



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 6, 2016

XXXXX X. XXXXX
XXXXX XXXXX, LLC
XXXXX XXXXX XXXXX XXXXX
XXXXX XXXXX
XXXXX XXXXX, XXXXX XXXXX

Re: Docket # 07161043

Dear Mr. XXXXX:

On November 10, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Jefferson County R-VII School District (District), Festus, Missouri, alleging discrimination on the basis of disability. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve allegation 1 of this complaint. For the reasons set out below, we have determined there is insufficient evidence to conclude that the District discriminated against the Complainant's son on the basis of disability as alleged in allegations 2 and 3 of the complaint.

The Complainant alleged the District discriminates on the basis of disability because:

1. the front doors and parking at Danby-Rush Tower Middle School are not accessible to persons with disabilities;
2. the District fails to implement his son's Individualized Education Program (IEP) by failing to provide 130 minutes per week of specialized instruction in behavioral and social skills, and fails to provide quarterly reports of his son's progress in meeting his IEP goals; and
3. when his son was involved in an XXXXX XXXXX, XXXXX incident in physical education class, the District interviewed his son when he was crying and in pain and failed to interview him in person later, but later interviewed in person the nondisabled student involved in the incident.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Federal financial assistance.

- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

In the remainder of this letter, the Complainant is referred to as “the Complainant” and his son is referred to as “the Student.” To protect individuals’ privacy, the names of employees, witnesses, and other parties also were not used in the letter.

OCR applies a preponderance-of-the-evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination in this complaint, OCR considered information the Complainant and the District submitted, including special education records, records relating to the October 5, 2015 incident, and other documentation. OCR conducted a site visit to the District to examine the front doors and parking at Danby-Rush Tower Middle School. OCR also conducted interviews with the Complainant and District employees. The legal and factual bases for OCR’s determination are set forth below.

Allegation 1

The Complainant alleged the District discriminated on the basis of disability because the front doors and parking at Danby-Rush Tower Middle School are not accessible to persons with disabilities.

Prior to the completion of OCR’s investigation, the District submitted a signed Agreement (copy enclosed) on May 6, 2016 that, when fully implemented, will address allegation 1 of this complaint. The Agreement requires the District to make the Danby-Rush Tower Middle School parking and building entrances accessible by meeting the requirements of Sections 208, 404, and 502 of the Americans with Disabilities Act (ADA) 2010 Standards. Please consult the Agreement for further details.

OCR considers allegation 1 of this complaint resolved effective the date of this letter and will monitor the District’s implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

Allegation 2

The Complainant alleged that the District discriminated against the Student on the basis of disability because the District failed to implement the Student's IEP by failing to provide 130 minutes per week of specialized instruction in behavioral and social skills and quarterly reports of the Student's progress in meeting his IEP goals.

Legal Standards

The Section 504 regulations require a recipient to provide a free appropriate public education (FAPE) to a student with a disability, regardless of the nature or severity of the student's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of nondisabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34–104.36 pertaining to educational setting, evaluation and placement, and due process protections.

A school district's failure to implement key aids, services or modifications identified in a student's IEP or Section 504 plan may deny the student a FAPE and, thus, violate Section 504 and Title II. OCR reviews the evidence to determine whether a student's needs were determined on an individualized basis, whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation, and whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Not every failure to implement an aid, service or modification in an IEP or Section 504 plan automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the student's ability to participate in or benefit from a school district's services, programs and activities. Except in extraordinary circumstances, OCR does not review educational decisions about the appropriateness of specific aids and services identified in a student's plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

Under 28 C.F.R. § 35.103, the Title II regulation does not set a lesser standard than that found in Section 504. The regulation implementing Title II at 28 C.F.R. § 35.130(a) states that a qualified individual with a disability may not be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity. The Title II regulation at 28 C.F.R. § 35.130(b)(1)(i) similarly states that a public entity, in providing any aid, benefit, or service, may not deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service on the basis of the individual's disability. Accordingly, OCR interprets the Title II regulation to require public entities to provide a FAPE to students with disabilities to the same extent as is required under the Section 504 regulation. Under the Title II regulation at 28 C.F.R. § 35.171(a)(3), OCR uses its Section 504 procedures to investigate Title II complaints.

