

Ms. Mary Ellen Elia
Superintendent
Hillsborough County School District
901 E. Kennedy Boulevard
Tampa, Florida 33602

Re: OCR Docket #04-12-1030

Dear Ms. Elia:

This letter is to notify you of the determination of the U.S. Department of Education (Department), Office for Civil Rights (OCR), regarding the above-referenced complaint filed on October 24, 2011, against the Hillsborough County School District (District), alleging discrimination on the bases of race (Caucasian), disability (Attention Deficit Hyperactivity Disorder (ADHD)) and retaliation. Specifically, the Complainant alleged that during the 2010-2011 and 2011-2012 school years,¹ the District: 1) failed to respond to her complaints that the Student was being intimidated and called racially derogatory names by black students at the School, and instead punished the Student for being involved in fights with black students;² 2) denied the Student a free appropriate public education (FAPE) by failing to implement his Section 504 Plan (Plan); 3) suspended the Student for more than 10 days without conducting a Section 504 meeting to determine whether the Student's behavior was a manifestation of his disability; 4) failed to provide her with notice of her procedural safeguards; and 5) retaliated against the Student after she advocated for his disability-related rights by persistently disciplining him.

OCR investigated this complaint under the authority of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100; Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability and retaliation by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability and retaliation by public entities. The District is a public entity and a recipient of Federal financial assistance from the Department and is therefore subject to these laws.

OCR investigated the following issues:

¹ During a number of interviews, the Complainant vacillated about the dates of her allegations. She noted that she had been complaining since September 2010, but the Student continued to be punished until she left the District in December 2011. OCR confined the investigation to the 2010-2011 and 2011-2012 school years.

² After the LON was issued, the Student clarified that the School failed to respond to his complaints of harassment/threats that he was subjected to by black students because he reported incidents of racial harassment.

1. Whether the Student was subjected to a racially hostile environment and the District failed to respond and prevent its recurrence, in noncompliance with the regulation implementing Title VI at 34 C.F.R. § 100.3 (a) and (b).
2. Whether the District denied the Student a FAPE, in noncompliance with the regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b) and the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District subjected the Student to a significant change in placement without conducting a manifestation determination meeting, in noncompliance with the regulation implementing Section 504 at 34 C.F.R. § 104.35(a) and the Title II implementing regulation at 28 C.F.R. § 35.130.
4. Whether the District failed to provide the Complainant notice of her procedural safeguards, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.36 and the Title II implement regulation at 28 C.F.R. § 35.130.
5. Whether the District retaliated against the Student, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the Title VI implementing regulation at 34 C.F.R. 100.7(e) and the Title II implementing regulation at 28 C.F.R. § 35. 134.

OCR's investigation included a review of documents provided by the Complainant and District, and interviews with the Complainant, the Student and District staff. Prior to the completion of the investigation, the District indicated its interest in resolving the complaint allegations. In May 2013, OCR sent a draft resolution agreement to the District. Numerous discussions were held with the District over the next several months and the District eventually agreed to sign the Agreement to resolve compliance concerns raised by issues 1, 2 and 3. By September 2013, however, the District still had not remitted the signed Agreement, and thereafter, by letter dated October 18, 2013, the District advised OCR that the school board had rejected the Section 302 resolution. OCR completed its investigation and made a determination on the complaint issues. OCR found sufficient evidence of noncompliance with regard to issues 1, 2 and 3, and insufficient evidence of a violation with regard to issues 4 and 5.

Applicable Regulations

TITLE VI STANDARDS

Race Discrimination and Harassment

The Title VI implementing regulation at 34 C.F.R. § 100.3 provides that (a) no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies. A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or

national origin: (i) deny an individual any service, financial aid, or other benefit provided under the program; (ii) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; (iv) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; (v) treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; (vi) or deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program.

The Title VI implementing regulation at 34 C.F.R. §100.6(d) provides that each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

Hostile Environment Standard

Racially based conduct that consists of different treatment of students on the basis of race by recipients' agents or employees, acting within the scope of their official duties, violates Title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI. Racial harassment of a student creates a hostile environment if the conduct is sufficiently severe, pervasive or persistent that it interferes with or limits a student's ability to participate in or benefit from the services, activities or privileges provided by a recipient.

OCR considers a variety of related factors to determine if a racially hostile environment has been created and also considers the conduct in question from both an objective and subjective perspective. OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved. The harassment must in most cases consist of more than casual or isolated racial incidents to establish a violation. Generally, the severity of the incidents needed to establish a racially hostile environment varies inversely with their pervasiveness or persistence.

