



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

February 2, 2018

Dr. Catherine C. Latham
Superintendent
Lynn Public Schools

By email: lathamc@lynnschools.org

Re: Complaint No. 01-16-1006
Lynn Public Schools

Dear Superintendent Latham:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received on October 6, 2015 against the Lynn Public Schools (District). The Complainant alleged that the District discriminated against the daughter (the Student) of her client (the Parent) on the basis of disability by failing to implement a provision of her Individualized Education Program (IEP) that required her to have an aide in her XXXXXXXXX class (Allegation 1). The Complainant also alleged that the District denied the Student the aide in a more advanced XXXXXXXXX class which she was recommended to take (Allegation 2). Finally, the Complainant alleged that the District retaliated against the Student by removing her from an XXXXXXXXX class after the Complainant filed a complaint with the Massachusetts Department of Elementary and Secondary Education (DESE), in which she asserted rights on the Student's behalf as a student with a disability (Allegation 3). Hereinafter, you will be referred to as "the Superintendent."

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws.

In reaching a determination, OCR reviewed documentation submitted by the District and the Complainant and interviewed the Complainant, the Parent, the Student, and eleven District employees.

OCR is administratively closing Allegation 1 and found insufficient evidence to support Allegations 2 and 3. During the course of its investigation, however, OCR found sufficient evidence of violations of Section 504 and Title II with respect to the manner in which the District

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changed the Student's educational placement in XXXXXXXXX (Allegation 4) and the manner in which the District customarily changed the educational placements of similarly situated students at the Student's school (the School) between 2011 and 2016 (Allegation 5). The District agreed to resolve these violations through the enclosed Resolution Agreement (Agreement). OCR's findings and conclusions are discussed below.

Factual Findings

The District provided OCR documentation indicating that, at the beginning of the 2014-2015 school year, the School's special education department head sent all School special education staff a form letter (hereinafter, the "Letter") to be "used when a student is ready to enter a less restrictive environment for a trial basis." The materials accompanying the Letter explain that it "gives [the School] written permission to change [a student's] placement without writing a new IEP," noted that it "is not to be used for [a] long term, just a short term basis," and clarified that School staff "will need to modify the letter to accommodate the needs of your student." The School's special education department head informed OCR that she created the Letter after she assumed her current position during the 2011-2012 school year. She explained that School staff would send the Letter to a student's parent when the student expressed a desire at any point between his or her annual IEP meetings to move from a class with special education and related services specified in the student's IEP to a more challenging alternative that lacked such services. She also noted that it was not the School's typical practice to provide the parent notice of the District's Section 504 or Individuals with Disabilities Education Act (IDEA) procedural safeguards when it sent the Letter. If the parent signed and returned the Letter, the School would immediately change the student's placement as described in the Letter. The student's IEP team would later convene after an unspecified trial period to consider whether to remove the applicable special education and related services from the student's IEP if the student was making effective progress in the new placement, or return the student to the previous placement if the student was not making effective progress. The School's special education department head and the District's special education administrator confirmed that the Letter has only been used at the School, and not at any other District schools. The School's special education department head informed OCR that the School stopped using the Letter at the end of the 2015-2016 school year.¹

Throughout the 2014-2015 school year, the Student's IEP provided for daily support from the District's special education staff² in an "Inclusion / XXXXXXXXX" class (hereinafter, the "Inclusion class") and tutoring assistance from a reading specialist XXXXXXXXX times per week. District employees informed OCR that the Inclusion class is co-taught by a regular education teacher and a special education teacher, whereas the School's other XXXXXXXXX classes are taught by a single regular education teacher. District employees also noted that content is delivered at a slower pace and students have more support in the Inclusion class than in the District's other XXXXXXXXX classes.

¹ In contrast, one District employee informed OCR that he believed the Letter was still in use at the School as of June 2017.

² Although not specified in the Student's IEP, the Complainant informed OCR that this is not "one-to-one" support for the Student.

