



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

August 31, 2017

John F. Doherty
Superintendent
Reading Public Schools
82 Oakland Road, Reading, MA, 01867
Fall River, MA 02720

Re: Complaint Nos. 01-16-1234 & 01-16-1235
Reading Public Schools

Dear Superintendent Doherty:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaints we received on May 9, 2016 against the Reading Public Schools (the District). Complainant A and Complainant B alleged that the District discriminated against Student A and Student B, respectively, on the basis of disability.¹ Specifically, the Complainants alleged that the District was discriminating against the students in the Bridge Program at the XXXXXXXXXXXX School (the School), including XXXXX and XXXXX, because the classroom space used by the Bridge Program students was not comparable to the classroom space used by students without disabilities (Allegation 1). In addition, the Complainants alleged that the District was discriminating against Student A and Student B by failing to implement their Individualized Education Programs (IEPs) with respect to certain provisions related to XXXXXXXXXXXX instruction (Allegation 2).

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 District is a recipient of Federal financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate these complaints under Section 504 and Title II.

¹ As used herein, the complainant in Complaint No. 01-16-1234 is referred to as "Complainant A" and XXXXX will be referred to as "Student A." In addition, the complainant in Complaint No. 01-16-1235 is referred to as "Complainant B" and XXXXX will be referred to as "Student B."

In reaching a determination, OCR reviewed documents and photographs provided by the Complainants and the District; interviewed the Complainants, District staff, and third parties; and conducted a site visit on November 2, 2016.

After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II regarding Allegation 1 and certain aspects of Allegation 2, which the District agreed to resolve through the enclosed resolution agreement.

OCR's findings and conclusions are discussed below.

Allegation 1: The Classroom Spaces Used by the Bridge Program Students

The School provides a substantially separate special education program called the Bridge Program. Students in the Bridge Program are qualified students with a disability who are afforded the protections of Section 504 and Title II. They receive multi-sensory instruction in reading, writing, and sometimes math in the Bridge Program for the majority of the school day; although they are provided science and social studies in their general education classes and they attend specials with their general education classes.

OCR learned that the structure of the Bridge Program Classes was substantially similar during the 2014-2015 and 2015-2016 academic years. A teacher (the 2/3 Teacher) and a paraprofessional (the 2/3 Paraprofessional) taught Bridge Program students in second and third grade (the 2/3 Class); and a teacher (the 4/5 Teacher) and a paraprofessional (the 4/5 Paraprofessional) taught Bridge Program students in fourth and fifth grade (the 4/5 Class).²

During these academic years, both the 2/3 Class and the 4/5 Class shared their classroom spaces with Learning Centers (the 2/3 Learning Center and the 4/5 Learning Center, respectively). The Learning Centers provided pull-out instructional services, whereas the Bridge Program Classes provided a substantially separate special education program.

The District split the classroom space between the Bridge Program Classes and the Learning Centers using temporary, partial coverage partitions between the two programs that did not reach the ceiling and lacked doors. As a result of this partitioning, the 2/3 Class and the 4/5 Class did not have full use of the classrooms, but rather only had about two-thirds of the space, which could only be accessed by entering through the doors located at the Learning Centers' sides of the classrooms. No general education classroom in the School shared space with another program, and none of the other Bridge Program classes in the District shared space with another program. The Complainants alleged that as a result of sharing space with the Learning Centers, the classroom spaces used by the Bridge Program Classes were smaller than general education classrooms; were noisy; and lacked doors, direct means of ingress and egress to a hallway, and privacy.

² As used herein, the 2/3 Class and the 4/5 Class are referred to collectively as the "Bridge Program Classes."

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), 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 students in the Bridge Program less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

In addition, the Section 504 regulation, at 34 C.F.R. § 104.34(c), requires that the District ensure that facilities for students with disabilities are comparable to the school district's other facilities.

Analysis

OCR's investigation sought to determine whether the beneficial and negative features of the classroom spaces used by the special education Bridge Program Classes on the whole made the spaces inferior or not comparable to those of the general education classrooms in the School, thereby resulting in different treatment of students with disabilities. OCR's investigation also sought to determine whether the District articulated a legitimate, nondiscriminatory reason for any such different treatment.

A. Classroom Size

The 2/3 Class and the 4/5 Class had fewer students than the general education classes at the School. The square footage of the space used by the 2/3 Class and by the 4/5 Class was comparable to the square footage of the space used by the general education classes at the School when averaged by the number of students in the classes.³ However, classroom size alone is not determinative of whether the space used by the Bridge Program Classes was inferior to that of the general education classrooms in the School.

B. Access to the Hallway

Students in the Bridge Program Classes needed to walk through the Learning Centers to access the hallway several times a day, e.g., when the Bridge Program students went to their general education classes, lunch, specials, the bathroom, and the nurse.

