



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

April 30, 2020

Darryll McCall, Ed.D.  
Superintendent  
Wachusett Regional School District  
1745 Main Street  
Jefferson, MA 01522  
Via email to: [darryll\\_mccall@wrsd.net](mailto:darryll_mccall@wrsd.net)

Re: Complaint No. 01-19-1221  
Wachusett Regional School District

Dear Superintendent Darryll McCall:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against the Wachusett Regional School District (District). The Complainant alleged that the District discriminated against her clients (Parents) and their son (Student) on the basis of the Student's disability. Specifically, the complaint alleges that the District failed to respond appropriately to disability-based harassment by the Student's peers (Allegation 1). The complaint also alleges that the District unilaterally changed the Student's placement to provide the Student with a 1:1 aide, without convening an Individualized Education Program (IEP) team meeting (Allegation 2). Finally, the complaint alleges that the District retaliated against the Student by assigning the Student a 1:1 aide during XXXXXXXX; imposing discipline on the Student; and XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX (Allegation 3). As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement).

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 any program or activity receiving federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or their implementing regulations, 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 entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

### Summary of Preliminary Investigation

During the XXXXXXXX school year, the Student was a XXXXXXXXXXXXXXXXXXXX student at the District's XXXXXXXXXXXXXXXX (School). The Student was determined to be eligible for special education related aids and services under an Individualized Education Plan (IEP) on XXXXXXXXXXXXXXXX, due to XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX, and XXXXXXXXXXXXXXXX. On XXXXXXXXXXXXXXXX, at the Complainant's request, the District held another IEP team meeting and revised the Student's IEP, to provide that the Student receive a range of special education services, including (1) XXXXXXXXXXXXXXXX, (2) XXXXXXXXXXXXXXXX, (3) XXXXXXXXXXXXXXXX, (4) XXXXXXXXXXXXXXXX, (5) XXXXXXXXXXXXXXXX, (6) XXXXXXXXXXXXXXXX, (7) XXXXXXXXXXXXXXXX, (8) XXXXXXXXXXXXXXXX, (9) XXXXXXXXXXXXXXXX, (10) XXXXXXXXXXXXXXXX, (11) XXXXXXXXXXXXXXXX).

On XXXXXXXXXXXXXXXX, the Principal of the School received a report that the Student had XX. In response to this report, the Principal conducted an investigation. Based on that investigation, the Principal determined that the Student had engaged in a physical altercation with the student in question after XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, and imposed an out-of-school suspension of XXXXXXXX school days for that misconduct. In addition, the Principal informed the parents that the Student would be XXXXXXXXXXXXXXXX following his return to school from his short-term suspension. The Complainant advised OCR that at the Student's parents' request, the suspension was subsequently rescinded by the District's Superintendent after a meeting with the Student's parents, because the District had erroneously concluded that the Student was solely responsible for the misconduct XXXXXXXX.<sup>1</sup>

In late XXXXXXXX, the Complainants wrote to the Principal to report that they and the Student believed that the Student was being XXXXXXXXXXXXXXXX due to the previous incident in XXXXXXXX. The Complainants advised the Principal that they were not seeking to pursue a formal complaint but simply were requesting that the Principal meet with the students XXXXXXXX and encourage a positive and welcoming environment for all students. The District advised OCR that the Principal subsequently met with the students XXXXXXXX in accordance with that request.

In early XXXXXXXX, the Principal received multiple complaints from parents of students alleging that the Student had been engaging in bullying and discriminatory harassment of his peers on their XXXXXXXX and at school. The conduct complained of included, but was not limited to, repeated harassment of a fellow student on the basis of perceived disability, directing disparaging comments toward fellow students based on national origin, gender and/or sexual orientation, and on the basis of race.

The complaining parents reported that the Student's bullying and discriminatory harassment of fellow students had created a hostile environment for the students at school and had resulted in a number of students being no longer willing to XXXXXXXX. Shortly after the filing of

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<sup>1</sup> The XXXXXXXX advised the Superintendent that the bus video showed that another student had also hit the Student.

those complaints, the Student's parents alleged that the Student himself was being bullied through social exclusion by his fellow students due to the students' resistance to interacting with the Student XXXXXXXXXXXX. The Complainants advised OCR that with respect to the parallel investigations in XXXXXX, the District failed to respond appropriately to disability-based harassment by the Student's peers, because the determination did not include a discussion of or consideration of the Student's disability.

