

August 7, 2018

Mark Laurrie  
Superintendent of Schools  
Niagara Falls City School District  
630 66<sup>th</sup> Street  
Niagara Falls, New York 14304

Re: Case No. 02-13-1169  
Niagara Falls City School District

Dear Superintendent Laurrie:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Niagara Falls City School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by improperly restraining him on several occasions during school year XXXX-XXXX (Allegation 1); denying him access to XXX XXX for time-outs during school year XXXX-XXXX, as stipulated in his Individualized Education Program (IEP) (Allegation 2); and, failing to provide him with appropriate home instruction in XXXXXXXXXXXXXXXXXXXX XXXX (Allegation 3). The complainant also alleged that District staff retaliated for the complainant's advocacy in December XXXX and February XXXX, by disciplining and physically restraining the Student more severely and frequently, and sending the Student home more frequently for his behavior (Allegation 4). The complainant further alleged that the District discriminated on the basis of disability, by failing to respond appropriately to a complaint she made to the District's Superintendent on March XX, XXXX, regarding Allegations 1 and 2 (Allegation 5).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In its investigation, OCR interviewed the complainant, her husband and District staff. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

OCR determined that the Student attended the XXXXXX XXXXXX XXXXXX (the school) from XXXXXX XXXX through XXXXXX XX, XXXX. The Student was in XXXXXX during school year XXXX-XXXX and in the XXXX grade during school year XXXX-XXXX. During this time, the Student received special education and related aids and services pursuant to IEPs dated March XX, XXXX (IEP 1) and February XX, XXXX (IEP 2),<sup>1</sup> which provided for, among other things, placement in a XXXXXX classroom and XXXXXXXXXXXXXXXXXXXX and XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXXX.<sup>2</sup> The Student also had a Behavior Intervention Plan (BIP), which was created on XXXX XX, XXXX, and updated during school year XXXX-XXXX. The Student’s BIP allowed for the following “crisis intervention”: “Remove [the Student] to a safe location (away from doors and furniture and other students). He may need to be restrained if demonstrating unsafe behaviors such as XXXXXXXXXXX, XXXXXXXXXXX, and XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXXXXXXXXX.”<sup>3</sup>

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by improperly restraining him on several occasions during school year XXXX-XXXX. In support of Allegation 1, the complainant asserted that between November XXXX and March XXXX, the Student was frequently restrained in the principal’s office “like a criminal,” face down on the ground with his arms behind his back, which the complainant asserted was “brutally inappropriate.”<sup>4</sup> The complainant asserted that the Student complained to her that his shoulders hurt because of the restraints. The complainant further asserted that District staff members who performed the restraints were not appropriately trained, and that the frequent restraints deprived the Student of his special education program. OCR determined that school staff physically restrained the Student on the following four occasions

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<sup>1</sup> The Student was classified with a Speech or Language Impairment and diagnosed with XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX XXXXXX and XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXXXXXXXXXX XXXXXXXXXXX XXXXXXX.

<sup>2</sup> On XXXXXX XX, XXXX, the Committee on Special Education amended the Student’s IEP and placed him on home instruction, pending placement in an out-of-District program.

<sup>3</sup> According to IEPs 1 and 2, the Student “likes to XXXX XXXXXX.” “does not follow basic adult directions in the classroom, or follow basic routines,” and when frustrated “XXXXXX XXX XXXX, XXXXXX XXXXXXXXXXX, XXXXXXX, XXXXXXXXXXX, XXXXXX XXX XX XXXXXXXXXXX, XXXX XXXXXXX XXX XXXX and XXX XX XXX XXXXXXXXXXX.” The IEPs noted that the Student “has difficulty calming down when XXXXXXX X XXXXXXX,” and “has been physically restrained XX XXXXXXXXXXX XXXXXXXXXXX.”

<sup>4</sup> The complainant did not provide OCR with dates of the alleged restraints.

during school year XXXX-XXXX: XXXXXXXXXXXXXXXXXXXX (incident 1); XXXXXXXXXXXXXXXXXXXX (incident 2); XXXXXXXXXXXXXXXXXXXX (incident 3); and, XXXXXXXXXXXXXXXXXXXX (incident 4).