For the 2/3 Class, OCR learned based on photographs and interviews with the 2/3 Teacher, the Complainants, and third parties that the single means of access to the hallway was on the 2/3

³ OCR notes that the only rooms smaller than the 2/3 Class and the 4/5 Class were rooms used for pull-out instruction and support services, including the Learning Centers, the psychology room, and the speech room.

Learning Center side of the classroom. In addition, OCR learned that there was a gap in the middle partial room dividers between the 2/3 Class and the 2/3 Learning Center that was used as a makeshift doorway. As a result, students in the 2/3 Class had to walk past the students in the 2/3 Learning Center to access their side of the classroom and to access the hallway.

For the 4/5 Class, OCR learned based on photographs and interviews with third parties that the single means of access to the hallway was on the 4/5 Learning Center side of the classroom. In addition, OCR learned that there was a gap in the partial room divider between the 4/5 Class and the 4/5 Learning Center in the front of the classroom. As a result, students in the 4/5 Class had to cross the 4/5 Learning Center to access their side of the classroom and to access the hallway. The exception to this was during the 2014-2015 academic year, when the 4/5 Class shared an additional door that led directly into the fourth grade students' general education classroom.

No general education classrooms in the school were set up in this manner – with students required to walk through other classrooms to enter or exit their own classroom spaces. In addition, the lack of direct access to the hallway was exacerbated in the Bridge Program Classes because the Bridge Program students were frequently entering and exiting their classroom spaces as they transitioned to class time with their general education classes, lunch, the nurse, and the bathroom. As a result, the lack of direct access to the hallway was a negative feature of the Bridge Program classroom space.

C. Classroom Noise

There was no door or full wall separating the Bridge Program Classes from the Learning Centers. Rather, the District used partial wall room dividers that did not reach the ceiling and had no doors. As a result, noise travelled between the two programs, although the level of noise is disputed between the District and the Complainants.

For the 2/3 Class, the 2/3 Teacher explained in an interview with OCR that approximately once a week or less the 2/3 Class would ask the 2/3 Learning Center to quiet down, or vice versa. However, both XXXXX and XXXXX mentioned to the Complainants that they could hear teachers and students talking in the 2/3 Learning Center on multiple occasions. Both Complainants alleged that this noise was distracting and this distraction was exacerbated by XXXXX and XXXXX's XXXXX disabilities.

For the 4/5 Class, OCR learned from an interview with a third party that during the 2014-2015 academic year an educational specialist recommended and the District purchased "soundproof" dividers for the 4/5 Class to provide some additional separation between the 4/5 Class and the 4/5 Learning Center. However, since these dividers did not reach the ceiling, they were not effective in soundproofing. As a result, the third-party interviewee explained, the 4/5 Teacher and the teachers in the 4/5 Learning Center worked with each other to manage the noise levels. In addition, the third-party interviewee explained that the noise level was more of an issue during the 2015-2016 academic year because there were more students in both the 4/5 Class and in the 4/5 Learning Center.

OCR recognizes that students may overhear other classes throughout the school day. However, the likelihood that the Bridge Program students would overhear the Learning Center students and teachers was augmented by the classroom structure: the Bridge Program Classes lacked both a door and a full wall or other barrier to effectively separate their space from the space used by the Learning Centers. In addition, while some level of background noise may be easily tolerated by students and adults without certain disabilities, the Bridge Program students' processing disabilities made it more difficult for these students to process their learning materials with the additional classroom noise from the Learning Centers. In sum, the noise inherent when two educational programs involving small children with disabilities share their classroom space was a negative feature of the Bridge Program classroom space.

D. Privacy

As a result of sharing space with the Learning Centers and because there was no door separating the Bridge Program Classes from the Learning Centers, the Complainants were concerned that students in the Learning Center knew which students received services in the Bridge Program, and vice versa, and would therefore know which students had difficulty reading or doing math. Specifically, Complainant A explained that XXX was concerned about bullying because XXXXX was told by a group of students that XX was "stupid" when other students saw XX in the Bridge Program Class. In addition, Complainant B explained that XXX was concerned that students in the Learning Center could see how XXXXX was performing in the Bridge Program Class and be able to determine XX special needs.

This issue appears to have been more acute in the 2/3 Class because, as the 2/3 Teacher explained, students would sometimes sit in the open space between the partial wall partitions dividing the 2/3 Class from the 2/3 Learning Center when the 2/3 Class was using the SmartBoard. OCR learned from an interview with a third party that, in contrast, the 4/5 Class had its desks and tables set up on the opposite side of the 4/5 Learning Center.

