

December 14, 2016

Gene Mancuso
Superintendent of Schools
Honeoye Falls – Lima Central School District
20 Church Street
Honeoye Falls, New York 14472

Re: Case No. 02-16-1321
Honeoye Falls – Lima Central School District

Dear Superintendent Mancuso:

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 Honeoye Falls – Lima Central School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by assigning the Student and four other students with disabilities seats at the back of the classroom from the beginning of school year 2015-2016 through February 2016 (Allegation 1); not allowing the Student to visit the nurse when he was injured on the playground on February 22, 2016 (Allegation 2); and not allowing the Student to participate in a basketball fundraising event organized by the Manor Intermediate School's (the school) "Make a Difference Committee", on or about April 28, 2016 (Allegation 3). The complainant also alleged that the District failed to implement the following provisions in the Student's Individualized Education Plan (IEP) for school year 2015-2016: (a) counseling services from January 2016 to June 2016 and (b) integrated co-teaching (ICT) services from early February 2016 to March 23, 2016 (Allegation 4). The complainant further alleged that the Student's bus driver (the bus driver) retaliated for her disability-related advocacy on behalf of the Student by (a) refusing to wait for the Student to take his medication before boarding the bus; and (b) not allowing the Student to have fidget toys, games, a cellphone or tablet, and water on the bus, from September 2015 through January 25, 2016 (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 or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (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.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a recipient that operates a public elementary or secondary education program or activity shall 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)(i), 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 non-disabled persons are met and (ii) based upon adherence to procedures that satisfy the evaluation and placement requirements of §§ 104.34, 104.35 and 104.36. Implementation of an IEP is one method for meeting this requirement.

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

During school year 2015-2016, the Student was enrolled in the fifth grade at the school. He is classified as "XXXXXXXXXXXXXXXXXXXXXXXXXXXX" and has been diagnosed with XX and XXXXXX. The Student was eligible to receive related aids and services pursuant to IEPs dated September 1, 2015 and May 23, 2016.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by assigning the Student and four other students with disabilities seats at the back of the classroom from the beginning of school year 2015-2016 through February 2016. OCR determined that the Student received instruction in two different general education teacher's classrooms (teachers A and B) during school year 2015-2016.¹ The complainant did not specify whether her concerns were regarding teacher A's or teacher B's classroom.

¹ Teacher A was the Student's homeroom teacher and taught him most subjects throughout the day. The Student received XXXX instruction from teacher B.

With respect to teacher A's classroom, students sat at six tables spread throughout the room. Teacher A and the Student's two special education teachers (teachers C and D)² all informed OCR that the Student sat in a variety of locations throughout the classroom near various students, including students with and without disabilities. The teachers informed OCR that students with disabilities were spread throughout the classroom, and none of the teachers recalled an instance when a group of students with disabilities were assigned to sit in the back of teacher A's classroom.³ The Student corroborated that he sat in a variety of locations in teacher A's classroom, and stated that he recalled sitting in three different locations throughout the school year, next to a variety of students, including students with disabilities and students without disabilities.⁴

With respect to teacher B's classroom, students sat at smaller tables throughout the room; there was also a larger table near the projector at the front of the classroom. Teachers C and D informed OCR that the Student sat in a variety of locations. Teacher D asserted that seating in teacher B's classroom was flexible, and both teachers C and D stated that the Student sat at the larger table at the front of the room.⁵ Both teachers informed OCR that students with disabilities sat throughout the classroom, and teacher C stated that she did not recall an instance when a group of students with disabilities were assigned to sit in the back of the room. Teacher D stated that students were not in their assigned seats for very long in teacher B's classroom, because students worked in various XXXX "centers" within the classroom throughout the period.

