cause for . . . accommodations other than excusing absences when her involuntary movements affect her.

On March 18, 2016, the Complainant sent a letter to the Headmaster and EC Coordinator requesting an IEP evaluation. The same day, the School held a 504 meeting. Handwritten notes from the meeting stated that "based on team recommendations no 504 would be granted."

A meeting to discuss an initial referral for evaluation for special education services was held on April 8, 2016. The Prior Written Notice (PWN) provides that the team decided to not evaluate Student B because "The IEP team majority determined that . . . the review of existing data showed that there was enough evidence to determine that [Student B] would not benefit from Special education and/or related services." The PWN further provides that the team considered parent concerns, School staff summaries and observations indicating that Student B is a good student and that School staff had not observed any of the medical conditions described by the Complainant, grades and standardized tests scores, and medical reports from spring XXXX through XXXX "stating different diagnosis [sic] and symptoms." Both parents disagreed with the IEP team decision.

There were no further meetings to discuss eligibility under Section 504 or the IDEA. Student B finished the 2015-2016 school year at the School, but did not return to the School for the 2016-2017 school year.

Although no determination has been made as to whether the School's actions with respect to Student B violated Section 504, OCR is concerned that the School failed to provide the parent with procedural safeguards when the School decided not to hold a 504 meeting in November and December 2015 and failed to provide Student B with FAPE. As early as May 2015, the Complainant provided the School with documentation indicating that Student B needed or was believed to need special education or related services, including multiple medical reports. However, written documentation submitted by the School to OCR indicates that School staff did not see enough evidence of Student B's medical issues presenting at School to warrant a Section 504 or IEP meeting until March 2016, and even at that point, School staff chose not to evaluate Student B for special education or related services. There is therefore a factual question as to whether any School staff saw indications of a disability or impairment at the School that should have led them to recommend that Student B undergo an evaluation for special education or related services. Before OCR could interview Student B's teachers and any other staff with she interacted to determine whether any had observed XXXX, or other impairments at School that would indicate to them that Student B was in need of special education or related services due to a disability, the School agreed to voluntarily resolve this allegation.

### Allegation 2

The Complainant alleged that the Headmaster harassed Student B on the basis of disability when he insisted at the October 2015 meeting that she enroll in an online charter school so that she did not cost the School money by taking a spot that a healthy child could use.

### *Analysis*

The Complainant told OCR that at the October 13, 2015 meeting regarding Student A, the Headmaster said that it would be better if the Complainant unenroll both Student A and Student B because they were costing the School money by taking a slot at the School.

As detailed above under allegation 2 for Student A, OCR considered information gathered from the Complainant and School staff as well as relevant contemporaneous emails and social media posts from the time period at issue. As part of her Facebook post the day after the October meeting the Complainant wrote, "[The Headmaster] also wants me to withdraw [Student B] as well since she has been absent due to her medical condition, even though she is working to catch up and her grades aren't horrible. He says when they are healthy enough to be here then I can re-enroll them." On October 18, 2015, the Complainant emailed the Headmaster and said in part that Student B "was crushed" when the Complainant told her that the Headmaster wanted her to withdraw and attend a virtual school.

When asked by OCR, the Headmaster did not recall discussing placement options for Student B at the October 13<sup>th</sup> meeting because that meeting was solely to discuss Student A. The Headmaster also said that in general conversations with the Complainant, he had repeatedly emphasized that Student B was an amazing student and that staff just wanted her in class. The guidance counselor also did not recall anyone discussing placement options for Student B at the October 13<sup>th</sup> meeting because Student B was not the topic of discussion at that meeting.

Viewing all of the evidence, OCR has determined that there is insufficient evidence to support the allegation that School staff harassed Student B on the basis of disability. Because of conflicting statements between the Complainant and the staff, OCR cannot determine whether the online charter school option was discussed only for Student A or if it was mentioned as an option for Student B as well. Also, as discussed above under allegation 2 for Student A, merely posing an option cannot be considered disability-based harassment. This is especially true with regard to Student B who did not attend the meeting. Further, although the Complainant may have considered the Headmaster to have ill intentions in suggesting online options, there is insufficient evidence to substantiate this.

### **Conclusion**

On September 26, 2016, the School agreed to implement the enclosed Resolution Agreement (Agreement), which commits the School to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the School is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the School deemed compliant if the School enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the School's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the School has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the School on September 26, 2016, if the School fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the School written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the School must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to

protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the School's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Nicole Dooley or Dana Russo, the OCR attorneys assigned to these complaints, at 202-453-5675 or 202-453-6559, or nicole.dooley@ed.gov or dana.russo@ed.gov, respectively.

Sincerely,

/S/  
Michael Hing  
Supervisory Attorney  
Office for Civil Rights  
District of Columbia Office

Enclosure

cc: XXXX