To determine that the Student was discriminated against on the basis of disability, the preponderance of evidence must establish that: 1) the District receives Federal financial

assistance from the Department; 2) the Student is a qualified individual with a disability; 3) the District knew or had reason to suspect that the Student was an individual with a disability who needed or may need special education and/or related services; 4) the District failed to provide the Student special education and/or related services designed to meet his individual educational needs; and 5) the District's failure to provide the Student special education and/or related services designed to meet his individual educational needs as adequately as the needs of students without a disability are met denied him a FAPE.

Findings of Fact

The Student has XXXXX and is XXXXX years old. He has an IEP and receives regular and special education services. He has been a student in the District since XXXXX of XXXXX. The Complainant told OCR that the Student's IEP provides the Student will receive 130 minutes per week of specialized instruction in behavioral and social skills. The Student's IEP further requires that the District provide the Complainant with quarterly reports of the Student's progress in meeting his IEP goals.

The Complainant told OCR the Student begins the school day in an advisory class with the special education teacher which lasts for 27 minutes. The Complainant asserted that the Student's attendance in the advisory class is insufficient to satisfy the IEP requirement that he receive 130 minutes of specialized instruction because there are other special education students in the advisory class which prevents the special education teacher from spending individual time with the Student one-on-one for 130 minutes per week. The Complainant told OCR that he asked the Student on several occasions what the students do in the advisory class and the Student said they are told to finish their homework or study for tests and if they have this done, to play games or Legos. The Student also told him that the special education teacher does not assist him one on one during the advisory class. The Complainant told OCR that he substituted for the special education teacher during the 2014-15 school year and he observed that the students worked on their homework.

The Complainant told OCR he received a quarterly progress report dated October 8, 2015, and December 18, 2015, in the mail in late January 2016. He received a quarterly progress report dated March 3, 2016, in late March 2016. The Complainant disagreed with the October 8, 2015 progress report because the progress report stated that the Student was struggling with positive social interactions with his peers although the Complainant has been told by teachers and students that the Student gets along with everybody. The Complainant also disagreed with the March 3, 2016, progress report because the progress report stated that the Student had difficulty remembering behavior strategies during unstructured activities (lunch, recess, etc.).

In its response to this complaint, the District asserted that it provided the Student 130 minutes per week of specialized instruction in behavioral and social skills during the advisory class from 7:30 a.m. to 7:56 a.m. every school day. The District cited to the special education teacher's data collection sheets and lesson plans as evidence that the IEP was fully implemented. OCR reviewed the weekly lesson plans prepared by the special education teacher which showed that in the advisory class students worked on cursive writing, watched character education videos, and participated in twister and dance. The District also provided weekly data collection sheets

prepared by the special education teacher which showed the Student's name under the advisory class and a check mark when he was meeting his IEP goals. The District asserted that reports of the Student's progress were mailed to the Complainant quarterly.

OCR reviewed the Student's August 22, 2014 IEP (2014 IEP) and confirmed it requires the Student receive 130 minutes per week of study skills and 50 minutes per week of language therapy in the special education classroom. The 2014 IEP identifies six goals; the Student's progress toward the goals was to be measured by observation chart and reported to the parents quarterly. The following persons attended the 2014 IEP meeting to develop the IEP: the local education agency representative and special education process coordinator, the special education teacher, the speech/language pathologist, the classroom teacher, the counselor, the in-District XXXXX consultant, and the Complainant. The 2014 IEP states that the Student's XXXXX causes him to miss spoken and facial cues when interacting with others, he needs additional instruction in social skills in order to be successful in the general education classroom, and he is in the regular education classroom 92% of the time. The Student's mother acknowledged that she received a copy of the District's procedural safeguards on August 11, 2014.

The District provided documentation of the Student's progress toward the six 2014 IEP goals. The documentation identified the date of the report and whether the Student was making progress toward the goal, not making progress toward the goal, the goal was not addressed, or the goal was met. For report dates of October 9, 2014, December 19, 2014, March 19, 2015, and May 12, 2015, the documentation showed that the Student was making progress toward the six goals.

