

John McDonald  
Superintendent  
Regional School Unit #13  
28 Lincoln Street  
Rockland, Maine 04841

Re: Complaint No. 01-14-1163  
Regional School Unit #13

Dear Superintendent McDonald:

This letter is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Regional School Unit #13 (District) alleging discrimination on the basis of disability. The Complainant alleged that the District failed to provide a student (Student) a Free Appropriate Public Education (FAPE) by delaying its identification of him through its special education process, although he had been diagnosed with XXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXX and XXXXXXXX for years. The Complainant also alleged that shortly after an Individualized Education Program (IEP) was developed for the Student, he was XXXXXXXXXXXXXXXX XXXXXXXX from school for disciplinary purposes and the school did not conduct a manifestation determination for the Student. As explained in more detail below, OCR identified compliance concerns through its investigation. Thus, the District has agreed to implement the enclosed Voluntary Resolution Agreement (Agreement) in response to OCR's investigation.

OCR enforces Section 504 of the Rehabilitation Act of 1973 and its implementing regulation found at 34 C.F.R. Part 104 (Section 104), as well as Title II of the Americans with Disabilities Act of 1990 and its implementing regulation found at 28 C.F.R. Part 35 (Title II), both of which prohibit discrimination based on disability. The District is subject to the requirements of Section 504 because it receives Federal financial assistance from the Department, and it is subject to Title II under OCR's jurisdiction because it is a public entity that operates an education program.

Based on the allegations, OCR opened the following issues for investigation:

1. Whether the District denied the Student a FAPE by failing to timely evaluate the Student after the Complainant notified the District that he had a disability, in violation of 34 C.F.R. Section 104.35 and 28 C.F.R. Section 35.130; and
2. Whether the District denied the Student a FAPE by failing to conduct an evaluation prior to a discipline-related significant change in placement, in violation of 34 C.F.R. Section 104.35 and 28 C.F.R. Section 35.130.

During the course of OCR's investigation, OCR identified an additional issue for investigation:

3. Whether the District designated an employee to coordinate its efforts to comply with Section 504/Title II as required by 34 C.F.R. Section 104.7(a) and 28 C.F.R. Section 35.107(a).

OCR reviewed data provided by the Complainant and District, and reviewed the District's and St. George School's (School's) websites at different times for policies and procedures related to Section 504 and Title II. Additionally, OCR conducted a two-day onsite visit to interview District staff including the Principal of the Student's School (Principal), the XXXXXXXX XXXXXXXXXX Teacher/ Case Manager (Case Manager), the former and new Directors of Special Education, the School Guidance Counselor and several of the Student's 5<sup>th</sup> and 6<sup>th</sup> grade teachers. While onsite, OCR also met with the Complainant, his wife and the Student.

## **Facts**

### *Background*

The Student was diagnosed with XXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXX (XXXX) in kindergarten, at which time he was referred to the District's special education process. Due to his young age, the Individualized Education Program (IEP) team decided not to classify him at that time. According to the Student's educational records, and OCR's interviews with staff with long-term knowledge of the Student, he continued to struggle with XXXXXXXXXX, XXXXX, sitting still, and other behavioral expectations throughout the following academic years. Staff and the Complainant also noted that the Student developed significant XXXXXXXX during fourth grade, resulting in a modified schedule and staff interventions.

In the spring of 2013, when he was in XXX grade, the Student was again referred for evaluation through the District's special education process, by both his parents and a group of teachers for his grade (grade span team). In their referral, the Student's parents cited concerns that a possible learning disability or Other Health Impairment (OHI) due to XXX was causing the Student's poor performance in basic math and language arts, as well as his issues with XXXXXXXXXX, concentration, low self-esteem and persistence of low effort and XXXXXXXXXX. The grade span team described behavioral interventions that had been tried without success, noting that the Student had not been able to complete significant academic work in two classes due to time out of class for XXXXXXXXXXXX or XXXXXXXX issues. The grade span team also included the Student's disciplinary record for the academic year, which contained numerous incidents of "disruption of the learning process," "defiance," and XXXXXXXXXX XXXXXXXXXXXXXXXXXXXX with his XXXXXX. In this referral and in interviews with OCR, grade span team members asserted that the Student's parents were not supportive of their efforts to address the Student's behavior, particularly having the Student access in-school XXXXXXXXXXXX.