The regulation implementing Section 504, at 34 C.F.R. § 104.4, provides that qualified individuals with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity that receives federal financial assistance from the Department. The regulation implementing the ADA, at 28 C.F.R. § 35.130, contains similar provisions.

Additionally, the regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires that a recipient that operates a public elementary or secondary education program or activity provide a free appropriate public education (FAPE) to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation, at 34 C.F.R. § 104.33(b)(1), defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met. The implementation of an IEP is one means of meeting this standard.

A school district discriminates on the basis of disability in its use of restraint by (1) unnecessarily treating students with disabilities differently from students without disabilities; (2) implementing policies, practices, procedures, or criteria that have an effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (3) denying the right to a FAPE.

The District informed OCR that it did not have a written policy regarding physical restraint<sup>5</sup> of students during the relevant time period; however, the District's Code of Conduct provided that where "alternative procedures and methods that do not involve the use of physical force cannot reasonably be used, reasonable physical force may be used to: (1) protect oneself, another student, teacher or any person from physical injury, (2) protect the property of the school or others or (3) restrain or remove a student whose behavior interferes with the orderly exercise and performance of [District] functions, powers and duties, if that student has refused to refrain from further disruptive acts." District staff advised OCR that the District's practice, which was applicable to students with and without disabilities, was to use physical restraint only when necessary to ensure the safety of students and others, consistent with applicable state regulations.<sup>6</sup>

The District informed OCR that Strategic Crisis Intervention and Prevention (SCIP) training, which included training regarding use of physical restraint, was last provided to District staff

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<sup>5</sup> OCR defines physical restraint as a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.

<sup>6</sup> New York State regulations contain specific requirements for implementing behavior interventions, and state that physical restraint may only be used in emergency situations in which alternative procedures and methods not involving use of physical force cannot reasonably be employed. See 8 NYCRR §§19.5 and 200.22(d).

members five to seven years prior to school year XXXX-XXXX. The Code of Conduct does not specify that restraints may be performed only by trained staff members. Further, the Code of Conduct does not require staff members to document all instances in which restraints are used, and does not require the District to notify a parent when restraint has been used.

With respect to incident 1, OCR determined that on the morning of XXXXXXXXXXXXXXXXXXXX, the principal of the school removed the Student from class because he was acting out in the classroom by XXXXXXXX XXXXXXXX, XXXXXXXXXXX XXXXXXXX, and refusing to follow directions. The principal walked with the Student in the hallway for XXXX XX XXXX and then took him to her office, to try to calm him down. In the principal's office, the Student began XXXXXXXX on the XXXXX "XXXXXXXX and looking for things to XXX XX XXX XXXXX." The principal placed the Student in her lap to try to calm him, and the Student began to XXXXX and XXXX XXX. The school XXXXXXXXXXX XXXXXXXXXXX entered the room and placed his hands on the Student's forearms for five minutes to restrain him until the risk of imminent danger of serious physical harm to the Student or school staff dissipated.<sup>7</sup> At that point, the Student colored for 10 minutes to relax, and then XXXX XXXXXX from XXXXX – XXXX p.m., after which the complainant came to pick him up. As discussed below with respect to Allegation 4, the Student was suspended for two days for incident 1.

With respect to incident 2, OCR determined that on the morning of XXXXXXXXXXXXXXXXXXXX, the Student was removed to the principal's office because he was XXXXXXXX XXXXXXXX XXX classroom and refusing to follow directions. The Student was brought to the principal's office where he continued to ignore staff requests to sit down. The Student began to XXXXX XX XXXXXXXX, XXX XXX XXXX on the XXXX and XXXXXXXXXXX. OCR determined that a District staff member held the Student on her lap to restrain him until the Student calmed down. As discussed below with respect to Allegation 4, the Student was suspended for three days for incident 2.<sup>8</sup>

With respect to incident 3, OCR determined that on XXXXXXXXXXXXXXXXXXXX, the Student tried to XXX XXX of the XXXXXXXX XXXXXXXXXXX while the XXXXXXXXXXX was escorting him to the XXX at XXXXXXXXXXX. The XXXXXXXXXXX therefore picked the Student up to restrain him, carried him to XXX XXX, and XXXXXXXX him into XXX XXXX. The XXXXXXXXXXX stated that he did so to prevent the Student from running away and/or hurting himself or others.