In response to these complaints,<sup>2</sup> the Principal conducted an investigation and determined that the Student had engaged in conduct at school and XXXXXXXX that violated both the District's anti-bullying policy as well as District policies prohibiting discriminatory harassment. The investigation did not support the Student's allegation that his XXXXXXXX had engaged in bullying of him through social exclusion. The Complainant advised OCR that XXXXXXXXXXXX disputed portions (but agreed with other portions) of the Principal's findings and notified him of their disagreement by email. As a result of the Principal's findings, a hearing was conducted to consider the Student's possible short-term suspension from school. Based upon the evidence presented at that hearing, the Student was suspended from school for a period of XXXXXXXX school days and was assigned to alternate, XXXXXXXXXXXXXXXXXXXX for the remainder of the school year.

Based upon the investigation findings, the Principal also developed a bullying and harassment intervention plan ("Safety Contract") to limit the Student's contact with the confirmed targets so as to restore and ensure a non-hostile school environment for the students that the Student was found to have targeted. This plan included a "No Contact" order, reassignment of the student to general education XXXXXXXXXXXX classes away from the confirmed targets, and the assignment of the student to alternate, XXXXXXXXXXXXXXXXXXXX for the remainder of the school year. The Student's parents declined to sign the Safety Contract or no contact order. The District also convened a meeting of the Student's IEP Team to consider the need for additional supports or services to address the Student's bullying-related needs on XXXXXXXXXXXXXXXXXXXX. At that meeting, the Team recommended that a Functional Behavior Assessment (FBA) of the Student be conducted by the District.

In early XXXXXXXXXXXX, the Principal received several reports that, despite the previous investigation and the disciplinary sanctions imposed, the Student was continuing to bully, harass and retaliate against the previously identified targets of his misconduct. These reports included allegations that the Student was continuing to make derogatory remarks and gestures toward a fellow student based on her perceived disability and directed comments to the previously identified targets regarding those students' previous reports of bullying and harassment by the Student.

Shortly thereafter, in XXXXXXXXXXXX, the Principal assigned a staff member to XXXXXXXXXXXX the Student throughout the school day, ostensibly to prevent further bullying and harassment of the targets and other students, which remained in place until terminated on or about XXXXXXXXXXXX in accordance with the Parents' requests.

In XXXXXXXXXXXX, in response to the assignment of a staff member to XXXXXXXXXXXXXXXXXXXX the Student throughout the school day, the Student's parents filed a complaint with the District's superintendent that the Principal was inappropriately targeting and harassing the Student.

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<sup>2</sup> Those of the complaining parents about the Student's alleged bullying, and the Complainants XXXXXXXX

Subsequently the District's Section 504 Coordinator, and the District's Interim Administrator of Special Education investigated the Parents' allegations against the Principal. Based upon interviews of witnesses and review of relevant documentation, the Section 504 Coordinator and Director of Special Education determined that there was insufficient evidence to support a finding that the Principal or other School administrators had engaged in bullying of the Student as defined under M.G.L. c. 71, § 370 or the District's Bullying Prevention and Intervention Plan or had discriminated against the student on the basis of his disability.

**Allegation 1:**

With respect to Allegation 1, the Complainant alleged that the District failed to respond appropriately to disability-based harassment by the Student's peers.

**Legal Standard**

A District's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the District's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a District must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

**Analysis**

On XXXXXXXXXX, the Principal sent a letter to the Student's parents advising that he would be suspended for XXXXXX days and have to sit at the XXXXXXXX until XXXXXXXX. The letter followed an investigation by the Principal into allegations the Student had bullied other students XXXXXXXX. Following complaints by the Student's parents, the Principal rescinded

the Student's suspension in a letter dated XXXXXXXX, while still enforcing the requirement that the Student sit at the XXXXXXXX.

In early XXXXXXXXXXXX, the Principal received complaints from parents of three students alleging that the Student had been engaging in bullying and discriminatory harassment of his peers on their XXXXXXXXXXXX and at school. The conduct complained of included, but was not limited to, repeated harassment of a fellow student (Student 1) on the basis of perceived disability, directing disparaging comments toward fellow students based on national origin, gender and/or sexual orientation, and on the basis of race. Specifically, it was alleged that the Student directed repeated disparaging remarks at Student 1 Student 2, and Student 3 both XXXXXXXXXXXX and at school.