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. OCR did not find that a preponderance of the evidence substantiated that the Student and four other students with disabilities were assigned to sit at the back of the Student's classroom from the beginning of school year 2015-2016 through February 2016. Rather, the Student's teachers asserted that the Student sat in a variety of locations in teacher A's and B's classrooms next to a variety of students, including students with disabilities and students without disabilities, and the Student confirmed the teachers' assertions with respect to teacher A's classroom. With respect to teacher B's classroom, neither the complainant nor the Student provided any information or identified any witnesses to contradict the teachers' assertions. Accordingly, 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 assigning the Student and four other students with disabilities seats at the back of the classroom from the beginning of school

² Special education teachers C and D pushed in to teacher A's and teacher B's classroom to provide ICT services to the Student and other students.

³ Teacher A stated that the only time a group of students with disabilities may have gathered at the back of the classroom was during guided reading. Teacher A explained that she provided individualized reading instruction to groups of students who were at similar reading levels for approximately 20 minutes; this occurred in various locations throughout the room, including at the back of the room. However, all of the students in her class, both disabled and non-disabled, were grouped by reading level and sat in various locations in the room for this activity.

⁴ The Student recalled that for one period of time he sat next to two students, one who is not disabled (student A) and one who is disabled (student B). The Student recalled that during another period of time, he sat next to a disabled student (student C). The Student recalled that during a third period of time he sat next to student A. The Student could not recall who else he sat next to during each time period.

⁵ Teacher D stated that the Student also sat at a table near the classroom door and next to teacher B's desk.

year 2015-2016 through February 2016. Accordingly, OCR will take no further action regarding Allegation 1.

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by not allowing the Student to visit the nurse when he was injured on the playground on February 22, 2016. The complainant stated that the Student injured himself on the playground when he fell on ice, and she asserted that when the Student cried and asked teacher A if he could visit the nurse, teacher A told him to “get [him]self together” so he did not interrupt other classes. The complainant asserted that teacher A would not let the Student go to the nurse and kept him outside, wet and hurt. The Student stated that recess lasts approximately 30 minutes, and he fell about one-quarter of the way through recess but was not permitted to see the nurse until after recess ended. The complainant alleged that teacher A allowed another student to go to the nurse immediately after that student was injured on the playground; however, the complainant did not provide this student’s name or any other information about the circumstances of the incident.⁶

Teacher A informed OCR that she uses a “common sense” approach and sends students to the school’s nurse when they are injured. Teacher A stated that on the day the Student slipped on the ice, he approached her while he was crying, and he told her that he had fallen on the ice and wanted to see the nurse. Teacher A stated that the Student did not appear to have any serious injury, in that she did not see any blood on the Student and he was mentally cognizant. Teacher A stated that she tried to calm the Student down by asking him to take a few, deep breaths; however, she stated that his crying thereafter increased. Teacher A stated that at the time the Student approached her, recess was nearly over, so she determined that the Student could wait and enter the building with all of the other students at the end of recess, and then go to the nurse’s office. Teacher A denied saying, “get yourself together,” to the Student. Teacher A stated that the Student entered the building with the other students, dropped his coat off in teacher A’s classroom, and walked himself to the nurse’s office, and returned to teacher A’s classroom after a brief period of time.

Another teacher (teacher E) who witnessed the interaction between teacher A and the Student on the playground on February 22, 2016, corroborated teacher A’s account of the incident. Teacher E stated that teacher A’s decision to ask the Student to wait was a “normal response” because the situation did not appear to be an emergency, and she stated that she would have handled the situation similarly.

The nurse informed OCR that when the Student visited her office on February 22, 2016, he told her that he slipped and bumped his side. The nurse observed that the Student was wet, and had a red mark on his hip; however, he was not bleeding, he did not have any bruising, and his lungs sounded good. The nurse assessed that the Student’s injury was not serious, and she sent the Student to the gym for dry clothes. She stated that after the Student changed into dry clothes, he settled down and returned to his classroom.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-discriminatory reason for having the Student wait until the end of recess to visit the nurse on

⁶ The District informed OCR that teacher A did not allow any other students to see the nurse during recess that day.