In evaluating the severity of racial harassment, the unique setting and mission of an educational institution must be taken into account. An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

OCR also takes into account the relevant particularized characteristics and circumstances of the victim, including the victim's race and age, when evaluating the severity of racial incidents at an educational institution. OCR will find that a hostile environment existed if it determines that the harassment was sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient's educational program by a reasonable person, of the same age and race as the victim, under similar circumstances. The nature of incidents is also considered in determining severity. Considerations may include whether the conduct was verbal or physical and the extent of hostility characteristic of the incident. In some cases, a racially hostile environment requiring appropriate responsive action may result from a single incident that is sufficiently severe. Such incidents may include, for example, injury to persons or property or conduct threatening injury to persons or property.

On a case-by-case basis OCR also considers the identity, number, and relationships of the individuals involved. For example, racially based conduct by a teacher even an "off-duty" teacher, may have a greater impact on a student than the same conduct by a school maintenance worker or another student. The effect of conduct may be greater if perpetrated by a group of students rather than by an individual student.

OCR also takes into account the possible existence at the recipient institution of racial incidents other than those alleged in a specific complaint and will determine whether they contributed to a racially hostile environment. Moreover, racial acts need not be targeted at a specific complainant in order to create a racially hostile environment; rather, the acts may be directed at anyone. Also, so long as acts are racially motivated, the harassment need not be based on the ground of the victim's or complainant's race. Finally, the harassment need not result in tangible injury or detriment to the victims of the harassment.

Notice

If discriminatory conduct causes a racially hostile environment to develop that affects the enjoyment of the educational program for the student(s) being harassed, and the recipient has actual or constructive notice of the hostile environment, the recipient is required to take appropriate responsive action. This is the case regardless of the identity of the person(s) committing the harassment and regardless of how the recipient received notice. So long as an agent or responsible employee of the recipient received notice, that notice will be imputed to the recipient. A recipient can receive notice in many different ways, including grievances, complaints made by a student to a teacher, or contact with appropriate personnel made by a student, parent or other individual. Also harassment may be witnessed by an agent or responsible employee of the recipient. A recipient may receive indirect notice from staff members who are not "responsible employees," reports to campus police, flyers around campus, media reports or reports from the local community. A recipient will be deemed to have constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In some cases, the pervasiveness, persistence or severity of the racial harassment may be enough to infer that the recipient had notice of the hostile environment. If the alleged harasser is an agent or employee of the recipient acting within the scope of his or her official duties (i.e. such that the individual has actual or

apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice.

Recipient's Response

Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. OCR will evaluate the appropriateness of a recipient's responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or non-employees.

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's 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 racial harassment created a hostile environment, the recipient must then take prompt and effective steps reasonably calculated to end the racial harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. These duties to respond are a recipient's responsibility regardless of whether a student has complained, asked the recipient to take action, or identified the racial harassment as a form of discrimination.

SECTION 504/TITLE II STANDARDS

Disability Discrimination

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b) requires a recipient to provide each qualified person with a disability in its jurisdiction a free appropriate public education (FAPE), regardless of the nature or severity of the person's disability. FAPE is defined 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 persons without disabilities are met, and that satisfy the requirements of the regulation at 34 C.F.R. Sections 104.34, 104.35, and 104.36, regarding educational setting, evaluation and placement and procedural safeguards. Implementation of an individualized educational program (IEP) in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a) requires that a recipient evaluate any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the

person in a regular or special education program and any subsequent significant change in placement. The Section 504 implementing regulation at 34 C.F.R. § 104.36 provides that a recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a disability, need or are believed to need special instruction or related aids and services, a system of procedural safeguards that includes notice, an opportunity for the parents or the guardian to examine relevant records, an impartial hearing with an opportunity for participation by the person's parents or guardian and representation by counsel and a review procedure.

The regulation implementing Section 504 at 34 C.F.R. § 104.61 incorporates by reference the retaliation prohibition of Title VI of the Civil Rights Act of 1964 (Title IV), 42 U.S.C. Sections 2000d *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title II implementing regulation at 28 C.F.R. § 35.134 also prohibits retaliation. The Title VI regulation at 34 C.F.R. § 100.7(e) 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 the laws OCR enforces, or because he or she has made a complaint, testified, assisted or participated in an investigation, proceeding or hearing in connection with a complaint. The regulation implementing Title II contains similar provisions.

PREPONDERANCE STANDARD

OCR reviews evidence under the preponderance of the evidence standard. Under the preponderance of the evidence standard, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

Findings of Fact

Background Information

The Complainant (Student's grandparent) has legal custody of the Student, who is white and attended McLane Middle School (School), during the 2010-2011 (sixth grade) school year and 2011-2012 (seventh grade) school years. He was diagnosed with ADHD in 2003 and anxiety disorder in the summer of 2011. The Student's ADHD symptoms include impulsivity, inattentiveness, distractibility and diminished concentration, while symptoms of anxiety include nervousness, fidgeting and diminished appetite. The Student's Section 504 Plan was initially developed in 2004, and was amended on November 7, 2011. The Complainant left the District and enrolled the Student in Pasco County School District in January 2012. The Complainant has informed OCR that she does not intend to reenroll the Student in the District.