In or around the time of the filing of those complaints,<sup>3</sup> the Student's parents alleged that the Student himself was being bullied through social exclusion by his fellow students due to the students' resistance to interacting with the Student XXXXXXXX. The Complainants advised OCR that with respect to the parallel investigations in XXXXXX, the District failed to respond appropriately to disability-based harassment by the Student's peers because the determination did not include a discussion of or consideration of the Student's disability and its role in the behavior.

In response to the complaints of the Student's peers and the Student's parents' complaint about the Student's peers, the Principal conducted an investigation by interviewing the Student, Student 1, Student 2, Student 3, and ten other students, including three student witnesses identified by the Student himself. On XXXXXXXXXX, the Principal notified the Student's parents in writing of the outcome of his investigation of the complaints, including the Student's parents' complaint. The Principal determined that:

- “Based upon my investigation of the complaints of Students 1, 2 and 3, I find that there is a clear preponderance of evidence to support the determination that [the Student] has engaged in the bullying of Student 1, Student 2 and Student 3 in violation of the rules for student conduct at the [the School], District policies, and M.G.L. c. 71, § 370.”
- “I find no basis to support the allegations of [the Student’s] parents that [the Student] has been bullied (through social exclusion) on the school bus.”

Based on the conclusions outlined above, the District took the following actions to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring, including the following:

1. [The Student] was removed from XXXXXXXX for the remainder of the XXXXXXXX school year. Due to his status as an eligible student with a disability, however, [the Student] will be provided with XXXXXXXXXXXX by the District to and from school via a XXXXXXXX to ensure his continued access to his educational services.

<sup>3</sup> On XX.

2. A "No Contact" order was imposed prohibiting [the Student] from having any direct contact with Student 1, Student 2, or Student XXXXXXXX, at school, or via social media for the remainder of the XXXXXXXX school year.<sup>4</sup>
3. [The Student] was reassigned to an alternative XXXXXXXXXXXXXXXX class for the remainder of the XXXXXXXX school year which may also result in additional schedule changes to allow for all of these changes to be made.
4. [The Student's] IEP Team was convened in XXXXXXXX to consider the need for supplemental services to facilitate [the Student's] avoidance of bullying, harassment and retaliation in the future.<sup>5</sup>

The Complainant advised OCR that she believed that the XXXXXXXXXXXXX investigations were not equitable because they did not involve a discussion of or consideration of the Student's disabilities, and because the Principal did not interview the Student's parents; although the Principal did not interview the parents of Students 1, 2 and 3 either.

OCR determined that the District's Bullying Intervention and Prevention Plan, (BPIP), provides that the administrator investigating alleged bullying will interview parents.<sup>6</sup> The BPIP specifically provides that "during an investigation, the principal and/or his or her designee will interview students, staff, witnesses and parents or guardians." OCR further determined that the investigation involved making factual determinations about the conduct of the students, including the Student, and the investigation was not related to the Student's disability; nor was it a manifestation hearing to determine whether the Student's misconduct was related to or caused by the Student's disability. OCR also reviewed the Student's IEP and determined that the IEP does not contain any provision related to the discipline of the Student (such as a provision that the Student is exempt from discipline or that any disciplinary action must involve prior consideration of the Student's disability).

OCR has not concluded its investigation into whether the District failed to respond appropriately to disability-based harassment by the Student's peers. Prior to OCR deciding regarding Allegation 1, the District expressed interest in resolving the allegation pursuant to a Resolution Agreement.

### **Allegation 2:**

The Complainant also alleged that the District unilaterally changed the Student's placement to provide the Student with a 1:1 aide, without convening the Student's IEP team.

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<sup>4</sup> The parents declined to sign the Safety Contract or no contact order.

<sup>5</sup> After a disciplinary hearing on XXXXXXXXXXXX, the Student was also suspended for XXXXXXXX school days.

<sup>6</sup> <http://www.wrsdonline.net/parentinformation/BullyingPreventionPlan.pdf>

### Legal Standard

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.

In investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. If OCR finds that a district has not implemented a student's plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to convene an IEP team meeting, and/or re-evaluate a student with a disability before any significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities.

### Analysis

In response to the investigation of the complaints of bullying/harassment discussed above with respect to Allegation 1, the Principal requested that the Student's IEP team be convened in XXXXXXXX to consider the need for supplemental services to facilitate the Student's avoidance of bullying, harassment and retaliation in the future. A meeting was convened on XXXXXXXX. The IEP team proposed that the Student continue in general education classes with pullout services for counseling as a result of the TEAM meeting. The proposed services included counseling two times per week and added counseling services once in a group in addition to the one session of individual counseling time. The District advised OCR that the Team proposed this increase in services due to a lack of effective progress as it relates to behavior.<sup>7</sup>

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<sup>7</sup> Specifically, with respect to the Student's bullying/harassment of his peers.