In early XXXXXXXX, the Student and Parent informed the Student's XXXXXXXX teacher and guidance counselor that the Inclusion class was too easy for the Student and asked the District to place her in a more challenging XXXXXXXX class. The Student's reading specialist and special education XXXXXXXX teacher told the guidance counselor that they believed the Student would be successful in a more challenging XXXXXXXX class and noted that she was receiving XXXXXXXX in the Inclusion class. The guidance counselor relayed this information to the Student's special education liaison, who sent the Parent the Letter on XXXXXXXX. The Letter that the Parent received states:

Although we realize your child has an [IEP] with an Inclusion setting for [XXXXXXX], we would like to put your student in a regular education class. . . . We want to accommodate the needs of your student. The difference between Inclusion class (one special education teacher & one content teachers [sic]) and the regular education class (one teacher) is the level of support, speed of content delivery, and staff) [sic]. We'll keep you informed of progress and you'll be notified as soon as possible to reconvene the TEAM to reflect changes in the IEP when necessary. . . . Please sign below and return immediately if you agree to the above.

On XXXXXXXX, the Parent wrote a letter to the Student's special education liaison stating that she and the Student "both agree with you and [the Student's] current [XXXXXXX] teacher that [the Student] needs to be in a more challenging [XXXXXXX] class. We would both like her to make the switch into a class that is faster paced. However, [the Student's] IEP provides that she will receive support in XXXXXXXX. . . . I am consenting to the change from [the Student's] current XXXXXXXX class to the one that will better meet her needs with the understanding that she will continue to be provided with the services listed on her IEP, that is, daily in-class support for [XXXXXXX]." The Student's special education liaison informed the Parent that she was confused by her request and clarified that the Student could either remain in the Inclusion class with daily in-class support from the District's special education staff or move to the regular education class without that support.

On XXXXXXXX, the Student's IEP team convened for the Student's annual IEP meeting with the following individuals in attendance: the Parent; the Student; the Student's special education liaison, special education ELA teacher, regular education math teacher, guidance counselor, reading specialist, and XXXXXXXX;³ and the School's special education department head. At the meeting, the Student reiterated the Parent's earlier request that she be permitted to move to a more challenging XXXXXXXX class while still receiving the daily in-class support from the District's special education staff specified in her IEP. The District provided OCR documentation indicating that the Student's IEP team considered the Student's grades, attendance, standardized test scores, written input from several of her teachers (including her special education XXXXXXXX teacher), and a progress report from the Student's XXXXXXXX. The IEP team ultimately agreed that the Student was "read[y] to move to a less[] restrictive environment"⁴ and

³ XXXXXXXX.

⁴ The IDEA requires the District to place children with disabilities in the "[l]east restrictive environment," meaning that "[t]o the maximum extent appropriate, children with disabilities . . . [must be] educated with children who are

proposed placing the Student in the regular education class when the new quarter began in XXXXXXXX, but without the daily in-class support from the District’s special education staff requested by the Student and Parent.⁵ The District conceded to OCR that “this plan and discussion was not memorialized effectively in the N1 letter,⁶ [the] additional information section of the proposed IEP, or [the] Team Meeting Summary Form.”

On XXXXXXXX, the District sent the Parent a proposed IEP specifying that the Student would remain in the Inclusion class with daily in-class support from the District’s special education staff throughout the upcoming year.⁷ A letter accompanying this proposed IEP states that “[y]ou will find specific information about your legal rights within the *Parent’s Notice of Procedural Safeguards*” brochure, which “[y]ou should carefully review . . . before making any decisions.”

The District moved the Student to the regular education class without daily in-class support from the District’s special education staff on XXXXXXXX. The Student’s IEP was never changed to reflect this move and the Parent never provided the District written consent to take this action, which she learned had occurred after receiving an IEP progress report later in XXXXXXXX which stated that “the Student “recently moved out of inclusion [XXXXXXX] class to a regular education class.”

On XXXXXXXX, the Parent filed a complaint with DESE alleging that the District had failed to provide the Student a free appropriate public education (FAPE) in accordance with the IDEA, an analogous state statute, and those statutes’ implementing regulations. The complaint notes that the Parent XXXXXXXX when she no longer had access to daily in-class support from the District’s special education staff and requests that the District XXXXXXXX for one academic year to compensate for the District’s failure to comply with this provision of the Student’s IEP. DESE notified the District’s superintendent and special education administrator that it was investigating the complaint on XXXXXXXX.

