Megan Zidian, Esq. Britton Smith Peters & Kalail Co., L.P.A. 3 Summit Park Drive, Suite 400 Cleveland, Ohio 44131-2582

Re: OCR Docket #15-14-1188

Dear Ms. Zidian:

OCR is responsible for enforcing Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education and by public entities, respectively. As a recipient of Federal financial assistance from the Department and as a public school system, the District is subject to these laws; therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following legal issues:

- 1. whether the District failed to appropriately and timely evaluate and determine the educational placement of a student with a suspected disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35;
- 2. whether the District failed to effectively establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a disability, need or are believed to need special instruction or related services, a system of procedural safeguards in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.36;
- 3. whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because the individual made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under those laws in noncompliance with the regulations implementing Section 504 at 34 C.F.R. § 104.61 and Title II at 28 C.F.R. § 35.134(b); and
- 4. whether the District failed to designate an individual responsible for coordinating its efforts to comply with Section 504 in violation of Section 504's implementing regulation at 34 C.F.R. § 104.7(a).

#### Alleged Failure to Timely Evaluate the Student for Suspected Disability

XXXXXXXX, the Student's mother met with the XXXXXXXXXXXXXX to discuss her concerns about the Student. The XXXX told OCR that the Student's mother advised her that the Student had been diagnosed with some learning disabilities, but the Student's mother was unsure of what action, if any, the family wanted to take. The Student's parents provided a neurobehavioral report which indicated that the Student had been diagnosed with a XXXX. The Student's mother told OCR that she was surprised when the XXXX stated that a meeting was required before any action would be taken by the District, despite the diagnosis in the report. The Student's mother confirmed telling the XXXX that she was unsure if she wanted the Student to be evaluated to determine if he was eligible as a student with a disability.

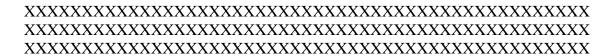
In response to the neurobehavioral report and the parents' concerns, the XXX convened an intervention assistance team (IAT) meeting in XXXX, which included some of the Student's teachers, the Student's parents, a psychologist, the supervisor, and a District counselor. At the meeting, the IAT decided to draft an intervention plan for the Student, and agreed to reconvene six weeks later to determine if the interventions were effective. The intervention plan provided for: a daily planner sheet, notes, breaks, follow-up on concerns about the legibility of writing, and extended time.

The XXX stated that the IAT did not suspect that the Student was a student with a disability and as a result, did not initiate an evaluation of the Student. Following the XXXX meeting, the XXXX issued a Prior Written Notice to the parents notifying them that the District was not going to evaluate the Student. The XXXX stated that she does not typically issue a Prior Written Notice when there has not been a request to evaluate and there is no suspicion that a student may have a disability. However, she wanted to clarify for the parents that the District did not consider the Student to be a student with a disability. In response, the Student's parent sent the XXXX a letter indicating that he had not requested an evaluation of the Student.

On XXXX, the IAT, along with the occupational therapist, and the principal met to discuss the effectiveness of the intervention plan. The Student's teachers stated that the Student's academic performance and behavior were not a concern. With regard to the interventions, the XXXX teacher stated that she moved the Student's seat, provided notes, and tutored him regularly. The Student's mother confirmed that the Student stayed after school to work on XXXX assignments with the teacher on a few occasions.

The XXXX teacher also reported that the Student responded well to redirection and working in small groups. Both teachers stated that granting additional time on tests had no effect on the Student's test scores, because he would hand in tests with time remaining and several unanswered questions. The Student's mother told OCR that the Student told her that he did not use the additional time because he did not know how to answer the questions.

At the XXXX meeting, the Student's parent submitted a note from the Student's doctor requesting that the District evaluate the Student for possible ADHD and learning disabilities. The Student's parent also provided his written request that the District evaluate the Student for special education under Individuals with Disabilities Education Act (IDEA) or accommodations under Section 504.



# **Procedural Due Process**

On XXXX, the District issued a Prior Written Notice (the Notice) indicating that it was refusing to initiate an evaluation of the Student. The Notice indicates that the IAT met on XXXX to review the interventions provided to the Student and document his progress. At the meeting, the IAT discussed the Student's most recent Ohio Achievement Assessments (OAA) scores which ranged from proficient to advanced. According to the Notice, the Student's parents expressed concerns with the Student's current performance, believed that he might have problems focusing, and believed that the Student has a learning disability.

#### The Notice stated:

the district is unable to establish an adverse effect on [the Student's] educational performance at this time as it relates to the individuals with disabilities in education act. The district is also unable to establish an issue of [the Student] being unable to access his education due to any of the focusing issues or purported concern of a learning disability by the parent at this time.

The XXXX told OCR that the District XXXX disagreed with the neurobehavioral report's diagnoses of cognitive disorder and math disorder because the Student's overall IQ, grades, and OAA scores indicated that the Student did not have any significant deficits. The Student's parent asserted that the neurobehavioral report was not discussed at the October or January meetings. The Student's parent stated that whenever he attempted to bring up the neurobehavioral report, the District staff would cut him off. The Student's mother stated that the District staff referenced the report at meetings, but not to any depth.

On XXXXX, the District received another letter from the Student's parent requesting that the Student be evaluated under IDEA and Section 504. In response, on XXXX, the District issued a Prior Written Notice identical to the XXXX Notice refusing to initiate an evaluation of the Student. The XXXX told OCR that the Notices were intended to alert the parents that the District was refusing to evaluate the Student to determine whether he was a student with a disability under IDEA and Section 504.

At the bottom of the Notice is a paragraph entitled "Provision of Procedural Safeguards" which indicates that the parents of a student with a suspected or identified disability have procedural safeguard protections under IDEA. The Notice indicates that parents will be given a copy of their procedural safeguards: once a year, when a copy is requested, when the student is initially referred or when the parents request an evaluation, when the parents file a formal written complaint, or when the parents request a due process hearing. The Notice also indicates that parents can obtain a copy of the procedural safeguards from the supervisor and provides her contact information.

The District provided OCR with a XXXXX, letter from the supervisor to the Student's parent, which indicates that the parent had requested information regarding his options for disagreeing with the District's actions under IDEA. The supervisor also provided "Whose IDEA Is This? A Parent's Guide to the Individuals with Disabilities Education Improvement Act of 2004" (Whose IDEA). The letter referred the parent to the section of Whose IDEA regarding resolving conflicts. The District and the Student's parent agreed that this was the first time the District provided the Student's parents with procedural safeguards during the XXXXX school year.

On XXXXX, the Student's parent XXXX a letter to the superintendent's office requesting an XXXX of the January 31, 2014, Prior Written Notice. The letter indicates that the parent disagreed with the decision not to evaluate the Student and asserted that the Student failed his math midterm exam, was unable to focus in class, and unable to retain important facts. The parent attached page XX of Whose IDEA, which described the XXXXX process.

On XXXXX, the Student's parent sent the superintendent another letter by certified mail reiterating his request for XXXX. The XXXX, letter was substantially similar to the XXXX, letter except for an additional paragraph asserting that the supervisor failed to return the his phone calls and dismissed his concerns. The Student's parent alleged that the District failed to respond to his requests for an XXX.

OCR that he was unfamiliar with the term XXXX but believed that the supervisor responded to the parent's request. The XXXX, while familiar with the XXXXXX process, stated that she was unaware of the request and did not respond.

The District provided OCR with its current Section 504 Policy and Procedures that were approved by the Board of Education in April 2014. The Policy includes the Section 504 procedural safeguards entitled, "Policy 2260.01B Section 504/ADA Parents' Procedural Rights, Including Due Process Hearing." The Policy requires the District to notify parents of their Section 504 rights:

- when evaluations are conducted;
- when consent for an evaluation is withheld;
- when eligibility is determined;
- when a Section 504 Plan is developed; and
- before there is a significant change in the Section 504 Plan.

In addition, the procedural safeguards indicate that parents have the right to request mediation or an impartial due process hearing related to decision or actions concerning their child's identification, evaluation, educational program, or placement. The procedural safeguards do not identify the District's Section 504 Coordinator(s) or include the Coordinator(s) contact information.

### Applicable Legal Standards and OCR Policy

As the Title II implementing regulation offers no greater protection than the Section 504 implementing regulation with respect to this allegation, OCR analyzed this allegation using Section 504 standards. The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires school districts operating a public elementary and secondary education program or activity to provide a free and appropriate public education to each qualified student with a disability in their jurisdictions. The regulation defines a free and appropriate public education as the provision of regular or special education and related aids and services that are: 1) designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met, and, 2) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The Section 504 implementing regulation also provides, at 34 C.F.R. § 104.35(a), that school districts evaluate any person who, because of a disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Compliance with IDEA regarding the group of persons

present when an evaluation or placement decision is made is satisfactory under Section 504.

The Section 504 implementing regulation, at 34 C.F.R. § 104.36, requires districts to establish, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, the right to examine relevant records, and an impartial hearing. The regulations also indicate that compliance with IDEA is one means of meeting the requirements of Section 504. If parents request a disability evaluation the district may: (1) evaluate the student within a reasonable period of time; or (2) decline to evaluate the student because the district does not believe that the student has a disability. If the district refuses to evaluate, it must explain to the parents the reason, and inform them that they have the right to challenge the refusal to evaluate the student by requesting an impartial hearing by a person knowledgeable about the requirements of Section 504.

Here, the District asserts that it disagreed with the neurobehavioral report and did not suspect that the Student was a student with a disability. However, due to the parents' concerns, the District convened an IAT in October and drafted an intervention plan. The evidence established that at another IAT meeting in January, the IAT discussed that the Student was performing well academically and determined that it did not suspect that the Student was a student with a disability. On XXXX and XXXX, the Student's parent requested that the District evaluate the Student to determine if he was eligible as a student with a disability under IDEA or Section 504. In response, the District issued Prior Written Notices on XXXX and XXXXX, indicating that it was refusing to initiate an evaluation of the Student under IDEA and Section 504. Since the District considered the parent's requests to evaluate the Student and timely notified the parent that it was declining to evaluate him, OCR finds that there is insufficient evidence that the District failed to appropriately and timely evaluate the Student in violation of Section 504 as alleged.

While the District provided the parent with IDEA's procedural safeguards, it is undisputed that the District failed to provide the parent with its Section 504 procedural safeguards during the XXXXXXX school year, despite the District's refusal to evaluate the Student under Section 504. While the District provided Whose IDEA on XXXX, the District did not respond to the parent's request for an XXXX under IDEA. Section 504 permits districts to utilize IDEA's procedural safeguards in order to meet the requirements of Section 504, however the District failed to comply with IDEA's procedural safeguards when the parent requested an XXXX.

OCR finds that the District failed to effectively establish and implement a system of procedural safeguards in violation of Section 504. As result, the Resolution Agreement requires the District to revise its Section 504 procedural safeguards to include: information on who an individual may contact to request mediation or file a due process complaint, and the contact information for the District's Section 504 Coordinator(s). In this regard, the Resolution Agreement requires the District to provide training to its

Section 504/Title II coordinator(s) and other staff about the revised procedural safeguards as well as any other dispute resolution procedures the District uses to comply with Section 504 requirements. Further, the Agreement requires the District to issue a letter to the Student's parent committing to respond to the parent's request for an administrative review upon the Student's reenrollment in the District.

#### Section 504/ Title II Coordinator

Section 504's implementing regulation requires recipients that employ 15 or more people to designate at least one person to coordinate its efforts to comply with Section 504 (typically referred to as the "Section 504 Coordinator"). The regulation also requires recipients to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, of the identity of the Section 504 coordinator. 34 C.F.R. §§ 104.7(a) and 104.8(a). Title II contains a similar requirement at 28 C.F.R. § 35.107(a), which specifies that a public entity that employs 50 or more persons shall make available to all interested individuals the name, office address, and telephone number of the designated individual(s).

On July 3, 2014, the District provided OCR with its current Section 504 policies and procedures (2014 Policy) that were revised on April 28, 2014. The 2014 Policy contains Policy 2260: *Nondiscrimination and Access to Equal Educational Opportunity* which identifies the supervisor and the superintendent as the District's Compliance Officers and provides their contact information. The 2014 Policy states that the Compliance Officers coordinate the District's efforts to comply with: Title II of the ADAA, Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendment Act of 1972, Section 504, and the Age Discrimination Act. While OCR has confirmed that the District's current policy is published on the District website, the District's 2010 Policy, identifying the Director of Educational Services as the District's Section 504 Coordinator, was also published on the website as of July 2, 2014.

The Student's parent alleged that on multiple occasions he asked the District staff to identify the District's Section 504 coordinator and never received a response, but later another parent advised him that the supervisor was the Section 504 coordinator. The superintendent asserted that staff advised the parent that the supervisor was the Section 504 coordinator. The District provided OCR with a XXXX e-mail from the Student's parent asking the XXXX for the District's Section 504 Coordinator's contact information. The XXXX told OCR that he believes that he responded to the parent's e-mail but did not provide the email response to OCR.

There is no evidence that the District identified the District's Section 504 coordinators during the XXXX school year. Further, the parent would have been unable to ascertain the identity of the coordinator on the District's website, as the published policy was incorrect. As a result, OCR finds that the that the District failed to take appropriate steps to notify interested parties of its Section 504 and Title II coordinators in violation of the Section 504 and Title II. The Agreement requires the District to notify parents/guardians of the name(s) of the District's Section 504 Coordinator(s) along with the Coordinator(s)

contact information and to include the notification on the District's websites, and in any District student/parent handbooks.

### **Alleged Retaliation**

The Student's parent alleged that the District retaliated against him for his disagreement with its decision not to evaluate the Student by:

- not responding to his phone calls during the week of XXXX;

The Student's parent stated that he left voice mail messages for the Student's XXX teacher on XXXXX and XX, and for the XXXX teacher on XXXXX. The parent alleges that the teachers did not return his calls in retaliation for his disagreement with the District's decision not to evaluate the Student. On XXXX, the Student delivered letters to the teachers requesting a meeting to discuss concerns the parent had about the Student's performance in their classes. The parent asserted that the teachers' lack of response negatively impacted his ability to assist the Student. Both teachers indicated that they forwarded the parent's phone messages to the XXXX for him to respond on their behalf. The XXXX did not recall whether he called the parent on behalf of the teachers, but did recall having a discussion with the parent regarding his presence at any proposed parent/teacher meetings. The parent did not recall the XXXX returning calls on the teachers' behalf, but did note that the District arranged a meeting for him to meet with all of the Student's teachers and the principal on XXXXXXX.

 The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose or interfering with any right or privilege secured by the regulation or because s/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation. Title II's implementing regulation contains a similar prohibition against retaliation at 28 C.F.R. § 35.134.

To find a *prima facie* case of retaliation, OCR must find: (1) the individual engaged in protected activity; (2) the individual experienced a materially adverse action by the recipient; and (3) there is a causal connection between the protected activity and the materially adverse action. To determine whether a "materially adverse action" has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination. Normally, petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. The significance of any given act of retaliation will often depend upon the particular circumstances. Depending on context, an act that would be immaterial in some situations may be material in other situations. Whether an action is materially adverse is judged from the perspective of a reasonable person in the individual's position.

If any of the elements of a *prima facie* case cannot be established, OCR will find insufficient evidence of a violation. If the evidence demonstrates a *prima facie* case of retaliation, a presumption or inference of unlawful retaliation is raised. OCR must then determine whether the recipient had a facially legitimate reason for the materially adverse action. If OCR finds that the recipient did have a facially legitimate reason for the materially adverse action, OCR must conduct a "pretext" inquiry to determine whether the recipient's reason is a cover-up for retaliation. Evidence of pretext may involve factual scenarios in which the individual was treated differently from how he or she was treated prior to the protected activity or was treated differently from similarly situated individuals. Evidence of pretext may also include situations in which the individual was treated in a manner that deviated from the recipient's established policies or practices.

With respect to protected activity, OCR determined that the parent's disagreement with the District's decision not to evaluate the Student, and his continued requests that the District evaluate the Student, constituted activities protected by Section 504 and Title II.

Thus, OCR sought to examine whether the District took an adverse action against the parent because of the protected activity or after the protected activity occurred. Regarding the allegation that the District's failure to respond to the parent's phone calls was retaliatory, there is no evidence that the Student was adversely affected. Moreover, although the parent asserts that the District limited his ability to discuss his concerns with the teachers, the evidence indicates that after the parent sent letters to the Student's teachers on XXXXX, requesting a meeting, the District arranged for the parent to meet with the Student's teachers on XXXXX. Additionally, the evidence does not support that

the alleged failure to return phone calls had the effect of deterring the parent from filing complaints or pursuing discrimination claims against the District. Thus, OCR finds that the District's failure to return the Student's parent's phone calls during the week of XXXXX, was not an adverse action.

OCR therefore examined whether the District articulated a legitimate, non-retaliatory reason for these actions and, if so, whether the weight of the evidence supported that the articulated reason was a pretext for retaliation.

The weight of the evidence supports that the parent's actions could reasonably be seen as inappropriate. There is evidence that the Student's parent engaged in repeated behaviors that several District staff found to be threatening, abusive, and erratic and that they reported the parent's behaviors to administrators. OCR's investigation found no evidence that the District's reasons for restricting the parent's access to District buildings were pretext for retaliation for the parent's having asserted rights or opposed discrimination under Section 504, and the parent did not provide any evidence to suggest that the District's articulated reasons were pretext, other than his own assertions. Based on the above, OCR found no evidence to support that the District's articulated reasons for threatening to call, or for calling the police, and restricting the parent's access to buildings, were a pretext for discrimination in violation Section 504 II, as alleged.

## Conclusion

This concludes OCR's investigation of this matter. OCR will monitor the implementation of the Agreement. The District's first monitoring report is due by February 27, 2015. If the District does not fully implement the agreement, OCR will reopen the investigation and take appropriate action. In addition, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of 60 calendar days to cure the alleged breach.

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.

OCR would like to thank you and the District for your cooperation in the investigation and resolution of this matter. The OCR contact person for the monitoring of the agreement is XXXXXX, who may be reached at (216) 522-XXX, or XXXXX@ed.gov. We look forward to receiving the District's first monitoring report by February 27, 2015 and the report should be directed to Ms. Sample. If you have any questions about this letter or OCR's resolution of this case, please contact XXXXXX, at (216) 522-XXX or at XXXXX@ed.gov.

Sincerely,

/s/

Meena M. Chandra Director

Enclosure