



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

January 21, 2020

Superintendent Kevin Richard  
School Administrative Unit Number 9

Via email: krichard@sau9.org

Re: Complaint Nos. 01-16-1260 & 01-17-1181  
School Administrative Unit Number 9

Dear Superintendent Richard:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaints we received on June 6, 2016 and March 28, 2017 against School Administrative Unit Number 9 (District).

In Complaint 01-16-1260, the Complainant alleged that the District:

- denied her son (Student) a free appropriate public education (FAPE) by failing to
  - implement accommodations listed in his Section 504 plan related to his allergies (Allegation 1a) (with respect to a xxx-free classroom and xxxxxx), and
  - ensure that his placement was determined by a group of persons that included someone knowledgeable about the meaning of a medical evaluation of the Student (Allegation 1b);
- denied the Student an equal opportunity to attend a xxx xxxx field trip based on his disability (Allegation 2);
- denied her request to record, or have her advocate take notes during a xxxx xx, xxxx meeting as an accommodation for her disability (Allegation 3);
- failed to adequately and impartially investigate her internal grievance alleging discrimination against the Student during the xxxxxx of xxxx (Allegation 4); and
- withheld opportunities for her to serve as a xxxxxxxxxxx xxxxxxx between xxxxxxx xxxx and xxxx xxxx because she pressed the District to comply with the Student's Section 504 plan (Allegation 5).

In Complaint 01-17-1181, the Complainant alleged that the District retaliated against her for her disability-related advocacy on behalf of the Student by intentionally submitting false information to the xxxxxxx xxxxxxx xxxxxxxxxxx (xxxx) in the xxxxxx of xxxx (Allegation 6).

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

During the course of its investigation, OCR identified additional issues to investigate regarding the District’s compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) with respect to:

- whether the District failed to carefully consider sufficient individualized evaluation data in designing regular or special education and related aids and services to meet the Student’s individual educational needs (Allegation 7);
- whether the District unreasonably denied the Complainant’s request that the District copy her xxxxxx on all correspondence from the District as a modification of the District’s policies, practices, and procedures (Allegation 8); and
- whether the District failed to disseminate an adequate notice of nondiscrimination pursuant to Section 504 (Allegation 9).

OCR enforces 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 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. Because the District receives Federal financial assistance from the Department and is a public education system, OCR has jurisdiction pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documentation submitted by the District, the Complainant, the Complainant’s xxxxx, and the head of the xxxxxx xxxxx xxxxxx xxxxxxxx School (xxxxxx School). OCR also interviewed the Complainant, the Complainant’s xxxxxx, and eight District employees during an on-site visit on November 16, 2017.

After carefully considering all of the information obtained during the investigation, OCR found evidence of a violation of Section 504 and Title II regarding Allegations 1a (xxx-free classroom), 4, 7, 8, and 9, which the District agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support Allegations 1a (EpiPen), 1b, 2, 3, 5, and 6.

OCR’s findings and conclusions are discussed below.

### **Factual Determinations**

On xxxxxxxxxxx xx, xxxx, the Student’s treating physician, then an xxxxxxxx xxxxxxxx of pediatrics at xxxxxxxx xxxxxxxx xxxxxxxx xx xxxxxxxx and xxxxxxxx of the xxxxxxxx xxxxxxxx xx xxxxxxxxxxxx xxxxxxxx x xxxxxxxxxxxx (xxxxxxx), wrote a letter on the Student’s behalf “request[ing] the availability of a xxxxxxxx free room and table through xxxxxx grade”

because accidental food ingestion “may be life threatening” for the Student.<sup>1</sup> The Complainant informed OCR that she sent this letter to the Student’s xxxxxxxxxx school (School) “prior to his entry to xxxxxxxxxx” and “hand delivered a copy to the school nurse the first day of school in xxxx.”<sup>2</sup> The District asserts it did not receive the letter until the Complainant provided it to the School principal (Principal) on xxxxxx xx, xxxx, as discussed below.

On xxxxxxxxxx xx, xxxx, the District received a copy of an “After Visit Summary” (Summary) from the xxxxxxxxxx. The Summary notes that the Student should “continue avoid[ing] xxxxx, xxxxxxxxxx, xxxxxxxxxx xxx, xxxxxxxxxx xxx, and xxxx xxxx.” It also references a Centers for Disease Control (CDC) website that “has excellent guidelines for food allergies in school settings.”<sup>3</sup> The Summary does not include any recommendations regarding areas of the School that should remain allergen-free to appropriately accommodate the Student. The CDC website referenced in the Summary links to a National Association of School Nurses (NASN) website and several Food Allergy Research and Education (FARE) resources.<sup>4</sup>

On xxxxxxxxxx xx, xxxx, the District’s Section 504 coordinator (Coordinator) mailed the Complainant a plan characterized as the Student’s “[f]inalized [Section] 504 Plan” (xxxx Plan). The xxxx Plan stated that the Student “will only access classrooms that are xxxxxxx, xxxx xxx, xxxx, xxxx, xxxxxxxxxx xxx and xxxxxx xxx-free” and “will utilize a xxxxxxx, xxxxxxx xxx, xxxx, xxxx, xxxxxxxxxx xxx and xxxxxxxxxx xxx-free table in the cafeteria.”

#### *Alleged Discrimination against the Student*

The xxxx Plan provides that “[a]ll [School staff] are trained in the need for and use of xxxxxxxxxx” due to the possibility of the Student suffering a “life-threatening reaction” following contact with specified allergens. The Complainant asserts the District failed to comply with this provision because a parent who had previously served as a substitute teacher at the School told the Complainant she did not realize that the Student had an allergy. However, the Complainant could not recall whether that parent said anything regarding training on the need for, or use of, xxxxxxxxxx. All five School staff members interviewed by OCR confirmed they had received such training prior to and during the xxxx-xxxx school year, explained how to

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<sup>1</sup> The letter states, “Contact reactions are less likely to result in severe reactions, but ingestion of food allergens may be life threatening. To decrease the risk of accidental food ingestion I would request the availability of a xxxxxxx free room and table through xxxxxx grade, as well as the practice of handwashing after meals and wet-wiping of tables before and after meals.” The Student had also been diagnosed with xxxxxx, which, according to the Allergist’s “Food Allergy Action Plan,” placed him at a “[h]igher risk for severe reactions” to these allergens.

<sup>2</sup> The Complainant provided to OCR a letter that the Student’s xxxxxxxxxx teacher and the School nurse allegedly sent to all parents and guardians of the Student’s xxxxxxxxxx classmates in xxxxxxxxxx. The letter states that “we have a student in xxxxxxxxxx with severe allergies to xxxxx, xxxxxxxxxx and xxxxxx xxxx” and “due to shared items and supplies in the classroom, as well as the ease with which food residue is transferred from one student to the other, we would like to keep our classroom xxxxxxxxxx free.”

<sup>3</sup> <http://www.cdc.gov/HealthyYouth/foodallergies/publications.htm>. Although this URL is no longer functional, it remains accessible as it appeared in xxxxxxxxxx xxxx via the Internet Archive’s “Wayback Machine” at <https://archive.org/web/>.