OCR reviewed the Student's August 19, 2015 IEP (2015 IEP) and confirmed it requires the Student receive 130 minutes per week of specialized instruction in behavioral/social skills and 50 minutes per week of language therapy in the special education classroom. The following persons attended the IEP meeting to develop this IEP: the local education agency representative and special education process coordinator, the special education teacher, the speech/language pathologist, the classroom teacher, and the Complainant. The IEP noted that the Student's XXXXX causes him to miss spoken and facial cues when interacting with others, he needs additional instruction in social skills in order to be successful in the general education classroom, and he is in the regular education classroom 92% of the time. The Complainant acknowledged that he received a copy of the District's procedural safeguards on August 10, 2015.

The Student's August 19, 2015 IEP has the following four goals:

Area: Pragmatic/Social Language

Standard: Speaking and Listening

Annual Goal #: 1

[The Student] will understand and participate in positive social interactions/ collaborative discussions with peers and adults during structured and unstructured activities on 4/5 opportunities within a 12 month period based on observations with the classroom teacher/SLP.

Progress will be reported to the parent(s)/guardian(s): Quarterly

Progress toward the goal will be measured by: (check all that apply)

[Observation Chart was checked.]

...

Area: Behavioral/Affective Skills

Annual Goal #: 2

[The Student] will improve social interaction by controlling impulsive behavior 80% of the time during unstructured activities on 4/5 data collection days through teacher observation (lunch, recess, etc.) within a 12 month period.

Progress will be reported to the parent(s)/guardian(s): Quarterly

Progress toward the goal will be measured by: (check all that apply)

[Observation Chart was checked.]

...

Area: Behavioral/Affective Skills

Annual Goal #: 3

[The Student] will increase age appropriate social interactions with peers or adults by demonstrating working cooperatively and interacting appropriately 90% of time in organized activities and cooperative groups on 4/5 data collection days within a 12 month period through teacher observation.

Progress will be reported to the parent(s)/guardian(s): Quarterly

Progress toward the goal will be measured by: (check all that apply)

[Other: teacher observation participation points was checked.]

...

Area: Behavioral/Affective Skills

Annual Goal #: 4

[The Student] will demonstrate improved self direction by following classroom and school rules with 90% accuracy on 4/5 data collection days within a 12 month period with teacher using a classroom point system.

Progress will be reported to the parent(s)/guardian(s): Quarterly

Progress toward the goal will be measured by: (check all that apply)

[Data Collection was checked.]

The District provided documentation showing the Student's progress toward the four goals in the 2015 IEP. The document identified the date of the report and whether the Student was making progress toward the goal, not making progress toward the goal, the goal was not addressed, or the goal was met.

The October 8, 2015, report stated the Student was not making progress toward goals 1-3 but was making progress toward goal 4. The December 18, 2015 and March 3, 2016, report stated the Student was making progress on all 4 goals. OCR interviewed the Student on April 21, 2016. The Student said he works on science, social studies, math, or homework and watches channel 1

news during the advisory class. He also plays with Legos. He stated that the special education teacher spends most of the advisory class on the computer. The Student told OCR that he worked on behavioral skills a few times in the advisory class but not since January or February. He stated he did not remember what he talked about with the special education teacher and stated that he has never worked on social skills in the advisory class. The Student told OCR that on April 21, 2016 (the day of his interview with OCR), he watched channel 1 news and then he sat and did nothing. He could not remember what he did in the advisory class the day before.

OCR interviewed the special education teacher who stated the Student receives 130 minutes per week of specialized instruction in behavioral and social skills in the advisory class. The special education teacher told OCR the advisory class has eight special education students and the class watches videos on different topics like personal goal setting and cyber bullying. During class she asks the students about their evenings and weekends to see if they are having problems and the type of problems, and the students complete social skills worksheets and work in playgroups. The special education teacher told OCR that each student is unique and receives one-on-one attention.