With respect to incident 4, OCR determined that on XXXXXXXXXXXXXXXXXXXX, at around XXXXX a.m., the Student was XXXXXXXXXXX, XXXXXXXXXXX on the XXXXX, and XXXXXXXXXXX XXXXX in his classroom. The teacher sent the Student to the principal's office to calm down. The principal called the complainant and the Student's XXXXXXXX to inform

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<sup>7</sup> The XXXXXXXXXXX stated that he received training through the District's Teacher Resource Center in 2005-2006 regarding "Defensive Tactical Classroom Skills," which he believed provided instruction on how to safely restrain a child. The XXXXXXXXXXX did not recall receiving any subsequent training regarding use of physical restraint.

<sup>8</sup> The suspension was also for behavior that occurred earlier that day. Specifically, the Student was XXXXXXXXXXX XX and XXXXXXXX XXX XX XXXXXXXX, XXXXXXXX XXXXXXXXXXX, and XXXXXXXX XXXXXXXX XXX classroom and XXXXXXXXXXX other students trying to XXX XXX XX XXXXX XXX. The Student's teacher advised OCR that she asked XXX XXXXX to XXXX the XXXXX XX XXXXX, so that she could walk with the Student to try to calm him. The teacher advised OCR that the Student XXX XXXX her for most of the day, and later XXX a staff member XXXXXXXXXXX while XXXXXXXX XXX "XXX XXX XXXX."

them of the Student’s behavior; and, the Student was taken for walks in the XXXXXXXX and XXXXXXXXXXXX with staff because he was unable to calm down. OCR determined that at around XXXX p.m., a school XXXXXXXX was assigned to sit with the Student and XXXXX; however, after several minutes, the Student began XXXXXXXXXXX XXXXXXXX and XXXXXXXX XXXXXXXX the XXXXXXXX. At dismissal, the Student refused to XXXX XX XXX XXX; therefore, the XXXXXXXXXXXX and principal placed the Student in a XXXXXXXXXXXXX and brought him to the XXXXXXXXXXXX to await the bus. The Student then XXXXXXXX the principal and XXXXXXXX XXX in XXX XXXXX. The XXXXXXXXXXXX placed his hands on the Student’s XXXX for approximately two minutes to restrain him and prevent further XXXXXXXX, until the risk of imminent danger of serious physical harm to the Student or school staff dissipated.<sup>9</sup>

OCR did not find any evidence that District staff physically restrained the Student on any other occasion during school year XXXX-XXXX, or that the four restraints described above deprived the Student of his special education program. The District asserted that the Student was never restrained face down on the ground with his arms behind his back, as alleged, or that any restraint resulted in injury to the Student. OCR found no evidence to contradict this assertion; and, as stated above, the complainant did not provide any specific information regarding the alleged restraints.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find the complainant’s assertion that school staff frequently restrained the Student in the principal’s office face down with his arms behind his back was supported by a preponderance of the evidence.

OCR determined that during school year XXXX-XXXX, school staff physically restrained XXX other students who engaged in conduct similar to the Student, XXXX of whom are disabled. OCR found no evidence that any non-disabled student engaged in behavior that resulted in a threat of imminent danger of serious physical harm to the student and/or others that warranted physical restraint.

Based on the foregoing, OCR determined that although school staff physically restrained the Student on four occasions, these restraints did not violate the Student’s IEPs or BIP, as the Student’s BIP indicated that the Student may need to be restrained if demonstrating unsafe behaviors such as XXXXXXXX, XXXXXXXX, and XXXXXXXX XXXX XXXX XXXXX. Further, OCR determined that school staff had legitimate, non-discriminatory reasons for using physical restraints in these four situations; specifically, the Student’s behavior posed a risk of imminent danger of serious physical harm to himself or others. OCR did not find evidence to indicate that the proffered reasons were a pretext for discrimination, because staff acted in accordance with the District’s Code of Conduct and practice, which apply equally to disabled and non-disabled students, and with New York State law; i.e., school staff employed restraints only in situations where the Student’s behavior posed a risk of imminent danger of serious