<sup>4</sup> <https://www.nasn.org/nasn-resources/practice-topics/food-allergies>; <http://www.foodallergy.org/laws-and-regulations/statewide-guidelines-for-schools>; <http://www.foodallergy.org/document.doc?id=234>; <http://www.youtube.com/watch?v=zvM8EaOpkw>; <http://www.foodallergy.org/managing-food-allergies>.

recognize the need to xxxxxxxxxxxx xxxxxxxxxxxx to a child experiencing an allergic reaction, and demonstrated the proper procedure for doing so. The District also provided OCR minutes from an xxxxxxxx xx, xxxx Section 504 team meeting, which noted that the Principal informed the meeting attendees “that all staff are aware of [the Student’s] allergies and are trained to xxxxxxxxxxxx xxxxxxxxxxxx [sic].”

On xxxxxxxx xx, xxxx, the School’s cafeteria was used for the School’s xxxxxxxxxxxx xxxxxxxxxxxx xxxx xxxxxxxxxxxx xxxx and thus all students were required to eat lunch in their classrooms. The School served xxxxxx xxxxxx and xxxx xxxxxxxxxxxx to students who did not bring lunch, including the Student’s classmates. School staff implemented in the Student’s classroom the provisions of the xxxx Plan that would typically be implemented in the cafeteria. Specifically, the Student ate at an allergen-free table and School staff verified that only students with food free of allergens sat at that table. Staff assisted students with handwashing, washed all tables, chairs, and other equipment in the classroom, disposed of all food-related trash outside of the classroom, and helped the Student’s classmates place their lunchboxes in their backpacks after they finished eating.

According to the Complainant, the Student subsequently informed her that xxxxxxxx xxxxxx and xxxxx xxxxxxxxxxxx had been served in the classroom.<sup>5</sup> She reported to OCR that the Student began experiencing xxxxxxxxxxxx xxxxxx related to the presence of xxxxxxxx xxxxxxxx in his classroom and began attending xxxxxxxxxxxx xxxxxxxx to manage his xxxxxxxxxxxx, although the District informed OCR that its employees never observed signs of xxxxxxxx or xxxxxxxx in the Student. The Complainant advised OCR that she was unaware of any other occasion when one of the Student’s allergies was present in his classroom.

On xxxxxxxx xx, xxxx, the Complainant sent the Superintendent an email alleging that the District “ignored the” xxxxx Plan by serving “xxxxxxxxx xxxxxxxx [and] xxxxxxx xxxxxxx . . . in the [Student’s] classroom.” The Superintendent informed the Complainant that he would speak to the Principal about her concern, and the Principal followed up with the Complainant xxxx days later. The Complainant told the Principal that the xxxxxxxxxxxx had requested a xxxxxxxxxxx-free classroom for the Student. The Principal responded that she had reviewed the Summary “and could not find that piece.” She noted that the School has “xxxxxxxxx-free tables” and “we can only program for [the Student] w[ith the] info we are provided.” In response, the Complainant provided the Principal a copy of the xxxxxxxxxxxxxxx’s xxxxx letter. On xxxxxx xx, xxxx, the Principal sent a letter to the Complainant stating that the District had “never seen [the xxxxx] letter previously and some of the recommendations are not reflected in later recommendations contained in” the Summary.

The Principal informed OCR that because the classroom was being used as a “temporary cafeteria” it was thus appropriate for the School to implement the provisions of the xxxxx Plan that would typically be implemented in the School’s cafeteria. She asserted the xxxxx Plan clearly

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<sup>5</sup> The Complainant was not notified in advance that xxxxxxxx xxxxxx would be present in the Student’s classroom or that the School planned to accommodate the Student as described above, but the Student’s teacher, the Principal, and the Coordinator all informed OCR that the Complainant was at the School on this date and did not object to what was occurring. The Complainant informed OCR that she arrived at the School in the afternoon and was not in the Student’s classroom while students were eating their lunches.

and unambiguously supported her interpretation.<sup>6</sup> However, she also informed OCR that the concerns the Complainant later raised caused the Student’s Section 504 team to realize the phrasing of the relevant provision “may not have been the best,” and “the most accurate way to depict [the Section 504 team’s] intention was to specify that a xxxxxxx-free table would be provided in the classroom.”

On xxxx xx, xxxx, the Student’s Section 504 team, including the School nurse, met to discuss the xxxx Plan; the School nurse attended every Section 504 meeting for the Student during the xxxx-xxxx school year except for one on xxxxx xx, xxxx.<sup>7</sup> During the xxxx xx, xxxx meeting, the Complainant’s xxxxx stated “that she ha[d] been told that [the Student] is sitting with children who have xxxxx xxxxxx in their lunches.” The Principal responded that the school was in compliance with his “individual health plan”<sup>8</sup> and emphasized that “the entire school follows protocols for xxxxxxx allergies as recommended by” NASN, including “xxxxxx-free tables in the . . . classroom.” The Student’s classroom teacher informed the meeting attendees that “these protocols are being followed” in the Student’s classroom. The Student’s treating xxxxxxxxxx xxxxxxxx also called into this meeting to discuss the Student’s dietary needs.<sup>9</sup> On xxxxxx xx, xxxx, the Principal received a letter from the xxxxxxxxxxx xxxxx dated xxx xx, xxxx summarizing her recommendations for the Student, none of which reference the areas of the School that the District should endeavor to maintain allergen-free. Although the letter states that “[a]ll . . . food allergy positive items should be avoided as [the xxxxxxxx] has already recommended,” it focuses primarily on the Student’s “food xxxxxxxxxx” and whether he should eat xxxxxxxx foods. The Complainant subsequently informed the District that the information in this letter was “exactly the [same] information discussed in the [xxxx xx, xxxx] meeting” and the letter contained “no[] new information.” The Principal likewise informed OCR that the letter contained no additional information beyond that discussed at the xxx xx, xxxx meeting.

On xxxx xx, xxxx, the Principal mailed the Complainant a revised Section 504 plan for the Student (xxxx Plan). The xxxx Plan replaced the provision that the Student “will only access classrooms that are xxxxxx, xxxxx xxx, xxxxx, xxxxx, xxxxxx xxx and xxxxxx xxx-free” with one stating that he “will only access classrooms that utilize a xxxxxxx, xxxx xxx, xxxx, xxxxx, xxxxxxx xxx and xxxxxxxxxx xxx-free table . . . as recommended by” NASN. The Complainant subsequently protested and requested a return to the original language; the District refused this request.<sup>10</sup>

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<sup>6</sup> The Coordinator informed OCR that she agreed with the Principal’s interpretation of the xxxx Plan. She noted that the text “could be interpreted in two different ways,” but she did not “believe there was any ambiguity for [her] and [District] staff.”

