



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION XV

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REGION XV  
MICHIGAN  
OHIO

December 22, 2015

Dr. Shawn K. Wightman  
Superintendent  
Marysville Public Schools  
1111 Delaware Avenue  
Marysville, Michigan 48040

Re: OCR Docket #15-15-1223

Dear Dr. Wightman:

This is to notify you of the disposition of the above-referenced complaint that was filed on April 2, 2015, with the U.S. Department of Education's Office for Civil Rights (OCR) against the Marysville Public School District (the District). The complaint alleged that the District discriminated against a District student (the Student) based on his disabilities. Specifically, the complaint alleged:

1. From January through March 2015, the District repeatedly excluded the Student from school by requiring the Student's xxxxxx xx xxxx xxx xx xxxxx xxxx xxxxxx due to behaviors related to his disabilities.
2. XXX---paragraph redacted---XXX
3. During the 2014-2015 school year, District staff harassed the Student and attempted to exclude him from school based on his disability by calling the police and reporting him truant even when he was at school; threatening to call the police if he did not attend class; calling him xxxxxxxx when he could not xxxxx due to an xxxxxx xxxxxx; calling him a "xxxxxxx xxx" when he xxxxxxxx as a result of an xxxxxxxx xxxxxx; and attempting to xxxxxxxxxx xxxx him into the school when he was afraid to go inside, which caused him to xxxx xxx xxx xxx xxxx.
4. In October 2014, the District refused to take action when the Student's mother reported that the Student was being repeatedly bullied by another student and was being denied an education as a result.

5. In October 2014, the Student was subjected to different treatment based on his disability when he was suspended for xxxxx xxxx for fighting, while the two students he fought with, including the student who started the fight, were only suspended for xxx xxx.
6. In xxxxx xxxx, after the Student's parent complained that the District was not following the Student's Section 504 plan and requested a new evaluation for the Student, the District retaliated by filing a xxxxx xxxxxxxx xx xxxxxxxx against the Student's parent with xxxxx xxxxxxxxxx xxxxxxxx.
7. From April 2015 through the present, the District has failed to provide the Student with agreed upon xxxxxxxxxx services, including a xxxxxxxxxx instructor, a health book, and work for his classes.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability by public entities. Additionally, the regulations implementing Section 504 and Title II prohibit retaliation against individuals engaging in activities protected by these statutes. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to Section 504 and Title II. Therefore, OCR had jurisdiction to investigate this complaint.

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

- Whether the District excluded a qualified person with a disability from participation in, denied him the benefits of, or otherwise subjected him to discrimination under any of its programs or activities, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.
- Whether the District subjected a student to different treatment on the basis of his disability with respect to discipline without a legitimate, nondiscriminatory, non-pretextual reason, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.
- Whether District staff members, acting within the scope of employment, subjected a student to disability-based harassment that was sufficiently severe, persistent, or pervasive to interfere with his ability to participate in or benefit from the District's educational program, in violation of the Section 504

implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

- Whether the District failed to provide a qualified student with a disability with a free and appropriate public education (FAPE) as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33.
- 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 Section 504 or Title II in violation of Section 504's implementing regulation at 34 C.F.R. § 104.61, and/or Title II's implementing regulation at 28 C.F.R. § 35.134.

OCR investigated this complaint by speaking with the Complainant and relevant District staff, and by reviewing documentation provided by the District. After carefully considering the information provided, OCR has determined that the information is insufficient to support a finding that the District discriminated against the Student based on his disability in violation of Section 504 and Title II with respect to allegations 2, 4, 5, and 7, and portions of allegation 3. OCR did find sufficient information to support that the District failed to comply with the requirements of Section 504 and Title II with respect to allegation 1 and portions of allegation 3. In addition to OCR's findings on the above-referenced allegations, OCR identified other Section 504 and Title II compliance concerns with respect to this matter. Specifically, OCR determined that the Student's behavior plan was not designed to provide the Student with a FAPE. Further, OCR found that the District failed to timely reevaluate the Student in response to a significant change in placement in January 2015 when he stopped attending class, and in April 2015, when he went on xxxx instruction. OCR also concluded that the District denied the Student FAPE when it failed to provide the Student with course instruction from January through March 2015, failed to provide him with instruction from a xxxxxxxxxx teacher from March 26, 2015, until he stopped coming to the school on April 17, 2015, and failed to ensure that it conducted a reevaluation of the Student prior to agreeing to a placement of xxxxxxxxxx instruction for the Student in April 2015. OCR found that the District's decision to place the Student on xxxxxxxxxx instruction also did not comply with the requirements of Section 504 in that the District failed to make the placement change through a group of knowledgeable persons, and failed to ensure that the Student's placement provided for his education with persons without disabilities to the maximum extent appropriate to his needs.