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<sup>9</sup> The complainant provided to OCR a record of a doctor’s visit dated XXXXXXXXXXXXXXXXXXXX, in which the Student’s doctor noted a “sprain of shoulder”; however, the doctor did not indicate the cause of the injury, or that the injury was the result of any action of any District staff member.

physical harm to himself or others, and the restraints were discontinued as soon as the risk of imminent danger of serious physical harm had dissipated. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that District staff discriminated against the Student, on the basis of his disability, by improperly restraining him on several occasions during school year XXXX-XXXX. Accordingly, OCR will take no further action with respect to Allegation 1.

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by denying him access to XXX XXX for time-outs during school year XXXX-XXXX, as stipulated in his IEP. In support of Allegation 2, the complainant alleged that the principal prohibited staff from taking the Student to XXX XXX for time-outs, which the complainant asserted would have allowed the Student to XXXXXX his XXXXXX; and, that staff instead brought the Student to the principal’s office.

OCR determined that IEPs 1 and 2 did not stipulate that the Student would always be given access to XXX XXX for time-outs, as alleged. Rather, IEP 1 referred to the Student’s BIP, which stated that “[a]t times if [the Student] is XXXXXX XXXXXXXX and cannot settle, staff may XXXX XXX for X XXXX, allow time to XXX XXXXX in XXX, if available, or XXXX XXX XXXXX XXXXXXXX (XXXXXXX permitting).” IEP 2 provided that the Student be “allow[ed] time out of class XXX XXX XXXX daily” in the “classroom and special areas.”

The Student was given time-outs on XX occasions during school year XXXX-XXXX, XXX of which occurred in XXX XXX; however, at other times XXX XXX was in use, so staff members instead XXXX the Student XXX X XXXX in the XXXXXXXX or XXXXXXXX. On XXXXX occasions when the Student’s behavior did not de-escalate during a time-out, staff members took the Student to the principal’s office to further de-escalate and/or so that the complainant could be called to take the Student home. The principal asserted that she never prohibited any staff member from XXXXXXX the Student to XXX XXX for time-outs, and staff members corroborated the principal’s assertion. The complainant did not provide and OCR did not find any evidence to contradict the assertions of the District staff members.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant’s assertion that the principal prohibited staff from XXXXXXX the Student to XXX XXX for time-outs, or that staff denied the Student access to XXX XXX for time-outs was supported by a preponderance of the evidence. To the extent that staff members did not XXXXX the Student XX XXX XXX for a time-out when it was in use, OCR determined that this did not conflict with the Student’s IEP, as the IEP did not stipulate that time-outs would always occur XX XXX XXX, as alleged.<sup>10</sup>

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<sup>10</sup> Section 504 does not require a recipient to provide a student with related aids and services that are not set forth in the Student’s IEP. To the extent that the complainant disagrees with the provisions of the Student’s IEP, and believes his IEP should require staff to XXXXXXX the Student XX XXX XXX for all time-outs, it is OCR’s policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened for the purpose of evaluating a student and/or making decisions regarding whether a student is eligible for certain related aids and services and the manner in which such aids and services will be provided. Any disagreement between the complainant and the group should be addressed through a due process hearing. A due process hearing

Therefore, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that the District discriminated against the Student, on the basis of his disability, by denying him access to XXX XXX for time-outs during school year XXXX-XXXX. Accordingly, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide him with appropriate home instruction in XXXXXXXXXXXXXXXXXXXX XXXX. On XXXXXXXXX, XXXX, the Committee on Special Education (CSE) amended the Student’s IEP (IEP 3). IEP 3 stipulated that the Student would receive home instruction for one hour daily five days per week, XXXXXXXX XXXXXXXXXXXX XX XX XXXXXXXXXXXXXXXXXXXX XXXXXXXX; home instruction was to begin on Monday, XXXXXXXXX, XXXX. On Monday, XXXXXXXXX, XXXX, the Student began XXXXXXXXXXXX XX XXXXXXXXXXXXXXXXXXXX XXXXXXXX; and on XXXXXXXXX, XXXX, the CSE amended the Student’s placement in his IEP to reflect XXX XXXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXX. Accordingly, OCR determined that the Student was entitled to receive home instruction for one hour per day from XXXXXXXXX, XXXX, to XXXXXXXXX, XXXX.