<sup>7</sup> The purpose of the xxxx xx, xxxx meeting was “to review the . . . written recommendations from [the Student’s xxxxxxxxxx xxxxxxxx] received on xxxxxx.” However, as noted below, the meeting adjourned before the participants could engage in any discussion of the Student’s Section 504 plan or the xxxxxxxxxxx xxxxxxxxxx recommendations.

<sup>8</sup> The District provided OCR an “Individual Health Plan” for the Student specifying the actions to take in the event he experienced anaphylaxis at school.

<sup>9</sup> Although the Complainant and her xxxxxx informed OCR that the xxxxxxxxxx xxxxxxxxxx reiterated the Allergist’s request for a xxxxxxx-free classroom, the District’s minutes of that meeting do not refer to any such request.

<sup>10</sup> Although the School nurse informed OCR that the revised provision was discussed at the xxxx xx, xxxx meeting and none of the attendees expressed concerns about it, the District’s minutes from the meeting do not reference such a discussion and the Complainant informed OCR that she never agreed to the change.

The District informed OCR that this change was based on a 2012 NASN Position Statement on Allergy/Anaphylaxis Management in the School Setting (Position Statement), and provided OCR a copy that includes a note written by the Principal stating that it had been “provided by [the xxxxxxxx]” and that a “xxxxxxx ‘free’ env[ironment was] not recommended.”<sup>11</sup>

The Principal subsequently sent a letter to the Complainant noting that “protocols for reduction of exposure to xxxxx” that “have been implemented in our school and on field trips” are “in accordance with recommendations from [NASN] and the [FARE] site as recommended by [the xxxxxxxx] in” the Summary.<sup>12</sup> The Principal informed OCR that after she received the xxxxxxx’s xxx letter from the Complainant, she was “not in any position to make any assumptions” regarding whether the request in the letter for a xxxxxxx-free classroom remained valid xxxxxx years later, and so “[t]here was a critical need to consult directly with the” xxxxxxx due to the “conflicting” and “limited” information available to the Section 504 team.

Throughout the xxxx-xxxx school year, the District sought the Complainant’s consent to speak with the xxxxxxx and the xxxxxxx xxxxxxx regarding the Student’s disability-related needs. With the exception of the xxxxxxxxxxx xxxxxxx’s participation in the xxxx xx, xxxx team meeting, the Complainant refused to provide her consent because she believed the District already had “the information needed to supply the 504 plan and should be doing so.” The District employees whom OCR interviewed all informed OCR that they were not aware of the District ever requesting consent from the Student’s parents to conduct its own medical evaluation of the Student’s disability-related needs at District expense after the Complainant refused to provide the District access to the Student’s medical providers. The Principal told OCR “[t]here was no need” to seek the Complainant’s consent for the District to conduct its own evaluation of the Student’s disability-related needs at District expense because his Section 504 team had access to sufficient evaluation data to design a plan that “adequately met his needs.”

The School nurse informed OCR that she advised School staff to follow what she believed to be the Position Statement’s recommendations for all students with food ingestion allergies in order to prevent students and their parents and guardians from developing a false sense of security regarding allergens in the school environment. She was aware the xxxxxxx had previously requested that the Student have an allergen-free classroom, but she did not believe this was a “reasonable accommodation” due to her belief that the request conflicted with the Position Statement.<sup>13</sup>

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<sup>11</sup> The Position Statement is no longer available on NASN’s website. *See* <https://www.nasn.org/nasn/advocacy/professional-practice-documents/position-statements>. The Position Statement provided to OCR states that “[a]ll environments in the school setting require special attention to protect students by limiting allergens or providing areas that are allergen safe,” but “[c]ompletely banning nuts or other foods is not recommended as it is 1) not possible to control what other people bring onto the school grounds, and 2) does not provide the allergic student with an environment where he/she can safely learn to navigate a world containing nuts.”

<sup>12</sup> When OCR informed the Principal that the Summary references neither NASN nor FARE, she noted that it does reference the CDC website, which in turn references NASN (albeit not the Position Statement) and FARE, and she believed that this was a sufficiently direct connection to attribute what she believed to be the NASN and FARE recommendations to the Allergist.

<sup>13</sup> When asked, the School nurse informed OCR that she was unsure whether the Position Statement recommends against providing xxxxxxx-free classrooms or xxxxxxx-free schools.

The Student’s teacher informed OCR that the Student’s Section 504 team decided to revise the xxxx Plan because the Principal and School nurse believed that reliance on the NASN recommendations constituted a “best practice” for the District and because the language in the xxxx Plan “was not reasonable or reflective of what we were accommodating for.” When asked whether she believed the District had access to sufficient evaluation data in the xxxxx of xxxx to develop a Section 504 plan designed to meet the Student’s individual needs, she responded “yes and no” because the Complainant had raised various, sometimes inconsistent concerns throughout the year and it was difficult to respond effectively to these concerns.

On xxxx xx, xxxx, the Student’s classmates participated in a School-sponsored field trip to a xxxxxxxxxxxx. The day before, the Complainant asked the Student’s teacher and guidance counselor whether xxxxxxxx xxxxxx and xxxxxxxx xxxxxxxxxxxx would be served “like [they] usually [are].” The teacher and counselor responded affirmatively, noted the School would “follow[] all lunch procedures to ensure [the Student’s] safety,” and emphasized they had “made the xxxxxxxxxxxx aware of our needs.” The Complainant responded that the School’s planned actions would constitute “attempted murder” of the Student “[s]o he’s probably not going.”

Later that day, the Complainant’s xxxxxxxx sent an email to the Superintendent about the field trip and other issues, and alleged the Student’s “civil rights as a disabled child” were being violated.<sup>14</sup> The Superintendent responded to the Complainant’s xxxxxxx, stating only that he was “referring this to our . . . attorney.” He copied the Principal, the Coordinator, and the District’s counsel on this response, which included the Complainant’s xxxxxxx’s original email. The Coordinator informed OCR this was the first time she was made aware of the aforementioned concerns.<sup>15</sup>

The Principal subsequently emailed the Complainant “to review the protocols for [the] field trip.” In the email, the Principal noted that lunches were to be placed in a secure container at the front of the bus and brought to the cafeteria space after the cleaning of cafeteria tables; the xxxxxxxxxxxx was aware of the Student’s medical needs and agreed to provide support; as of that afternoon, there was no request made for alternative bag lunches; and all allergen-free protocols would be followed. She also noted there had been no request for the Complainant to ride the bus, “but you are welcome to do so if you wish.” The Complainant responded that she did not “understand why an alternative lunch cannot be made as a substitute.”<sup>16</sup> District employees informed OCR that the District provides xxxxxxx xxxxxxxxxxx and xxxxxxx xxxxxxxxxxx on field

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<sup>14</sup> The email noted that the Complainant had “requested [that] the sandwich menu be changed” and that she be permitted to “ride the bus as a layer of protection for” the Student, but “she was denied” both requests. The Complainant’s xxxxxxx asserted that “[t]he only alternative to keep [the Student] safe is to remove him from the field trip.” She also alleged that the Student was “directed to sit next to a table that was served xxxxxx xxxxxxxx”; that he was “in a class in close proximity to a life threatening food”; that the Principal was aware of this but “refused to change the menu”; and that the Complainant had been “excluded in job opportunities” “[s]ince the original [Section] 504 meeting in xxxxxxxxxxx xxxx.”