An IEP team convened on April 22, 2013, to consider the Student's eligibility under the Individuals with Disabilities Education Act (IDEA). Notes from the meeting cite the Student's diagnoses of XXXX and XXXXXXXX, as well as his history of behavioral difficulties, low assessment scores and self-esteem concerns. The team determined that additional evaluations were needed. Thus, an Educational Report (Report) was completed in May 2013, which stated that, although no math-

related learning disability was present, the Student was significantly below grade level in the subject, which would “require significant classroom modifications during math class.” A XXXXXX-Educational Evaluation (Evaluation) was also completed, on August 23, 2013, which reiterated the Report’s findings regarding math. It also stated that the Student “likely needs academic and behavioral support,” given his XXXX, XXXXXXX and history of behavioral challenges. The Evaluation also stated, however, that “there is no evidence that this support cannot be provided through positive behavioral interventions using regular education resources and 504 modifications and services,” noting that there was no data suggesting such interventions had been tried.

The District convened an IEP meeting on October 2, 2013, to review the Report and Evaluation. The Special Education Director (Director), who was new to the Student and the District, led the meeting, attended by the Student’s parents, a teacher who was also his advisor (Teacher/Advisor), the Case Manager and the District’s School Psychological Examiner. The team concluded that, currently, the Student was doing significantly better than in prior years. Thus, it determined the Student did “not qualify for services as a student with a learning disability,” nor did he “qualify for services as a student with an emotional disability” under IDEA. The team did not consider the Student’s eligibility under Section 504, nor did it refer him to a different team to do so.

As reflected in the meeting minutes, the Student’s parents raised concerns that the teacher reports of the Student’s progress were significantly different from previous years, and they were worried that the improved behavior and attitude would not be sustained. In particular, they highlighted that the Student had a pattern of doing well during football season, then decompensating shortly after football ended. Team members responded that the team could be reconvened if any concerns arose later.

When OCR asked members of the IEP team about the ineligibility determination, many spoke of the Student’s improvement at the outset of the 2013-2014 school year (his XXX grade year). Many also said, however, that at the meeting, they were told they could not find the Student eligible for special education because the August 2013 Evaluation stated that there was no documentation of any “structured positive intervention” for the Student’s behavioral difficulties, nor of any math interventions. This lack of data was interpreted to mean that such interventions had to be tried, *documented* and *shown to be unsuccessful* at addressing the Student’s needs, before he could be eligible for special education or related services. OCR found that interpretation at odds with other investigative information indicating that staff *had* tried positive behavioral interventions with the Student without success, which actually had led to their referral of the Student.

Beginning in November of 2013 (i.e., the start of the timely period covered by this OCR complaint), and consistent with the pattern in prior years, the Student’s attention and behavior in class began to decline. On XXXXXXXX XXXXXXXX, he received a 2-day in school suspension for a serious behavioral infraction. Thereafter, disciplinary referrals for being off task and engaging in other misbehavior in class continued. According to most staff interviewed by OCR, by Christmas 2013 or January 2014, the Student was struggling significantly in terms of focus, behavior and interactions with peers, resulting in frequent timeouts, dismissals from the class to the library or resource room, and/or detentions served during lunch and/or recess.

By all accounts, from January through the end of the school year, there were several meetings between School staff and the Student's parents to discuss his behavior. Although OCR was unable to obtain notes or other materials from these meetings, both the Complainant and District confirmed that the Student's eligibility for Section 504 was not discussed at any of these meetings, nor was there a re-referral of the Student through the IDEA process (until May 16, 2014, as discussed below). The Complainant felt that the meetings resulted in the labelling of the Student as a behavior problem, without considering the reasons behind his misbehavior, or offering necessary supports. In contrast, District staff characterized the meetings as efforts to determine how to best support the Student, but that the parents refused to acknowledge the extent of the Student's misbehavior and/or accept the District's offer of school-based counseling.