OCR determined that the complainant requested that the instructor provide five hours of weekly home instruction over three days per week, rather than five days. The complainant alleged that on XXXXXXXXX, XXXX, the home instructor provided only 45 minutes of instruction; on XXXXXXXXX, XXXX, the home instructor provided only 15 minutes of instruction; and, from XXXXXXXXX-XX, XXXX, the home instructor provided no instruction. The complainant further alleged that the home instructor was not qualified to provide home instruction to the Student.

Based on a review of the home instructor’s timesheets, which were signed by both the home instructor and the complainant, OCR determined that the home instructor provided five hours of home instruction to the Student on three days during the week of XXXXXXXXX, XXX (XXXXXXXXXX, XX and XX, XXXX); and, four hours of home instruction to the Student during the week of XXXXXXXXX, XXXX.<sup>11</sup> District schools were closed during the weeks of XXXXXXXXX and XXXXXXXXX, XXXX; accordingly, the District was not required to provide home instruction to the Student during this time period. Therefore, OCR determined that the District provided all but one required hour of home instruction to the Student during the relevant time period.

OCR did not find any evidence to indicate that the District’s failure to provide a single hour of home instruction to the Student between XXXXXXXXX and XXXXXXXXX, XXXX, constituted a denial of a FAPE. Therefore, based on the foregoing, OCR determined that there was

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officer is empowered to review the determinations made by the group of knowledgeable persons. The complainant may exercise her right to due process by contacting the District in writing.

<sup>11</sup> The complainant alleged that on XXXXXXXXX, XXXX, the instructor called her and said she would come at XXXX or XXXX p.m., which the complainant indicated was too late for the Student. The complainant further alleged that on XXXXXXXXX, XXXX, the instructor told her that she did not come to the complainant’s home as scheduled because she had called and received no answer. The instructor had no recollection of these alleged incidents.

insufficient evidence to substantiate the complainant’s allegation that the District discriminated against the Student, on the basis of his disability, by failing to provide him with appropriate home instruction in XXXXXXXXXXXXXXXXXXXX XXXX. Accordingly, OCR will take no further action with respect to Allegation 3.<sup>12</sup>

With respect to Allegation 4, the complainant alleged that District staff retaliated for her advocacy in December XXXX and February XXXX, by (a) physically restraining and (b) disciplining the Student more severely and frequently, and (c) sending the Student home more frequently for his behavior. In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

OCR determined that the complainant engaged in protected activity when she complained to the District’s XXXXXXXXXXX XXXX<sup>13</sup> on February XX, XXXX, that school staff were inappropriately restraining the Student and that she disagreed with the District’s decision to place the Student on X XXXXXXXXXXX XXXXXXXXXXX. OCR determined that the District was aware of this protected activity. The complainant alleged that she also participated in protected activity by complaining to XXX XXXXX several times in December XXXX that XXXXX XXXX XXXXXXXXXXXXXXXX the Student and preventing him from receiving his special education services. District staff members denied knowing that the complainant had complained to XXX XXXXX in December XXXX.

With respect to Allegation 4(a), the complainant alleged that District staff retaliated for her advocacy in December XXXX and February XXXX, by physically restraining the Student more severely and frequently. As set forth above with respect to Allegation 1, OCR determined that the Student was restrained by school staff on four occasions during school year XXXX-XXXX; specifically, on XXXXXXXXXXXXXXX and XX and XXXXXXXXXXX and XX, XXXX. District staff asserted that the Student was restrained because his XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX escalated and he became more XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX in XXXXXXXXXXXXXXX. OCR determined that both the Student’s disciplinary and special education records corroborated the assertions. IEP 2, dated February XX, XXXX, noted that “[the Student’s] XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX have escalated recently to the point of being XXXXXXXXXXXXXXX XXXX the classroom” and “have escalated to which he will XXX XXX XXX the XXXX XXXXXXX the XXXXXXXXXXX.” Further, OCR determined, with respect to Allegation 1 above, that the District

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<sup>12</sup> With respect to the instructor’s qualifications, the complainant asserted that the home instructor was not qualified to provide home instruction to the Student because she only had a “XXXXXXXXXXXX XXXX” certification. The District disputed the complainant’s assertion, and advised OCR that the home instructor has both bachelor’s and master’s degrees, as well as permanent certification in the area of XXXXXXX XXXXXXXXXXX.