On December 16, 2015, the District signed the attached Resolution Agreement (Agreement), which once implemented, will address the compliance concerns OCR identified during its investigation. The reasons for OCR's determinations and the terms of the Agreement are discussed below.

## **Background**

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## **Allegation #1**

- **Summary of OCR’s Investigation**

The Complainant alleged that from January through March 2015 the District repeatedly excluded the Student from school by requiring the Student’s xxxxxx xx xxxx xxx xx due to behaviors related to his disabilities.

XXX---paragraph redacted---XXX

XXX---paragraph redacted---XXX

A District staff member informed OCR that, during the spring of 2015, she was gathering information to do a reevaluation of the Student to determine if he qualified for an Individualized Education Program (IEP) under the emotionally impaired classification, and she was in communication with the Student’s mother regarding these efforts. She stated that she completed a Review of Existing Evaluation Data (REED) for the Student and provided the Student’s mother with an opportunity to provide input. She stated that she asked the Student’s mother about additional testing for the Student to complete the reevaluation, but the Student’s mother declined the additional testing. The Student’s mother stated that she refused additional testing because by that point he was on xxxx instruction. No reevaluation was ever completed.

- **Applicable Legal Standards, Analysis, and Conclusion**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives federal financial assistance. Title II’s implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a).

Further, the Section 504 regulation, at 34 C.F.R. § 104.33(a), requires a school district to provide each qualified student with a disability within its jurisdiction a free appropriate public education (FAPE). For purposes of FAPE, an appropriate education is the provision of 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 nondisabled students are met and that satisfy the procedural requirements of the Section 504 regulation regarding educational setting, evaluation, placement, and procedural safeguards. See 34 C.F.R. § 104.33(b). Pursuant to Appendix A, Subpart D,

paragraph 23 of the regulation implementing Section 504, to provide FAPE, the quality of the educational services provided to students with disabilities must equal that of the services provided to students without disabilities. Thus, teachers of students with disabilities must be trained in the instruction of persons with the disability in question and appropriate materials and equipment must be available.

The regulation implementing Section 504, at 34 C.F.R. § 104.35, requires recipient school districts to conduct an evaluation of 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. The regulation also requires recipient districts to reevaluate students with disabilities periodically and before any subsequent significant change in placement. OCR has interpreted this provision to require districts to reconvene and reevaluate students whose current disability-related services contained in a student's Section 504 plan or IEP are no longer sufficient to provide FAPE.

In the instant case, OCR finds that the District excluded the Student from participation in the District's educational program and denied him FAPE when it sent him xxxx early from school on certain occasions for behaviors related to his disabilities.

XXX---paragraph redacted---XXX

While school districts are permitted to exclude students with disabilities from school for up to ten days for disciplinary reasons without further action, OCR noted that these exclusions were not disciplinary in nature. Rather, based on the information provided, the District contacted the Student's mother and asked that he be xxxxx xxxx as a method of dealing with his disability-related behaviors, instead of reconvening the Student's Section 504 team to determine what disability-related services might be necessary to allow the Student to remain in school or whether an alternative placement might be necessary.

Similarly, OCR finds that requiring the Student's xxxxxx xx xxxx xxx xx from school xxxx as a requirement of his behavior plan was not a free or appropriate disability-related service designed to provide FAPE. Pursuant to the Section 504 implementing regulation at 34 C.F.R. § 104 Appendix A, Subpart D, OCR does not, except in extraordinary circumstances, review individual placement and other educational decisions, such as the particular services provided in a student's behavior plan, so long as a school district complies with the process requirements of Section 504.

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In light of the foregoing, OCR finds that the District excluded the Student from school and denied him FAPE in violation of Section 504 with respect to this allegation.

**Allegation #2**

- **Summary of OCR’s Investigation**

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- **Applicable Legal Standards, Analysis, and Conclusion**

As noted above, pursuant to Section 504, districts have an obligation to provide each qualified student with a disability within their jurisdiction a FAPE. As was also noted above, to provide FAPE, the quality of the educational services provided to students with disabilities must be equal to that provided to students without disabilities. One way a District can demonstrate that it is providing a student with FAPE is by showing that it is implementing the Student’s properly developed Section 504 plan or IEP. Similarly, a district’s failure to properly implement a student’s Section 504 plan or IEP may, if sufficiently severe, result in the student being denied FAPE.