OCR recognizes that students may be aware of who receives special education services. However, this awareness was heightened by the fact that the Bridge Program classroom spaces lacked their own doors and full walls separating them from the Learning Centers and students in the Bridge Program Classes had to walk through the Learning Centers to enter and exit their classroom space. As a result, the classroom structure was a negative feature of the Bridge Program classroom space which compromised the privacy of the Bridge Program students.

E. Conclusions Regarding the Classroom Space Used by the Bridge Program Students

OCR found that students in the Bridge Program Classes were more likely than not adversely impacted by their shared classroom set-up. In terms of square footage, the Bridge Program portion of the shared classroom space was somewhat comparable to that of other classrooms in the school, after taking into account the class sizes of the Bridge Program Classes. However, the space used by Bridge Program students was inferior to other classrooms in that it lacked direct access to the hallway, lacked a door, was noisy, and lacked privacy. As a result, the District treated the Bridge Program students differently than other students at the School.

The District failed to articulate a legitimate, nondiscriminatory reason for this different treatment. The District explained that the classrooms shared by the Bridge Program Classes and the Learning Centers were set up with the hallway door on the side of the Learning Centers because the students in the Learning Centers were coming and going more frequently. In addition, the District explained that classroom space at the School was at a premium, as evidenced by the District's use of modular classrooms for kindergarten classes. However, OCR found that no other class in the School shared space with another class. Further, none of the other Bridge Program classes in the District shared space with another class. Thus, no other students in the District had to go through other classes to reach their own, or be subjected to the greater potential for noise and its attendant distractions, or diminished privacy, because of their classroom set-up. As a result, OCR has determined that in combining the Bridge Program Classes with the Learning Centers, the District treated the Bridge Program students differently during the 2014-2015 and 2015-2016 academic years.

During the course of the investigation, the District provided evidence that as of the start of the 2016-2017 academic year, the Bridge Program Classes no longer shared space with the Learning Centers, but had their own classroom spaces. As a result, the different treatment described above was independently resolved as of that point in time. However, the District was still obligated to remedy any harm incurred by the Bridge Program Students during the 2014-2015 and 2015-2016 academic years as a result of sharing classroom space with the Learning Centers. The Resolution Agreement includes provisions to remedy such harm.

Allegation 2(a): The Implementation of Student A's IEPs

Student A has XXXXXXXXXXXX. As a result, Student A is a qualified student with a disability who is afforded the protections provided under Section 504 and Title II.

Student A had XXX IEPs in effect during the 2015-2016 academic year, and Student A's IEP was amended XXXXXXXXXXXXXXXX. As a result, OCR analyzed:

- Student A's IEP dated XXXXX to XXXXX, as amended in XXXXX (June XXX Amendment), in November XXX (November XXX Amendment), and in January XXX (January XXX Amendment).⁴
- Student A's IEP dated XXXXX to XXXXX (Student A's 2016 IEP), which went into effect XXXXX.

Complainant A alleged that Student A's IEPs were not fully implemented with respect to certain provisions that required XXXXX instruction, XXXXX reading, a XXXXX environment, and XXXXX breaks. As a result of the District's failure to implement these provisions of Student A's IEPs, Complainant A alleged that Student A's learning and XXX socioemotional welfare were negatively affected, as evidenced by XXXXX.

⁴ Student A's June XXX Amendment was signed by Student A's parents on XXXXX and was effective until XXXXX. Student A's November XXX Amendment was signed by Student A's parents on XXXXX, was received by the District on XXXXX, and was effective until XXXXX. Student A's January XXX Amendment was signed by Student A's parents on XXXXX, was received by the District XXXXX, and was effective until XXXXX.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (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 Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act 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.

Analysis

A. XXXXX Instruction

Student A's IEPs in effect during the 2015-2016 academic year required the District to provide XXXXX instruction to Student A in XXXXX.⁵ The 2/3 Teacher explained in interviews with OCR that XXXXX instruction aims to engage at least two senses at the same time. The 2/3 Teacher explained that XXX implemented XXXXX instruction in the 2/3 Class through the Wilson Reading Program (Wilson), Fluency, Lexia Reading Core 5 (Lexia), Framing Your Thoughts, Applied Writing, and Sentence Construction programs. The 2/3 Teacher also explained that XXX is Level 2-certified in Wilson.

Complainant A asserted that the XXXXX instruction that Student A received only required XXX to move items around at a table or move sections of a paragraph at a table. Complainant A was concerned that Student A was not engaging in gross motor learning, which can include activities such as bouncing a ball towards sight words on the wall.

The 2/3 Teacher demonstrated the XXXXX techniques XXX used in the classroom that involved gross motor learning, including having students trace letters or words in the air or on the wall while sounding them out (a technique known as skywriting), play a card game requiring students to determine the number of sounds in each word, diagram sentences using hand motions for different parts of speech, and place sentences in a bucket to form a paragraph relating to the key point of the paragraph.