The special education teacher told OCR the Student sometimes asks her questions about an assignment he does not understand and she provides him the extra help he needs to complete the assignment. She stated that she talks to the Student about many different things and discussion back and forth with a child with XXXXX is an example of socialization. The special education teacher said that sometimes the Student requests to complete homework if he has not completed the homework the night before. She stated that when she provides the Student with assistance to complete the assignment it is specialized instruction in behavior and social skills because to be successful, the Student has to follow school rules which require turning in assignments on time.

The special education teacher provided the weekly lesson plans she prepared for the advisory class. The plans call for the students to work on cursive writing, watch character education videos, and participate in twister and dance. The special education teacher also prepared weekly data collection sheets which tracked whether the Student was meeting his IEP goals.

OCR interviewed a special education aide (aide 2), who was a paraprofessional in the special education teacher's class from the beginning of the 2015-16 school year, including during the first period advisory class. Aide 2 told OCR that during the advisory class, there are brief lessons on incidents that happened in private life, what happened on the weekend, and a discussion of what would be the best way to handle the situations. He stated that the students watch behavioral and social skills videos which include topics like bullying and cyber theft. Aide 2 stated that they check to see if the Student is caught up with his homework, if there are any assignments he needs assistance with, and help him with his homework if he needs help. He stated that the Student receives 130 minutes per week of specialized instruction in behavioral and social skills in the advisory class and that the special education teacher provides this through videos, conversations, and group discussions every day.

OCR interviewed special education aide 3 (aide 3) who started working in the advisory class in January 2016 and works in the advisory class only on Mondays. She has observed the special education teacher working on life skills and discussing anger management and how to make a

living. She said they do different kinds of activities and discuss different things. The class watches videos and discusses ways to handle a situation. Aide 3 told OCR the special education teacher works individually with the Student sometimes, depending on what is needed for each individual student in the class.

Legal Analysis and Conclusion

The Complainant alleged that the District discriminated on the basis of disability because the District failed to implement the Student's IEP by failing to provide 130 minutes per week of specialized instruction in behavioral and social skills and quarterly reports of the Student's progress in meeting his IEP goals. The Complainant believes that the Student's attendance in the advisory class is insufficient to satisfy the IEP requirement that he receive 130 minutes of specialized instruction because there are other special education students in the advisory class which prevents the special education teacher from spending individual time with the Student one-on-one for 130 minutes per week.

As stated in the **Legal Standards** above, to determine that the Student was discriminated against on the basis of disability, the preponderance of evidence must establish that: 1) the District receives Federal financial assistance from the Department; 2) the Student is a qualified individual with a disability; 3) the District knew or had reason to suspect that the Student was an individual with a disability who needed or may need special education and/or related services; 4) the District failed to provide the Student special education and/or related services designed to meet his individual educational needs; and 5) the District's failure to provide the Student special education and/or related services designed to meet his individual educational needs as adequately as the needs of students without a disability are met denied him a FAPE. Except in extraordinary circumstances, OCR does not review educational decisions about the appropriateness of specific aids and services identified in a student's plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

There is no dispute that the District receives Federal financial assistance from the Department, that the Student is a qualified individual with a disability, or that the District knew that the Student was an individual with a disability who needs special education or related services. Accordingly, OCR considered whether the District failed to provide the Student special education and/or related services designed to meet his individual educational needs.

The Student's 2015 IEP states that the Student should receive 130 minutes per week of specialized instruction in behavioral/social skills in the special education classroom. The District asserted that this IEP requirement is satisfied by the activities which occur during the advisory class with the special education teacher each morning. The Complainant and the Student stated that the Student's only activity in the advisory class is to work on his classwork or complete his homework, watch the news, or play with Legos.

The special education teacher told OCR that the 130 minute of specialized instruction in behavioral/social skills is satisfied by the activities in the advisory class. She told OCR that the Student watches videos on different topics like personal goal setting, participates in discussions about problems the students in the class are having, completes worksheets and participates in

playgroups, responds to questions, receives extra help to completing assignments, and engages in back and forth discussion. Aide 2 verified that the Student engaged in group discussion, including discussions of incidents that happened in private life and what would be the best or alternative ways to handle the situations and watched behavioral and social skills videos. Aide 2 said he checked to see if the Student completed his homework. Aide 3, who started working in the advisory class in January 2016 and works in the advisory class only on Mondays, stated the special education teacher has worked on life skills, anger management, how to make a living, and ways to handle a situation.