By all accounts, the District started the Student on a behavior monitoring plan in late January or early February (though March 24, 2014 is the earliest date on copies of the "daily assessment sheets" provided to OCR). Staff told OCR that the behavior monitoring plans were created by the grade span team, and reviewed by the District's consulting psychologist.

Each such assessment sheet states the following Student goal at the top: "I can manage my own behavior to be productive in class. I will not distract others. I will focus on my task." Then, in each class, the Student and teacher would separately assess whether the Student "distract[ed] others" and whether he was "focused on his task." The Student was required to take the sheet to each teacher during class for the teacher to complete and sign. The Student was expected to have the Teacher/Advisor check the sheet at the end of each day, and if the Student was 80% behavior compliant, he would earn rewards such as time on his computer or other free time.

Staff and the Complainant agreed that a similar behavior monitoring plan had been unsuccessful in XXXX grade. By all accounts, the plan proved to be similarly unsuccessful in XXX grade. While staff expressed that this was because the Student's parents were not supportive of the behavior plan and did not reinforce the behavioral expectations at home, the Complainant said that the plan was punitive and did not offer any help for the Student. By April 2014, according to District staff and the Complainant, the Student was struggling daily with attention, fighting, inappropriate or offensive comments and other negative interactions with peers, and plummeting self-esteem. He again received multiple disciplinary referrals for being off task, distracting other students, and harassing peers.

These disciplinary incidents amounted to significant time outside of the classroom and/or away from his peers; by May 2014, according to documents provided by the District, the Student had received at least XX detentions from lunch or recess and been removed from class at least XXXX times. Based on OCR interviews with District staff and the Complainant, it appears that the Student received additional detentions from lunch/recess, and spent more time out of class than is reflected in the disciplinary referrals. For instance, staff reported to OCR that the Student spent significant time in timeout, either in the classroom, in the Head Teacher's room or in the office, while the Complainant reported that the Student spent a great deal of time alone in the library. Additionally, the Student received XXX suspensions, in late March and early May. Each suspension consisted of two days out of school, and one day in school, for XXXXXXXXXX another student (the Student claimed he was the victim of XXXX XXXXXXXXXXXX in each instance).

The Complainant filed this complaint with OCR on May 9, 2014, initially alleging that the District had failed to provide the Student with the educational and related services that he needed due to his disabilities. At roughly the same time, the District began the process of again considering IDEA eligibility for the Student. Additionally, the District and the Student's parents agreed that the Student would receive a Functional Behavioral Analysis (FBA) conducted by a Board-Certified Behavior Analyst (BCBA); the FBA was initiated on May 13 and completed on June 3, 2014.

On May 16, 2014, the District convened an IEP team, which found the Student eligible for special education services due to disability. The team decided, preliminarily, that IEP goals should be developed in the areas of "math, self-regulation and coping skills." The proposed placement included a revised behavior plan coupled with check-ins with special education personnel, who would gather data about the Student's behavior and the effectiveness of the behavior plan. The Student would also receive 60 minutes a day of small-group math instruction, along with social skills training, though "the details as to how and who will provide this instruction [were] yet to be determined." The team also determined that the Student would need modified assignments, breaks for redirection, extended time on tests and assignments, small group test administration, checks for understanding and access to the resource room. The team agreed that this proposed IEP would take effect on Tuesday, May 27, 2014.

District staff told OCR that they were waiting for the parents' consent to the above proposed plan when a significant incident occurred on XXXXXX XXX XX, involving XXXXXXXXXXXX XXXXXXXX among the Student and some of his peers (XXX XXXX Incident). District staff shared that they were very upset by the event and had suggested to the Student's parents that they seek medical attention for him. The District also referred the Student for a XXXX XXXXXXXXXXXX and removed him from school for the remainder of the school year, providing him with tutoring in core subjects from XXX XX, 2014 through June 19, 2014, for a total of 34 hours. Additionally, on June 13, 2014, the Student's IEP was amended to provide the Student with extended school year (ESY) services during the summer – specifically, two hours of tutoring a day, three times a week. The Complainant confirmed that the Student received a total of 45 hours of tutoring as ESY.