The 2/3 Teacher also reviewed a Wilson lesson plan with OCR and provided examples of instructional techniques that XXX used in the 2/3 Class. For example, 2/3 Teacher would use magnetic board and magnetic letter tiles and would have students (1) sound out the letters or letter groupings when the 2/3 Teacher pointed to the magnets; (2) count the sounds in a word and tap on the magnetic letter tiles; and (3) spell using the magnetic letter tiles. The 2/3 Teacher also used a magnetic sketch board and would have students say a word, write it on the sketch board,

⁵ Student A's June XXX Amendment required "XXXXX." Student A's November XXX Amendment and 2016 IEP required XXXXX."

and trace over each letter of the word to erase it. Students would also sort words into categories, highlight sight words in a binder, read words off of flash cards, and trace their fingers over large printed text or stiff needlepoint. The 2/3 Teacher explained that Wilson provides instructional techniques and XXX was “pretty strict in following the Wilson lesson plan,” but that teachers have discretion on how they implement Wilson.

While OCR understands Complainant A’s concerns that the classroom set-up may have limited the 2/3 Teacher’s ability to implement XXX XXXXX instruction techniques given that the 2/3 Class shared classroom space with the 2/3 Learning Center, OCR found insufficient evidence to suggest that the District failed to implement the XXXXX instruction provisions of Student A’s IEPs.

B. XXXXX Reading Services

Student A’s IEPs in effect during the 2015-2016 academic year required XXXXX reading services provided by a special education teacher XXX times during a XXX cycle for XXX minutes (240 minutes of reading per cycle).

The 2/3 Teacher explained that XXX implemented XXXXX reading through Wilson, Fluency, Lexia, and Word Work. Word Work and Lexia are activities that students execute independently. The District provided four classroom schedules for the 2/3 Teacher that were in effect during the 2015-2016 academic year: (1) a schedule from September through October 2015 (September Schedule); (2) a schedule from October 14 through December 2015 (October Schedule); (3) a schedule from January through March 2016 (January Schedule); and (4) a schedule from March through June 2016 (March Schedule). The District also provided three classroom schedules for the 2/3 Paraprofessional that corresponded to the September Schedule, the January Schedule, and the March Schedule. The District explained that it did not have a schedule for the 2/3 Paraprofessional that corresponded to the October Schedule and that it believes it was deleted by mistake during the 2015-2016 academic year.

Based on the September Schedule, Student A received XXXXX reading through Wilson and Word Work with the 2/3 teacher approximately nine times during a XXX cycle for 30 minutes (270 minutes of XXXXX reading per XXX cycle). Student A also received XXXXX reading through Lexia and Fluency with the 2/3 Paraprofessional. As a result, OCR determined that there is insufficient evidence to suggest that the District failed to implement the XXXXX reading provision in Student A’s IEP from the start of the 2015-2016 academic year through the end of the September Schedule on October 13, 2015.

However, OCR found that as of October 14, 2015, and for the remainder of the academic year, the XXXXX reading services in Student A’s IEPs were not fully implemented. Based on the October Schedule, January Schedule, and March Schedule, Student A received XXXXX reading through Wilson with the 2/3 Teacher five times during a XXX cycle for 30 minutes (150 minutes of Wilson per XXX cycle, or 62.5% of the XXXXX reading required by XXX IEPs).

OCR acknowledges that the schedules showed that Student A received Fluency with the 2/3 Paraprofessional and that the 2/3 Teacher explained that the 2/3 Paraprofessional oversees

students' independent Lexia and Word Work. However, Student A's IEPs specifically stated that XXX XXXXX services were to be provided by a special education teacher. Therefore, it is not sufficient that the 2/3 Paraprofessional provided Fluency and supervised Student A's Lexia and Word Work.

The District did not take steps to ensure that it faithfully implemented the XXXXX reading services in Student A's IEPs after the implementation of the October Schedule on October 14, 2015. To fully implement Student A's IEPs, the 2/3 Teacher should have provided Student A with 90 additional minutes of XXXXX reading each XXX cycle starting on October 14, 2015. As a result, the District failed to implement the XXXXX reading provisions of Student A's IEPs from October 14, 2015 through the end of the 2015-2016 academic year.

C. XXXXX Environment

During the 2015-2016 academic year, Student A's IEPs included XXXXX that "XXXXX." Complainant A asserted that while this XXXXX was implemented in the general education classroom, it would have been difficult to implement in the 2/3 Class because the 2/3 Class shared classroom space with the 2/3 Learning Center and was noisy. Complainant A also asserted that the 2/3 Class did not have access to noise-cancelling headphones, despite XXXXX in Student A's 2016 IEP that required that Student A have access XXXXX.