<sup>15</sup> The Complainant and her xxxxxxx both reported that they had discussed some of these concerns with the Coordinator prior to xxxx xx, xxxx, although they were unable to identify the dates of these discussions.

<sup>16</sup> The Complainant informed OCR that the District told her she could not ride the bus because there were already enough adults scheduled to chaperone. She also asserted the District refused her offer to buy xxxx and xxxxxxx xxxxxxxxxxx for every student, and when she asked the Principal why she was insisting that xxxx xxxxxx and xxxxxx xxxxxxxxxxx be served on the field trip, the Principal responded “because I can.”

trips because they do not need to be xxxxxxxxx and are the most popular lunch option amongst students.

The xxxx and xxxx Plans provided that a “designated staff person will carry [the Student’s] xxxxxxxxxx. . . [during] all field trips.” They do not otherwise reference field trips. The Student’s teacher and the School nurse informed OCR that the protocols referenced in the Principal’s email and all provisions of the Student’s plan for the cafeteria would have been implemented had the Student attended the field trip. The Student’s teacher also noted that these same procedures had been implemented during a previous District field trip that the Student and Complainant had both attended without complaint or incident. The Complainant agreed with this assertion, but she explained that her response was different on this occasion because the Student had grown more xxxxxxx about the presence of xxxxxx xxxxxxxxxx after the xxxxxxxxxx xxxx xxxxxxxxxx xxx discussed above.

### *The District’s Response to the Complainant’s Grievance*

The District’s “Grievance Procedures for Persons with Disabilities” states that a “person with an identified disability or someone acting on that person’s behalf, may file a written grievance regarding compliance with state and federal disabilities laws with the building principal where the grievance arose or with the ADA/504 compliance coordinator.” The District’s nondiscrimination notice states that the Superintendent, rather than the Coordinator, “has been designated to handle inquiries regarding the [District’s] nondiscrimination policies,” and it does not reference Section 504 or its implementing regulation at 34 C.F.R. Part 104. Neither document distinguishes between formal and informal grievances or complaints.

On xxxxxx xx, xxxx, the Complainant spoke with the Coordinator about her concerns regarding the District’s treatment of the Student. The following day, the Complainant sent an email to the Coordinator noting that, “[p]er [the Coordinator’s] statement . . . yesterday, even thou[gh the Complainant had] complained multiple times, in order to file a complaint against the [School], [she] need[ed] to [send] it to [the Coordinator] as a . . . formal complaint.” The Complainant’s “formal complaint” stated that the Student’s “life is in danger as long as he attends” the School and noted that the Student would “no longer be attending [the School] until his life is a priority.”

The Coordinator informed OCR that she had had multiple conversations with the Complainant before the formal grievance on xxxxxx xx, xxxx, but the Complainant refused to speak with her after that date. The Coordinator informed OCR that she discussed the Complainant’s concerns with the Student’s teacher, his guidance counselor, the School nurse, and the Principal, asking each about the Student’s Section 504 plan and the training each had received on xxxxxxxxxxxxxx xxxxxxxxxxxxxx. She noted that the School nurse told her the xxxxxxxxx had referenced the Position Statement as an appropriate resource to use in developing a Section 504 plan for the Student. The Coordinator observed the protocols in place in the Student’s classroom. She noted that neither her own observations nor the responses of the interviewees raised any concerns. She informed OCR she believes the CDC never recommends that schools provide a xxxxxxxxx-free environment for students who are allergic to xxxxxxxxx.

On xxxxx xx, xxxx, the Coordinator sent the Complainant a letter summarizing the outcome of her investigation into the Complainant’s internal grievance. The letter states that the Coordinator “reviewed relevant information from the student’s file, including his [Section] 504 plan and interviewed numerous school staff.” It notes that the Coordinator “offered [the Complainant] the opportunity to confer with [her] about [the] grievance, but [the Complainant] . . . chose [not] to speak with” her. The letter states that all School staff who have contact with the Student “are trained by the school nurse 2–3 times per school year regarding . . . xxxxxxxxxxxxxxx of [the Student’s] xxxxxxx [sic].” The Coordinator noted her “understanding that [the Complainant] wishes the school to ban all xxxxxxx from the premises” and asserted the Student’s Section 504 plan “does not envision such an intervention.” She “conclude[d] that the . . . School has implemented reasonable modifications to address [the Student’s] xxxxxxx allergy, in accordance with his 504 plan.”

On xxxxx xx, xxxx, the Complainant sent an email to the Coordinator and Superintendent stating that she had “spoke[n] to [the Coordinator] on xx occasions regarding [her] complaints via the telephone,” asserting that neither she nor the Student’s father had ever “requested that the entire school be xxxxxxx free,” and alleging that the Coordinator “did not address all of [the] complaints specifically discussed in [the] last phone conversation in xxxxxx,” including the fact that “nobody complies [with] the medical recommendations on the [Section] 504 [plan] of keeping his classroom free of xxxxxxx xxxxxxx.”

The Coordinator informed OCR that she immediately forwarded the Complainant’s email to the Superintendent because she considered it to be an appeal of her decision and did not consider the merits of the contentions raised in the email. She informed OCR that she could not recall whether the Complainant had requested that the Student’s classroom or the School be free of xxxxxxx. The Coordinator reported that she did not determine whether the presence of xxxxxxx xxxxxxx in the Student’s classroom had denied the Student a FAPE or take any additional action related to this concern because she did not believe that the School had failed to implement the Student’s Section 504 plan during the xxxxxxx xxx xxxxxxxxxxxxxx xxx.

On xxxxxx xx, xxxx, the Superintendent sent the Complainant a letter noting that he was treating the Complainant’s xxxxx xx, xxxx email as a “grievance to the Superintendent.” The letter states, without further clarification, that the Superintendent had “reviewed the [Section] 504 grievance proceeding and [was] uphold[ing] the decision of” the Coordinator. The Superintendent told OCR that he spoke with the Coordinator about her investigation and reviewed all of the Section 504 team meeting minutes and medical documentation relevant to the development of the Student’s Section 504 plan. He also noted that he had observed the procedures in the Student’s classroom during the xxxx-xxxx school year and was satisfied that they were sufficient to meet the Student’s needs. He informed OCR that he was aware that the Complainant had disputed the Coordinator’s statement that she had requested that the school be free of xxxxxxxxxxx. However, he did not feel the need to resolve this dispute because “[r]egardless of the space, the guarantee of having a xxxxxxx free environment is not obtainable.”