The above-noted XXXX XXXXXXXXXXXX was completed on June 22, 2014. In sum, it recognized that the Student presented with XXXX and XXXXXXXX, and had experienced many problems at school stemming from difficulties with XXXXXX pragmatics, task management, self-regulation and self-monitoring. Recommendations included: a highly-structured small group or self-contained classroom within the mainstream when feasible; evaluations regarding the Student's executive functioning to assess his math and behavioral deficits; teaching of cognitive behavioral and self-regulation strategies; pre-teaching and handouts before class of materials; and accommodations such as preferential seating, removal of extra materials, and a quiet environment. The XXXX XXXXXXXXXXXX also noted that the Student's disability might be re-categorized.

On July 8, 2014, the team met to consider the Student's evaluations, and to retroactively conduct a manifestation determination to address the Student's removal after the XXX XXXX Incident (the manifestation determination is discussed in more detail under "Issue 2" below). As suggested by the XXXX XXXXXXXXXXXX, the team agreed to change the Student's disability category. Additionally, the team decided that, for the following (2014-2015) school year, the Student would be placed in a self-contained, small group setting for some of the school day, in which math instruction as well as

social pragmatic training and self-monitoring tools would be provided to help him with impulsive behaviors. The team also decided that social work services would be provided for 30 minutes a week when school resumed. It was decided that he would remain in regular education classes for science, art, music and physical education.

### **Issue 1: Failure to Evaluate Under Section 504/Title II**

#### *Legal Standards*

The implementing regulation for Section 504, at 34 C.F.R. § 104.4, provides that students with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, be afforded an opportunity that is not equal to that afforded others, or otherwise be subjected to discrimination. The regulation further provides that a recipient may not otherwise limit an individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

At 34 C.F.R. § 104.33, the Section 504 regulation requires recipient school districts to provide a FAPE to each qualified student with a disability who is in the recipient's jurisdiction. An appropriate education for purposes of a FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs, including behavioral needs, of students with disabilities as adequately as the needs of non-disabled students are met. To satisfy the FAPE requirements described in the Section 504 regulation at 34 C.F.R. §§ 104.35 and 104.36, recipient school districts must comply with several evaluation and placement requirements, afford procedural safeguards, and inform the student's parents or guardians of those safeguards.

More specifically, at 34 C.F.R. § 104.35(a), the Section 504 regulation requires that recipient school districts conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Factors that could indicate that a student may have a disability and be in need of services include documentation of a mental or physical impairment or other information from care providers; increased absenteeism; increased disciplinary incidents; and/or changes in grades or social interactions.

At 34 C.F.R. § 104.3(j), the regulation implementing Section 504 defines a qualified student with a disability as, in relevant part, one who has a physical or mental impairment which substantially limits one or more major life activities. The regulation includes a non-exhaustive list of such impairments, including neurological conditions, as well as any mental or psychological disorders, explicitly including emotional or mental illness. Examples of "major life activities" that could be impacted include – but are not limited to – caring for one's self, performing manual tasks, breathing, learning, communicating, and digestive functions.

When a recipient has reason to believe that a student may have a disability within the meaning of Section 504, it has an obligation to evaluate and consider that student under Section 504, even when the student has been found ineligible for services under IDEA. Unlike Section 504/Title II,

IDEA limits eligibility to an enumerated list of disabilities and to effects on the activity of learning, only. In contrast, Section 504 encompasses any physical or mental impairment which substantially limits any major life activity, not only learning. Since Section 504 is broader than IDEA, students who may not qualify as having a disability under IDEA may still be eligible for special education, regular education and/or related aids and services, under Section 504.

If a student is found to have an impairment that substantially limits one or more major life activities, the next question is whether the impairment limits that individual's access to the recipient's educational benefits, programs, services and activities. If so, then the recipient must determine which services, or combination of services, are needed in order to provide that individual with a FAPE.

If a recipient determines that it does not have reason to believe that a student, based on disability, needs or may be in need of special education or related services, the regulation implementing Section 504 at 34 C.F.R. § 104.36 requires that the covered entity provide the student's parent(s)/guardian(s) with notice of their procedural safeguards under Section 504, including the right to challenge the covered entity's decision not to evaluate the student through an impartial due process hearing.