With respect to noise-cancelling headphones, the 2/3 Teacher explained that the 2/3 Class borrowed noise-cancelling headphones from the 4/5 Class until the 2/3 Class received additional headphones for their own use. As a result, OCR found insufficient evidence to suggest that the District failed to implement the provisions of Student A's 2016 IEP related to access to XXXXX.

With respect to XXXXX Student A in the XXXXX location XXXXX, the 2/3 Teacher explained that if a student was distracted, XXX would pull them back in, redirect them, and ask that they repeat the directions XXX had just provided. The 2/3 Teacher also explained that the 2/3 Class had privacy shields that students could use to separate their work space off from other students and minimize distractions. However, as described above, noise travelled between the 2/3 Class and the 2/3 Learning Center because there was no door or full wall separating the 2/3 Class from the 2/3 Learning Center. While the level of noise is disputed between the District and Complainant A, OCR notes that the 2/3 Teacher explained that approximately once a week or less, the Bridge Program Class would ask the Learning Center to quiet down, or vice versa. While OCR recognizes that students may overhear other classes throughout the school day, the unique structure of the 2/3 Class supports a finding that the District more likely than not failed to fully implement the provisions of Student A's IEPs related to providing a XXXXX environment because the 2/3 Class's shared classroom space was, on the whole, more distracting than if the 2/3 Class had had its own classroom space.

D. XXXXX Breaks

During the 2015-2016 academic year, Student A's IEPs required that Student A should have XXXXX breaks built into XXX school day. Student A's 2016 IEP also provided an XXXXX that "XXXXX." Complainant A stated that Student A's therapist believed that the Student was

not getting enough XXXXX breaks, which caused Student A’s XXXXX to escalate. Complainant A also explained that the XXXXX system was not implemented after Student A’s 2016 IEP went into effect in XXXXX.

The 2/3 Teacher explained that XXXXX breaks were built into the instructional day as students moved between lessons and small groups in the 2/3 Class and as students moved from the 2/3 Class to their general education classes, specials, and lunch. While the 2/3 Teacher explained that XXX did not specifically schedule additional XXXXX breaks for the students, XXX permitted XXXXX breaks when a student asked, or when XXX observed that a student needed a break.

The 2/3 Teacher estimated that Student A took three to four XXXXX breaks per day during the 2015-2016 academic year, in addition to the built-in XXXXX breaks discussed above. During these three to four XXXXX breaks, Student A would walk around or go to the nurse. The 2/3 Teacher also explained that Student A had not needed the XXXXX system for structured breaks that was suggested, but not required, by Student A’s 2016 IEP.

As a result, OCR found insufficient evidence to suggest that the District failed to implement the provisions of Student A’s IEPs related to XXXXX breaks.

E. Conclusions Regarding the Implementation of Student A’s IEP

In conclusion, OCR found it more likely than not that the District failed to properly implement the following provisions: (1) in Student A’s IEPs, the provisions that required a total of 240 minutes of XXXXX reading per XXX cycle with a special education teacher from October 14, 2015 through the end of the 2015-2016 academic year; and (2) in Student A’s IEPs, the provisions that explained that Student A “XXXXX” for the entirety of the 2015-2016 academic year.

As a result of these instances where the District failed to implement Student A’s IEPs during the 2015-2016 academic year, OCR determined that it was more likely than not that Student A’s progress was negatively affected. Therefore, OCR found that the District’s failure to implement these aspects of Student A’s IEPs rose to the level of a denial of FAPE. The Resolution Agreement includes provisions to remedy the harm suffered by Student A as a result of this denial of FAPE.

Allegation 2(b): The Implementation of Student B’s IEPs

Student B has XXXXX. As a result, Student B is a qualified student with a disability who is afforded the protections provided under Section 504 and Title II.

Student B had two IEPs in effect during the 2015-2016 academic year after XXXXX. As a result, OCR analyzed:

- Student B’s IEP dated XXXXX to XXXXX (Student B’s 2015 IEP), which went into effect XXXXX.

- Student B’s IEP dated XXXXX to XXXXX (Student B’s 2016 IEP), which went into effect XXXXX.

Complainant B alleged that Student B’s IEPs were not fully implemented with respect to certain provisions that required XXXXX instruction, XXXXX reading, a XXXXX environment, a XXXXX locations and positions, and XXXXX breaks. As a result of the District’s failure to implement these provisions of Student B’s IEPs, Complainant B alleged Student B’s learning was affected, as demonstrated by XXXXX.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (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 Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act 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.

Analysis

A. XXXXX Instruction

Student B’s IEPs in effect during the 2015-2016 academic year required the District to provide XXXXX instruction to Student B in XXXXX.⁶ Complainant B asserted that XXX did not see any evidence of XXXXX instruction as described in Student B’s IEPs, but rather saw Student B doing XXXXX on the iPad and sitting with the 2/3 Teacher reviewing flash cards.