In preparing the District’s response to the DESE complaint, the special education administrator reviewed the Student’s student record and realized that the District had neither proposed an IEP reflecting the Student’s placement in the regular education class, received written consent from the Parent to amend the Student’s IEP, nor implemented all accepted elements of the Student’s IEP since XXXXXXXX. Before the 2015-2016 school year began, the District’s special education administrator and the School’s special education department head agreed to return the Student to the Inclusion class with daily in-class support from the District’s special education

not disabled . . .” 20 U.S.C. § 1412(a)(5)(A). District employees informed OCR that the Inclusion class has a greater percentage of students with disabilities than the regular education class.

⁵ The Parent alleged that the District employees who attended this meeting stated that the Student could not receive special education support in the regular education classroom “because aides are never provided [in] that level class,” whereas the District asserted that the Student’s IEP team concluded that support from an aide in the regular education class would be “overly restrictive” for the Student given her needs. The District also asserted that it “was not possible” to provide the same type of support specified in the Student’s IEP in the regular education class “due to the fact that [the District] did not have a co-taught . . . [XXXXXXX] class” aside from the Inclusion class.

⁶ The N1 letter is a DESE form entitled “Notice of Proposed School District Action.” See <http://www.doe.mass.edu/sped/iep/forms/pdf/N1.pdf>.

⁷ The proposed IEP also states that “[t]he TEAM discussed whether [the Student] will move temporarily to regular education [XXXXXXX] class The TEAM is supportive of this move but wants [the Student] and her parents to know that she has the support in the Inclusion class and from multiple teachers.”

staff because that was the placement specified in the Student's last-approved IEP. On XXXXXXXX, the District informed DESE and the Parent that "a change in placement should not have occurred" in XXXXXXXX "without explicit parent consent as well as without a signed IEP that proposed this change in service delivery." The District noted that although the Student had earned an XXXXXXXX each quarter that she was enrolled in the regular education class and had "been recommended for an XXXXXXXX course for the upcoming 2015-2016 School Year," she had been "returned to the co-taught inclusion setting" "[i]n order to return to compliance with her currently agreed upon IEP." The District also noted that it would conduct training at the Student's school on XXXXXXXX "to review the findings from this case and illustrate the severity of this non-compliance."

The Complainant informed OCR that the Student met separately with her guidance counselor and the School's special education department head in XXXXXXXX to ask to be moved once again to a more challenging XXXXXXXX class. The Complainant informed OCR that the guidance counselor informed the Student that her XXXXXXXX class could not be changed "because of the trouble [the Parent] had made" and because the Parent "wouldn't sign the [Letter]," and the special education department head informed the Student that "if she switched, she would have to be taken off her IEP and [the Parent] wouldn't allow that." The Complainant informed OCR that the Student and Parent made the same request to the special education liaison in XXXXXXXX, but she informed them "that she was not able to make any decisions and . . . everything had to go through [the School's special education department head] because [the Parent] had 'filed with the state.'" The Complainant informed OCR that the Student and Parent subsequently met again with the School's special education department head, who "told them that because the state was 'involved,' everything now had to go through" the District's special education administrator.

The guidance counselor and special education liaison informed OCR that they did not recall meeting with the Parent or Student to discuss the Student's XXXXXXXX placement in XXXXXXXX and denied making the comments that the Complainant attributed to them. They both informed OCR that they believed the Student had been returned to the Inclusion class because that was the placement specified in the Student's IEP, and that is what they would have told the Student and Parent if they had been asked. The School's special education department head informed OCR that when the Student and Parent requested that she place the Student in a more challenging XXXXXXXX class in XXXXXXXX, she directed them to the District's special education administrator because she believed that any changes to the Student's academic programming should be approved at a higher level given DESE's involvement in the matter. She otherwise denied making the comments that the Complainant attributed to her.

In XXXXXXXX, the District cancelled a scheduled IEP team meeting for the Student after the Parent and the District's special education administrator agreed that a meeting was not necessary in light of ongoing negotiations between the Complainant and the District's counsel regarding compensatory services for the Student. The following month, the District sent the Parent an invitation to an IEP team meeting to conduct the annual review of the Student's IEP. The Complainant and Parent requested that the meeting be delayed until the District completed a reevaluation of the Student, and the District complied.