As the implementing regulation for Title II explicitly states that it does not set a lesser standard than Section 504, OCR interprets Title II to impose the same legal obligations as those imposed by Section 504.

#### *Additional Facts*

OCR asked how students generally are referred for possible eligibility for special education services, and for eligibility under Section 504/Title II. Staff responded that, generally, referrals for special education come from the "grade-span" team, comprised of four core teachers for each grade, who meet more than weekly to discuss their students. Students of concern from those discussions are referred to the Student Intervention Team (SIT), if the grade span team believes more information and support are needed, or to a Response to Intervention (RTI) team for supports in either ELA or math. However, staff were unsure which team would address students whose challenges did not fit into either of those categories. Some noted that the District had hired two BCBA's for the 2013-2014 school year who might address behavior-related concerns by helping teachers with classroom strategies.

According to the Case Manager and other staff, the SIT or RTI teams then create plans for supporting students through "tier one" (classroom) interventions. If those are not successful after a time, then "tier two" interventions, outside of the classroom, are tried. If the student does not improve with those supports, the RTI team refers the student through the special education process for further evaluation.

OCR asked how evaluations were handled in the 504 Process for students for whom a disability might be suspected. The Principal, whom some staff identified as the School's 504 Coordinator, responded that evaluations are only conducted through the special education referral process. She told OCR that most of the School's 504 plans derive from medical issues raised by parents to

the School Nurse, who prepares a list of such students for discussions at weekly staff meetings. Additionally, the School may learn of a concern based on medication or conditions listed on a student's Emergency Card, which triggers the School to try and determine whether there are recommendations they should follow or doctors with whom they should speak, to accommodate students with such conditions. Other staff echoed that eligibility for Section 504 was usually based on "health issues," which could be obvious; might come up at a SIT meeting; or, for a "serious disability," be referred to an IEP team.

When asked, "what happens to get a kid on a [504] plan," the Principal responded that teachers might first try interventions in the classroom to address any issues, and might then try working with the Guidance Counselor to assist the student. She said that there was not a 504 team "per se," rather, a more formal, written plan might be done by the SIT or grade span team to address issues in math, social studies, or other areas.

The former Assistant Special Education Director (now the Special Education Director) told OCR that in the past, when a student had been found ineligible for special education, there would be a referral to a different team for consideration of Section 504 eligibility. She said that for the current school year, however, the IEP team "goes right into" considering Section 504 eligibility.

OCR asked District staff if eligibility under Section 504 was ever considered for the Student. Some staff thought that it may have been discussed at some point in 5<sup>th</sup> grade, but were unsure what had resulted from the discussion. Some staff discussed that the Student seemed to raise issues that were "more serious" than could be addressed through Section 504.

### *Analysis*

OCR determined that the District did not comply with 34 C.F.R. Section 104.35 when it failed to evaluate the Student for eligibility according to Section 504/Title II, from November 2013 until he was re-referred through the special education process on or around May 16, 2014. The Student's documented diagnoses of XXXX and XXXXXXXX; his recent evaluations recommending classroom modifications and behavioral supports; his poor academic performance and his numerous disciplinary referrals that resulted in increasing time out of the classroom or away from his peers, from November 2013 onward, were clear indicators that he might, because of disability, need regular or special education and related services in order to access the District's programs and activities.

Although the District held several meetings to address the Student's behavior, from January 2014 forward, staff also acknowledged that they did not discuss whether he was a student with a disability according to the eligibility requirements of Section 504, i.e., whether he had any physical or mental impairment(s) which substantially limit one or more major life activities, and if so, whether that impairment affected his ability to access the District's programs and activities. In other words, although these meetings resulted in various strategies to address the Student's misbehavior (e.g., the behavior monitoring plan that imposed responsibility for managing behavior solely on the Student), they did not include consideration of whether any disability might be causing, or impacting, that behavior. OCR found that this was due, in part, to staff's

misunderstanding about the Section 504 evaluation process and standards, including that the kind of disabilities the Student presented could be addressed by Section 504/Title II.