Further, as was also noted above, OCR has interpreted the Section 504 implementing regulation’s reevaluation requirements, at 34 C.F.R. § 104.35, to require districts to reconvene and reevaluate a student where the disability-related services contained in the student’s Section 504 plan or IEP are no longer sufficient to provide FAPE.

XXX---paragraph redacted---XXX

Accordingly, OCR finds insufficient evidence to support that the District denied the Student FAPE or otherwise discriminated against the Student in violation of Section 504 or Title II with respect to its provision of an xxxxxxxxxxxx xxxxx. OCR also found insufficient evidence to confirm the Complainant’s assertion that the Student was not provided with work to complete while xx xxx xxxxxxxxxxxx xxxxx, as multiple District staff reported that work was in fact provided.

While OCR was unable to confirm the Complainant’s assertions with respect to this specific allegation, OCR does find that the District denied the Student FAPE in violation of the Section 504 regulation at 34 C.F.R. § 104.33, due to its failure to provide the Student with instruction while xx xxx xxxxxxxxxxxx.

XXX---paragraph redacted---XXX

In light of the foregoing, OCR concludes that the District failed to timely reevaluate the Student in response to a significant change in placement in violation of Section 504. OCR also finds that the District denied the Student FAPE in violation of Section 504 when it failed to provide the Student with course instruction from January through March 2015, and failed to provide him with instruction from a xxxxxxxx teacher from xxxxx xx xxx, until he stopped coming to the school on xxxxxx xxxxxx.

**Allegation #3**

- **Summary of OCR’s Investigation**

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- Calling the police and reporting him truant while at school

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XXX---paragraph redacted---XXX

XXX---paragraph redacted---XXX

- Threatening to call the police if he did not attend class

XXX---paragraph redacted---XXX

XXX---paragraph redacted---XXX

- Calling the Student xxxxxxxxx when he could not xxxxx due to an xxxxxxxx xxxxxx

XXX---paragraph redacted---XXX

XXX---paragraph redacted---XXX

- Calling the Student a xxxxxxxxx xxx when he xxxxxxxx due to an xxxxxxxx xxxxxxxx

XXX---paragraph redacted---XXX. She stated that the Student was very upset by this staff member’s comment.

XXX---paragraph redacted---XXX

- Attempting to xxxxxxxxxx xxx the Student into the building, which caused him to xxx xxx xxxxx

XXX---paragraph redacted---XXX

OCR spoke with another staff member who was present with the Student at the time of the alleged incident. She confirmed that the teacher never tried to xxxxx the Student inside the building. She also stated that she never saw the Student xxxxx xx xxx xxx xxxxx.

OCR spoke with the Complainant and gave her an opportunity to provide additional information regarding this allegation. She stated that the teacher did try to xxxxx the Student into the building and that the Student did xxx xxx xxxxx. However, she acknowledged that she was not present for the incident. She did not provide any additional information to support this allegation.

- **Applicable Legal Standards, Analysis, and Conclusion**

As noted above, the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives federal financial assistance. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II. Disability harassment is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in a school district's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.

Determining whether disability-based harassment has created a hostile environment is done on a case-by-case basis, considering a number of factors, including the frequency and severity of the incidents. It should be noted, however, that one incident of harassment, if sufficiently severe, may create a hostile environment. OCR also considers the relationship between the harassed individual and the alleged harasser. For example, an incident of harassment of a young student by a teacher or adult would be considered more serious than harassment by an individual of the same age. Other relevant factors, such as where the incident occurred and whether the incident occurred in front of others, are also considered. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the district's educational program.



When a school knows or should know of harassing conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If a school's investigation reveals that harassment based on disability created a hostile environment, i.e., it was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by the school, the school must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Accordingly, OCR will find a disability-based harassment violation under Section 504 and Title II where (1) a student is harassed based on a disability; (2) the harassment is sufficiently serious to create a hostile environment; (3) school officials know or should know about the harassment; and (4) the school does not respond appropriately.

When the alleged harasser is a school employee acting within the scope of his or her duties, the school district is automatically charged with notice of the alleged harassment.

Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and thus amount to a denial of FAPE pursuant to Section 504. Therefore, for a student with a disability who is receiving FAPE services pursuant to a Section 504 plan or an IEP, a school's investigation into disability-based harassment should include determining whether the student's receipt of appropriate services may have been affected by the harassment. If there is reason to believe that the student's disability-related services may have been affected by the harassment, the school has an obligation to remedy those effects on the student's receipt of FAPE.

Similarly, harassment or bullying on *any* basis of a student who is receiving FAPE services can result in a denial of FAPE that must be remedied under Section 504. Accordingly, under Section 504, as part of a school's appropriate response to bullying or harassment on any basis, the school should convene the student's Section 504 or IEP team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE.