On XXXXXXXX, DESE determined that “XXXXXXX. . . sessions of services by a Reading Specialist . . . were not provided” to the Student, concluded that the District had denied the Student a FAPE, and ordered the District to provide the Student with XXXXXXXX hours of compensatory reading support. DESE also concluded that the Student’s move from the Inclusion class to the regular education class constituted a “significant change in the model of the delivery of services” and determined “that for the period of XXXXXXXX through XXXXXXXX, direct special education services were not provided in the [Inclusion] classroom . . . consistent with the consented-to IEP.” DESE nevertheless concluded that the Student “made effective progress in the [regular] education classroom” and declined the Parent’s request that it order the District to offer the Student any individual remedies related to the District’s failure to implement this provision of the Student’s IEP.

The District completed its reevaluation of the Student in XXXXXXXX. On XXXXXXXX, the Student’s IEP team convened to discuss the results of the reevaluation and concluded that the Student was no longer eligible to receive special education and related services under the IDEA because the weight of the available evidence indicated that she was able to make effective progress without these supports.⁸ The Parent disagreed with the IEP team’s determination and invoked the IDEA’s “stay-put” provision⁹ to ensure that the Student continued to receive the services specified in her IEP. The Student subsequently remained in the Inclusion class with daily in-class support from the District’s special education staff.

Legal Standards

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

In investigating whether a recipient denied a student a FAPE under Section 504 and Title II, OCR first looks at the services to be provided as written in the student’s IEP or as otherwise agreed to by the student’s IEP team. If OCR finds that the recipient has not implemented the plan by failing to provide some or all of the services listed, OCR examines various factors to determine whether the student was denied a FAPE as a result of the failure to implement the IEP. Specifically, OCR examines: the extent and nature of the missed services; the reason for the missed services; the recipient’s response, including efforts to offset or compensate for any missed services; and the effect of the missed services on the student’s ability to participate in or benefit from the recipient’s services, programs, and activities.

⁸ For a detailed discussion of the XXXXXXXX IEP team meeting, see OCR case 01-16-1203.

⁹ 20 U.S.C. § 1415(j) (“[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . .”).

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), also provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. A District treats a qualified individual with a disability less favorably than similarly situated individuals without disabilities when it conditions participation in an accelerated class or program on the forfeiture of special education or related aids and services to which the Student is legally entitled.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), further requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement. In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability. Implementation of a reevaluation procedure consistent with the IDEA is one means of meeting this requirement.

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

Lastly, the Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation. When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the District took an adverse action against the Complainant (i.e., an action that could

deter a reasonable person from engaging in further protected activity); and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

Allegation 1

The Complainant alleged that the District discriminated against the Student on the basis of disability by failing to implement a provision of her IEP that required her to have an aide in her XXXXXXXX class (Allegation 1). OCR learned that the Complainant filed Allegation 1 with DESE and that DESE resolved Allegation 1 on XXXXXXXX. OCR reviewed DESE's investigation and resolution of Allegation 1.

DESE determined that the District failed to provide the Student daily in-class support from the District's special education staff in the Inclusion class between XXXXXXXX and XXXXXXXX and failed to provide the Student XXXXXXXX tutoring sessions with a reading specialist, as required by the Student's IEP. DESE also examined the effect of the missed services on the Student's ability to participate in or benefit from the District's services, programs, and activities and determined that the Student made effective progress in XXXXXXXX between XXXXXXXX and XXXXXXXX. DESE determined that the District denied the Student a FAPE, but only ordered the District to provide the Student XXXXXXXX hours of reading support in compensation. DESE was aware that the Parent had XXXXXXXX during the period in which the District failed to provide daily in-class support from the District's special education staff and that the Parent had requested that the District XXXXXXXX in compensation for its failure to implement this provision of the Student's IEP. DESE nevertheless declined to order the District to provide any individual remedies to the Student other than the aforementioned XXXXXXXX hours of reading support. Based on the foregoing, OCR has determined that DESE implicitly found that the District's failure to provide the Student XXXXXXXX tutoring sessions with a reading specialist denied the Student a FAPE, but that the District's failure to provide the Student daily in-class support from the District's special education staff in the Inclusion class did not.