OCR finds it very concerning that the District failed to evaluate the Student as a possible student with a disability in need of services under Section 504, and instead repeatedly removed the Student from the classroom, and frequently prevented him from participating in lunch and/or recess with his peers, between November 2013 and May 2014. The Student was further excluded, during this same period, from academic, social, and other activities when he was placed in timeouts or sent to the office, in response to behaviors that were related to his disabilities (as noted in the August 2013 and June 2014 evaluations). Additionally, he lost opportunities to interact with his peers at lunch and recess, due to his lack of attention, focus and ability to conform to behavioral expectations.

OCR recognizes that District staff met often and employed various strategies to address the Student's behaviors, and once the Student was evaluated, the resulting IEP recommended math-related goals, a number of social and emotional interventions (e.g., goals for self-regulation and coping skills, behavior plan, and small-group social skills training), and modifications to assignments, test-taking, and access to additional supports (e.g., the resource room). Because of the clear indications of the possible connection between the Student's disabilities and his behaviors as of November 2013, OCR finds that the District's delay in evaluating the Student until May 2014 resulted in a denial of a FAPE during this time period.

## **Issue 2: Failure to Conduct an Evaluation prior to a Significant Change in Placement**

### *Legal Standards*

The Section 504 implementing regulation, at 34 C.F.R. Section 104.35(a), specifically requires that a recipient conduct an evaluation prior to a significant change in placement for a qualified student with a disability. Under OCR policy, a removal, expulsion or suspension for more than ten consecutive days constitutes a significant change in placement, so that an evaluation, often referred to in this context as a manifestation determination, should be conducted by no later than the tenth day of the removal. A significant change in placement may occur if a student is subjected to a series of removals that constitute a pattern and, in the aggregate, add up to more than ten days, similarly requiring a manifestation determination.

In making a manifestation determination, a team of individuals knowledgeable about the involved student, the meaning of any evaluation data and the available placement options, must determine: (1) if the misconduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (2) if the misconduct in question was the direct result of the recipient's failure to implement the student's IEP or 504 plan. These decisions may not be based simply on a recipient's normal disciplinary procedures; rather, they must be based on information from a variety of sources.

If either condition applies, the team must determine that the misconduct is a manifestation of the student's disability. If so, further evaluation of the student's FAPE-related needs is required and normal disciplinary procedures do not apply. The team should consider whether further assessments are necessary, and whether any modifications to the student's current program or

placement are needed in order for the student to receive a FAPE. If, after the evaluation process is complete, the student's parents disagree with the team's determination regarding relatedness of the behavior to the student's disability, or with the subsequent placement proposal, they may request a due process hearing.

*Additional Facts*

Immediately following the XXX XXXX Incident, the Student was removed from school; he remained out for the rest of the school year. The District informed OCR that, at the time, they believed the removal was evaluative rather than disciplinary because they had referred the Student for a XXXX XXXXXXXXXXXX. Thus, they did not believe a manifestation determination was necessary at that time.

Prior to the XXX XXXX Incident, however, the Student had already served four days of out of school suspensions in the spring of 2014, specifically March XXXX, April XXX, May XXX and May XXX. Additionally, he served XXXX days of in school suspension, which do not appear to have included access to the curriculum (November XX and XX, 2013, April X, 2014 and May X, 2014). As the District acknowledged to OCR, these disciplinary actions stemmed from similar behaviors of disrespect, defiance, and/or fighting. Whether or not the May 2014 removal is counted as a part of a pattern with those prior removals, it is undisputed that during the period of removal that followed the XXX XXXX Incident, the Student experienced his 10<sup>th</sup> day of removal, thus triggering the obligation to hold a manifestation determination before any further days of removal.

The District provided OCR with documents regarding a XXX XXXX IEP team meeting as the source of the decision to remove the Student and to have him receive tutoring. However, OCR learned while onsite that there was no IEP meeting that day. Instead, as the Principal confirmed to OCR, she made the initial immediate decision to remove the Student on XXX XXXX, after consulting with the Director of Special Education. District documents and interviews with staff and the Complainant evidence that an IEP meeting was convened on the next school day after the XXX XXXX Incident (XXXXXXXX XXX XXX).