The Complainant removed the Student from the School following the xxxx xxx xxxxxxx xxxxx and he did not return for the remainder of the xxxx-xxxx xxxxx xxxx. On xxxxxx xx, xxxx, the

Complainant requested and was granted permission to enroll the Student in another District xxxxxxxxxxxx school. The Complainant met with the principal of that school (New Principal) to request that the Student’s xxxx Plan revert to the language used in the xxxx Plan. On xxxxxxxxxxxx xx, xxxx, the New Principal sent the Complainant a letter stating that “it is reasonable for [the District] to provide a xxxxxxx free, xxxx xxx free, xxxx free, xxxx free, xxxx free, xxxxxxx xxx free, xxxxxxx xxx free *table* but it is not reasonable for any public school to provide a xxxxxxxxxxx free, xxxx xx free, xxx free, xxxxxxx free, xxx free, xxxxxxx xxx free, xxxxxxxxxxx xxx free *classroom*” (emphasis in original). Consequently, the Complainant withdrew the Student from the District and enrolled him in the xxxxxxxxxxx School in xxxxxxxxxxx xxxx.<sup>17</sup> The Complainant drove the Student to and from the xxxxxxx School each school day during the xxxx-xxxx school year when he was attending xxxxxxx grade.

*Alleged Discrimination Against the Complainant*

On xxxxxxxxxxxx xx, xxxx, the Complainant sent the Superintendent an email requesting that he “Cc [the Complainant’s xxxxxxx] on all correspondence” because she “ha[s] xxxxxxxxxxx disabilities . . . and need[s] her [xxxxxxxx’s] assistance.” The Superintendent responded that the District had “been advised by counsel to be consistent with our practice of communicating directly to the parent/guardian,” but “you are free to share any and/or all information with whomever you would like.” He subsequently forwarded the Complainant’s email and his response to the Principal and the Coordinator.

On xxxxx xx, xxxx, the Complainant sent the Superintendent an email to inform him that she had “made [him] aware that [she is] disabled [her]self” and to request “that [her] xxxxxxx . . . be informed on [sic] everything that involves” the Student. She noted that she had “signed a release form for [the School] as they requested allowing her [xxxxxxx] to be kept informed” and gave the District “permission once again to speak to her and keep her informed of all that involves” the Student. The Superintendent responded that the Complainant “may invite individuals to [Section] 504 team meetings, but communications will remain between school officials and parents.” He noted that if the Complainant “wish[es] a third party to receive written communications, that will remain [her] responsibility.” The Superintendent did not provide the Complainant any other explanation for his decision to refuse her request.

The District did not provide to OCR any written policies or procedures for individuals with disabilities to request modifications to the District’s policies, practices, or procedures. The Coordinator informed OCR that it is the District’s practice to provide reasonable modifications to the District’s policies, practices, or procedures when necessary to avoid discriminating against parents on the basis of their disabilities. She was not aware whether the District had ever

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<sup>17</sup> The xxxxxxx School developed a Section 504 plan for the Student that states the Student “will only access classrooms that utilize xxxxxxx free, xxxx xxx free, xxxxx, xxxxxxx, xxxxxxx xxx, and xxxxxxx xxx free environments,” and it emailed parents of the Student’s classmates that the Student’s “classroom will be xxxxxxx free,” requesting that parents “do not send any xxxxxxx or xxxxx containing products for your child to eat during snack in the classroom.” The head of the xxxxxxx School informed OCR that the “xxxxxxxx School has attempted to provide a xxxxxxx, xxxxxxx xxxx, xxx, xxxx, xxxxxxxxxxx xxx and xxxxxxxxxxxxxx xxx-free classroom to the [S]tudent” since he first enrolled, including by posting a “‘xxxx-free section’ sign . . . at the entrance of the classroom space” and monitoring student foods “to ensure a xxxx-free area.”

disputed that the Complainant had a disability or requested that the Complainant provide documentation to substantiate her disability or requested modification.

At the start of a xxxxxxxx xx, xxxx Section 504 meeting for the Student, the Complainant and her xxxxxxxx allegedly “requested that the meeting be taped” or, in the alternative, that her xxxxxxxx be permitted to take notes as an accommodation for the Complainant’s xxxxxxxx disability, and the Principal allegedly denied both requests. The District informed OCR that, at the start of the meeting, the Complainant’s xxxxxxxx “placed a tape recorder on the table and informed participants that she would be recording the meeting.” The Principal responded “that a recording was only allowed if all participants agreed to be recorded.”<sup>18</sup> When the teacher and guidance counselor “expressed concern over being recorded,” the Principal informed the attendees that “audio recording was not appropriate” and offered to review the guidance counselor’s meeting minutes with the Complainant and her xxxxxxxx at the conclusion of the meeting.<sup>19</sup> When the Complainant’s xxxxxxxx continued to insist on audio recording the meeting, the Principal adjourned the meeting. Each District employee who attended the meeting informed OCR that no one mentioned that the Complainant had a disability at the meeting, and all but the Principal asserted that they had never been informed that the Complainant had a disability.<sup>20</sup> Each District employee who attended the meeting also informed OCR that no one ever denied any meeting attendee the opportunity to take notes during the meeting, and the Complainant’s xxxxxxxx informed OCR that she did in fact take detailed notes during the meeting.

*Alleged Retaliation Involving xxxxxxxx xxxxxxxxxx*

The Complainant alleged that the District withheld opportunities for the Complainant to serve as a xxxxxxxx xxxxxxxx between xxxxxxxxxxxx xxxx and xxxxxx xxxx. The District provided OCR documentation indicating that the Complainant applied to xxxxxxxx xxxxxxx at the School in xxxxxxxx xxxx. The District added the Complainant to the School’s list of approved xxxxxxxx xxxxxxx and the Complainant subsequently xxxxxxx at the School on xxxx occasions in the xxxxxx of xxxx. She submitted a form to the District at the beginning of each subsequent school year to indicate her continued interest in xxxxxxxx xxxxxxx at the School, but the School did not invite her to xxxxxxxx xxxxxxx between the xxxx-xxxx and xxxx-xxxx school years.

The School’s clerical aide responsible for coordinating xxxxxxxx xxxxxxx assignments at the School reported that she first contacts current School staff because these individuals are the most knowledgeable of the students and the School. Next she reaches out to retired teachers or former District employees because these individuals similarly have a relatively greater understanding of the District’s policies and procedures. If the position still cannot be filled, she contacts individuals on the School’s approved xxxxxxxxxxxx xxxxxxxxxxxx list with the most experience xxxxxxxx xxxxxxx at the School, individuals who hold a xxxxxxxx certificate, and individuals with a xxxxxxxx xxxxxxxxxxxx, in that order. She informed OCR that she has

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<sup>18</sup> The District subsequently informed OCR that, pursuant to state law, it could not allow audio recording of the meeting unless all attendees agreed to be recorded. *See* N.H. Rev. Stat. Ann. 570-A:2(I)(a).

<sup>19</sup> In contrast, the Complainant and her xxxxxxx informed OCR that the only meeting attendee who expressed any concern about being recorded was the Principal.