<sup>13</sup> XXXXXXXXXXX XXXXXXX are staff designated by the District to XXXXXXX XX XXXXXXX XXXXXXX and XXXXXXXXXXX.



had legitimate reasons for restraining the Student on each of the four occasions. OCR determined that records of the Student’s escalating behavior support that the restraint was not a pretext for a retaliatory motive. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that District staff retaliated for her advocacy in February XXXX, by physically restraining the Student more severely and frequently. Accordingly, OCR will take no further action regarding Allegation 4(a).

With respect to Allegation 4(b), the complainant alleged that that District staff retaliated for her advocacy in December XXXX and February XXXX, by disciplining the Student more severely and frequently. OCR determined that the Student was suspended XXXX times between the beginning of school year XXXX-XXXX and his placement on home instruction on XXXXXXXX, XXXX. The Student did not receive any other discipline during the relevant timeframe. One suspension occurred before the complainant’s alleged advocacy in December XXXX; specifically, a XXXXXXXX suspension on XXXXXXXXXXXX, XXXX, for XXXXXXXX another student XX XXX XXXXXXXX. Another suspension occurred before the complainant’s advocacy on February XX, XXXX; specifically, a XXXXXXXX suspension on XXXXXXXXXXXX, XXXX, for engaging in XXXXXXXXXXXX XXXXXXXX related to incident 1. Subsequent to the complainant’s advocacy on February XX, XXXX, the Student received a XXXXXXXX suspension on XXXXXXXXXXXX, XXXX, for XXXXXXXX X XXXXXXXX in relation to incident 2; a XXXXXXXX suspension on XXXXXXXX, XXXX,<sup>14</sup> for XXXXXXXXXXXXXXXXXXXX related to incident 4; and, a XXXXXXXX suspension on XXXXXXXX, XXXX, for refusing to follow directions. OCR determined that only one of these suspensions was for more days than suspensions that occurred prior to the complainant’s protected activity, and one of these suspensions was for fewer days than the suspensions that occurred prior to the complainant’s protected activity. Accordingly, OCR determined that, contrary to the complainant’s allegation, the Student was not disciplined more frequently and more severely after her protected activities. OCR determined that all XXXXX suspensions were consistent with the District’s Code of Conduct.<sup>15</sup> OCR did not find any evidence to indicate that the Student was treated differently with respect to discipline from other students who engaged in similar misconduct whose parents had not engaged in any protected activity. Further, OCR determined that there was no causal connection between the complainant’s protected activity and the Student’s suspensions. Absent an adverse action and causal connection, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 4(b).

With respect to Allegation 4(c), the complainant alleged that that District staff retaliated for her advocacy in December XXXX and February XXXX, by sending the Student home more frequently for his behavior. OCR determined that School staff called the Student’s parents to ask them to pick the Student up from school early XXXXXXXX occasions between the beginning of school year XXXX-XXXX and his placement on home instruction on XXXXXXXX, XXXX. School staff called the Student’s parents to ask them to pick the Student up from school early

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<sup>14</sup> The Student was suspended for XXXXXXXX on XXXXXXXX, XXXX, and should have been out of school on XXXXXXXX and XX, XXXX; however the complainant sent the Student back to school on XXXXXXXX, XXXX, XXXXXXXX early. The Student was then suspended for XXX XXXXXXXXXXXX XXX on XXXXXXXX, XXXX.

<sup>15</sup> The Code of Conduct provides that a principal may suspend a student for up to five days for XXXXXXXXXXXX XXXXXXXX, including XXXXXXXX or XXXXXXXX, and for up to five days for XXXXXXXXXXXXXXXXXXXX.