The School's student population during the 2010-2011 and 2011-2012 school years totaled 1,030, with 452 blacks (44%), 281 Hispanics (27%), 236 whites (23%), 15 Asians (1%) and approximately 44 students (4%) of two or more races.

Issue #1: Failure to respond and prevent recurrence of a racially hostile environment

The Complainant indicated that the incidents at the School involved black students persistently calling the Student racially derogatory names (specifically “cracker”), intimidating him, hiding his cell phone and fighting him. The Complainant stated that she complained to School administrative personnel, specifically the Assistant Principal (AP), but nothing was done. The Student indicated that he was reluctant to report the incidents of derogatory name calling and threats to School personnel for fear of reprisal.

The Student stated that he was constantly bothered by black students (male and female), who called him (and other white students) “cracker” and “whitey” in his classes, in the halls and on the School’s grounds. He could not recall any specific dates when the comments were made, but referred to the latter part of the fall 2011 semester, and noted that the comments were not frequently made during the 2010-2011 school year.

The Student indicated that the comments were sometimes made in the presence of his teachers, who often failed to act. He recalled complaining to his math, reading, and science teachers and to his Physical Education (PE) coach, and sometimes they would ask the offending students to stop, but with no follow through. The Student added that generally whenever he reported his claims to the Principal or AP, the claims were denied. He noted that as a result, he often ignored the comments and did not report them for fear of reprisal. The Student recalled that the Complainant often complained to School personnel, but he does not believe that any action was taken, since nothing seemed to have changed. He was convinced that none of the black students were ever punished. The Complainant was sufficiently concerned about the Student’s safety that she removed him from the District in January 2012.

The District informed OCR that it has no record or knowledge of the Complainant complaining formally or informally that the Student was the victim of racial harassment. The District indicates that it has no knowledge that the Student was being intimidated and called racially derogatory remarks by black students. According to the District, there is no record or knowledge of any alleged complaints or actual incidents of the Student being subjected to racially-motivated comments or conduct sufficient to trigger any obligation by the District to respond and prevent its recurrence.

During interviews, District staff informed OCR that they were knowledgeable about the District’s policies and procedures for handling reports of racial harassment. The personnel indicated that they were not aware of a racially hostile environment existing at the School. They indicated that they always encourage students to report any form of harassment and bullying to School staff. In commenting on the process for investigating and resolving complaints of harassment, the District staff indicated that if a complaint is made, either verbally, in writing or online, School administration would initially attempt to mediate the issue. An investigation would require questioning students, teachers and witnesses involved. The alleged harasser would be informed of the steps to be taken by the administration, and if the problem persisted, the victim’s parent would be contacted about the matter. If the panel found evidence of harassment, the harasser would be disciplined through in-school suspension (ISS), out-of-school

suspension (OSS), alternative to out-of-school suspension (ATOSS) or expulsion, depending on the severity of the harassment. Some personnel believed that the time limit for completing the investigation ranged from 24 to 48 hours.

District staff indicated that the School experienced some problems between black and Hispanic students, involving the use of racially derogatory terms to each other, during the 2011-2012 school year. A staff person stated that, as a result, the parents were contacted and some students were suspended following investigations. District staff was not aware of the outcome of the investigations. District staff stated that some problems persist, particularly in PE classes. District staff further stated that the School does not seem to be too aggressive when black students use derogatory terms (“N” word) toward each other even though this frequently occurs. She was not aware of many issues involving the use of racially derogatory terms between Hispanic and whites. District staff noted that there appeared to be little interaction between students of different races.

District staff noted that they were not aware of any problems involving the Student, such as he and other students exchanging racially charged comments or name calling, and do not recall the Student or Complainant reporting any complaints of harassment or bullying. District staff recalled speaking with the Complainant about the Student’s problems, but did not recall the Complainant making any claims of racial harassment. A staff person stated that she was aware that the Student claimed that black students were calling him racially derogatory names but she did not believe these were racial problems but rather the Student’s attempt to gain credibility with class mates. District staff recalled witnessing the Student calling other students the “B” word, but could not recall him getting involved in fights in the class. District staff could not recall any racial incidents, but noted that black and Hispanic students often engaged in derogatory name-calling. None of the personnel recalled being involved in reporting or being part of an investigation of racial harassment.

OCR conducted a random survey of students of various races at the School during an onsite visit on June 4, 2012 and thereafter conducted focus group discussions with the students. More than one-third of the students reported either that they frequently heard unfriendly or hostile remarks about white students and another one third of the students reported having witnessed use of derogatory language toward white students once or twice. More than one half of the students reported having seen white students attacked or threatened because of their race. The student surveys provided some evidence concerning the severity of non-verbal incidents. Reported incidents included bullying because of color, getting “jumped” while going home and going to classes, tripping a student who was running in the gym, shoving a student into lockers, and hitting and squirting a student with mustard.