<sup>20</sup> The Principal informed OCR that she learned from the Superintendent that the Complainant had alleged she has a xxxxxxxx disability, but the Complainant had never mentioned having a disability in the Principal’s presence and the Principal had never observed anything to suspect that the Complainant has a disability.

consistently utilized these criteria in coordinating xxxxxxxxxxxx xxxxxxxxxxx assignments since assigned this duty several years ago and that she did not contact the Complainant regarding any xxxxxxxxxxx opportunities during the xxxx-xxxx school year because she was able to fill all available positions with individuals who, under the criteria specified above, were more qualified than the Complainant.<sup>21</sup>

The District provided OCR the names of xxxxxxx School employees who xxxxxxx xxxxxxx at the School during the xxxx-xxxx school year. The District also provided OCR a spreadsheet indicating that xx non-School employees were on the School’s approved xxxxxxx xxxxxxx list during that school year. xxxxxxx of these individuals did not xxxxxx xxxxxxx in the District during the xxxx-xxxx school year, including the Complainant. The District also provided OCR the names of xx individuals on the School’s approved xxxxxxx xxxxxxx list for the xxxx-xxxx school year whom it identified as retired teachers or former District employees. Of these xx individuals, xxxx did not xxxxxxx xxxxxx in the District during the xxxx-xxxx school year. Of the xx individuals eligible to xxxxxxx xxxxx at the School (and not at any other District school) during the xxxx-xxxx school year, including the Complainant, only xx individuals – all but xxxxx a retired teacher or former District employee – xxxxxxxxxxx xxxxxx at the School during the xxxx-xxxx school year.

Every District employee interviewed by OCR stated that he or she was not aware of any District employee instructing anyone to select, or not select, the Complainant for any xxxxxxxxxxx xxxxxxxxxxx opportunity.

*Alleged Retaliation Involving the xxxx*

The Complainant alleged that the District retaliated against her for her disability-related advocacy on behalf of the Student by intentionally submitting false information to the xxxxx concerning the Student. On xxxxxx xx, xxxx, the District received a questionnaire from the xxxx relating to the Complainant’s application for xxxxxxx xxxxxxx xxxxxxx for the Student. The Principal submitted the completed questionnaire to the xxxx on xxxxxx xx, xxxx.

The Principal wrote the Student’s teacher’s name as well as her own name in the “[t]his form completed by” section of the questionnaire. She informed OCR that she completed the questionnaire without consulting with the Student’s teacher because the teacher was on xxxxxxx xxxxxx during the xxxxxxx of xxxx and, as a xxxxxxx xxxxxx employee, was not under contract with the District during the xxxxxxx in any event. The Principal reported that she wrote the teacher’s name on the questionnaire because she had reviewed records relating to the Student that had been completed by the teacher while filling out the questionnaire. The Principal noted that she had always been a member of the Student’s Section 504 team, had attended every Section 504 team meeting for the Student, and frequently observed him in the hallways and in his classroom. The Student’s teacher informed OCR that she had frequently discussed the Student with the Principal during the prior school year and she believed that the

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<sup>21</sup> The District informed OCR that the Complainant is not a member of School staff, a retired teacher, or a former District employee, and it noted that she does not have significant experience xxxxxxx xxxxxxx at the School. The District also noted that it does not have any reason to believe that the Complainant holds a xxxxxxx certificate or a xxxxxxx xxxxxx. The Complainant confirmed that the District’s description of her is accurate.

Principal had sufficient information regarding the Student from those conversations to accurately complete the questionnaire. When OCR provided a copy of the completed questionnaire to the Student's teacher, she informed OCR that she believed each response was accurate, and noted that she would have filled out the questionnaire in a materially identical manner. OCR reviewed the answers provided on the xxxxx questionnaire, which appeared consistent with the records and interview statements about the Student provided to OCR.

### **Legal Standards**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to each qualified student with a disability in its jurisdiction. 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.<sup>22</sup>

34 C.F.R. § 104.35(c) requires that recipients 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. Section 504 places the onus on school districts to identify and evaluate qualified students with disabilities to determine what may be necessary to provide those students a FAPE.<sup>23</sup> School districts must also ensure the appropriate parental consent to and participation in the evaluation process if they lack sufficient information regarding a student with a disability to conduct an individualized assessment of his or her needs.

Once a recipient completes the aforementioned evaluation process and determines what regular or special education and related services are necessary for a student to receive a FAPE, it must provide those services to the student. In investigating whether a recipient denied a student a FAPE, OCR first looks at the services to be provided as written in the student's Section 504 plan or as otherwise agreed to by the student's Section 504 team, deferring to the plain language of the Section 504 plan when there is a dispute regarding its terms. 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 Section 504 plan. 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.

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<sup>22</sup> 34 C.F.R. § 104.33(b).

<sup>23</sup> See *id.* §§ 104.32–104.35; see also *id.* Pt. 104 App. A (“Recipients must . . . pay for . . . those medical services necessary for diagnostic and evaluative purposes.”).

OCR interprets the Section 504 regulation, at 34 C.F.R. § 104.4, to require recipients to make reasonable modifications to policies, procedures, or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity or impose an undue financial or administrative burden on the recipient.<sup>24</sup> A recipient is only obligated to provide such reasonable modifications if it knows of, or if it would be reasonably expected to know of, a qualified individual's disability. Recipients may establish reasonable requirements and procedures for individuals with disabilities to provide documentation of their disability and request reasonable modifications; individuals with disabilities are responsible for obtaining the required documentation and for knowing and following the procedures established by the recipient.

Once a recipient is on notice of an individual's disability and that individual has complied with any reasonable documentation requirements adopted by the recipient, the recipient must consider in a timely manner alternative means to meet the needs of the individual along with their feasibility, cost and effect on the recipient's program. This deliberative procedure consists of a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between the recipient and the individual with a disability. Whether a recipient has to make modifications to its policies, practices, or procedures depends on the individual circumstances of each case, and requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him or her to enjoy meaningful access to the program. If a recipient denies a request for a modification, it should clearly communicate the reasons for its decision to the individual with a disability so that he or she has a reasonable opportunity to respond and provide additional documentation that would address the recipient's objections.

The anti-retaliation provision in Title VI of the Civil Rights Act has been incorporated by the Section 504 regulation, at 34 C.F.R. § 104.61, so as to extend Section 504's protections to any individual who has been intimidated, threatened, coerced, or discriminated against for the purpose of interfering with protected rights under Section 504.<sup>25</sup> A retaliation claim fails if there is no causal connection between the protected activity and the alleged adverse action. A retaliation claim also fails where the recipient identifies a legitimate, non-retaliatory reason for taking the alleged adverse action and there is insufficient evidence that the reason is pretextual.

The Section 504 regulation, at 34 C.F.R. § 104.8(a), requires recipients that employ 15 or more people to provide notice that it does not discriminate on the basis of disability in violation of Section 504 and its implementing regulation at 34 C.F.R. Part 104. The notification must also identify the employee whom the recipient has designated to coordinate its efforts to comply with Section 504 pursuant to 34 C.F.R. § 104.7(a). The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires recipients that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public entities that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

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<sup>24</sup> See also 28 C.F.R. § 35.130(b)(7) (Title II regulation imposing the same obligation).