Documents from this IEP meeting state that, pending the XXXX XXXXXXXXXXXX, the Student would receive two hours of tutoring a day, five days a week, in all core subjects, with the details to be worked out by the Assistant Director of Special Education. The documents further note that, although the team discussed having the Student attend the School for the rest of the year, it was decided that it would be "prudent to provide [the Student] tutoring outside of school" given "the nature of the issues and the pending XXXX XXXXXXXXXXXX."

District staff who had attended the XXX XXXX meeting explained that the team discussed how students and staff, and the Student, were very upset by the XXX XXXX Incident. Additionally, staff were concerned about the safety of students and the Student; thus, it was determined that it would be better for all if the Student received tutoring rather than coming back to school. When OCR asked if the team discussed whether being in school, out of school with tutoring, or another placement, was more suited to the disability-related needs of the Student, staff responded that removing the Student seemed the best way, for all, in order to ease the fear and tension after the XXX XXXX Incident.

Regarding the tutoring, OCR asked how the amount and content was determined. Multiple staff confirmed that the Director and Assistant Director for Special Education determined the details of the tutoring, including the content and quantity. Some staff also told OCR that, because one-on-one tutoring is very intense, one to two hours is normally what is provided. Following its onsite and review of documents, OCR did not find any evidence that the team considered whether the amount and content of the tutoring was appropriate for the Student's individualized needs, nor whether he would need any other special education and related aids and services, such as self-regulation, coping skills and social pragmatics (i.e., services determined by the May 16, 2014 IEP team as necessary for the Student) in order to receive a FAPE.

As noted above, a "manifestation determination" was eventually conducted during the July 8, 2014 team meeting. The team determined that the Student's behaviors in the school setting were a manifestation of his disabilities, as he had a history of "impulsiveness, aggressive behaviors and poor social boundaries." The team also decided that the District could not maintain the Student's placement at the time of the XXX XXXX incident, due to "the substantial likelihood of injury either to the Student or others," so he had received tutoring for 2 hours a day, 5 days a week, in a separate setting, based on "the IEP determination on XXX XX 2014." The July 8<sup>th</sup> notes do not include any discussion of whether the tutoring that had been provided was sufficient and appropriate to the Student's needs at the time, nor whether any other services should have been considered; nor did the team consider whether the Student required additional evaluation(s) other than safety, so as to identify the appropriate placement suitable to address the Student's disability-related needs.

### *Analysis*

By a preponderance of evidence, OCR finds that the District did not provide the Student a FAPE, when it did not conduct a manifestation determination before significantly changing the Student's placement from in-school education and supports (as described in his May 16<sup>th</sup> proposed IEP) to academic tutoring outside of school.

First, OCR finds that the team did not make a timely determination as to whether the Student's misconduct on XXX XXXX was caused by, or had a direct and substantial relationship to, his disabilities. This is an essential first inquiry, because if a team determines that misconduct leading to so many removals is related to a student's disability, then it must engage in further inquiry when developing a subsequent placement, to ensure that the student's needs are met, particularly with regard to supports that could assist in inhibiting future instances of the behavior in question.

OCR also finds that the decision to change the Student's placement from in-school with services to tutoring outside of school was not made based upon any consideration of whether the Student was more appropriately provided a FAPE in a school setting with supports, through outside tutoring, or by any other placement configuration. OCR understands that students and staff were significantly affected by events of XXX XXXX and that ongoing safety or other concerns are to be considered by the team in determining the Student's placement. However, the District must also consider whether it has sufficient information to determine an appropriate placement or whether additional evaluations are needed, and must decide on a placement that is appropriate for the Student by meeting the Student's individualized disability-related needs. Here, OCR did not find

that the team meeting included such considerations when the team decided that the Student should not return to school.

Relatedly, OCR finds that the decision to provide the Student with two hours of academic tutoring a day (and only academic tutoring) was not based on a determination of what regular or special education and related services would be needed to ensure that the Student was provided a FAPE, either in school or in an alternative placement such as at-home tutoring. In other words, the decision of the content and amount of tutoring, as well as the decision to only provide tutoring, does not appear to have been an individualized determination of what was appropriate given this Student's needs, but rather the rote provision of what is usually offered. Thus, OCR finds that the team did not consider whether the tutoring was appropriate or sufficient to provide the Student a FAPE.