February 22, 2016; namely, teacher A determined that the Student had not suffered serious injuries necessitating an immediate visit to the nurse. OCR did not find any evidence that this reason was a pretext for discrimination, as teacher E corroborated teacher A's account of what occurred, and the nurse confirmed that the Student did not suffer serious injuries. 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 not allowing the Student to visit the nurse when he was injured on the playground on February 22, 2016. 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 not allowing the Student to participate in a basketball fundraising event organized by the school's "Make a Difference Committee" (the committee), on or about April 28, 2016. The complainant stated that the Student served on the committee throughout school year 2015-2016, and helped to plan the committee's basketball event. The complainant alleged that the Student signed up to participate in the game, but was ultimately not permitted to play or otherwise assist with the event such as by selling concessions or keeping score. She stated that the Student was required to sit in the bleachers throughout the game. The Student informed OCR that he recalled signing up to participate in the basketball game. He stated that the sign-up sheet included options to volunteer to play in the game or sell concessions, and he signed up to play in the game. The Student stated that when he arrived at the game, the principal asked him to sit in the bleachers.

The District informed OCR that school staff members and fifth grade students participate on the committee. The committee engages in various types of activities, including fundraising for charitable causes and making posters for the school building, in order to spread positive messages to students at the school. OCR determined that the committee planned the basketball fundraising event, held on April 28, 2016.

The District informed OCR that the Student was not allowed to participate in the fundraising event because he had not signed up for it and had not brought in a permission slip allowing him to participate. OCR reviewed two sign-up sheets related to the basketball game, one that was created in or around October 2015, that included a list of student signatures under the heading "St. Bladrick's Student/Staff Basketball Game"; and another that was created in or around March or April 2016, that included student signatures under two sign-up lists, labeled "Players" and "Concessions/Tickets." The Student's name did not appear on either sign-up sheet. The principal acknowledged that she told the Student to sit in the bleachers, but asserted that she did so because he was not signed up to participate in the event. OCR did not find any evidence that any students whose names did not appear on the sign-up sheets and who requested to participate in the event on the day of the game were permitted to play in or assist with the operation of the event, including helping with a raffle or scorekeeping.⁷

⁷ OCR determined that a student (student D) who did not initially sign up as a player on the March or April 2016 sign-up list was permitted to play in the game because one of the students who had signed up to play decided not to participate and her name was crossed off the sign-up list. The principal stated that at the final committee meeting prior to the game, an announcement was made asking if anyone wanted to volunteer to fill the available playing spot for the student whose name was crossed off the sign-up list, but neither the Student nor anyone else signed up. The principal thereafter asked one of the players who had signed up to recruit an additional player to fill the available playing spot. Student D was recruited prior to the day of the game, and turned in a permission slip to play in the

Based on the foregoing, OCR determined that the District proffered legitimate, non-discriminatory reasons for not allowing the Student to participate in a basketball game organized by the committee on or about April 28, 2016; namely, the Student did not sign up to participate or bring in a permission slip authorizing him to participate. OCR determined these reasons were not a pretext for discrimination because documentation corroborated that the Student had not signed up to participate or submitted a permission slip authorizing him to participate; and no students who had not signed up were permitted to volunteer on the day of the game to participate in the event. 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 not allowing the Student to participate in a basketball fundraising event organized by the committee, on or about April 28, 2016. Accordingly, OCR will take no further action with respect to Allegation 3.

With respect to Allegation 4(a), the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide the Student with counseling services from January 2016 to June 2016, as required by the Student's IEP for school year 2015-2016. The complainant asserted that the Student's IEP specified that he would receive counseling services with the school XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX on a weekly basis, but the Student told her that he did not receive such services from January 2016 to June 2016. The Student informed OCR that he met with the XXXXXXXXXXXXXXX in both a group and individual setting. The Student stated that he participated in a weekly group counseling lunch meeting with the XXXXXXXXXXXXXXX. He stated that he could not recall specifically how often he met with the XXXXXXXXXXXXXXX individually, or when specifically he was not able to meet with the XXXXXXXXXXXXXXX individually, but "from time to time" they did not meet. The Student stated that when he was not able to meet with the XXXXXXXXXXXXXXX, he met instead with the school's XXXXXXXXXXXXXXX.