OCR determined that DESE investigated Allegation 1 and there was a comparable resolution process under comparable legal standards.¹⁰ Therefore, in accordance with Section 110(a)(2) of OCR's *Case Processing Manual* (CPM), OCR is administratively closing its investigation of Allegation 1 as of the date of this letter.

¹⁰ Although DESE only applied provisions of the IDEA, an analogous state statute, and those statutes' implementing regulations in reaching its determination, the implementation of an IEP in accordance with the IDEA is one means of meeting the Section 504 and Title II FAPE standard. Accordingly, OCR determined that DESE applied legal standards that are comparable to those applied by OCR in this case.

Allegation 2

OCR finds that there is insufficient evidence that the District denied the Student an aide in a more advanced XXXXXXXXX class which she was recommended to take (Allegation 2).

As an initial matter, OCR determined that the Student was never enrolled in an XXXXXXXXX class. The Student was enrolled in the Inclusion class prior to XXXXXXXXX. The District subsequently allowed the Student to participate in the regular education class until the end of the 2014-2015 school year, but it denied the Parent's request that it continue to provide the Student daily in-class support from the District's special education staff in that class. The District informed DESE and the Parent that it returned the Student to the Inclusion class with in-class support from special education staff at the start of the 2015-2016 school year "[i]n order to return to compliance with her currently agreed upon IEP," notwithstanding the District's previous recommendation that the Student take an XXXXXXXXX course that school year.

As noted above, a district may not treat a student with a disability less favorably than similarly situated students without disabilities by conditioning the student's participation in an accelerated class or program on the forfeiture of special education or of related aids and services to which the student is legally entitled. However, here, throughout the relevant time period, the Student's IEP specified that she was legally entitled to daily in-class support from the District's special education staff in the Inclusion class, but not in any other class (including in the more challenging regular education class).¹¹

Accordingly, OCR found insufficient evidence that the District treated the Student less favorably than similarly situated students without disabilities when it allowed the Student to participate in the regular education class while denying the Parent's request that the Student continue to receive daily in-class support from the District's special education staff in that class.

Allegation 3

OCR finds that there is insufficient evidence that the District retaliated against the Student by removing her from an XXXXXXXXX¹² XXXXXXXXX class after the Complainant filed a complaint with DESE, in which she asserted rights on the Student's behalf as a student with a disability (Allegation 3).

OCR determined that the Parent (not the Complainant) engaged in a protected activity when she filed her complaint with DESE alleging that the District had failed to provide the Student a FAPE. OCR also determined that the District took an adverse action against the Student when it removed her from the regular education class and placed her in the Inclusion class at the start of

¹¹ To the extent the Parent believes that the Student required daily in-class support from the District's special education staff in the regular education class to receive a FAPE, OCR generally does not review or second-guess individual evaluation, placement, and other educational decisions as a matter of policy. *See* CPM § 110(d). Disagreements over a student's evaluation, services, placement, or educational program are more appropriately addressed through an impartial hearing, such as a due process hearing. *See* <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/>.

¹² As discussed above, OCR determined that the Student was removed from a general education class and was never enrolled in an XXXXXXXXX class.

the 2015-2016 school year after the Student and Parent had repeatedly expressed their dissatisfaction with the Inclusion class during the previous year. Finally, OCR determined that there was a causal connection between the protected activity and the adverse action. DESE notified the District's special education administrator that it was investigating the complaint fewer than XXXXXXXX weeks before she and the School's special education department head decided to move the Student to the Inclusion class. The District's special education administrator informed OCR that, while preparing the District's response to the DESE complaint, she realized that the District had not appropriately placed the Student in the general education class and decided to return her to the Inclusion class "[i]n order to return to compliance with her currently agreed upon IEP." OCR has therefore determined that the District would not have removed the Student from the regular education class and placed her in the Inclusion class but for the Parent's filing of the DESE complaint.