XXXX times before her protected activity on February XX, XXXX; namely, on XXX, and XXXXXXXXXXX, XXXX, for XXXXXXXX in class.<sup>16</sup> Following the complainant's protected activity on February XX, XXXX, School staff called the Student's parents to ask them to pick the Student up from school early XXXXXXXX occasions; XXX; and, XXXXXXXXXXX, XXXX, for engaging in XXXXXXXXXXX XXXXXXXX. Accordingly, OCR determined that, contrary to the complainant's allegation, the Student was not sent home early more frequently after her protected activities. Further, OCR determined that there was no causal connection between the complainant's protected activity and School staff calling the Student's parents to pick him up early from school. Absent an adverse action and causal connection, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 4(c).

With respect to Allegation 5, the complainant alleged that the District discriminated on the basis of disability, by failing to respond appropriately to a complaint she made to the District's Superintendent on March XX, XXXX, regarding Allegations 1 and 2. Specifically, the complainant asserted that the District ignored her complaints, and did nothing to prevent staff from improperly restraining the Student or denying him access to XXX XXX for time-outs.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. The regulation implementing Title II of the ADA contains a similar provision at 28 C.F.R. § 35.107(b). In addition, the regulation implementing Section 504, at 34 C.F.R. § 104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the requirements of Section 504 and its implementing regulation. The regulation implementing Section 504, at 34 C.F.R. § 104.8(a), also requires each such recipient to take appropriate steps to notify participants, beneficiaries, applicants, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity; and the notification shall also include the identity of its designated coordinator(s). The regulation, at 34 C.F.R. § 104.8(b), requires recipients to publish this notice in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants or employees. The regulation implementing the ADA has similar provisions, at 28 C.F.R. §§ 35.106 and 35.107(a).

OCR has identified a number of elements for determining whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for: (1) notice of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (2) application of the procedures to complaints alleging discrimination or harassment carried out by employees, other students, or third parties; (3)

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<sup>16</sup> District staff stated that they called the complainant instead of attempting to XXXX the Student XXXXX, because when they attempted the latter the Student's XXXXXXXXXXX XXXXXXX intensified.

adequate, reliable, and impartial investigation of complaints, including an opportunity to present witnesses and evidence; (4) designated and reasonably prompt timeframes for the major stages of the complaint process; (5) notice to the parties of the outcome of the complaint; and, (6) an assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects, if appropriate.

Section 504 Coordinator:

The District advised OCR that the District’s Director of Human Resources is the individual designated to coordinate the District’s efforts to comply with Section 504; she was also so designated during school year XXXX-XXXX. Accordingly, OCR determined that the District satisfied the requirement of the regulation implementing Section 504, at 34 C.F.R. § 104.7(a).

Non-Discrimination Notice:

OCR determined that the District’s nondiscrimination notice states that the District does not discriminate on the basis of disability, but the notice does not state that the District does not discriminate in admission or access to, or treatment or employment in, its programs and activities, OCR further determined that the District’s notice of nondiscrimination is not published in all District recruitment materials or publications containing general information that the District makes available to participants, beneficiaries, applicants or employees. On August 6, 2018, the District signed the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement.

Grievance Procedures:

OCR reviewed the District’s grievance procedures<sup>17</sup> to determine whether these provided for the prompt and equitable resolution of complaints of discrimination on the basis of disability. OCR determined that the District’s grievance procedures for complaints of disability discrimination/harassment appear in Board Policy 3420, entitled “Anti-Harassment in the School District” (policy 1); and in Board Policy 7555, entitled “Dignity For All Students Act [(DASA)]” (policy 2).<sup>18</sup>

Policy 1, which the District does not disseminate or publish, states that any employee, student, vendor/contractor, school volunteer, visitor, guest and other third party who is participating in, observing, or otherwise engaging in activities subject to the supervision of the District, who believes he or she has been a victim of discrimination/harassment, as well as anyone with knowledge of discrimination/harassment, should report such discrimination/harassment to the District’s designated “complaint officer,” either formally or informally, orally or in writing.

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<sup>17</sup> OCR determined that the grievance procedures currently in effect were in effect during school year XXXX-XXXX.