A preponderance of the evidence is insufficient to establish that the District failed to provide the Student 130 minutes per week of specialized instruction in behavioral and social skills. While the Complainant disagrees that the time the Student spends in the advisory class is not sufficiently individualized to the Student's particular needs, OCR concludes that the District's method of providing the specialized instruction is an educational decision. The Complainant and the Student's mother both acknowledged receiving notice of their procedural safeguards.

OCR further concludes that a preponderance of the evidence established that the District satisfied the IEP requirement that the parents receive quarterly progress reports. The special education teacher stated that she mailed quarterly progress reports to the Complainant one week after report cards were issued. The Complainant stated that he received in the mail in late January 2016 a quarterly progress report dated October 8, 2015 and December 18, 2015. He also stated that he received in the mail in late March 2016 a quarterly progress report for the above dates and March 3, 2016. OCR reviewed the quarterly progress reports which showed dates of October 8, 2015, December 18, 2015, and March 3, 2016. The Complainant confirmed that he has received these progress reports, although he said he received the October 8, 2015 report late. While the Complainant may disagree with the content of the progress reports, the evidence was insufficient to establish that the District failed to provide quarterly reports of the Student's progress in meeting his IEP goals.

Accordingly, as of the date of this letter, OCR is closing allegation 2 of the complaint.

Allegation 3

The Complainant alleged the District discriminated against the Student on the basis of disability because when the Student was involved in an XXXXX XXXXX, XXXXX incident in physical education class, the District interviewed the Student when he was crying and in pain and failed to interview him in person later, but later interviewed in person the student without a disability involved in the incident.

Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.4(a) and (b)(1) prohibits discrimination on the basis of disability, including different treatment. The Title II regulation at 28 C.F.R. § 35.130(a) and (b)(1) also prohibits discrimination on the basis of disability, including different treatment.

Different treatment requires a finding of intentional discrimination on the basis of an individual's

disability. Evidence of discriminatory intent may be direct or circumstantial, and intent cases usually involve a highly fact-intensive inquiry. Absent direct proof of discriminatory motive, a different treatment inquiry frequently focuses on: 1) whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently; and 2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. Also, a recipient’s rebuttal/nondiscriminatory justification can be overcome with a showing of pretext.

OCR will use a different treatment approach to determine whether there is a *prima facie* case of discrimination on the basis of disability. To establish a *prima facie* case of discrimination on the basis of disability, OCR will determine whether the facts are sufficient to establish: 1) the disability of the Student against whom the District allegedly discriminated; 2) the Student was qualified for a particular benefit provided by the Student; 3) a District official, acting in their capacity as an employee of the District, treated the Student less favorably than a similarly situated student who does not have a disability with respect to the benefit in question; and (4) this interfered with the Student’s ability to participate in or benefit from the District’s education program.

If a *prima facie* case of discrimination on the basis of disability is established by the evidence, OCR will then determine whether the District offered a legitimate nondiscriminatory reason for treating the Student less favorably than the similarly situated student who does not have a disability. If the District proffered such a reason, OCR will determine whether the evidence is sufficient to support a conclusion that the proffered reason was a pretext for discrimination.

Findings of Fact

On XXXXX XXXXX, XXXXX, the Student and another student (Student 2)¹ who did not have a disability hit each other with lacrosse sticks in physical education class (the incident). Both students were disciplined for the incident. The Complainant said there were no other incidents between the Student and Student 2.

The District provided OCR with a handwritten statement with the Student’s name on it dated XXXXX XXXXX, XXXXX. This statement consists of nine lines. OCR observed that the first 3 ½ lines appear to be written in one handwriting and the next 5 ½ lines are written in a different handwriting. The Student told OCR the physical education teacher wrote the first 3 ½ lines and then told the Student he could not understand what the Student was telling him and asked the Student to write the rest of the statement. The Student wrote the rest of the statement which was 5 ½ lines. The Student told OCR he was crying the whole time the written statement was prepared. After the incident, he told the physical education teacher his arm hurt and he received an ice pack.