While there is, thus, a prima facie case of retaliation, OCR determined that the District proffered a legitimate, non-retaliatory reason for its actions. In the course of preparing the District's response to the DESE complaint, the District's special education administrator determined – correctly – that the District had failed to "implement all accepted elements of the" Student's IEP since XXXXXXXX, in violation of a state special education regulation.¹³ Soon thereafter, the special education administrator and the School's special education department head returned the Student to the placement specified in her IEP in order to rectify this continuing violation of state special education law. This qualifies as a legitimate, non-retaliatory rationale for the District's actions.

OCR has also determined that the District's proffered rationale is not a pretext for unlawful retaliation. Multiple District employees have consistently communicated this rationale to the Parent, to DESE, and to OCR since XXXXXXXX. Although the Complainant alleged that certain District employees made comments to the Parent and Student indicating that the District had acted for retaliatory reasons, OCR was unable to substantiate these comments. Moreover, OCR determined that two of the three individuals who allegedly made these comments were not involved in the District's decision to remove the Student from the general education class and return her to the Inclusion class. The Complainant further alleged that the District's failure to convene an IEP team meeting to consider changes to the Student's IEP for XXXXXXXX months after it returned the Student to the Inclusion class, despite the IEP team's prior determination that the Student was "read[y] to move to a less[] restrictive environment" and the District's statement that the Student had "been recommended for an XXXXXXXX course," indicates that the District's proffered rationale for the Student's placement in the Inclusion class is pretextual. However, OCR determined that the District twice scheduled IEP meetings for the Student within the first XXXXXXXX months of the school year, but the Parent and Complainant requested that these meetings be delayed until after the District completed a reevaluation of the Student. The District's acquiescence to the Parent and Complainant's requests is not indicative of an unlawful pretext.

For the reasons discussed above, OCR found insufficient evidence that the District retaliated against the Student by removing her from a regular education class after the Complainant filed a complaint with DESE on behalf of the Student.

¹³ 603 Mass. Code Regs. 28.05(7)(b).

Allegation 4

OCR finds that there is sufficient evidence that the District violated Section 504 and Title II in the manner in which it changed the Student's educational placement in XXXXXXXX (Allegation 4).

As noted earlier, the District must reevaluate any student who needs or is believed to need special education or related services due to a disability before significantly changing the student's placement. OCR determined that the Student's move from the Inclusion class to the regular education class on XXXXXXXX constituted a significant change in placement, given the faster rate of content delivery and lower level of support in the latter class. Consequently, the District was required to evaluate the Student prior to making this change.¹⁴

OCR determined that the District convened the Student's IEP team on XXXXXXXX to consider evaluation data concerning the Student and to discuss her educational placement. OCR also determined that the Student's IEP team included persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options, and that these individuals drew upon information from a variety of sources (e.g., the Student's grades, attendance, standardized test scores, teacher input regarding the Student's progress in class, and a progress report from the Student's XXXXXXXX) in its discussions regarding the Student's placement at the team meeting.

However, OCR determined that the District failed to adequately document how the IEP team's consideration of this information resulted in its decision to place the Student in the regular education class without daily in-class support from the District's special education staff beginning in XXXXXXXX, in violation of 34 C.F.R. § 104.35(c)(2). The District conceded that the IEP team's "plan and discussion" at the XXXXXXXX meeting "was not memorialized effectively in the N1 letter, [the] additional information section of the proposed IEP or [the] Team Meeting Summary Form," and OCR has found no other evidence indicating that the District documented how the IEP team's consideration of the available evaluation data resulted in this placement determination.¹⁵

For similar reasons, OCR determined that the District failed to provide the Parent adequate notice of the placement decision reached by the IEP team at the XXXXXXXX meeting, in violation of 34 C.F.R. § 104.36. Assuming that at the meeting the Parent was provided oral notice of the team's decision to place the Student in the regular education class without daily in-class support from the District's special education staff, that notice was rendered inadequate when the District subsequently sent the Parent a proposed IEP specifying that the Student would remain in the Inclusion class with daily in-class support from the District's special education staff throughout the coming year. A reasonable parent in such circumstances would likely

¹⁴ See 34 C.F.R. § 104.35.