<sup>25</sup> The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

## Analysis

### *Evidence of Noncompliance with Section 504 and Title II*

OCR finds that the District failed to comply with the xxxx Plan. The xxxx Plan specified that the District would provide the Student a “classroom[] that [is] xxxxxx, xxxxx xxxx, xxxxx, xxxxx, xxxxxxxx xxx and xxxxxxxxxxx xxx-free.” Multiple District employees conceded, however, that the District served xxxxxxxx xxxxxx and xxxxx xxxxxxxxxxx to the Student’s classmates, in the Student’s classroom and in his presence, on xxxxxxxx xx, xxxx. While the District argues that the Student’s classroom was serving as a “temporary cafeteria” rather than as a “classroom” at that time, the plain language of the xxxx Plan referred to the Student accessing only xxxxx-free classrooms and using a xxxx-free table in the cafeteria and made no reference to focusing on the functional use of a space.

This single failure rose to a denial of FAPE because of how the District responded. As previously noted, a school district’s response to an alleged failure to comply with a Section 504 plan is a factor OCR examines when determining whether that failure has resulted in the denial of a FAPE. When the Complainant notified the District that it had “ignored the [xxxx Plan]” by serving “xxxxxxxx xxxxxxx [and] xxxxxx xxxxxxx . . . in the [Student’s] classroom,” the District did not assess the impact of that failure upon the Student, including the degree of risk that the Student may have been exposed to given the nature of his disability, or review any individualized evaluation data regarding the Student’s individual educational needs. Rather, the District responded by changing the xxxx Plan to align with the District’s actions on the xxxxxxxxxxx xxx xxxxxxxxxx xxx and a general policy that the District wanted to follow (i.e., the District’s interpretation of the Position Statement).<sup>26</sup> At that time, however, the District unquestionably had the xxxxxxxx’s xxxx letter in which he explained that accidental ingestion of allergens could be “life-threatening” to the Student and requested a xxxx-free room through xxxxxxx grade. If the District questioned the validity of the xxxxxxxx’s recommendation or questioned how the xxxx letter should be read in light of the passage of time and/or the Summary, the District should have requested the Complainant’s consent to conduct a further evaluation of the Student’s disability-related needs at District expense.<sup>27</sup>

Accordingly, OCR finds that the District failed to comply with Section 504 and Title II with respect to Allegations 1(a) (xxxx-free classroom) and 7.

OCR also finds that the District failed to promptly and equitably respond to complaints alleging that the District had failed to implement the Student’s Section 504 plan. On xxxxxxx xx, xxxx,

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<sup>26</sup> OCR notes that while the Position Statement does recommend against school districts wholly banning allergens on “school grounds,” it does not speak to the appropriateness of allergen-free classrooms for students with life threatening allergies. However, the authorities that the Position Statement cites for the language that the District relied on to revise the Student’s Section 504 plan recommend that school districts provide allergen-free classrooms for students with life-threatening allergies, as do a number of the publications referenced on the CDC website cited by the xxxxxxxx.

<sup>27</sup> Although a school district may request that a parent or guardian share relevant individualized evaluation data with a student’s Section 504 team, Section 504 does not require parents or guardians to do so. As previously noted, Section 504 places the onus on school districts to identify and evaluate qualified students with disabilities to determine what may be necessary to provide those students a FAPE.

the Complainant emailed the Superintendent that the District had ignored the xxxx Plan by serving “xxxxxxxx xxxxxx [and] xxxxx xxxxxx . . . in the [Student’s] classroom.” The Complainant’s xxxxxxxx reiterated the allegation at a xxxx xx, xxxxx Section 504 team meeting. In a xxxx xx, xxxxx email to the Superintendent, the Complainant’s xxxxxxxx complained again that the Student had been “in a class in close proximity to a life threatening food.” Despite these repeated complaints about xxxxxxxxx xxxxx in the Student’s classroom in violation of the xxxx Plan, the Principal and the Coordinator responded by discussing a xxxxxxxx-free table and refusing to provide a xxxxxxxx-free school. Indeed, upon receiving notice of the outcome of the Coordinator’s investigation, the Complainant emailed the Superintendent and Coordinator to complain that the Coordinator had mischaracterized her allegation. She clarified that her complaint concerned the District’s failure to “keep[ the Student’s] classroom free of xxxxxxxxx xxxxxxxxx,” and had not requested a xxxxxxxx-free school. Neither the Coordinator nor the Superintendent responded to this email or otherwise addressed the Complainant’s actual concern. Instead, the Superintendent affirmed the Coordinator’s determination without explanation.<sup>28</sup> A response to an alleged failure to implement a Section 504 plan that does not address the allegation actually raised is not prompt and equitable.<sup>29</sup>

Accordingly, OCR finds sufficient evidence that the District failed to comply with Section 504 and Title II with respect to Allegation 4.

OCR also finds that the District failed to comply with Section 504 and Title II when it denied the Complainant’s request that the District copy her xxxxxxxx on all correspondence from the District. The Complainant, on at least xxxxx occasions, sent written requests to the Superintendent to copy her xxxxxxxx on correspondence because of the functional limitations imposed by her xxxxxxxx disability. Although the District may establish and publicize procedures for individuals with disabilities to request reasonable modifications and provide documentation of their disability, the District has not done so. Thus, the Complainant’s emails were sufficient to trigger the District’s obligation to engage in an interactive and collaborative process with the Complainant to determine whether the Complainant had a qualifying disability and, if so, to determine what modifications of the District’s policies, practices, or procedures, if any, were necessary to avoid discriminating against the Complainant on the basis of disability.

The District failed to do this. In response to both of the Complainant’s emails, the Superintendent merely restated the District’s typical practice to communicate directly with parents and not with third parties. The only explanation that the Superintendent offered the

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<sup>28</sup> Although the Coordinator informed OCR that she believed that the District had complied with the Student’s Section 504 plan because the classroom had been serving as a “temporary cafeteria” on the day in question, there is no evidence in the record indicating that the Coordinator or any other District employee had reached this determination prior to OCR conducting interviews of District employees, and the District never notified the Complainant or her xxxxxx of this determination.

<sup>29</sup> The District asserts that the Complainant’s formal complaint was vague and did not place the District on sufficient notice regarding the Complainant’s particular allegation, and the Complainant failed to respond to the District’s requests to clarify her complaint after it was filed. These concerns are undercut by the Complainant’s and her xxxxx’s repeated, specific allegations regarding the presence of xxxxxxx xxxxxx in the Student’s classroom that were presented to the District both orally and in writing prior to the formal complaint, as well as the Complainant’s prompt notification to the Coordinator that she had mischaracterized her allegation, to which the District failed to promptly and equitably respond.

Complainant for his refusal was a general reference to advice of counsel. He did not ask the Complainant any questions to substantiate the existence of her disability or to clarify any functional limitations that may be imposed by it, request any documentation from the Complainant regarding these issues, or offer the Complainant an opportunity to communicate further with any District employee regarding her request.