The 2/3 Teacher explained in interviews with OCR that XXX implemented XXXXX instruction in the 2/3 Class through the Wilson Reading Program (Wilson), Fluency, Lexia Reading Core 5 (Lexia), Framing Your Thoughts, Applied Writing, and Sentence Construction programs. The 2/3 Teacher also explained that XXX is Level 2-certified in Wilson.

The 2/3 Teacher explained that XXXXX instruction is designed for students to engage at least two senses at the same time. The 2/3 Teacher noted that the provisions in Student B’s 2015 IEP related to Student B receiving XXXXX instruction “XXXXX” may have been a typo, but XXX added that in using a XXXXX approach XXX would start by engaging one sense (i.e., seeing a letter on a magnetic board) and then add a second sense (i.e., hearing how the letter is sounded out).

⁶ Student B’s 2015 IEP required an XXXXX that “XXXXX.” Student B’s 2015 IEP also included a related XXXXX provision of “XXXXX.” Student B’s 2016 IEP required the following XXXXX: “XXXXX.”

The 2/3 Teacher demonstrated the XXXXX techniques XXX used in the classroom that involved gross motor learning, including having students trace letters or words in the air or on the wall while sounding them out (a technique known as skywriting), play a card game that requiring students to determine the number of sounds in each word, diagram sentences using hand motions for different parts of speech, and place sentences in a bucket to form a paragraph relating to the key point of the paragraph.

The 2/3 Teacher also reviewed a Wilson lesson plan with OCR and provided examples of instructional techniques that XXX used in the 2/3 Class. For example, 2/3 Teacher would use magnetic board and magnetic letter tiles and would have students (1) sound out the letters or letter groupings when the 2/3 Teacher pointed to the magnets; (2) count the sounds in a word and tap on the magnetic letter tiles; and (3) spell using the magnetic letter tiles. The 2/3 Teacher also used a magnetic sketch board and would have students say a word, write it on the sketch board, and trace over each letter of the word to erase it. Students would also sort words into categories, highlight sight words in a binder, read words off of flash cards, and trace their fingers over large printed text or stiff needlepoint. The 2/3 Teacher explained that Wilson provides instructional techniques and XXX was “pretty strict in following the Wilson lesson plan,” but that teachers have discretion on how they implement Wilson.

While OCR understands Complainant B’s concerns that the classroom set-up may have limited the 2/3 Teacher’s ability to implement XXX XXXXX instruction techniques given that the 2/3 Class shared classroom space with the 2/3 Learning Center, OCR found insufficient evidence to suggest that the District failed to implement the XXXXX instruction provisions of Student B’s IEPs.

B. XXXXX During the School Day

Student B’s 2015 IEP included the requirement that “XXXXX.” However, the 2/3 Teacher explained to OCR that students in the 2/3 Class, including Student B, used XXXXX on the classroom iPads. Based on the classroom schedules and student-specific schedules that the District provided to OCR, Student B received approximately 45 to 195 minutes of XXXXX per week.

The 2/3 Teacher explained to OCR that XXX had told Complainant B about the various instructional techniques the Bridge Program used, including XXXXX. Complainant B could not recall whether this conversation occurred, but explained that the prohibition on XXXXX was put into Student B’s 2015 IEP because Student B was already using XXXXX at home, as a supplement to the classroom instruction that Student B was to receive from XXX teachers and paraprofessionals.

OCR notes that the District did not revise Student B’s 2015 IEP to remove this prohibition on XXXXX use during school when XXXXX. Thus, Student B had an IEP in effect through XXX 2016 that prohibited the District from using XXXXX during the school day, but the District provided him XXXXX on an iPad in lieu of small-group reading instruction involving interaction with the 2/3 Teacher or the 2/3 Paraprofessional. As a result, the District failed to properly implement Student B’s 2015 IEP, which required that “XXXXX.”

C. Reading and XXXXX Reading Services

The 2/3 Teacher explained that XXX implemented XXXXX reading through Wilson, Fluency, Lexia, and Word Work. Word Work and Lexia are activities that students do independently. The District provided classroom schedules for the 2/3 Teacher that were in effect while Student B XXXXX: (1) a schedule from January through March 2016 (January Schedule); and (2) a schedule from March through June 2016 (March Schedule). The District also provided classroom schedules for the 2/3 Paraprofessional that corresponded to the January Schedule and the March Schedule.

a. Reading Services in Student B's 2015 IEP

Student B's 2015 IEP, which was in effect from when XXXXX until XXXXX, 2016, required reading services provided by a special education teacher or paraprofessional XXX times during a XXX cycle for XXX minutes (90 minutes of reading per cycle). Based on the January Schedule and the March Schedule, Student B received reading instruction in Wilson with the 2/3 Teacher five times during a XXX cycle for 30 minutes (150 minutes of Wilson per XXX cycle). Student B also received reading instruction through Lexia, Fluency, and Word Work with the 2/3 Paraprofessional.