OCR reviewed the Student's IEP dated XXXXXXXXXXXXXXXXXXXX. The IEP provided that the Student would receive the following related aids and services:

- XXXXXXXXXXXXXXXXXXXX;
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.
- XXXXXXXXXXXXXXXXXXXX.

The Student's revised IEP did not provide that the Student be assigned a 1:1 aide; however, in or around XXXXXXXX, the Principal of the School assigned a school staff member to "provide XXXXXXXX of the Student's compliance with the bullying and harassment interventions previously imposed by the Principal so as to prevent further bullying and harassment of the targets and other students." The Complainants alleged that in XXXXXXXX to the Student, without including it in the Student's IEP, the District unilaterally changed the Student's placement to a more restrictive environment. The District advised OCR that the XXXXXXXX was not imposed as a part of the special education process; instead, an individual at the school was XXXXXXXX the Student in the school environment because the Student was found to be a perpetrator of continued bullying and harassment. The Complainants also advised OCR that the adult staff member collected data which was subsequently used in a functional behavioral analysis (FBA) of the Student in or around XXXXXXXX, as a 1:1 aide would do.

OCR has not concluded its investigation into whether the District's XXXXXXXX the Student throughout the school day constituted a unilateral change in placement. Prior to OCR making a determination regarding Allegation 2, the District expressed interest in resolving the allegation pursuant to a Resolution Agreement.

### **Allegation 3:**

The Complainant further alleged the District retaliated against the Student and/or the Student's parents by assigning the Student a 1:1 aide during XXXXXXXX; imposing discipline on the Student; and XXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

### **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation. In analyzing



an individual's claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity;<sup>8</sup> (2) the individual experienced an adverse action caused by the recipient;<sup>9</sup> and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. However, if any one of the above elements cannot be established, then OCR cannot infer that retaliation occurred and will dismiss a complaint. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR next examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

### Analysis

OCR determined that the Student's parents engaged in protected activity by advocating for the Student in IEP meetings and in response to the XXXXXXXX XXXXX incident and filed a complaint of bullying/harassment on behalf of the Student in early XXXXXXXX. OCR also determined that the District was aware of the Students' parents' protected activity.

### Allegation 3(a) Assignment of a 1:1 aide during XXXXXXXX

With respect to Allegation 3(a), the Complainant alleged that the District retaliated against the Student by assigning an adult XXXXXXXX the Student throughout the School day. An adverse action is something that could deter a reasonable person from engaging in further protected activity. The provision of an additional aide or service such as XXXXXXXX could reasonably be determined not to be an adverse action if sought by a student's parents. In this case, however, OCR notes that XXXXXXXX of the Student was not sought by the parents, was not included in the Student's IEP, and the Student was in XXXXXXXX. It is possible, from the Student's perspective, that the assignment of an adult XXXXXXXX the Student throughout the School day could reasonably be interpreted to be an adverse action. OCR also determined that the assignment of the adult staff member XXXXXXXX the Student occurred approximately one month after the XXXXXXXX complaints, therefore a causal connection between the protected activity and the adverse action could reasonably be inferred.

The District advised OCR that it required the adult staff member XXXXXXXX the Student throughout the School day because in early XXXXXXXX, the Principal received several reports that, despite the previous investigation and the disciplinary sanctions imposed, the Student was continuing to bully, harass and retaliate against the previously identified targets of his misconduct. These reports included allegations that the Student was continuing to make derogatory remarks and gestures toward a fellow student based on her perceived disability and directed comments to the previously identified targets regarding those students' previous reports of bullying and

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<sup>8</sup> A "protected activity" is the exercise of a right that is protected under OCR's non-discrimination laws.

<sup>9</sup> An adverse action is something that could deter a reasonable person from engaging in further protected activity.

harassment by the Student (in effect, that the Student was himself retaliating against the targeted students). The District advised OCR that the prevention of the Student's continued bullying and harassment constituted a legitimate non-retaliatory reason for the assignment of the adult staff member.