OCR reviewed the physical education teacher’s typed description of the incident which states that after the incident, the physical education teacher took the Student and Student 2 to the nurse’s office. The nurse was not there, so he took the students to the principal’s office. The principal called Student 2 into her office to speak with him about the incident. The physical

¹ The District confirmed that Student 2 is a nondisabled student.

education teacher then walked the Student to the nurse's office to fill out an incident report and to obtain the Student's description of the incident in writing. The Student seemed to have trouble recalling exactly who hit who and at what point in time.

OCR interviewed the physical education teacher who stated that following the incident, he took the Student and Student 2 to the principal's office. The principal told him to take the Student to the nurse's office and get the Student's statement. Student 2 remained in the principal's office. After arriving at the nurse's office, the physical education teacher filled out an incident report while the nurse attended to the Student's needs. The physical education teacher and the nurse tried to calm the Student to get his description of the incident. The physical education teacher told OCR the Student had periods where he was upset and he and the nurse tried to calm him down as best they could. The physical education teacher explained that the nurse wrote the first 3 ½ lines of the Student's statement and the Student wrote the rest of the statement. The physical education teacher stated that the Student alternated between being calm and upset and crying so the nurse wrote the first part of the statement. The Student did not say he was in pain when the statement was being written. He did not recall the Student's demeanor when he was completing the second part of the statement that he wrote.

OCR reviewed the nurse's typed description which states that the while in the nurse's office the Student alternated between being upset and emotional and calm. When he was upset the Student tried to explain the incident, but it was hard to understand exactly what happened. He would talk about the incident, but was emotional and not able to write his thoughts. The nurse offered to start the written description of the incident and told the Student that she would write his exact words. The first couple of sentences of the description were written by the nurse as spoken by the Student. The nurse and physical education teacher provided the Student emotional support and the Student calmed down, his emotional status improved, and there was no more crying. The Student said he could finish his statement and he completed his statement.

OCR interviewed the nurse who stated she saw the Student after the incident, documented what she saw, and gave him an ice pack. The nurse told OCR the Student tried to describe the incident to the nurse and the physical education teacher and the nurse wrote exactly what the Student said.² The Student was tearful one minute and calm the next and indicated he was in pain on and off. They gave emotional support to the Student by trying to calm him down and letting him regroup. The nurse wrote the first 3 ½ lines and the Student wrote the remainder of the statement when he was calm. The nurse and physical education teacher obtained the Student's written description because they were trying to ascertain what happened when the Student and Student 2 hit each other with lacrosse sticks in the physical education class.

OCR reviewed the principal's typed description which states the physical education teacher brought the Student and Student 2 to the principal's office. The principal told the physical education teacher to write out his statement and to take the Student to the nurse. The principal brought Student 2 into her office, obtained his written statement and then spoke with him about

² The Student said the physical education teacher wrote the first part of the statement. The physical education teacher and the nurse said the nurse wrote the first part of the statement.

the incident. The principal then went to the nurse's office to check on the Student and to get his written statement which the Student had already completed.

OCR interviewed the principal who stated that when the Student was brought to the office; he was visibly upset and crying off and on. The principal separated the students by sending Student 2 into her office. She spoke briefly with the Student and the Student was holding his arm. She asked what hurt and he showed his arm. She told the physical education teacher to take the Student to the nurse. Before he went to the nurse, the Student said "he hit me, it was self-defense, I hit him." After the Student was taken to the nurse, the principal gave Student 2 a piece of paper and told him to write out a description of the incident. The principal told OCR she did not stay with Student 2 while he wrote his entire description. The principal told OCR that Student 2 was also visibly upset when he arrived at the office although he was not crying. She knew he was upset by looking at his face. Student 2 continued to be visibly upset while the principal was with him. When the principal later went to the nurse's office, the Student's statement was already completed.