The District also provided specific schedules for Student B: (1) a schedule dated February 3, 2016; (2) a schedule dated March 15, 2016; and (3) an undated schedule. OCR reviewed these schedules and noted that Student B's February 3, 2016 schedule and Student B's undated schedule were substantially similar and appeared to correspond to the January Schedule; and Student B's March 15, 2016 schedule appeared to correspond to the March Schedule. While there were some minor discrepancies between the specific schedules for Student B with respect to the January Schedule and March Schedule, these discrepancies did not impact OCR's conclusion regarding the implementation of the reading provisions of Student B's 2015 IEP.

As a result, OCR determined that there was insufficient evidence to suggest that the District failed to implement the reading provisions in Student B's 2015 IEP from XXXXX 2016 until XXXXX 2016.

b. XXXXX Reading Services in Student B's 2016 IEP

Student B's 2016 IEP, which was in effect from XXXXX 2016 until the end of the 2015-2016 academic year, required XXXXX reading services provided by a special education teacher XXX times during XXX for XXX minutes (300 minutes per week). The March Schedule that the District provided is the relevant schedule for the time period that Student B's 2016 IEP was in effect, as the District could not locate any schedule that was created after Student B's 2016 IEP went into effect on XXXXX 2016.

Under the March Schedule, Student B received XXXXX reading through Wilson with the 2/3 Teacher five times during the week for 30 minutes (150 minutes of Wilson per week, or 50% of

the XXXXX reading required by XXX 2016 IEP). Student B also received XXXXX reading through Lexia, Fluency, and Word Work with the 2/3 Paraprofessional.

OCR also considered Student B's March 15, 2016 schedule, which showed that Student B received XXXXX reading through Wilson with the 2/3 Teacher five times during a week for 30 minutes and an additional two hours of Fluency, Lexia, and Word Work with either the 2/3 Teacher or the 2/3 Paraprofessional. In total, this would be 270 minutes of XXXXX reading per week, or 90% of the XXXXX reading required by XXX 2016 IEP, assuming that the 2/3 Teacher provided Student B these additional two hours of services. This seems unlikely when one compares Student B's March 15, 2016 schedule to the March Schedule because the 2/3 Teacher was teaching Wilson and math during these periods. It is more likely that the 2/3 Paraprofessional provided these services, as XXX was teaching Word Work, Lexia, and Fluency to other students during these periods.

Because the District provided OCR with conflicting schedules for this period of time (the March Schedule for the 2/3 Teacher and the 2/3 Paraprofessional as compared to Student B's March 15, 2016 schedule) and because the District could not locate Student B's specific schedules for April, May, or June 2016, OCR cannot confirm with certainty which schedule accurately reflects the XXXXX reading services provided to Student B and who provided those services to the Student.

OCR acknowledges that the March Schedule and Student B's March 15, 2016 schedule showed that Student B received Fluency, Lexia and Word Work with the 2/3 Paraprofessional and that the 2/3 Teacher explained that the 2/3 Paraprofessional oversees students' independent Lexia and Word Work. However, Student B's 2016 IEP specifically states that XXX is to receive XXX XXXXX reading services from a special education teacher. OCR notes that during the 2015-2016 academic year, other students in the 2/3 Class received XXXXX reading in Fluency, Lexia and Word Work with the 2/3 Teacher. As a result, it is not sufficient that the 2/3 Paraprofessional provided Fluency and supervised Student B's Lexia and Word Work. Rather, to fully implement Student B's 2016 IEP, the 2/3 Teacher should have provided Student B with between 30 to 150 additional minutes of XXXXX reading XXXXX as of XXXXX 2016. As a result, the District failed to implement the XXXXX reading provisions of Student B's 2016 IEP from XXXXX 2016 through the end of the 2015-2016 academic year.

D. XXXXX Environment

Student B's IEPs included the following XXXXX related to XXX need for a XXXXX environment: "XXXXX" and "XXXXX" or XXXXX work spaces. Student B's 2016 IEP included an additional XXXXX that XXX should have access to noise-cancelling headphones. Complainant B asserted that the constant flow of students entering and exiting the 2/3 Learning Center, was distracting and adversely affected Student B's ability to focus and process information. Complainant B further asserted that Student B had not mentioned that XXX had access to privacy shields in the 2/3 Class.

With respect to noise-cancelling headphones and privacy shields, the 2/3 Teacher explained that the 2/3 Class borrowed noise-cancelling headphones from the 4/5 Class until the 2/3 Class

received additional headphones for their own use and that the 2/3 Class had used privacy shields. As a result, OCR found insufficient evidence to suggest that the District failed to implement the provisions of Student B’s IEPs related to access to noise-cancelling headphones and privacy shields.