OCR determined that the Student's IEPs from school year 2015-2016 state that the Student would receive "Counseling Services" individually on a weekly basis for 30 minutes in the "Counselor's Office" between September 14, 2015 and June 17, 2016. The District's Director of Pupil Personnel Service and Committee on Special Education Chair (the director) informed OCR that it was the District's expectation that the Student would receive at least 30 minutes of individual counseling per week in the office of the counselor who was providing the services. The director stated that counselors are not required to deliver counseling appointments through a regular standing appointment.

The XXXXXXXXXXXXXXX informed OCR that he did not keep any records of his meetings with the Student during school year 2015-2016,⁸ but stated that he believed he saw the Student for at least 30 minutes each week. However, the XXXXXXXXXXXXXXX could not recall with specificity whether he met with the Student in a group or individually. The XXXXXXXXXXXXXXX stated

game. OCR determined that student D was not similarly situated to the Student, because he did not request to participate in the game on the day of the event, as the Student did.

⁸ The District informed OCR that beginning in school year 2016-2017, the director began requiring counselors who provide counseling services pursuant to an IEP to document when counseling sessions occur, the length of the sessions, and to prepare "therapy notes" based on those sessions.

that at the beginning of school year 2015-2016, he had a standing appointment with the Student at the start of every week, but that meeting structure did not work because the Student often needed to see him at other times during the week. The XXXXXXXXXXXXXXXX stated that the Student “needed a lot of support,” and there were times that he checked in with the Student every day during a given week. He stated that as the Student’s needs increased during the school year, he saw the Student more often. The XXXXXXXXXXXXXXXX further stated that in March and April 2016, he missed approximately seven days of school while he was on XXXXXXXXXXXXXXXX; however, he stated that other service providers were available to see the Student to provide counseling support.

Teacher A informed OCR that the Student participated in a weekly group counseling lunch meeting with the XXXXXXXXXXXXXXXX. She stated that if the Student needed to speak with someone outside of the lunch meetings, she would attempt to arrange for the Student to meet with the XXXXXXXXXXXXXXXX or other staff members if the XXXXXXXXXXXXXXXX was not available. She stated that there may have been times when no one was available to meet with the Student, and either she or teacher D would try to make time to speak with the Student.

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. While the XXXXXXXXXXXXXXXX asserted that he saw the Student frequently during school year 2015-2016 and regularly provided counseling to him, the XXXXXXXXXXXXXXXX did not recall with specificity when this took place, and did not maintain any records of the counseling sessions. Accordingly, OCR was unable to substantiate that the XXXXXXXXXXXXXXXX met with the Student in his office for weekly one-on-one counseling sessions, as required by the Student’s IEP. Accordingly, OCR determined that there was sufficient evidence to substantiate the complainant’s allegation that the District discriminated against the Student on the basis of his disability by failing to provide the Student with counseling services from January 2016 to June 2016, as required by the Student’s IEP for school year 2015-2016. The District’s failure to appropriately implement the Student’s IEP violated 34 C.F.R. § 104.33(b)(1)(i).

On December 8, 2016, the District agreed to implement the enclosed resolution agreement in order to resolve Allegation 4(a). OCR will monitor the implementation of the resolution agreement.

With respect to Allegation 4(b), the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide the Student with ICT services from early February 2016 to March 23, 2016, as required by his IEP for school year 2015-2016. Specifically, the complainant alleged that teacher C went on XXXXXXXXXXXXXXXX in early February 2015, and no replacement was assigned until March 2016. The complainant informed OCR that she met teacher C’s replacement (teacher D) on March 23, 2016.

OCR determined that the Student’s IEPs from school year 2015-2016 state that the Student would receive ICT services once per day for two hours and 30 minutes. The principal informed OCR that ICT services are typically provided by two classroom teachers, one general education teacher and one special education teacher. The principal stated that students with disabilities and

students without disabilities are enrolled in ICT classrooms, and the general and special education teachers co-teach.