XXX---paragraph redacted---XXX

OCR found insufficient evidence to support the Complainant's assertion that District staff harassed the Student or attempted to exclude him from school by calling the police on the Student, as District staff denied ever doing so, and the Complainant provided no information, other than her own assertions, to support that they did. OCR also found insufficient evidence to support the Complainant's assertion that District staff harassed the Student or attempted to exclude him from school by reporting the Student truant, even when he was at school. The District did report the Student to the District's truancy officer in January 2015; however, based on the information OCR obtained, this option was pursued to try to convince the Student to attend class while at school. The Complainant does not dispute that the Student was refusing to attend his classes. When the initial meeting with the truancy officer was not effective in improving the Student's class attendance, the District did not pursue further truancy proceedings. In light of the foregoing, OCR found insufficient evidence to conclude that the District's contact with

the truancy officer constituted harassment of the Student based on his disability or resulted in the Student being excluded from school.

OCR also found insufficient evidence to confirm the Complainant's assertion that District staff harassed the Student or attempted to exclude him from school by allegedly threatening to call the police if the Student refused to attend class. Multiple District witnesses informed OCR that staff never required the Student to go to class and OCR was unable to confirm that any staff threatened to call the police if he failed to do so.

OCR also was unable to confirm the Complainant's assertion that District staff harassed the Student or attempted to exclude him from school when a teacher attempted to xxxx the Student xxxxxx the building. The teacher, and another staff member who was present at the time of this alleged incident, denied that the teacher attempted to xxxx the Student into the building. Both also denied seeing ever seeing the Student xxxx xxx xxx xxx xxx. After reviewing the information provided, OCR found insufficient evidence to support that this incident occurred as alleged.

OCR did, however, find sufficient evidence to conclude that a former District administrator called the Student XXX---paragraph redacted---XXX

OCR finds that these incidents, taken together, were sufficiently severe that they created a hostile environment for the Student. Specifically, the comments were demeaning; were related to the Student's disabilities; were made by adult employees to a middle school student, in one instance in front of other adults; and were very upsetting to the Student.

Because the comments were made by employees acting within the scope of their duties, the District was charged with notice of the harassment. Thus, it had an obligation to investigate these incidents promptly and respond appropriately to address the harassment, prevent its recurrence, and remedy its discriminatory effects on the Student. The District was also obligated to determine whether the harassment affected the disability-related services the Student was receiving and thereby denied him a FAPE.

The District acknowledged that it took no action regarding the xxxxxxxx comment by the former District administrator, as it did not officially learn of the comment until June 22, 2015, at which point this individual was no longer employed by the District. However, the District provided no information to support that it took any steps to remedy the effects of this incident on the Student, or examined whether the incident affected the Student's receipt of disability-related services.

With respect to the xxx comment by a different staff member, a former District administrator stated that once she learned of this incident the day after it occurred she took immediate action, verbally reprimanding the staff member who made the comment and warning him not to make such comments in the future. The staff member, however, did not remember anyone speaking with him about this incident. While OCR found insufficient evidence to conclude that harassment by this staff member ever happened again, OCR noted that the District did not identify any measures it took to remedy the

effects of this incident on the Student, nor did it examine whether the incident affected the Student’s receipt of disability-related services.

In light of the foregoing, OCR finds that the District subjected the Student to harassment based on his disability when the a former District administrator called him xxxxxxxx and when a different staff member told the Student that he was like his xxx, in relation to the Student’s disability-related behavior. OCR further finds that the District failed to take immediate and appropriate action to address the harassment and remedy its effects in violation of Section 504 and Title II.

#### **Allegation #4**

- **Summary of OCR’s Investigation**

The Complainant alleged that in October 2014 the District refused to take action when the Student’s mother reported that the Student was being repeatedly bullied by another student and was being denied an education as a result. Specifically, the Complainant alleged that, towards the end of October 2014, a male student in the Student’s class (Student A) began throwing paper at the Student and calling the Student names such as xxx and xxxxxx. She stated that Student A also made derogatory comments about the Student’s sister and mother and told the Student that he wanted to fight him. She said that Student A engaged in this behavior every day for about two weeks. She stated that she complained to two former District administrators about Student A’s behavior, but they took no action in response, stating that the Student “just needed to ignore” Student A. She reported that Student A subsequently started a physical fight with the Student and both were suspended. She stated that when the Student returned from the suspension, Student A continued to try to instigate a fight by following the Student around, “getting in his face,” and laughing at him. She recalled that this went on for an additional two weeks or so, but then the incidents became more sporadic. She stated that the last incident of harassment occurred right before Christmas break.