With respect to XXXXX when possible, the 2/3 Teacher explained that if a student was distracted, XXX would pull them back in, redirect them, and ask that they repeat the directions XXX had just provided. The 2/3 Teacher also explained that the 2/3 Class had privacy shields that students could use to separate their work space off from other students and minimize distractions. However, as described above, noise travelled between the 2/3 Class and the 2/3 Learning Center because there was no door or full wall separating the 2/3 Class from the 2/3 Learning Center. While the level of noise is disputed between the District and Complainant B, OCR notes that the 2/3 Teacher explained that approximately once a week or less, the Bridge Program Class would ask the Learning Center to quiet down, or vice versa. While OCR recognizes that students may overhear other classes throughout the school day, the unique structure of the 2/3 Class supports a finding that the District more likely than not failed to fully implement the provisions of Student B’s IEPs related to providing a XXXXX environment because the 2/3 Class’s shared classroom space was, on the whole, more distracting than if the 2/3 Class had had its own classroom space.

E. XXXXX Locations and Positions

Student B’s IEPs included provisions to allow for a variety of XXXXX locations and positions.⁷ Complainant B alleged that because the 2/3 Class shared space with the 2/3 Learning Center, there was not enough room for alternative XXXXX locations. Complainant B also asserted that XXX never observed seat cushions or bean bag chairs in the classroom.

The 2/3 Teacher explained that Student B rarely sat on the floor, but XXX would sometimes stand or kneel on XXX chair. The 2/3 Teacher also explained that students in the 2/3 Class, including Student B, had the option of using seat cushions that the 2/3 Class received at the end of the 2015-2016 academic year to sit more comfortably on the floor. As a result, OCR found that there is insufficient evidence to suggest that the District failed to implement the provisions in Student B’s IEPs related to allowing him to use a variety of XXXXX locations and/or positions.

F. XXXXX Breaks

Student B’s IEPs included XXXXX breaks as XXXXX. Complainant B explained that at the end of the 2015-2016 academic year, Student B was XXXXX during the school day, which suggested to XXX that Student B was not receiving sufficient XXXXX breaks.

The 2/3 Teacher explained that XXXXX breaks were built into the instructional day as students moved between lessons and small groups in the 2/3 Class and as students moved from the 2/3 Class to their general education classes, specials, and lunch. While the 2/3 Teacher explained that XXX did not specifically schedule additional XXXXX breaks for the students, XXX

⁷ The XXXXX in Student B’s 2015 and 2016 IEPs stated, “XXXXX.”

permitted XXXXX breaks when a student asked, or when XXX observed that a student needed a break.

The 2/3 Teacher explained that, in addition to the built-in XXXXX breaks discussed above, Student B's visits to the bathroom provided XXXXX breaks. The 2/3 Teacher noted that XXX discussed with Student B the appropriate time to ask for XXXXX breaks and how to advocate for XXXXX when XXX needed a break. Further, the 2/3 Teacher noted that Student B would wander during lunch and would XXXXX between XXX 2/3 Class and XXX general education class. The 2/3 Teacher explained that when this occurred, XXX would redirect Student B and maintain open communication with XXX general education teacher.

As a result, OCR found insufficient evidence to suggest that the District failed to implement the provisions of Student B's IEPs related to XXXXX breaks.

G. Conclusions Regarding the Implementation of Student B's IEP

In conclusion, OCR found it more likely than not that the District failed to properly implement the following provisions: (1) in Student B's 2015 IEP, the provision that required that "XXXXX"; (2) in Student B's 2016 IEP, the provision that required a total of 300 minutes of XXXXX reading per XXX cycle with a special education teacher from XXXXX 2016 through the end of the 2015-2016 academic year; and (3) in Student B's 2015 and 2016 IEPs, the provisions that the District should "XXXXX."

As a result of these instances where the District failed to implement Student B's IEPs during the 2015-2016 academic year, OCR determined that it was more likely than not that Student B's progress was negatively affected. Therefore, OCR found that the District's failure to implement these aspects of Student B's IEPs rose to the level of a denial of FAPE. The Resolution Agreement includes provisions to remedy the harm suffered by Student B as a result of this denial of FAPE.

Conclusion

On August 22, 2017, the District agreed to implement the enclosed Resolution Agreement, which commits the District to take specific steps to address the identified areas of noncompliance. The Resolution Agreement entered into by the District is designed to resolve the issues of noncompliance. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will take appropriate action to ensure the District's compliance with Section 504 and Title II.

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.

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 Amy Fabiano at (617) 289-0007 or by e-mail at Amy.Fabiano@ed.gov.

Sincerely,

/s/
Meena Morey Chandra *w/p AMM*
Acting Regional Director

Enclosure

cc: Michael Joyce, Esq.