Accordingly, OCR finds that there is sufficient evidence that the District failed to comply with Section 504 and Title II with respect to Allegation 8.

Finally, OCR finds that the District failed to disseminate an adequate notice of nondiscrimination pursuant to Section 504. As discussed above, the notice states that the Superintendent, rather than the Coordinator, “has been designated to handle inquiries regarding the [District’s] nondiscrimination policies,” and the notice does not reference Section 504 or its implementing regulation, as required by 34 C.F.R. § 104.8(a). Accordingly, OCR finds that there is sufficient evidence that the District failed to comply with Section 504 with respect to Allegation 9.

*Insufficient Evidence of Noncompliance with Section 504 and Title II*

OCR finds insufficient evidence that the District denied the Student a FAPE by failing to implement a provision of his Section 504 plan providing that “[a]ll [School] staff are trained in the need for and use of xxxxxxxxxx.” All five School employees interviewed by OCR informed OCR that they received the required training, accurately described when to xxxxxxxxxx xxxxxxxxxx, and how to do so in appropriate circumstances. Although there is no contemporaneous documentation of the training in the record, neither Section 504 nor Title II requires the District to document the training that it provides to its staff.

OCR also finds insufficient evidence that the District failed to ensure that the Student’s placement was determined by a group of persons that included someone knowledgeable about the meaning of a medical evaluation of the Student. The School nurse attended the Student’s Section 504 team meetings, including the meeting with the xxxxxxxxxxxx xxxxxxxxxxxx. There is no evidence in the record indicating that the School nurse, a trained health professional, was not knowledgeable about the meaning of evaluation data available at the Student’s Section 504 team meetings, including information from the xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx.

OCR also finds insufficient evidence that the District denied the Student an equal opportunity to attend a xxxxxxxx xxxx field trip based on his disability. The xxxx Plan in effect during the District’s xxxxx xx field trip provides that a “designated staff person will carry [the Student’s] xxxxxxxx. . . . [during] all field trips” and does not otherwise reference field trips. The District informed OCR that it would have implemented the xxxxxxxx provision, the provisions normally implemented in the School’s cafeteria, and additional safeguards had he attended the field trip.<sup>30</sup> The record contains no medical recommendations relating to field trips, and as previously mentioned, the Student’s Section 504 plan does not speak to this issue. If the Complainant was

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<sup>30</sup> Although the parties dispute whether the District initially denied the Complainant the opportunity to ride the bus to the field trip with the Student, it is undisputed that the District ultimately did extend that invitation to the Complainant. The parties also dispute whether the Complainant requested, or offered to buy, alternative bag lunches for all of the students attending the field trip.

dissatisfied with the Student’s Section 504 plan as it relates to field trips, such concerns are more appropriately addressed through an impartial hearing, such as a due process hearing.

OCR also finds insufficient evidence that the District denied the Complainant’s request to record, or have her advocate take notes, during a xxxxxxxx xx, xxxx meeting as an accommodation for her disability. As an initial matter, each District employee who attended the meeting informed OCR that no one had denied any meeting attendee the opportunity to take notes, and the Complainant’s xxxxxxxx confirmed that she did in fact take detailed notes during the meeting. OCR found insufficient evidence that the Complainant or her xxxxx expressed that the request to record was related in any way to the Complainant’s disability. Although the Complainant and her xxxxxxxx allege that they explained this, the District’s minutes from the meeting make no reference to the Complainant’s disability and each District employee who attended the meeting informed OCR that no one referred to the Complainant’s disability during the meeting.

OCR also finds insufficient evidence that the District withheld opportunities for the Complainant to serve as a xxxxxxxxxxx xxxxxxx between xxxxxxxx xxxx and xxxx xxxx because she pressed the District to comply with the Student’s Section 504 plan. As the Complainant admits, the District did not hire her as a xxxxxxxx xxxxxxx beginning in the xxxx-xxxx school year, which is before she pressed for compliance with the xxxx Plan. Moreover, the District proffered a legitimate, non-retaliatory reason for the action at issue, for which OCR found no evidence of pretext. The clerical aide explained what criteria she employs in selecting candidates to xxxxxxxxxxx xxxxxx at the School, the District’s records corroborate the clerical aide’s use of that criteria, and the Complainant admitted she does not satisfy most of the relevant criteria. Furthermore, every District employee OCR interviewed, including the clerical aide, was unaware of any instruction to select, or not select, the Complainant for any xxxxxxxxxxxxxx xxxxxxx opportunity in the District.

Finally, OCR finds insufficient evidence that the District retaliated against the Complainant for her disability-related advocacy on behalf of the Student by intentionally submitting false information to the xxxxx in the xxxxxxx of xxxx. Specifically, OCR did not find sufficient evidence that the Principal, who completed and submitted the xxxx questionnaire in the xxxxxxxx of xxxx, made any intentionally false statements or omissions on the questionnaire that could have had a materially adverse impact on the Complainant’s application for xxxxxxxx xxxxxxx for the Student. OCR found no evidence in the record indicating that any of the responses concerning the Student were contrary to the beliefs of the Principal or the Student’s teacher at the time the questionnaire was completed. The Student’s teacher reviewed the questionnaire, informed OCR that she believed that each response was accurate, and noted that she would have filled out the questionnaire in a materially identical manner.

Accordingly, OCR finds insufficient evidence that the District failed to comply with Section 504 and Title II with respect to Allegations 1(b), 2, 3, 5, and 6.

### **Conclusion**

During negotiations, the District represented to OCR that it has worked extensively since the underlying events in xxxx–xxxx to enhance its compliance with Section 504 and Title II.

Specifically, the District represented that the Superintendent discusses Section 504 and Title II obligations with all candidates for teaching/professional positions prior to hiring; hired teachers participate in an orientation program focusing in part on Section 504 plan implementation; and District administrators and special education teams meet at least bi-monthly to review any allegations of discrimination and to discuss proper development and implementation of students' plans. The District also represented that, since October 2017, it has conducted biannual Section 504 trainings for Section 504 team chairpersons, and teachers have reviewed and signed a "Memorandum of Understanding of Implementation Responsibilities of IEPs and 504 plans" each time a student's Section 504 plan/IEP has been updated. The District further represented that it established a "Special Services Family Engagement Council" in the summer of 2019 to provide parent education and training on topics such as the District's Section 504 referral processes.

On January 13, 2020, 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 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance.<sup>31</sup> 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 if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement entered into by the District on January 13, 2020, if the District fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, 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.

The Complainant has a right to appeal OCR's insufficient evidence determinations within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The

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<sup>31</sup> The *Case Processing Manual* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

Please be advised that the District may 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. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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](mailto:Paul.Easton@ed.gov).

Sincerely,

/s/

Ramzi Ajami  
Acting Regional Director

Enclosure

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Jeanne M. Kincaid, Esq. (via email: [JKincaid@dwmlaw.com](mailto:JKincaid@dwmlaw.com))