OCR spoke with the two former District administrators regarding this allegation. One confirmed that the Student’s mother complained that Student A was bullying the Student. He stated that she did not allege that the Student was being bullied based on his disabilities. He said that he responded by speaking with both the Student and Student A. He reported that he learned that they were in a dispute regarding an online video game.

XXX---paragraph redacted---XXX

XXX---paragraph redacted---XXX

OCR also spoke with the other former District administrator regarding this matter. She stated that neither the Student nor the Student’s parent ever complained to her that Student A was bullying the Student. She stated that Student A and the Student were friends who sat together at lunch every day. She stated that sometimes they did not get

along, but she never observed Student A bullying the Student. She stated that, at one point during a meeting, the Student's mother made a comment that the Student was bullied but then he was the one who got in trouble. She stated that she followed up with the other former District administrator regarding this assertion, and he reported that he had not seen evidence that the Student was being bullied.

OCR also spoke with another District staff member who regularly worked with the Student. She stated that the Student and Student A had a "love-hate" relationship. She reported that sometimes they were friends and sometimes they were not. She said that the Student would complain to her that the Student A was "being a jerk," or that Student A was trying to steal his girlfriend. However, she stated that it was not a situation where Student A was picking on or bullying the Student. She said that she never observed Student A bullying the Student. She stated that after Christmas break the Student raised no further complaints about Student A.

OCR spoke with the Complainant and gave her an opportunity to provide additional information regarding this allegation. She stated that the Student was bullied by Student A, and that she did report it to the two former District administrators. She recalled that she reported the bullying just before the Student and Student A got into a fight. She denied that the former District administrator ever spoke to the Student regarding this allegation; however, she provided no further information to support her assertions.

- **Applicable Legal Standards, Analysis, and Conclusion**

As noted above, disability harassment is a form of disability discrimination prohibited by Section 504 and Title II, and, in some cases, disability harassment may result in a denial of FAPE. Further, as was also noted above, the bullying or harassment of a student with a disability on *any* basis, when that student is receiving disability-related services pursuant to a Section 504 plan or IEP, may result in a denial of FAPE that must be remedied under Section 504. Under Section 504, schools have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE. This obligation exists regardless of why the student is being bullied.

In the instant case, the District contends that the Student's mother made one complaint that Student A was bullying the Student, but did not allege that the bullying was related to the Student's disability. A former District administrator stated that he looked into the Student's parent's complaint by speaking with both students. He said that he determined that the two were having conflict over a video game. He recalled that he did not discipline either student, but told them to stay away from each other and not play the game. He stated that there was a subsequent fight between the two, and that both were suspended, but after that he received no further reports of bullying involving the two boys. The other former District administrator denied that the Student or his parent ever complained to her about bullying by Student A, other than a comment the Student's mother made at a meeting that the Student was bullied but he was the one who ended up being punished. She stated that she had no information to support that Student A was

bullying the Student. Further, another staff member who worked with the Student also reported that she had not observed the Student being bullied by Student A.

After reviewing the information provided, OCR finds that there is insufficient evidence to support that the Student was bullied by Student A, or that any bullying resulted in the Student being denied FAPE in violation of Section 504. Further, OCR finds that when the Student's parent reported incidents of bullying the District took action to address the allegation, speaking with both boys and telling them to stay away from one another. While the Student and Student A subsequently got into a fight, the District handled the matter by disciplining both Students, and according to the District, it was notified of no further incidents between the two boys. The Complainant acknowledged that there were no further incidents between the Student and Student A as of Christmas break of that year.

OCR notes, however, that as part of the attached agreement, the District will provide training to its staff regarding Section 504 and Title II's prohibition against the harassment of students with disabilities, the obligation of District staff to report and address incidents of harassment involving students with disabilities, and the District's obligation to examine whether a student with a disability has been denied FAPE as a result of bullying or harassment regardless of the basis for that bullying and harassment.

#### **Allegation #5**

- **Summary of OCR's Investigation**

The Complainant also alleged that the Student was subjected to different treatment based on his disability when he was suspended for xxxxx xxxx for the above-referenced xxxxxxxx xx xxxx, fight with Student A, while Student A, who started the fight, and Student A's friend, were only suspended for xxx xxx.

OCR spoke to a former District administrator regarding this allegation. He confirmed that on xxxxxxxx xx xxxx, the Student and xxx xxxxxx were involved in a fight with other students, including Student A.