<sup>18</sup> The District also asserted that the grievance procedures are included in District Policy 7550, entitled “Complaints and Grievances by Students” (policy 3). Policy 3 requires the Superintendent to promulgate regulations and procedures for resolving complaints of discrimination on the bases of sex and disability and to disseminate the procedures to students, parents/guardians, employees and third parties. OCR determined that policy 3 did not itself contain procedures for the resolution of complaints of disability discrimination or harassment.

Policy 1 does not include contact information for the complaint officers. Policy 1 states that the complaint officer will conduct a prompt and thorough investigation of all oral, written or electronic reports of discrimination/harassment, and will report the results of the investigation to the Superintendent; however, policy 1 does not specify that the parties may submit witnesses or other evidence during the investigation of the complaint, and does not specify a timeframe for the completion of the investigation or for reporting the results of the investigation to the Superintendent. Policy 1 states that the Superintendent will report the results of the investigation to the Board no later than the date of the next Board meeting following the completion of the investigation. Policy 1 states that if the complaint officer determines that prohibited discrimination/harassment occurred, the District will take immediate action to correct the discriminatory effects of any discrimination/harassment including taking disciplinary action, if appropriate; however, policy 1 does not provide an assurance that the District will take steps to prevent the recurrence of any discrimination/harassment found to have occurred. Policy 1 states that notice of the outcome will be provided to the parties, as well as notice of the right of either party to appeal the determination. Based on the foregoing, OCR determined that policy 1 is not easily located or widely distributed; does not provide for adequate, reliable, and impartial investigation of complaints of disability discrimination/harassment, including an opportunity to present witnesses and evidence; does not include designated and reasonably prompt timeframes for the major stages of the complaint process; and, does not provide an assurance that the District will take steps to prevent recurrence of any discrimination or harassment found to have occurred.

Policy 2, which prohibits discrimination/harassment of students based on disability, among other things, is published in the District’s Code of Conduct, which is distributed to all students and parents. Policy 2 applies to “all forms of bullying, discrimination and/or harassment of students” by “school employees or students on school property.” Policy 2 states that incidents of possible student harassment should be reported to school teachers or administrators, and that the school’s designated DASA coordinator shall investigate all such complaints and take “prompt correct measures, as necessary.” Policy 2 only applies to complaints against students and employees; does not address whether the parties are provided an opportunity to present witnesses and evidence; does not include designated and reasonably prompt timeframes for the major stages of the complaint process; and, does not provide for notice to the parties of the outcome of the complaint. Policy 2 states that if there is a finding, “corrective action will be taken in accordance with policies and regulations” and “follow up inquiries shall be made to ensure that discrimination has not resumed.”

Based on the foregoing, OCR determined that the District does not have grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. On August 6, 2018, the District signed the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement.

District’s response to complainant’s complaint:

OCR determined that in a letter to the Superintendent dated March XX, XXXX, the complainant asserted that District staff members were inappropriately restraining the Student for minor infractions such as XXXXXXXX XX XXX XXXXXX or XXXXXXXX XX XXX XXXXXXX. The

complaint further asserted in the letter that XXXXXXXXX restraint of the Student deprived him of his special education program; and, that staff members were not letting the Student use XXX XXX for time-outs, in accordance with his IEP.

The District acknowledged that it received the complainant’s letter on March XX, XXXX. The District asserted that it responded to the concerns raised in the letter by obtaining witness statements from staff regarding the Student’s behavior and convening a CSE meeting on XXXXXXXXX, XXXX, during which the CSE agreed to change the Student’s placement to home instruction XXXXXXXX XX XXXXXXXXXXXXXXXXXXXX XXXXXXXXX; however, the District provided no information to indicate that it investigated or otherwise responded to the complainant’s assertions that District staff improperly restrained the Student, deprived him of his special education program through use of restraint, or failed to properly implement the Student’s IEP with respect to time-outs. On August 6, 2018, the District signed the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement.

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 may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint alleging such treatment.

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

If you have any questions regarding OCR’s determination, please contact Bernard Dufresne, Compliance Team Attorney, at (646) 428-3802 or [bernard.dufresne@ed.gov](mailto:bernard.dufresne@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXX XXXXXXX