The reported verbally harassing remarks included use of racial slurs such as “white ass,” “cracker” or “white cracker,” “snowflakes,” “white bread” and “slave master” and more graphic derogatory language.

Although the surveys did not include questions about use of derogatory language toward black students, three students described uses of derogatory terms concerning black students.

According to the student surveys, black students used the “N” word toward each other (and staff heard but did nothing). Some students reported that racially motivated incidents have occurred in front of School staff who did nothing. Also some students reported that there were racially motivated threats, attacks and fights targeting students of all races and committed by students of all races.

Student survey responses reflected that students did not believe the School effectively responded to concerns about racial harassment, and that students also had concerns about racial harassment incidents that were not captured by the survey questions.³ Comments about the School’s response to racial incidents included the following: “They don’t get suspended; they’re not responding to the racist comments;” “they just don’t care;” “they don’t do much – they just tell you to stop;” “they suspend them and drop the issue;” and, “they only give students ten days then they come back and do the same thing; it’s just not right.”

Most of the students reported that they were aware of the methods involved in reporting racial harassment. Some, however, stated that they were not aware of any School presentation on racial harassment, had not been advised by the School that they could report name-calling or other forms of harassment that happens at School (verbal or electronic), had not received information specifically on racial harassment, and had not received talks from their teachers or other school staff about racial harassment.

Analysis and Conclusion

Based upon the totality of circumstances, including the remarks and actions described by the students, and the incidents acknowledged by District staff, the evidence is sufficient to demonstrate that there was a racially hostile environment at the School during at least the 2011-2012 school year. White students comprised only 23% of the School’s enrollment. The interview of the Student, surveys and focus group discussions demonstrate that in an environment in which they constituted less than one out of every four students, white students were subjected to or witnessed frequent derogatory name-calling or other comments. Students also described physical acts of harassment of white students; these incidents included two attacks as well as “hitting,” tripping of a student while running around the gym and bullying of another white student. In addition, some students reported that there were racially motivated threats, attacks and fights targeting students of all races and committed by students of all races. The Complainant removed the Student from the District because of concerns about his safety due to racially-motivated harassment.

District staff acknowledged that during the 2011-2012 school year there were problems with black and Hispanic students using derogatory terms toward each other. District staff also acknowledged that some problems persist – particularly in P.E. classes. District staff stated further that there appears to be little interaction at the school between students of different races.

³ While questions about use of derogatory language and physically aggressive incidents were limited to harassment of white students, the survey questions concerning the School’s efforts to prevent or address racial harassment were not limited to white students. Some respondents who had not observed use of derogatory language or attacks against white students responded that they were not satisfied with the School’s response to racial harassment reports; thus, it appears that there also were student concerns about harassment of nonwhite students based on race.

Finally, a District witness acknowledged that black students frequently use the “N-word” but did not discuss steps taken to address it.

The evidence shows that School personnel had knowledge or should have known that the Student and other students at the School may have been subjected to racial harassment. In survey responses three white students reported having seen School staff witness racially-motivated incidents. Also, the Student stated that he reported harassing incidents to teachers as well as administrators, and that some of the comments directed to him were made in the presence of teachers. During the focus group session, black students also said that School staff members have witnessed racially motivated events and not responded.

Finally, the evidence also shows that the District has not taken adequate steps to address the racially hostile environment at the School. While a District witness stated that there had been an investigation of the incidents between black and Hispanic students, the witness did not know the outcome of the investigation and as noted above, the witness acknowledged that problems persist particularly in P.E. classes. During a focus group session, white students noted that their PE Teacher was a staff member who was present when name-calling occurred and the students were silent when asked if the Teacher intervened to stop the name-calling. In addition, the District witness observed that the School is not aggressive in addressing black students’ use of the “N-word.”

In the survey responses and focus groups, the majority of respondents stated they did not believe the District took adequate steps to address racial harassment at the School. Students also reported that staff had witnessed racially motivated incidents but did not intervene.

Based on the foregoing evidence viewed under the preponderance standard, the evidence is sufficient to demonstrate that the Student and other students were subjected to a hostile environment on the basis of race during the 2011-2012 school year, and the District failed to take prompt and effective steps to end the harassment and prevent it from recurring and failed to remedy the effects of the harassment on the Student in noncompliance with Title VI.

Issue #2: Denial of FAPE

The Complainant alleged that District denied the Student an appropriate education by failing to implement the Student’s Section 504 Plan (Plan) and provide the following services: use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model.

2010-2011 school year

The Student’s Plan of February 17, 2010, included: redirecting the Student, breaking his work into smaller segments as needed, providing extra time, work and help as needed, placing him in a small group setting for informal and formal assessments, with flexible presentation and extra time and breaks as needed. The Plan did not include the services such as use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model. The Plan dated March 11, 2011, provides for seating him near the teacher and a positive role

model, use of designated cues for direction, extended time on formal and informal tests, and on standardized tests, small group testing and frequent breaks as needed.