During OCR's investigation, the District acknowledged that the removal from school after XXX XXXX had been a significant change in placement resulting from a disciplinary incident, which should have triggered a manifestation determination prior to removing the Student beyond 10 cumulative days. Although the District did subsequently conduct a manifestation determination on July 8<sup>th</sup> to rectify this mistake, OCR also found that meeting deficient since, as noted, the team did not consider whether the tutoring had been appropriate and sufficient to meet the Student's needs, or whether other services or placement options should have been pursued.

Accordingly, OCR finds that the District failed to conduct an appropriate evaluation and manifestation determination prior to removing the Student from school, in violation of 34 Section 104.35(a).

### **Issue 3: Designation of a 504/Title II Coordinator**

#### *Legal Standards*

At 34 C.F.R. Section 104.7(a) and 28 C.F.R. Section 35.107(a), respectively, both Section 504 and Title II require covered entities such as the District to designate an employee to coordinate its efforts to comply with Section 504/Title II. That employee must be aware of his/her designation and the responsibilities attendant to the designation, as well as understanding the District's obligations under both laws.

#### *Additional Facts*

OCR reviewed the District's website early in the investigation, but did not find any designation of a Section 504/Title II Coordinator. While onsite, OCR asked staff to identify the District and/or School 504 Coordinators for the 2013-2014 school year. Some staff identified the Principal as the 504 Coordinator for the School, while others identified the Guidance Counselor for that role. The Principal and Guidance Counselor each described for OCR their roles in coordinating the School's efforts to comply with 504, but OCR found inconsistencies in those descriptions and noted the need for further clarity.

In August of 2014, the Director of Special Education was designated as the District-wide 504 Coordinator; her designation is now clearly indicated on the District's website.

### *Analysis*

OCR finds that until the Director of Special Education was designated in August of 2014, the District did not have anyone designated in that role District-wide, as required by both Section 504/Title II.

OCR further finds that the designation of the Principal as the building 504 Coordinator was not effective because staff were unclear as to who fulfilled the specific responsibilities required of a Section 504 Coordinator. In fact, the individuals who appeared to fulfill portions of the Coordinator's role provided somewhat conflicting accounts of their role.

As noted, during OCR's investigation, the District designated the Director of Special Education as its 504 Coordinator, and the Director displayed significant knowledge to OCR about the District's obligations under Section 504. For instance, she had the District adopt and post Section 504 grievance procedures, as well as additional policies governing the District's identification, evaluation and placement process under Section 504, on its website. OCR will review these new policies as part of its monitoring of the Agreement to address this complaint.

### Conclusion

Based on its investigation, OCR finds that the District did not comply with its obligations under Section 504/Title II with regard to the issues investigated. While the District denies that it violated either law, it has nonetheless agreed to take the steps in the enclosed Agreement, to address OCR's compliance concerns. OCR will monitor the District's implementation of the Agreement.

This letter sets forth OCR's determination in an individual OCR case. The information in this letter is not intended and should not be construed to cover any other issues regarding compliance with Section 504/Title II that may exist but are not discussed herein. 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. Please be advised that the Complainant may file a private suit in Federal court whether or not OCR finds a violation. Please also 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. If OCR receives such a request, OCR will seek to protect all personal information, to the extent provided by law, that, if released, could constitute an unwarranted invasion of privacy.

We wish to thank you, District Counsel and your staff for your cooperation with OCR in this matter. If you have any questions concerning this letter, please contact Civil Rights Attorney Meighan McCrea at (617) 289-0052 or [meighan.mccrea@ed.gov](mailto:meighan.mccrea@ed.gov). You may also contact Team Leader/Civil Rights Attorney Allen Kropp at (617) 289-0120, or me at (617) 289-0111.

Sincerely

Joel J. Berner  
Regional Director

Enclosure

cc: Attorney Jeanne Kincaid