The Student's mother met with the superintendent, the principal, and the special education director on XXXXX XXXXX, XXXXX. According to the special education director's notes of the meeting, the principal told the Student's mother that the Student was interviewed about the incident while in the nurse's office and the Student wrote part of his statement because his arm hurt and he was upset. The principal told the Student's mother that the Student was crying or upset during the interview at different times and that Student 2 was also crying or upset. The notes also state that the Student's mother provided an additional statement on behalf of the Student; she said that the Complainant wrote this statement, and the superintendent said that the District would review this statement.

OCR reviewed the typed statement dated XXXXX XXXXX, XXXXX, signed by the Student, the Complainant, and the Student's mother. The statement states the following:

As [the Student] is crying and upset in the office [the principal] asks [the Student] to say what happened. [The Student] was crying and to upset to explain everything and he is then sent to the nurse's office with the nurse so she can take care of his arm and other areas. While in the nurses office [the physical education teacher] asks [the Student] to write down what happened. [The Student] is still crying and upset and because of the pain and swelling in his right arm is having a hard time trying to do this. [The physical education teacher] then tells [the Student] to tell him and he writes things down.

The Complainant told OCR the Student's mother told him that when she presented the XXXXX XXXXX, XXXXX, statement to the superintendent, the superintendent said he would not consider the statement because the parents wrote it. The principal told OCR she does not recall the superintendent saying that he would not consider the statement and that no one made such an assertion. The special education director said she could not recall either way whether the superintendent said he would or would not consider the XXXXX XXXXX, XXXXX, statement. In an XXXXX XXXXX, XXXXX, letter to the Complainant and the Student's mother, the superintendent stated he reviewed the statement provided to him by the Student's mother at the

XXXXX XXXXX, XXXXX meeting. In an interview, the superintendent also told OCR he reviewed and considered the XXXXX XXXXX, XXXXX, statement submitted by the Student's mother.

Legal Analysis and Conclusion

The Complainant alleged the District discriminated against the Student on the basis of disability because when the Student was involved in an XXXXX XXXXX, XXXXX incident in physical education class, the District interviewed the Student when he was crying and in pain and failed to interview him in person later, but later interviewed in person the student without a disability involved in the incident.

To establish a *prima facie* case of discrimination on the basis of disability, OCR considered whether a preponderance of the evidence established: 1) the disability of the Student against whom the District allegedly discriminated; 2) the Student was qualified for a particular benefit provided by the Student; 3) a District official, acting in their capacity as an employee of the District, treated the Student less favorably than a similarly situated student who does not have a disability with respect to the benefit in question; and (4) this interfered with the Student's ability to participate in or benefit from the District's education program.

OCR determined that the Student is a qualified student with a disability and therefore, Elements 1 and 2 are established.

OCR next considered whether a District official, acting in their capacity as an employee of the District, treated the Student less favorably than a similarly situated student who does not have a disability with respect to the benefit in question. A preponderance of the evidence established that on XXXXX XXXXX, XXXXX, the Student and Student two hit each other with lacrosse sticks. The physical education teacher took the Student and Student 2 to the principal's office. Both students were upset, the Student was crying and said his arm hurt. The principal separated the students and directed the physical education teacher to take the Student to the nurse's office. While in the nurse's office, the Student alternated between crying and being calm. After looking at the Student's arm, the nurse and the physical education teacher provided the Student emotional support and asked him for a description of the incident. Because the Student was upset, the nurse wrote the first part of the Student's written description but the Student calmed down sufficient to complete the written statement himself.

A preponderance of the evidence established that the District obtained a written description of the incident from the Student and Student 2 immediately following the incident. While the Student was more visibly upset than Student 2, OCR cannot conclude that obtaining the Student's written description resulted in less favorable treatment than Student 2. Therefore, there is insufficient evidence to conclude that a *prima facie* case of discrimination on the basis of disability exists with respect to allegation 3.

Accordingly, as of the date of this letter, OCR is closing allegation 3 of your complaint.

This concludes OCR's investigation of allegations 2 and 3 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.

As noted above, OCR considers allegation 1 of this complaint resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

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 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 Complainant 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.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXX@ed.gov.

Sincerely,

/s/ Maria North

Maria L. North
Supervisory Attorney

Enclosure

cc: Dr. Margaret Vandeven
Commissioner of Education