¹⁵ This is particularly concerning given the District's and the Parent's conflicting accounts regarding whether the IEP team based its placement determination on the Student's individual educational needs, which would be appropriate, or on a District practice never to provide certain special education services in more challenging classes for which a student is otherwise qualified.

conclude that the IEP team's official placement decision was reflected in the proposed IEP rather than in any conflicting statements previously made by members of the IEP team at the XXXXXXXX meeting. Without adequate notice of the District's placement decision, the Parent was impeded in her ability to exercise her remaining rights under § 104.36 to examine records relating to that decision, to seek an impartial hearing to challenge the decision, and to invoke a review procedure if she were dissatisfied with the results of that hearing.¹⁶

Accordingly, OCR has determined that the District violated 34 C.F.R. §§ 104.35(c)(2) and 104.36 in the manner in which it changed the Student's educational placement in XXXXXXXX.

Allegation 5

OCR finds that there is sufficient evidence that the District violated Section 504 and Title II in the manner in which it customarily changed the educational placement of students at the School who asked School staff between annual IEP meetings to be placed in more challenging classes than the ones specified in their IEPs between 2011 and 2016 (Allegation 5).

As noted earlier, the District must reevaluate any student who needs or is believed to need special education or related services due to a disability before any significant change in the student's placement. The District may satisfy this obligation by complying with the IDEA's reevaluation and placement procedures.

OCR determined that between 2011 and 2016, the District customarily sent the Letter to the parent of any student at the School who expressed a desire at any point between his or her annual IEP meetings to move from a class with certain special education supports specified in the student's IEP to a more challenging alternative that lacked such supports. If the parent signed and returned the form, the School would immediately change the student's placement without simultaneously amending the student's IEP or providing the parent notice of the District's Section 504 or IDEA procedural safeguards.

This practice does not comport with 34 C.F.R. § 104.35(c), which requires that the District: "draw upon information from a variety of sources," "ensure that information obtained from all such sources is documented and carefully considered," and "ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."¹⁷ The District's practice also violated 34 C.F.R.

¹⁶ Although the District may meet its obligations under 34 C.F.R. § 104.36 by complying with the IDEA's procedural safeguards requirements, the District also failed to comply with the relevant IDEA provisions. Specifically, the District failed to provide the Parent "prior written notice" of its decision to move the Student to the regular education class without daily in-class support from the District's special education staff before moving the Student to that class on February 2, 2015, as required by 20 U.S.C. § 1415(b)(3) and (c)(1).

¹⁷ The District may also satisfy § 104.35 by complying with the IDEA reevaluation and placement procedures, which include an alternate process to "mak[e] changes to a child's IEP after the annual IEP meeting for a school year." 20 U.S.C. § 1414(d)(3)(D). In such cases, "the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP." *Id.* The District's practice similarly fails to satisfy this standard, as the Letter does not purport to amend the student's IEP. Rather, the Letter states that unspecified "changes" will be made to the IEP "when necessary" after the IEP team reconvenes at some unspecified point in the future.

§ 104.36, which requires that the District provide parents notice of any significant change in their child’s educational placement and “an opportunity . . . to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure” to challenge the District’s placement determination.¹⁸

Accordingly, OCR has determined that the District violated 34 C.F.R. §§ 104.35(c) and 104.36 in the manner in which it customarily changed the educational placement of students at the School who asked School staff between annual IEP meetings to be placed in more challenging classes than the ones specified in their IEPs between 2011 and 2016.

Conclusion

On January 24, 2018, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 303(b) of the CPM, a complaint will be considered resolved and the District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the District’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the District on January 24, 2018, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address the 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. 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

¹⁸ The District may also satisfy § 104.36 by complying with the IDEA’s procedural safeguards requirements, but the District’s practice also failed to satisfy these requirements. Specifically, the District did not customarily provide parents “prior written notice” of the District’s proposed action, including all of the elements specified in 20 U.S.C. § 1415(c)(1), before changing a student’s educational placement by way of the Letter.

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

If you have any questions, you may contact Civil Rights Attorney Paul Easton at (617) 289-0008 or by e-mail at Paul.Easton@ed.gov.

Sincerely,

Meena Morey Chandra *w/p RA*
Acting Regional Director

Enclosure

cc: XXXXXXXXX, Esq. (by email: XXXXXXXXX)