The Complainant advised OCR that the Principal's assignment of the adult XXXXXXXX the Student was motivated by the rescission of the Student's suspension in XXXXXXXX. However, the Complainant did not provide, and OCR did not find, any information to suggest that the Principal's motive was retaliatory, or that the District's proffered legitimate non-retaliatory reason was a pretext for unlawful retaliation. Students reported to the Principal that the Student continued to engage in the conduct, the parents declined to sign the "Safety Contract" or "no contact order," and the Principal believed that XXXXXXXX XXXXXXXX of the Student was the only way to prevent the recurrence of the harassment. OCR reviewed the reports made by the students involved about alleged continued harassment and the unsigned documents. The District advised OCR that it had a responsibility to prevent the recurrence of the harassment.

Based on the foregoing, OCR determined that the District proffered a legitimate non-retaliatory reason for the assignment of the adult XXXXXXXX the Student.<sup>10</sup> Accordingly, OCR determined that there was insufficient evidence to establish, by a preponderance of the evidence, that the District retaliated against the Student, by assigning an adult XXXXXXXX the Student, and OCR will take no further action with respect to Allegation 3(a).

*Allegation 3(b) Imposing discipline on the Student*

On XXXXXXXXXX, the Principal of the School received a report that the Student had XX XXXXXXXXXXXXXXXX. In response to this report, the Principal conducted an investigation. Based on that investigation, the Principal determined that the Student had, as alleged, engaged in a physical altercation with the student in question after taking that student's water bottle and bullying of his peers on the school bus, and imposed an out-of-school suspension of three (3) school days for that misconduct. In addition, the Principal informed the parents that the Student would be assigned a seat on the bus following his return to school from his short-term suspension. The District also advised OCR that at the Complainants' request, the suspension was subsequently rescinded. The Complainant and the Student's parents advised OCR that the suspension was rescinded because the Principal's factual determination was incorrect, the other student involved should have been disciplined because he had also struck the Student, and that they met with the Superintendent to discuss the discipline, after which the suspension was removed from the Student's disciplinary record.

On XXXXXXXXXXXXXXXXXXXX, as a consequence of the investigation(s) conducted by the Principal into the allegations made by Students 1, 2, and 3, and the complaint of the Student's parents, a disciplinary hearing was convened, and the Student was suspended out-of-school for seven (7) school days. Accordingly, OCR determined that the October and December

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<sup>10</sup> Although, as indicated with respect to Allegation 2, the question as to whether the assignment of an adult constituted a unilateral change in placement was not determined.

suspensions represented adverse actions,<sup>11</sup> and were taken after the communication and advocacy on behalf of the Student by his parents. The Complainants advised OCR that the December suspension was taken because the Principal was frustrated that the District had rescinded the Student's October suspension. However, the Complainant and the Student's parents did not provide, and OCR did not find, any information to corroborate that the Student's suspensions were not taken because of the Student's conduct, but instead as a pretext for unlawful retaliation.

The District advised OCR that the Student's suspension was in response to the Student's bullying and harassment of Students 1, 2 and 3, as determined by the outcome of the Principal's XXXXXXXX investigation. As stated above, in early XXXXXXXX, the Principal received complaints from parents of students alleging that the Student had been engaging in bullying and discriminatory harassment of his peers on their shared school bus and at school. The Principal conducted an investigation and determined on XXXXXXXXXXXXXXXXXXXX that the Student had engaged in the conduct complained of, and on XXXXXXXXXXXXXXXXXXXX, the Student was suspended for seven days.

Based on the foregoing, OCR determined that there was insufficient evidence to establish, by a preponderance of the evidence, that the District retaliated against the Student, by suspending the Student in response to the Student's conduct and the investigations, and OCR will take no further action with respect to Allegation 3(b).

*Allegation 3 (c) Providing false and/or inflammatory information about the Student to a private school*

The Complainants also advised OCR that, in retaliation for their protected activity, the District provided incorrect, incomplete, or inflammatory information about the Student to a private school, thereby causing such school to deny him admission.

An adverse action is something that could deter a reasonable person from engaging in further protected activity. The District denied that its staff provided incorrect, incomplete, or inflammatory information about the Student to a private school. In or around XXXXXXXX, the Student's sixth grade teacher from a previous school year (teacher) and the School's Assistant Principal and chair of the Student's IEP team (the AP), were contacted by the Student's parents, who requested that the teacher and AP respond to contacts by the private school, and provided releases for them to do so. The teacher advised OCR that in her recommendation, she stated that the Student would thrive and succeed in a structured environment, because she believed that the class sizes at the private school would be smaller, but she did not provide inaccurate, incomplete or inflammatory information to the private school. The AP advised OCR that she spoke to the director of admissions at the private school, but only spoke about the Student's IEP, not discipline. The director told the AP that his biggest concern was what the parents had written as the parent concerns in the IEP, which touched on harassment and bullying, and contained information about the Student's experiences at the School related to harassment and bullying.