The Student's teachers for the 2010-2011 school year submitted written reports showing that the Student's 504 Plan was implemented including use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model.

2011-2012 school year

The Student's Plan is dated November 4, 2011, and includes the following related aids and services for the 2011-2012 school year: preferential seating near teacher, positive role model, teachers using verbal/nonverbal cues to redirect attention; assigning a peer helper to help redirect Student when off task; allowing Student to complete unfinished classwork as homework; allowing extended time for tests as needed; and, extended time on formal tests in small group setting with frequent breaks.

Prior to the Student leaving the District in December 2011, teachers provided written reports showing that they provided the Student his services during the school year, including use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model. In interviews with OCR, the Student's Science and Reading/Language Arts teachers stated that they implemented the Student's Plan and provided examples of the services provided the Student that included: use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model.

During the rebuttal call, the Complainant could not provide OCR with any specific information regarding her allegation that the Student's teachers failed to implement his Section 504 plan during the 2010-11 and 2011-12 school years.

OCR also investigated whether the Student's Section 504 plan was implemented while he was placed in the Alternative to Out of School Suspension (ATOSS) program. ATOSS is a voluntary program, housed at different locations in the District, which allows students who have been suspended for inappropriate behavior to receive academic support. Students who successfully complete the requirements of the program will not be considered absent and will not receive any grade penalty. ATOSS also provides behavior and academic support to students. ATOSS's policy provides that students stay a maximum of 10 days at a time but the time can be extended under extenuating circumstances.

District staff stated that the schools do not notify staff about whether a student has a disability when a student is referred to ATOSS. District staff generally learns about whether a student has a disability through discussions with the parent during orientation. District staff further stated that no requests are made for a student's IEP or Section 504 Plan after they learn that a student has a disability. Sometimes a parent will provide some information about the student needing breaks, "chunk" materials or medication and they comply. Staff will contact the school that the student is enrolled in for assistance, if needed.

For the 2010-11 school year, the District’s discipline reports disclosed that the Student received 10 days of ATOSS and 3 days of OSS. Furthermore, the District’s discipline reports disclose that the Student received 2 days OSS and 22 days of ATOSS for the period from August to December 2011 prior to his leaving the District. The offenses include fighting/bullying, inappropriate conduct (use of a “fake” cigarette and firecrackers in a restroom) and failure to serve ISS. The evidence shows that the Student’s 504 Plan was not implemented for the days that the Student was assigned to ATOSS.

Analysis and Conclusion

OCR generally finds that a school district’s failure to implement key aids, services or accommodations/modifications, identified in the IEP or Section 504 Plan of a student with a disability denies the student a FAPE and, thus, violates Section 504 and Title II. Not every failure to implement an aid, service or accommodation/modification in a Section 504 Plan, however, automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the student’s ability to participate in or benefit from a school district’s services, programs, and activities. Except in extraordinary circumstances, OCR does not review educational decisions about the appropriateness of specific aids and services identified in a student’s Section 504 Plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

Based on the foregoing, the evidence shows that the Student’s Plan was implemented during the 2010-2011 and 2011-2012 school years. The teachers provided documentation showing that the Student was provided his services, including use of designations to redirect the Student, extended time for informal testing, and use of a positive (peer) role model. However, the evidence shows that the Student’s Plan was not implemented during the 2010-2011 and 2011-2012 school years while he was assigned to ATOSS. District staff could not provide any evidence that the Student’s Plan was implemented while he was in ATOSS and District staff admitted to OCR that the IEPs and 504 plans of students are not requested or sought for students with disabilities who are assigned to ATOSS.

Based on the weight of the information provided by the District’s witnesses, OCR finds that the evidence is insufficient to establish noncompliance with Section 504 or Title II with regard to the Complainant’s allegations that the Student’s teachers denied him a FAPE during the 2010-2011 and 2011-2012 school years while at School. However, OCR finds that the evidence is sufficient to establish noncompliance with Section 504 and Title II since the Student was denied a FAPE based on the District’s failure to implement the Student’s Plan while he was assigned to ATOSS during the 2010-2011 and 2011-2012 school years.

Issue #3: Subjecting the Student to a significant change in placement without conducting a manifestation determination meeting.

The Complainant alleged that the Student did not receive a manifestation determination for the discipline that he received, and she believes that the School did not attempt to determine whether the Student's conduct was impacted by his disability.