Teacher C informed OCR that her final day before she went on XXXXXXXXXXXXXXXX was Friday, January 29, 2016. Teachers C and D stated that prior to the time teacher C went on XXXXXXXXXXXXXXXX, they worked together to plan for teacher D's transition to teacher C's position. Teachers C and D and the principal all stated that teacher D took over teacher C's position on Monday, February 1, 2016. During an interview with OCR staff, the Student also confirmed that teacher D took over for teacher C as soon as teacher C left for the year.

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. OCR did not find any evidence to substantiate the complainant's assertion that no replacement was assigned for teacher C until March 2016. Accordingly, OCR determined there was 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 the Student with ICT services from early February 2016 to March 23, 2016, as required by his IEP for school year 2015-2016. Accordingly, OCR will take no further action regarding Allegation 4(b).

With respect to Allegation 5, the complainant alleged that the bus driver retaliated for the complainant's disability-related advocacy on behalf of the Student by (a) refusing to wait for the Student to take his medication before boarding the bus and (b) not allowing the Student to have fidget toys, games, a cellphone or tablet, and water on the bus, from September 2015 through January 25, 2016.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether the complainant engaged in a protected activity; (2) whether the complainant or alleged injured party experienced a materially adverse action by the recipient; and (3) whether there is a causal connection between the protected activity and the materially adverse action. When the evidence demonstrates a prima facie case of retaliation, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation. OCR determined that the complainant engaged in protected activity when she engaged in disability-related advocacy on behalf of the Student throughout school year 2015-2016.

With respect to Allegation 5(a), the complainant stated that the Student takes medicine for his XXXX each morning before boarding his bus. She stated that the Student was not able to wait outside for the bus during cold weather because of his XXXXXXXX. The complainant stated that the Student therefore takes his medicine in the house, watches for the bus, and upon seeing the bus, exits the house and walks to the bus. The complainant stated that the bus driver refused to stop and wait for the Student if he was not already outside waiting.

OCR determined that the Student's IEPs for school year 2015-2016 did not grant transportation as a related service, or include any specific provisions related to the Student's boarding the bus

and the amount of time the bus driver should wait for him to board the bus.⁹ OCR determined that the Student rode on two different bus routes during school year 2015-2016.¹⁰ On XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX the Student was scheduled to be picked up at approximately 7:50 a.m., and he rode the bus with other students from the school (the regular bus). On XXXXXXXXXXXXXXXXXXXXXXXX, and every other XXXXXXXXXXXX, the Student was scheduled to be picked up at approximately 6:45 a.m., and he rode the bus with middle and high school students so that he could arrive at the school earlier for extracurricular activities (the early bus). The complainant stated that there were no issues when the Student rode the early bus, as there was a different bus driver for the early bus.

OCR determined that the same driver was responsible for both the regular bus and the early bus. The bus driver denied that she knew the Student was a student with a disability or that he took medication. The bus driver stated that whenever she saw the Student outside waiting or in the process of coming outside, she always stopped for the Student. The bus driver further stated that if she arrived at the Student's house and he was not outside, she followed the same protocol that she follows for all students, even if the house was completely dark; namely, she would bring the bus to a complete stop with the lights flashing, she would look at the door of the Student's home to see if he was coming outside, and if she did not see the Student coming out, she would thereafter start driving to her next stop. The bus driver estimated that the protocol she followed lasted approximately 30 seconds. The bus driver also informed OCR that she received training from the District regarding the protocol she follows when she stops for and picks up students.