XXX---paragraph redacted---XXX

OCR spoke with the Complainant and gave her an opportunity to provide additional information regarding this allegation. The Complainant stated that the District is incorrect in its assertion that the Student engaged in physical fighting while Student A did not. She stated that Student A did get physical with the Student and actually started the fight. She provided no additional information to support this allegation.

- **Applicable Legal Standards, Analysis, and Conclusion**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from

participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives federal financial assistance. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Prohibited discrimination by a recipient or public entity includes denying a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits, or services offered by that recipient or public entity; affording a qualified person with a disability an opportunity to participate in or benefit from aids, benefits, or services that are not equal to that afforded others; and providing a qualified person with a disability aids, benefits, or services that are not as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iii); 28 C.F.R. § 35.130(b)(1)(i)-(iii). Pursuant to the Section 504 and Title II regulations, a recipient school district may not subject a student to different treatment based on his or her disabilities, including different treatment from similarly situated students with respect to discipline, without a legitimate, non-discriminatory, non-pretextual reason for doing so.

In the instant case, the Complainant alleged that the Student was subjected to different treatment based on his disabilities with respect to discipline when he was suspended for xxxxx xxx for fighting, while Student A and his friend, who started the fight, only received a xxx xxx suspension. OCR confirmed that the Student was subjected to a xxxxx xxx suspension while Student A and his friend only received a xxx xxx suspension. However, the District articulated a legitimate, non-discriminatory reason for the different treatment. Specifically, the District asserted that the Student received a more severe punishment because the District's investigation revealed that the Student engaged in physical fighting, while Student A and his friend did not. OCR found no information to support that the District's asserted reason for the different treatment was a pretext for discrimination. Thus, OCR finds that the evidence is insufficient to support a finding that the District subjected the Student to discrimination based on his disability with respect to this allegation in violation of Section 504 and Title II.

### **Allegation #6**

- **Summary of OCR's Investigation**

The Complainant alleged that in March 2015, after the Student's parent complained that the District was not following the Student's Section 504 plan and requested a new evaluation for the Student, the District retaliated by filing a xxxxx xxxxx xx xxxxxxxx xxxxx the Student's parent with xxxxx xxxxxxxxxxx xxxxxxxxxxx.

OCR spoke with a District administrator regarding this allegation. She stated that the District held meetings with the Student's mother in March 2015 regarding the Student's disability-related services, but the Student's parent never complained that the Student's Section 504 plan was not being implemented. Further, she stated that she is the one who suggested a reevaluation for the Student, not the Student's parent. She stated that she began a reevaluation of the Student, and made a number of attempts to follow up with the Student's parent regarding a reevaluation, including requesting consent from the

Student's mother to do additional testing, but the Student's mother ultimately declined additional testing.

XXX---paragraph redacted---XXX

OCR spoke with the Complainant to provide her with an opportunity to provide any additional information regarding this allegation. She stated that she did complain that the Student's Section 504 plan was not being implemented in that she complained that the door to his xxxxxxxxxxxxxx was locked. She stated that she also set up the March 5, 2015, meeting to have the Student reevaluated. She confirmed that she ultimately declined the District's offer to provide additional testing to the Student, but stated that by that point the Student was on homebound instruction and she did not want to put him through additional testing. She provided no further information in support of this allegation.

- **Applicable Legal Standards, Analysis, and Conclusion**

The regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, at 34 C.F.R § 100.7(e), prohibits recipients of Federal financial assistance from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the regulation or because that individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the regulation. This requirement is incorporated by reference in the Section 504 implementing regulation at 34 C.F.R. § 104.61. Title II contains a similar provision at 28 C.F.R. § 35.134.

To find a *prima facie* case of retaliation pursuant to Section 504 or Title II, OCR must find: (1) the individual engaged in protected activity under Section 504 or Title II; (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. If one of these elements cannot be established, then OCR finds insufficient evidence of a violation. If all of these elements establish a *prima facie* case, OCR next considers whether the recipient has articulated a legitimate, non-discriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for prohibited retaliation.

In the instant case, the Complainant alleged that, after she complained that the District failed to implement the Student's Section 504 plan and requested a reevaluation, the District retaliated by filing a xxx xxxxxx against her. OCR finds that the Complainant did engage in protected activities of which the District was aware when she complained that the Student's alternative room, which was a service required by his Section 504 plan, was inaccessible because it was locked, and also when she advocated for disability-related services for the Student around the time the xxx xxxxxx was filed in March 2015. Further, OCR finds that filing a xxx xxxxxx could constitute a materially adverse action. However, even assuming all of the above elements of a *prima facie* case were satisfied,

OCR finds that the District articulated a legitimate, nondiscriminatory reason for filing the xxx xxxxxx.

XXX---paragraph redacted---XXX

OCR found no evidence to support that the District's stated reason for the adverse action was a pretext for discrimination.

In light of the foregoing, OCR finds insufficient evidence to support a finding that District staff retaliated against the Student's mother in violation of Section 504 and Title II as the Complainant alleged.

### **Allegation #7**

- **Summary of OCR's Investigation**

Finally, the Complainant alleged that, from April 2015 through the end of the 2014-2015 school year, the District failed to provide the Student with agreed-upon xxxxxxxxxx services, including a xxxxxxxxxx instructor, a health book, and work for his classes. The Complainant informed OCR that she stopped sending the Student to school after the xxxxx xx xxxx, incident in which she said he xxxx xxx xxx xxxx. She stated that the Student was thereafter placed in a xxxxxxxx xxxxxxx xxxxxxxxxxxx program for xxxxx days, and then she requested xxxxxxxxxx instruction for the Student, which the District agreed to provide. She stated that the Student was never provided with a xxxxxxxxxx instructor, and that he only received limited work in his social studies and English and language arts classes, and no work in his science class. She also asserted that the Student did not receive a health book and thus could not complete some of his health assignments.

XXX---paragraph redacted---XXX

The District administrator stated that none of the staff volunteered to serve as the Student's xxxxxxxxxx instructor on a permanent basis, but she did find a substitute teacher willing to do it temporarily until she could find someone else. OCR interviewed this teacher, who acknowledged that she had agreed to serve as the Student's xxxxxxxxxx instructor on a temporary basis around May of 2015. The District administrator stated that she contacted the Student's parent by phone on xxx xx xxxx, informed her that she had found a temporary xxxxxxxxxx instructor who could start the next day, and asked the Student's parent if she wanted to meet this individual at the Student's home or at another location. The District administrator stated that the Student's parent responded that she had had a family emergency, and could not commit to xxxxxxxxxx services at that time. The District administrator stated that she asked the Student's parent to contact her when she was ready for the Student to start services; however, the Student's parent never contacted her.

The District administrator also stated that after the Student stopped attending school the District did send the Student's work home with xxx xxxxxxx. She stated that the teachers



put the work in the school office and the Student's xxxxxxxx picked it up to take it home. OCR confirmed this with the Student's teachers, who stated that they regularly sent work home for the Student after he stopped coming to school.

With respect to the health book, the District denied the Complainant's assertion that the Student was not provided with a health book. According to the District, students were not assigned an individual health book, and were not permitted to take the health books home, but the District made an exception for the Student, who was assigned an individual health book because he spent most of his time in the alternative room. According to the District, the Student was permitted to take the book home, and this book would have been his to use while he was on xxxx instruction. District staff informed OCR that, once the Student stopped coming to school, they never received any indication that the Student did not have a health book, nor did they receive a request for a health book for the Student. OCR noted that District staff reported finding a health book at school with a sticky note with the Student's name on it.

OCR gave the Complainant an opportunity to respond to the information provided by the District. She denied that she was ever offered a temporary xxxxxxxxxx instructor, and denied that she ever turned down the services of a xxxxxxxxxx instructor due to a family emergency. She stated that she did not have a family emergency at that time. She also stated again that the Student received very little work in social studies and English and language arts, and that he received nothing in science. She again asserted that the Student did not have a health book.

- **Applicable Legal Standards, Analysis, and Conclusion**

As noted above, the District was obligated to provide the Student with regular or special education and related aids and services necessary to provide FAPE. As was also noted above, the regulation implementing Section 504, at 34 C.F.R. § 104.35, requires recipient school districts to reevaluate students with disabilities periodically and prior to any significant change in placement. The regulation, at 34 C.F.R. § 104.35(c), requires the District to ensure that placement decisions are made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and that placement decisions are made in conformity with 34 C.F.R. § 104.34, which requires that the District educate students with disabilities with persons without disabilities to the maximum extent appropriate to the needs of the students with disabilities.

XXX---paragraph redacted---XXX

Accordingly, OCR finds that the District failed to comply with the requirements of Section 504 when it failed to reevaluate the Student prior to placing him on xxxxxxxxxx instruction, failed to make the placement change through a group of knowledgeable persons, and failed to ensure that the Student's placement provided for his education with persons without disabilities to the maximum extent appropriate to his needs.

OCR found insufficient evidence to support the Complainant's assertion that once the Student was on xxxxxxxx instruction he was denied educational services; in particular, a xxxxxxxx instructor, a health book and work for his classes. Specifically, based on the information provided by the District, which OCR found to be credible, the Student's parent was offered a xxxxxxxxd instructor, but declined this service. Further, information provided by the Student's teachers supported that work was sent home to the Student in all of his classes after his parent stopped sending him to the school. In addition, OCR finds that the Student did have access to a health book, but it does not appear that the Student brought the health book home. However, based on information provided by the District, the Student's mother did not notify the District that the Student did not have his health book nor did she request a health book for the Student. However, since as explained above the District failed to follow Section 504's procedural requirements with regard to the Student's change in placement to xxxxxxxx instruction, the District did not provide the Student with FAPE during this time period.

### **Resolution Agreement**

In order to address the above-referenced Section 504 and Title II compliance issues OCR identified during its investigation, on December 16, 2015, the District signed the attached Agreement. In summary, the Agreement requires the District to reconvene the Student's Section 504 team to determine whether the Student is entitled to compensatory education or other remedial services as a result of the District's decision to send the Student xxxx xxxx from school due to behaviors related to his disabilities during the 2014-2015 school year and its failure to provide the Student with instruction in his courses from January through March 25, 2015; the District's failure to provide instruction from a xxxxxxxx teacher from xxxxxx xx xxxx xxxxxx xxxxx xx xxxx, when he stopped coming to the school; and the District's improper placement of the Student on xxxxxxxxxx instruction from May 1, 2015, through the remainder of the 2014-2015 school year without conducting a reevaluation, without ensuring the placement decision was made by a group of knowledgeable persons, and without consideration as to whether the new placement provided for the education of the Student with persons without disabilities to the maximum extent appropriate to his needs.

Pursuant to the Agreement, the team must also consider whether the Student's receipt of education services was affected by the harassment he experienced by school staff during the 2014-2015 school year, and what, if any, compensatory education or other remedial services are necessary to remedy those effects. The Agreement further requires the District to offer counseling services to the Student for the disability harassment he experienced by staff.

The Agreement also requires the District to provide mandatory Section 504 and Title II training to the District's superintendent, Section 504/ADA compliance officers, special education staff, and all staff at the District's middle school. The Agreement states that the training shall be provided by a source with expertise in Section 504 and Title II and shall cover, at a minimum, Section 504 and Title II's prohibition against discrimination and different treatment on the basis of disability and Section 504's requirement that

school districts provide students with disabilities with a FAPE. The training will reference the requirement that educational services provided to students with disabilities be equal in quality to those provided to non-disabled students. The Agreement further provides that, as part of this training, District staff will be informed that it is generally inappropriate to send a student home early from school as a disability-related service or as a tool for dealing with disability-related behaviors outside of the disciplinary process, and that if sending a student with a disability home early on a regular basis is necessary due to safety concerns the District will consider providing tutoring or other education services to compensate for missed instructional time as necessary to provide FAPE. The Agreement also requires the District to provide its staff with training on Section 504 and Title II's prohibition against disability harassment, and to provide its staff with information regarding what constitutes disability-based harassment and the obligation of all staff to report any such harassment to the District's Section 504/ADA compliance officers. Pursuant to the Agreement, the training must also cover the District's obligation to promptly investigate any allegations of bullying or harassment of a student with a disability, and if bullying or harassment is found to have occurred, to take immediate and appropriate steps to address the bullying or harassment, prevent it from reoccurring and to remedy its effects on the harassed individual and others as appropriate. Pursuant to the Agreement, the training shall also cover the obligation of the District to reconvene the Section 504 or IEP team of a student with a disability who has been subjected to bullying or harassment on any basis to determine if the bullying or harassment has affected the Student's receipt of FAPE, and to determine whether compensatory educational services or a change in placement is necessary to address any denial of FAPE.

OCR will monitor the District's compliance with the terms of the Agreement.

### **Conclusion**

This concludes OCR's investigation of the complaint and should not be interpreted to address the District'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. The 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

We appreciate your cooperation, as well as that of the District staff during the investigation of this complaint. We look forward to the District's first monitoring report under the Agreement, which is due by **February 1, 2016**. If you have questions regarding the District's obligations under the Agreement, please contact xxxxxx xxxxxxx, the OCR attorney assigned to monitor the District's compliance with the Agreement. Ms. xxxxxxx can be reached by telephone at (216) xxx xxx or by e-mail at xxxxxx [xxxxx@ed.gov](mailto:xxxxx@ed.gov). If you have any questions about this letter, please contact me by telephone at (216) xxx xxx or by e-mail at [xxx x xxx@ed.gov](mailto:xxx x xxx@ed.gov).

Sincerely,

/s/

Lisa M. Lane  
Supervisory Attorney/Team Leader

Enclosure