Under Section 504, a suspension for more than 10 consecutive days, or a total of 10 cumulative days in a school year under circumstances constituting a pattern of exclusion, constitutes a significant change in placement. The determination of whether a series of suspensions creates such a pattern of exclusion is made on a case-by-case basis. If it is determined that disciplinary actions involving a student with a disability constitute a significant change in placement, a District must conduct a reevaluation of the student pursuant to 34 C.F.R. § 104.35(a) prior to the significant change in placement. As a first step in the reevaluation, the district must determine whether the misconduct was caused by the child's disability. If the District determines that the student's behavior is a manifestation of the student's disability, the student may not be disciplined and the District must determine whether the student's current educational placement is appropriate and, if not, make appropriate changes to the placement. If it is determined that the student's behavior resulting in the discipline is not a manifestation of the student's disability, the student may be excluded from school in the same manner as similarly-situated students without disabilities are excluded.

The District's policies for disciplining students with disabilities indicates in the preamble of the Manifestation Meeting section that when the aggregate number of days of suspension for a student with a disability reaches ten or more days during an academic year, a manifestation determination hearing must be held prior to any subsequent suspension. Item #8 of the Manifestation Meeting section states that manifestation determination meetings are not required for the first ten aggregate days of suspension.

The manifestation determination meeting is required to determine the existence of a relationship between the student's conduct and the disability and/or whether the conduct was the direct result of the District's failure to implement the student's Plan. A student with a disability is suspended when he/she is removed from the campus to another classroom or campus (ISS) that results in the student's Plan not being implemented. The manifestation determination meeting should include the parents (where possible) and staff knowledgeable about the student and his/her disability. The meeting should discuss all of the student's suspensions and should review the student's Plan to determine whether it appropriately meets the student's needs.

As noted above, for the 2010-11 school year, the District's discipline reports disclosed that the Student received 10 days of ATOSS and 3 days of OSS. The District's discipline reports disclose that the Student received 2 days OSS and 22 days of ATOSS for the period August to December 2011, prior to his leaving the District. The offenses include fighting/bullying, inappropriate conduct (use of a "fake" cigarette and firecrackers in a restroom) and failure to serve ISS.

As previously stated, students who have been suspended as a consequence for inappropriate behavior may voluntarily opt to participate in ATOSS. ATOSS's policy provides that students stay a maximum of 10 days at a time but the time can be extended under extenuating circumstances. District staff stated no reevaluation or manifestation determination is conducted

prior to a student being placed in the ATOSS program and that staff do not receive copies of Plans when students with disabilities are assigned to ATOSS. District staff stated that students with disabilities with Section 504 Plans or IEPs are not provided those services while at ATOSS. District staff also stated that the Student did not receive a manifestation determination hearing but was sent to the District's alternative site (ATOSS) for a number of offenses.

As indicated earlier, the Student is no longer enrolled in the District and the Complainant does not plan to return the Student to the District. Therefore, no individual remedy with regard to this issue is available.

Analysis and Conclusion

The evidence shows that during the 2010-11 and the 2011-12 school years, the Student was assigned to ATOSS for 10 or more days and did not receive Section 504 services, which constitutes exclusion or change in placement for which the District must conduct a manifestation determination. The evidence also shows that the District failed to conduct a manifestation determination meeting prior to assigning the Student to ATOSS. Additionally, OCR determined that the District's policy for conducting manifestation determination meetings does not comply with OCR policy. OCR policy states that a student should not be suspended from school more than 10 days (consecutively or in the aggregate under circumstances constituting a pattern of exclusions), unless the District has determined during the manifestation determination meeting that the student's behavior is not a manifestation of the student's disability. However, the District's policy, as written permits an accumulation of more than 10 days of suspension before a manifestation determination meeting is held. Based on the above, OCR finds that there is sufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II because the Student was subjected to a significant change in placement, without a reevaluation or a manifestation determination, when he was assigned to ATOSS, and the District's written procedures for when to conduct manifestation determination meetings do not comply with OCR policy.

Issue #4: Failure to provide procedural safeguards

The Complainant alleged that she was never provided with a copy of her due process safeguards, nor were these explained to her at any meeting with School personnel. She added that she was not aware of the safeguards until she did some research. Documentation shows that the District's procedural safeguards are included as part of its Section 504 policies and procedures. The policies indicate that procedural safeguards are to be included in the Section 504 files of all students with disabilities, and are to be provided throughout the 504 process, regardless of the Complainant's presence at 504 meetings, upon initial identification, request or referral for evaluation, eligibility, development or review of the accommodation plan, and when a decision is made to take a disciplinary action that constitutes a change in placement.

The District presented evidence demonstrating that due process safeguards were provided to the Complainant during Section 504 meetings held on February 17, 2010, March 11, 2011 and

November 7, 2011.⁴ The District provided documents with Complainant's signature acknowledging receipt of the procedural safeguards.

During a rebuttal call, the Complainant indicated that contrary to the information provided in her original interview, she did not intend to allege that she was not provided due process safeguards, but rather that the safeguards were never explained to her. Complainant admitted, however, that she had not requested an explanation until after reading a book concerning Section 504 issues and sought additional services for the Student. She indicated that she now has a better understanding of the safeguards.

Analysis and Conclusion

OCR found that the District has policies and procedures ensuring that procedural safeguards are provided to parents and guardians of students with disabilities. The evidence shows that the District presented evidence which showed that the Complainant signed documents confirming that she received her procedural safeguards for 504 meetings held on February 17, 2011, March 11, 2011 and November 7, 2011. OCR finds there is insufficient evidence to support a finding of noncompliance as it relates to this allegation.

Issue #5: Retaliation

In investigating allegations of retaliation, OCR examines whether the individual allegedly retaliated against engaged in a protected activity, whether the recipient was aware of the individual's participation in the protected activity, whether the recipient took adverse action against the individual contemporaneous with or subsequent to the protected activity, and whether a causal connection between the adverse action and the individual's participation in the protected activity can be reasonably inferred. If these elements are established, OCR determines whether the recipient has a legitimate, non-discriminatory, non-pretextual reason for the adverse action.

The Complainant alleged retaliation by claiming that the Student's teachers persistently punished him after she (Complainant) advocated for his disability rights. The punishment included ISS, OSS and ATOSS for a number of offenses. Although the Complainant alleged that the Student was being disciplined more harshly than other students, she noted that she does not know about the discipline given to other students, with or without disabilities.

Protected Activity and the District's Knowledge of the Protected Activity

There are two commonly recognized circumstances under which an individual engages in a protected activity, and thus is protected from retaliation: 1) if the individual has reasonably and in good faith opposed any act or policy that is unlawful under one of the laws that OCR enforces; or 2) if the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, or proceeding or hearing conducted under the laws that OCR enforces.

⁴ A copy of the procedural safeguards is mailed to a parent or guardian as part of the District's Parent Invitation to attend a Section 504 meeting.

The Complainant initially stated that her protected activity began in October 2010 when she began complaining about the District's failure to provide the Student with related aids and services and his failing grades. The Complainant further stated that in fall 2011, she also complained to the District about disciplining the Student and changes to his Section 504 Plan and racial harassment.

The District denied that it had knowledge that the Complainant was engaged in a protected activity in October 2010 but stated that it was aware that the Complainant engaged in a protected activity in October 2011, when the Complainant expressed her concerns that the Section 504 Plan was not working because he was failing his classes and also stated that the Student was being targeted due to his behavior. Additionally, the evidence shows that at least one School employee was aware that the Student had been subjected to racial harassment in fall 2011. Based on the above, OCR has determined that the Complainant engaged in a protected activity and the District had knowledge of the protected activity in fall 2011.

Adverse Action

OCR next determined whether the District took adverse action against the Complainant contemporaneous with or subsequent to the protected activity. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Complainant or Student in his or her ability to gain the benefits of the District's program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims. Merely unpleasant, transient, or inconvenient incidents are not usually considered adverse.

The evidence shows that for the two-month period of September 20, 2011 to November 18, 2011, the Student was referred for disciplinary action on eight occasions; however, during the entire 2010-11 school year, the Student was referred for disciplinary action on only four occasions.⁵ OCR has determined that the Student's treatment could be construed as an adverse action since the District's actions significantly disadvantaged the Student's ability to gain the benefits of the District's educational program.

Causal Connection

Because OCR determined that there was adverse action, OCR then proceeded to determine whether there was a causal connection between the adverse actions and the complainant's participation in protected activities. Several types of evidence are considered, including: (a) closeness in time between knowledge of the protected activities and the adverse actions; (b) change in treatment of the complainant after the District had knowledge of the protected activities; or (c) treatment of the complainant compared to other similarly situated persons. Evidence of only one of the three types of causation is sufficient to establish causation.

⁵ The Student left the District in December 2011.

a) Closeness in Time

The Complainant contends that the protected activities of complaining about his excessive discipline occurred during the period from September through November 2011, and the Student was disciplined excessively during the same time period. Accordingly, based on the close temporal proximity between the protected activity and the adverse action, OCR concludes that the causal connection between the adverse action and the protected activity has been established.

Legitimate, Nondiscriminatory Reasons for the District's Actions

After determining that the Student was subjected to an adverse action, and that a causal connection can be inferred, OCR considered whether the District had legitimate, nondiscriminatory reasons that are not a pretext for retaliation.

The Code of Student Conduct (Code) which is found in the Student Handbook, divides offenses into three categories. Level One (zero tolerance offenses) include arson, aggravated battery, bomb threats, sexual battery and use of a non-weapon as a weapon. Consequences include a recommendation for expulsion or change of placement, 3 to 10 days of out-of-school suspension (OSS) and a report to law enforcement. Level two (serious acts of misconduct) include bullying, sexual harassment, fighting, pattern of continuous disobedient/disruptive behavior and possession or use of tobacco or tobacco products. Consequences include in-school suspension (ISS), OSS or change of placement or expulsion. Level three (other offenses) include horseplay which leads to aggressive behavior, tardiness, and possession of lighters or matchers. Consequences include assignments or duties other than class tasks, assignment to time-out room, ISS, OSS, student self-improvement contracts, and notification of parent or guardian. Disciplinary action depends on the severity and frequency of the offenses.

OCR reviewed evidence pertaining to eight offenses involving the Student. The evidence shows that the Student was treated the same as other students involved in at least three of the eight offenses (offenses occurring on September 20, 2011, November 11 and 18, 2011) that occurred in fall 2011. While OCR did not have comparators for students for the remaining five offenses (offenses occurring on September 9, and October 10, 13, 25 and 26, 2011⁶), the preponderance of the evidence indicates that other students who were involved in the same offenses as the Student received the same punishment. District staff stated that it had no information to indicate that the parents of the other students disciplined along with the Student were engaged in a protected activity, prior to the students being disciplined.

During the rebuttal call, the Complainant could not provide any information to support her allegation of retaliation by District officials against the Student.

Analysis and Conclusion

⁶ The report dated October 26, 2011 stated that the Student was given ISS instead of OSS. While in ISS, the Student continued with his behavior from the previous day and was given 2 days of ATOSS.

OCR's review of the Student's discipline records show that he committed repeated offenses of inappropriate conduct, bullying and fighting. Accordingly, he was disciplined in accordance with the Handbook/Code policies. There is no evidence to show that these actions occurred because the Complainant was engaged in a protected activity. Additionally, the District provided evidence which showed that other students who committed the same offenses received punishment similar to the Student, and there is no evidence to indicate that their parents were engaged in a protected activity. Furthermore, the Complainant did not provide OCR with any information that would rebut the evidence presented by the District.

Accordingly, OCR has determined that the District has provided legitimate nondiscriminatory reasons for its actions since the Student was disciplined in accordance with the District's procedures and other students who engaged in the same behavior received the same discipline; therefore, the District's proffered reasons for its actions were non-pretextual. Consequently, OCR concludes that there is insufficient evidence to support a finding that the District retaliated against the Student in noncompliance with Section 504 and Title II as it relates to Issue #5.

Notice of Nondiscrimination

OCR reviewed the District's notice of nondiscrimination. OCR noted that the District's nondiscrimination notice did not include the contact information for the person(s) responsible for coordinating compliance with Section 504 and Title II, which is in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.7(a) and the Title II regulation at 28 C.F.R. § 35.107, respectively.

Resolution

On September 22, 2014, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. When fully implemented, the Agreement entered into by the District will resolve the issues of noncompliance. The Agreement does not include an individual remedy for the Student because he has not been enrolled in the District since January 2012 and his guardian does not plan to return him to the district.

The Agreement commits the District to do the following:

1. issue a statement to the School's students, parents and staff advising them that the District does not tolerate harassment on the basis of race, color or national origin;
2. develop grievance procedures to address racial discrimination (including harassment) to provide a prompt and equitable resolution of complaints;
3. revise its notice of nondiscrimination under Section 504/Title II and include the contact information of the person(s) responsible for coordinating compliance under those regulations and include that information in its publications;
4. administer a voluntary climate survey to students at the School;
5. provide annual age-appropriate training to students at the School on the prohibition of discrimination and harassment based on race, color and national origin;

6. provide annual training for administrators, faculty and staff at the School on the prohibition of harassment based on race, color and national origin and include examples of what constitutes harassment, and the prohibition against retaliation;
7. provide OCR with copies of all reports of racial harassment for a two-year period, including copies of the investigation, discipline imposed, corrective actions taken to stop further harassment and remedies provided to the student(s) subjected to harassment;
8. revise policy and procedures for disciplining students with disabilities to clearly state a student may not be suspended from school more than 10 days in a school year unless the District has conducted an evaluation and determined that the behavior is not a manifestation of the student's disability; and
9. provide district-wide training to all staff involved in evaluation and placement of students and administering disciplinary sanctions to students on the revised policy;
10. amend Section 504 policies and procedures to ensure that students with disabilities, whose parents elect ATOSS, receive special education and related services while in ATOSS; and,
11. provide district-wide training to all administrators, Section 504 personnel and all staff involved with ATOSS on the revised policy.

OCR will closely monitor the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title VI, Section 504, and Title II with regard to the issues raised. As stated in the Agreement, if the District fails to fully implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiation administrative enforcement (34 C.F.R. §§ 100.9 and 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Based the commitments the District has made in the Agreement, OCR has determined that it is appropriate to consider this complaint resolved. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR's 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 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, we 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 concerning OCR's determination, please contact Gerard C. Chasseau, General Attorney, at (404)-974-9368, or Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

/s/

Cynthia G. Pierre, Ph.D.
Regional Director