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<sup>11</sup> The October suspension was rescinded at the Student's parents' request. However, the determination to suspend the Student can reasonably be interpreted as an adverse action.

Based on the foregoing, OCR determined that the information provided to the private school, even if it had included information about the Student's discipline, would not have been inaccurate, incomplete or inflammatory, because the Student was subjected to discipline, and because the Student's parents had written concerns about bullying and harassment in the Student's IEP, which was reviewed by the private school. Notwithstanding that the information about the Student's discipline would not have been inaccurate, incomplete or inflammatory, the District staff involved in providing the recommendations denied that they discussed the Student's disciplinary history. OCR also reviewed contemporaneous emails and documentation that established that the AP asked the Principal if she should discuss the Student's disciplinary history, and the Principal directed her not to do so. The Complainant did not provide, and OCR did not find, any information to establish that the information provided to the private school was inaccurate, incomplete, or inflammatory.

With respect to Allegation 3(c), OCR determined that there was insufficient evidence to establish that there was an adverse action to which the Student was subjected. Accordingly, OCR determined that there was insufficient evidence to establish that the District retaliated against the Student, by providing incorrect, incomplete, or inflammatory information about the Student to a private school, thereby causing such school to deny him admission.

#### The District's Section 504 Policies

OCR also reviewed the District's Section 504 Policy and Section 504 Parent/Student Rights in Identification, Evaluation and Placement. OCR noted that the Section 504 Policy accurately describes the major terms of the Section 504 identification, evaluation and placement of students with disabilities, although it lacks a statement or description of the District's child find responsibility. OCR also noted that the 504 Parent/Student Rights policy states that the parents or student have a right to an impartial hearing if they disagree with the Section 504 team's determination, but does not describe how the parents file for due process with the District, or identify the person or persons to whom they should direct their appeal. Prior to OCR making a determination regarding the District's policies, the District expressed interest in resolving OCR's concerns pursuant to a Resolution Agreement.

#### Conclusion/Resolution

With respect to Allegation 3, OCR determined that there was insufficient evidence to establish, by a preponderance of the evidence, that the District retaliated against the Student and/or the Student's parents by assigning the Student a 1:1 aide during XXXXXXXX; imposing discipline on the Student; and providing false and/or inflammatory information about the Student to a private school. With respect to Allegations 1 and 2 and OCR's review of the District's Section 504 policies, OCR has not completed its investigation and accordingly has not reached a compliance determination, as described above. The Resolution Agreement will ensure that:

- The District will revise its Section 504 Policy to include information about the District's obligation to locate and identify students with disabilities in the District (child find). The District will also revise its Parent/Student Rights in Identification, Evaluation and Placement policy to provide information about how parents and/or students can file for

due process if they disagree with the Section 504 team's determination, including contact information for the Section 504 coordinator or other official responsible for Section 504 appeals.

- The District will provide training for District administrators with respect to the District's Bullying Prevention and Intervention Plan (BPIP), specifically with respect to the requirement that in a bullying investigation, parents be interviewed as part of the investigation.
- The District will provide training for District administrators, with respect to the requirement that a determination to change a student's placement to a more restrictive environment (i.e., direct supervision by an adult throughout the school day) must be made by a duly convened Team, who will consider whether a student is unable to remain in the regular educational environment, even with the use of supplementary aids and services. Training is to be conducted by an individual (Trainer) with expertise in FAPE.
- The District will convene an IEP team to determine whether the District's action in changing the Student's placement to a more restrictive environment (i.e., direct supervision by an adult throughout the school day) without convening an IEP team meeting to make this determination resulted in the denial of a FAPE for the Student and if so, what compensatory and/or remedial services, if any, will be provided to the Student to remedy said denial of FAPE. The services, if any, will be provided by a school psychologist or behaviorist, and may be provided at the Student's current school, or another location mutually convenient to the District and the Complainant.

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the complaint. OCR will monitor the District's implementation of the Agreement.

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.

Sincerely,

Timothy Mattson  
Compliance Team Leader

Enclosure

c:      XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
         XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
         *Via email to:* XXXXXXXXXXXXXXXXXXXX