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. The complainant asserted that the driver on the regular bus refused to stop and wait for the Student, but stated the driver on the early bus regularly waited for the Student. OCR determined that a preponderance of the evidence did not support the complainant's assertion, since the same driver was responsible for both of the Student's bus routes; and there was no evidence to contradict the bus driver's assertion that she followed the District's standard protocol when stopping to check for or pick up the Student each day, regardless of whether she was driving the regular bus or the early bus. Accordingly, OCR determined that there was insufficient evidence to substantiate that the Student was subjected to a materially adverse action. In the absence of a materially adverse action, OCR could not conclude that a prima facie case of retaliation has been established. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the bus driver retaliated for the complainant's disability-related advocacy on behalf of the Student by refusing to wait for the Student to take his medication before boarding the bus. Accordingly, OCR will take no further action regarding Allegation 5(a).

⁹ To the extent that the complainant is alleging that the Student's IEP should contain special provisions regarding his bus transportation, it is OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons, such as a Committee on Special Education, convened for the purpose of determining the appropriate related aids and services that a district should provide to a student. Any disagreement between the complainant and the group should be addressed through a due process hearing. A due process hearing officer is empowered to review the appropriateness of an IEP developed by the group of knowledgeable people. The complainant may exercise her right to due process by contacting the District in writing.

¹⁰ OCR determined that on or about XXXXXXXXXXXXXXXX 2016, the Student stopped riding the bus, and the District provided the Student with alternative transportation.

With respect to Allegation 5(b), the complainant alleged that the Student required fidget toys, games, a cellphone or tablet, and water due to the medication he took for his XXXXX. She alleged that other students were allowed to use these items on the bus, but the Student was not allowed to do so. As stated above, the Student's IEPs for school year 2015-2016 did not grant transportation as a related service, or include any specific provisions related to the Student's use of fidget toys, games, cellphone or tablet, or water on the bus.

The bus driver informed OCR that she does not allow any students to have toys or games on the bus because she may become distracted if students argue about the toys or games. She stated that she briefly allowed students to have Pokémon cards on the bus during school year 2015-2016, but she stopped this practice because students were trading the cards between themselves. The bus driver also stated that students may not use electronics on her bus until they are in sixth grade. The bus driver further stated that no student is allowed to have food or drink on the bus because they may choke or experience an allergic reaction. The Student did not provide any information to indicate that he was treated differently from other students on the bus with respect to the use of toys, electronics or food and drink.¹¹

Based on the foregoing, OCR determined that the District proffered legitimate, non-retaliatory reasons for not allowing the Student to have fidget toys, games, a cellphone or tablet, and water on the bus, from September 2015 through January 25, 2016; namely, the Student's IEP did not require that he be permitted to have such items on the bus; and the bus driver prohibited all students from having such items on the bus. OCR determined that this reason was not a pretext for retaliation because the information the Student provided to OCR indicated that the bus driver applied her rules to all students consistently. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the bus driver retaliated for the complainant's disability-related advocacy on behalf of the Student by not allowing the Student to have fidget toys, games, a cellphone or tablet, and water on the bus, from September 2015 through January 25, 2016. Accordingly, OCR will take no further action with respect to Allegation 5(b).

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

¹¹ The Student informed OCR that it was his understanding that students were allowed to have toys and games on the bus subject to three rules: (1) they were not allowed to trade, (2) if the toys or games were dropped, the bus driver would take them away, and (3) toys and games were not permitted in the bus aisle. The Student informed OCR that he brought Lego and figurine toys on the bus. He also stated that other students had Pokémon cards on the bus. With respect to electronics, the Student informed OCR that students are not permitted to use electronics on the bus until they are in ninth grade. The Student stated that one of his friends who had a tablet did not use the tablet on the bus, but instead used it at the school. With respect to food and drink, the Student informed OCR students were not allowed to have food or drinks on the bus. He stated that some students in the back of the bus consumed food and drinks without the knowledge of the bus driver, but when this conduct was reported to the bus driver, those students were required to sit at the front of the bus.

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 complainant may file another 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, which, 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 Crystal Johnson, Senior Investigator, at (646) 428-3821 or Crystal.Johnson@ed.gov; or Logan Gerrity, Compliance Team Attorney, at (646) 428-3791 or Logan.Gerrity@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXXXXXXXXXXXXX, Esq.