April 18, 2014

Dr. Michael Hinojosa
Superintendent
Cobb County School District
514 Glover Street
Marietta, GA 30060

Re: Case No. 04-14-1033

Dear Dr. Hinojosa:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint, filed on October 21, 2013, against the Cobb County School District (District), which the Complainants alleged that the District discriminated against their son (Student) on the basis of disability (XXXXXX XXXXXXXX XXXXXXXX and Anxiety) and engaged in retaliation.

Specifically, the Complainants alleged:

1. The Student has been harassed by his peers since August 2013, when the Student was called "idiot" and "stupid," and physically harmed without any intervention from the District.

2. The District failed to evaluate the Student for educational services pursuant to Section 504 or the Individuals with Disabilities Educational Act (IDEA) in or about August 2013, after the Complainants' request.

3. The District discriminated against the Complainants on the basis of race when it did not respond to their Family Educational Rights and Privacy Acts (FERPA) request in the same manner as it responded to the same FERPA request of similarly situated white parents in October 2013.

4. The District retaliated against the Student and the Complainants for advocating on behalf of the Student when it:

    a. gave the Student 11 discipline referrals immediately subsequent to the Complainants' advocacy for the Student; and
    b. removed the Student from the After School Program (ASP) and conditioned his return to the ASP upon having a XXXXXX XXXXXX him for the remainder of the program.

OCR is responsible for enforcing the following statutes:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the prohibition against retaliation provided for in the Title VI regulation at 34 C.F.R. § 100.7(e).

- 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. Title II prohibits discrimination and retaliation on the basis of disability by public entities. The Title II regulation, at 28 C.F.R. § 35.134, prohibits retaliation.

- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

Based on the above allegations, OCR investigated the following legal issues:

1. Whether the District discriminated against the Student on the basis of disability by failing to take appropriate responsive action to redress the disability-based harassing conduct and actions directed towards him when students called him "idiot" and "stupid," and hit him, in noncompliance with the regulation implementing Section 504, at 34 C.F.R. § 104.4, and Title II, at 28 C.F.R. § 35.130.

2. Whether the District failed to provide the Student with a free appropriate public education when it failed to evaluate him in or about August 2013, at the Complainants' request, in noncompliance with the regulation implementing Section 504, at 34 C.F.R. § 104.35(a), and Title II, at 28 C.F.R § 35.130.

3. Whether the District discriminated against the Complainants on the basis of race (African American) when the District failed to comply with the Complainants' FERPA request in the same manner as it complied with the same FERPA request of similarly-situated white parents, in noncompliance with the regulation implementing Title VI, at 34 C.F.R. § 100.3.

4. Whether the District retaliated against the Complainants and the Student after the Complainants complained of disability-based discrimination on behalf of the Student when the District (a) excessively disciplined the Student for minor infractions and (b) removed the Student from the ASP and conditioned the Student's return to ASP upon XXXXXX X XXXXX, in noncompliance with the regulation implementing Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. § 35.134.

Resolution of Issues 1 and Issues 2:

Prior to the completion of OCR's investigation, the District requested to voluntarily resolve Issues 1 and 2 of this complaint. Pursuant to Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved when, before the conclusion of an investigation the recipient or public entity expresses an interest in resolving the complaint. The attached Resolution Agreement (Agreement) will require the District to take actions to remedy any compliance concerns regarding disability-based harassment and failure to timely evaluate.

On April 18, 2014, OCR received the enclosed signed Agreement that, when fully implemented, will resolve Issues 1 and 2. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. The Complainants may file a private suit in federal court whether or not OCR finds a violation.

Regarding the remaining Issues 3 and 4, OCR's investigation included a review of documents pertinent to the complaint allegations. Additionally, OCR conducted interviews with District staff and the Complainant. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. Set forth below is a summary of OCR's legal standards, findings, analysis, and conclusions.

Legal Standards

Different Treatment:

The regulation implementing Title VI, at 34 C.F.R. § 100.3 (a), states that no person 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 the regulation applies. The regulation, at 34 C.F.R. § 100.3(b)(1)(ii), states that a recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin provide any service or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program.

A conclusion that an individual has been subjected to different treatment requires a finding of intentional discrimination on the basis of an individual's race. Evidence of discriminatory intent may be direct or circumstantial, and "intent cases" usually involve a highly fact-intensive inquiry. Absent direct proof of discriminatory motive, a different treatment inquiry frequently focuses on: (1) whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently; and (2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. A recipient's rebuttal or nondiscriminatory justification can be overcome with a showing of pretext.

Retaliation:

Finally, retaliation is prohibited under the Section 504 implementing regulation, at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of Title VI. The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against persons for engaging in a protected activity. The regulation implementing Title II, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

To establish a prima facie case of retaliation, OCR uses a four step analysis: (1) whether the Complainant engaged in a protected activity; (2) whether the District was aware of the protected activity; (3) whether the District took adverse action against the Complainants contemporaneous with or subsequent to participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient has a legitimate, non-discriminatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

Factual Findings and Analysis

Issue 3—Whether the District discriminated against the Complainants on the basis of race (African American) when the District failed to comply with the Complainants' FERPA request in the same manner as it complied with FERPA requests of similarly-situated white parents, in noncompliance with the Title VI regulation, at 34 C.F.R. § 100.3.

The Complainants submitted a FERPA request to the District on October 10, 2013, requesting a complete set of any and all records pertaining to the Student, which included various student records, correspondence and "emails." In response, on October 28, 2013, pursuant to FERPA, the District provided the Student's grades, attendance, discipline referrals, After School Program attendance sheets, and dental and vision records, but did not provide any emails to the Complainants. In a letter to the Complainants, dated October 25, 2013, the District stated that the cost to produce the emails was $1,146.61, indicating that the emails are covered under the Open Records Act. The District further stated that the emails can be provided, but must first be retrieved, reviewed and redacted, necessitating that a cost be incurred. Further, the District notified the Complainants that the emails requested by the Complainants exceed 1,000 pages and the District charges $ .10 per page for copies.

OCR's review of information obtained in this investigation indicated that the Complainants submitted a FERPA request that was identical to a request submitted by similarly-situated white parents to the District. OCR also determined that, even though the FERPA request from the similarly-situated white parents was identical to the Complainants' request, the similarly-situated white parents were not charged by the District for some of their records, and they received copies of emails related to the white student. Based on this information, OCR determined that the Complainants were treated differently than similarly-situated white parents who filed the same FERPA request.

Legitimate nondiscriminatory reason

The District's policy states that parents/guardians or eligible students can submit a written request to the School that identifies the records they wish to inspect. The school's principal then

makes arrangements for access and notifies the Complainant/guardian or eligible student of the time and place where the records can be inspected. The XXXXXXXX XX XXXXXXXX for the District notified OCR that the District does not charge for those records contained in a student's education file, pursuant to FERPA. In addition, he defined "student's education records" as those records that are purposefully maintained and kept in a student's file. He notified OCR that emails are not typically maintained as an educational record in a student's file, unless they are used in instances such as a Student's Study Team (SST) meeting, or for a discipline proceeding.

OCR also interviewed the District's XXXXXXXX XX XXXXXXXXXXXXXX and he stated that the individual schools determine which documents are purposefully maintained in a student's education file. All records that are not kept in the file, and have to be collected by his office, fall under the Open Records Act, and are subject to charge depending on the scope and labor involved with the collection process.

OCR's review of evidence indicated that the XXXXXXXX XX XXXXXXXXXXXXXX responded to both the Complainants' FERPA/Open Records request and the similarly-situated white parents' FERPA/Open Records Act request. He stated that his office receives and processes all Open Records requests submitted to the District, after the school has provided all FERPA related documents requested by a parent/guardian. He explained that he did not charge the similarly-situated white parents, because the Principal of their child's school made the decision as to which documents was a part of their child's educational record. The XXXXXXXXX then advised the XXXXXXXX XX XXXXXXXXXXXXXX that all the documents listed in the request, which included emails, were in the student's education file and ready to be sent to the parents. Accordingly, because the XXXXXXXX XX XXXXXXXXXXXXXX did not have to do any work to collect the records (as all of the records were deemed by the Principal to be FERPA educational records), the District did not charge the similarly-situated white parents for any records.

Regarding the Complainants' FERPA request, the XXXXXXXX XX XXXXXXXXXXXXXX stated that the staff at the School advised him that the emails requested by the Complainants were not printed and maintained as educational records in the Student's file, and were not subject to disclosure under FERPA. For this reason, the XXXXXXXX XX XXXXXXXXXXXXXX researched and located the emails, and charged the Complainants for the labor that was required to do this.

Based on the information obtained in this investigation, OCR determined that the District proffered a legitimate, nondiscriminatory reason for charging the Complainants and not including emails related to the Student.

Pretext

OCR next analyzed whether the District's proffered reason is a pretext for retaliation. Pretext can be shown by deviation from policies and practices or evidence which tends to weaken the inference that the asserted reason is the true reason for the action.

OCR examined both FERPA requests and determined that the requests were directed to two different schools in the District. OCR interviewed the XXXXXXXXXX of both schools, who stated that they were the staff who responded to the FERPA requests at their schools. The

XXXXXXXXXX of the Student's School stated that, after she was contacted by the XXXXXXXX XX XXXXXXXXXXXXXX, her office collected the records which are normally contained in the Student's education file, including attendance records, grades, registration forms, dental and vision records. The XXXXXXXXX stated that she did not include emails in the Student's educational file, because the School does not have a policy that requires teachers or staff to print emails and place them in students' files, as such practice would be difficult to monitor, and the District automatically archives emails. The XXXXXXXXX only places emails in students' files if the parent makes a specific request for her to do so. Finally, the XXXXXXXXX notified OCR that she did not process or assist with the processing of the similarly-situated white parents' request.

OCR also interviewed the XXXXXXXXX of XXXXXXXX XXXXXXXXXX School, who processed the FERPA requests for the similarly-situated white parents. She confirmed that she printed and kept the similarly-situated white student's emails with the student's file. The XXXXXXXXX stated that her staff does not typically maintain emails in the students' files, but she did for this student because there had been an issue regarding section 504 eligibility for the white student earlier in the school year so the information was readily available when the XXXXXXXX XX XXXXXXXXXXXXXX contacted her regarding the FERPA request. The Principal stated that she did not know the Student or the Complainants, who filed this complaint with OCR.

Finally, the XXXXXXXX XX XXXXXXXXXXXXXX notified OCR that when he processed the requests, he did not know the race of the Complainants or the similarly-situated white parents.

The Complainants advised OCR that they did receive, as a part of the Student's educational file, the emails that they had asked the District to include in the Student's file. Other than to provide OCR with copies of the request from the similarly-situated white parents, the Complainants did not submit any additional information to demonstrate that the FERPA requests were treated differently because of the Complainants' race. Accordingly, OCR determined that the difference in the District's processing of the two FERPA requests was not pretext for unlawful discrimination.

Conclusion

OCR determined that the District's XXXXXXXX XX XXXXXXXXXXXXXX, who processed both FERPA requests, did not know the race or identity of the Complainants or the similarly-situated white parents when he processed the requests. He based the Complainants' fees upon the cost for processing those documents that were not included in Student's educational files and this was his practice in processing all requests for documents that were not in students' educational files. He did not determine what records went into the education files of the Student or the comparator's child, and there is no district-wide standard for what should be included in educational files. Rather, two different principals at different schools, who were not involved in the processing of the request for the student at the other school, determined what records were to be considered a part of the education files of students at their respective schools. Moreover, the XXXXXXXXX at the Student's school stated that her practice is to have emails printed for inclusion in student files only upon the request of a parent; the Complainants told OCR that the educational file provided by the District did contain the emails that they asked the District to

place in the file. For these reasons, OCR finds that there is insufficient evidence to conclude under the preponderance of the evidence standard that the District discriminated against the Student on the basis of race when the District processed the Complainants' FERPA request differently than similarly-situated white parents.

Issue 4—Whether the District retaliated against the Complainants and the Student after the Complainants complained of disability-based discrimination on behalf of the Student when the District (a) excessively disciplined the Student for minor infractions; and (b) removed the Student from the ASP and conditioned the Student's return to the ASP upon XXXXXX X XXXXXX, in noncompliance with Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. § 35.134.

The Complainants contend that the District retaliated against them after they advocated for the Student's services pursuant to his disability by excessively disciplining the Student for minor infractions and by conditioning the Student's return to the After School Program on the Student XXXXXX X XXXXXX.

Protected Activity and Knowledge of the District

A protected activity is one in which a person either opposes an act, policy, or practice that is unlawful under any of the laws OCR enforces; files a complaint, testifies, assists, or participates in an investigation, proceeding, or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR.

On September 19, 2013, the Complainants emailed the XXXXXXXXX complaining that the School "is suspending [their] son for what is a manifestation of his disabilities." The email also included a signed parental consent form for a Section 504 evaluation. Based on this information, OCR determined that the Complainants engaged in a protected activity of which the District had knowledge, when they submitted their September 19, 2013, email to the District. Therefore, OCR will proceed to the next step of the analysis.

Adverse Actions

OCR next determined whether the District took adverse action against the Student contemporaneous with or subsequent to the protected activity. To be an "adverse action," the District's action must significantly disadvantage the Complainants or the Student, or their ability to gain the benefits of the District's program. In the alternative, even if the challenged action did not meet this standard, the action could be considered retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the Complainants were, because of the challenged action, precluded from pursuing their discrimination claims. To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect.

The Complainants contend that the District acted adversely when it 1) excessively disciplined the Student for minor infractions, and 2) conditioned the Student's return to the ASP program on a XXX XX XXX XXXX.

OCR's review of the Student's disciplinary report confirms that after September 19, 2013, which is the date the Complainants engaged in a protected activity, the Student received four discipline referrals. During an interview with OCR, the XXXXXXXXX confirmed that the School temporarily removed the Student from the ASP and XXXXXXXX XX XXXX to work with the Student in order for him to return.

Accordingly, OCR finds that there is sufficient evidence to demonstrate that the Complainant suffered an adverse act by receiving the four discipline referrals and by being removed from the ASP with a requirement XX XX XXXX to return. OCR next looked at whether there was a causal connection between the protected activity and the adverse act.

Causal Connection

To establish a causal connection between the protected activity and the adverse action, OCR considers: (a) closeness in time between knowledge of the protected activity and the adverse action; (b) change in treatment of the Student after the District had knowledge of the protected activity; or (c) treatment of the Student compared to other similar situated persons.

OCR determined that after the Complainants engaged in a protected activity on September 19, 2013, the Student received four discipline referrals, on the following dates: XXXXXXXXX XX XXXXX; XXXXXXX XX XXXX; XXXXXXXX XX XXXX; and XXXXXXX XX XXXX. Moreover, the records demonstrate that the Student was removed from the ASP on or about the second week in XXXXXXX XX, and was required to have a XXX XX XXX XXXX to stay in the ASP.

The alleged adverse actions were close enough in time to the Complainants' protected activity to satisfy the causal connection requirement. Therefore, OCR determined that a causal connection exists between the Complainants protected activity and the alleged adverse actions.

Based on the above, the Complainants established a *prima facie* case of retaliation. Accordingly, OCR next analyzed whether the District had legitimate, nondiscriminatory and non-pretextual reasons for its actions.

Legitimate Non-Retaliatory Reasons

Once OCR establishes that there is a causal connection between the protected activity and the adverse action, the next step of the analysis is to determine whether the recipient has legitimate, non-retaliatory reasons for its actions that are not a pretext for retaliation.

A. Discipline infractions

The Student received four disciplinary referrals after the Complainants submitted a complaint alleging discrimination on September 19, 2013, as follows:

Date	Description of Incident
XX/XX/XXXX	Disrupting class: 1 day in school suspension (ISS)
XX/XX/XXXX	Disrupting class, refusal to follow directions, preventing others from learning, threatening others and disrespecting authority: 1 day ISS

Date	Description of Incident
XX/XX/XXXX	Disrupting class, refusal to follow directions, preventing others from learning, disrespect of authorities: 2 day out of school suspension (OSS)
XX/XX/XXXX	Throwing paper, no citation, sat in principal's office the remainder of day.

OCR discussed each of the above-listed discipline referrals with the Student's Teacher. On XXXXXXXXX XX XXXXX, the Teacher clarified that the Student got into a fight with another student, and both students were referred and suspended. The Teacher also clarified that, on XXXXXXX XX XXXX, the Student threw paper at him while he was teaching and refused to stop even after asked, warranting the discipline referral. On XXXXXXX XX XXXX, the Student threw paper at another student and threw items off the Teacher's desk at the Teacher while he was giving instruction, and on XXXXXXXX XX XXXX, the Student threw a pencil across the room, left the classroom and refused to return.

The Teacher notified OCR that he knew that the Complainants were advocating for the Student to be evaluated for special education services when he referred him for the above offenses, but he stated that the offenses were serious enough to warrant a referral. He also stated that he did not have a role in assigning the consequences of the offenses.

OCR also interviewed the XXXXXXXXX XXXXXXXXX regarding these incidents, who stated that he investigated each incident and found that the Student did exactly what he was accused of doing. The investigations included interviewing the Teacher, classmates, and the Student, who often admitted to engaging in the behavior. The XXXXXXXXX XXXXXXXXX stated that he tried to give the Student light consequences because he was in elementary school, and he tried to tailor the consequences to help the Student change his behavior.

Based on the information obtained in this investigation, OCR determined that the District proffered a legitimate, nondiscriminatory reason for giving the Student the four disciplinary referrals and associated consequences.

Pretext

OCR next analyzed whether the District's proffered reason is a pretext for retaliation. Pretext can be shown by deviation from policies and practices or evidence which tends to weaken the inference that the asserted reason is the true reason for the action.

OCR first reviewed the District's discipline policy for elementary schools to determine whether the School staff followed policy when issuing the Student's discipline referral.

The District's policy describes three discipline levels, as follows: Level one applies to minor acts of misconduct and the consequences range from an administrative conference to three days of Administrative detention; Level two applies to intermediate acts of misconduct, and the consequences range from in school isolation, in school suspension, to five days of out of schools suspension; and Level three, which is for serious offenses and repeated misbehaviors such as disruption of the school environment, has consequences which range from long term out of school suspensions to expulsion from school. While the discipline policy gives ranges for the

offenses, the Administration is given the discretion to determine the consequences on a case by case basis.

Prior to receiving the above four referrals, the Student had already received XXX discipline referrals for similar offenses for disruption of the classroom environment and disrespect to teachers and students for the same school year. For these referrals, he received four counseling sessions, ½ day of ISS and ½ day of OSS. The punishments the Student received for his first four referrals are consistent with the consequences given for level one offenses, which require administrative consequences like the four counseling sessions the Student received. For his fifth and sixth referrals, the Student also received consequences consistent with the range of punishment for level two offenses, which requires in school and out of schools suspensions, when the Student received a ½ day of ISS and a ½ day of OSS.

According to the XXXXXXXXX XXXXXXXXX, the consequences the Student received after the period the Complainants submitted their complaint of discrimination, were an outgrowth and progression from the referrals and consequences the Student received earlier in the school year. Specifically, according to the District's discipline policy, progressive punishment for the Student for the four referrals he received post protected activity were in the level three range, which means the Student could have received long term out of school suspensions and even an expulsion since the behaviors were repeated behaviors. However, despite having received fifteen referrals, the School continued to give the Student short in-school and out-of-school suspensions, even at his fourteenth and fifteenth discipline referrals.

In response, the Complainants cited the proximity in time between the referrals to the days they complained on behalf of the Student as evidence that retaliation occurred; however, they never denied that the Student committed the infractions.

Conclusion

The District's progressive discipline policy states that students who commit disciplinary infractions that rise to the level three range can receive long term out-of-school suspensions or expulsions. The Student, despite having received XX discipline referrals through December 2013, never received any long term suspensions or expulsions. The evidence shows that when the School did deviate from the discipline policy, it was in the Student's favor. For this reason, OCR finds that there is insufficient evidence to conclude under the preponderance of the evidence standard that the District retaliated against the Student when he received the four disciplinary referrals between September 19, 2013, and XXXXXXXX XX XXXX[1].

B. After School Program

OCR reviewed four discipline referrals from the ASP for the Student, which were separate from the referrals the Student received during regular school hours. The referrals were as follows:

1. X/XX/XXXX: Student was cited for talking inappropriately to instructors and other students. Complainants were contacted.

[1] Even though OCR concluded that the discipline referrals were not in retaliation for a protected activity, OCR concluded that the failure to evaluate the Student was related to the disciplinary referrals the student received. For this reason, OCR included a remedy related to the Student's discipline in the Resolution Agreement for issue #1.

2. On three separate forms, the Student was accused of XXXXXXX XXX XXXXX on X/XX/XXXX, speaking rudely and throwing things at another student on X/XX/XXXX, failing to follow directions on XX/XX/XXXX, and XXXXXXXX XXX XXXX of two other students in computer lab on XX/XX/XXXX.
3. XX/XX/XXXX: Student was cited for disrespect to staff, failing to follow directions, touching other students, refusing to obey teacher after he called other students names, and XXXXXXXX XXXXXX at other students.

OCR interviewed the XXXXXXXXX who confirmed that the Student committed three disciplinary infractions and was scheduled to be removed from the program on or about the second week of XXXXXXX. However, because the Student was being evaluated for special education services, and was demonstrating that he was having problems adjusting to the ASP environment, the Complainants and the School agreed that the Student could continue in the program, despite the three infractions, if a XXXXXXX XXXXX worked with the Student during the Program. The XXXXXXXXX notified OCR that the parties agreed and the Student was temporarily removed from the ASP, not for punishment, but to give the School time to XXXX XXX XXXXX XX XXXX to assist the Student. The XXXXXXXX stated that the Program's staff felt it would be in the Student's best interest to have XXXXXX XXX XXX XXXXXX XX XXXX XXXX the Student directly while he was at the ASP. In particular, staff was concerned for the Student's safety if he continued in the program without the XXXX, because the Student would leave the classroom. She also stated that the Complainants seemed to think it was a good idea to have XX XXXX for the Student.

During an interview with the Complainants, they stated that it was the School's decision that XX XXXX be provided to the Student before he could return to the ASP. The Complainants were concerned that the Student was out of the ASP for weeks while XX XXXX XXX XXXXXXX, but stated that they believed that a XXXX XXXXXXX XXXX could help the Student.

Based on the information obtained in this investigation, OCR determined that the District proffered a legitimate, nondiscriminatory reason for temporarily removing the student from the ASP program and XXXXXXXXX XX XXXX XX XXXX with the Student in the ASP.

<u>Pretext</u>

To determine whether the preponderance of evidence establishes that the District's articulated rationale is a pretext for retaliation, OCR first examined whether the District's action was consistent with District policy. The District's policy for the ASP states that if a student misbehaves, the behavior will be documented on the ASP Discipline form, and given to the student's parents. The policy also says that excessive improper behavior may result in the student being withdrawn from the ASP. The withdrawal of any student must be approved by the Principal and may occur if there are: 1) three late pickups; 2) disciplinary referrals; 3) nonpayment of tuition and fees; and 4) at the Principal's discretion. The discipline forms for the ASP also indicate that if a student receives three disciplinary referrals, the student will be recommended for removal of the program. Based upon the District's policy, the Student was removed from the ASP for the discipline referrals.

OCR also determined whether students had been withdrawn from the ASP, based upon the District's policy. Even though the Student received three discipline referrals, he was not

removed from the program; he was temporarily removed for a XXX XXXX XXXXXX while the School XXXXX XXX XXXXXXX XX XXXX to work with the Student. In contrast, two students, whose parents did not engage in a protected activity, were removed from the ASP after receiving discipline referrals pursuant to the ASP's policy to withdraw students after discipline problems.

OCR contacted the Complainants to determine whether they had any information to rebut the District's proffered reason for temporarily removing the student and requiring XX XXXX to be with the Student during the ASP. The Complainants did not refute the evidence that the Student engaged in the cited behaviors. The Complainants stated that, contrary to the District's position, they were not in agreement XXXX XXX XXXX XXXXXXX with the Student, because they were unclear whether XXX XXXX XXXXX XX XXXXXXXX XXXXXXX. The Complainants also stated that they did not want the Student to be isolated or separated from the remainder of the class, but stated that they believed that someone XXX XXX XXXX XXXXXXX could help the Student.

OCR reviewed a letter submitted by the Complainants to the District, dated XXXXXXX X XXXX, (shortly after the committee met to discuss the Student's continued placement in the ASP) stating that they were concerned that the location and XXXXXXXX XX XX XXXX would cause disruption in the Student's placement for XXX XXXXX, but they also said that they would be completely open to X XXXXXX XXXXXXX XXXXXX to assist the Student with facilitating social skills. The Complainants also said that they felt having X XXXXXX XXXXXXX XXXXXX with the Student at the ASP would protect the Student from other Students who seek to target him unfairly.

Conclusion

Because the Student was not dismissed from ASP, like other students who had committed three disciplinary infractions, and the decision to XXXXXX XX XXXX to the Student during ASP was to help the Student cope with the ASP environment so he could continue in the program, as suggested by the Complainants in their XXXXXXX X XXXX, letter, OCR finds that there is insufficient evidence to conclude under the preponderance of the evidence standard that the District retaliated against the Student when he was required to have X XXXXXXXXXXXXXXXX XXXXXX him in order to continue in the After School Program.[2]

In conclusion, based on the evidence obtained in this investigation, OCR determined that there was insufficient evidence to establish a violation of Section 504, Title II and Title IV with regard to Issues 3 and 4 in this complaint. OCR will take no further action with regard to these allegations.

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

[2] While the evidence does not demonstrate that the District engaged in retaliation with respect to the Student's participation in the ASP, OCR notes that the failure to timely evaluate the Student may have impacted the District's satisfaction of the obligation to provide the Student meaningful and equal access to a noneducational program. Any potential compliance concern in this regard was resolved with the ultimate evaluation of the Student and provision of an XXXX.

the public. The Complainant may file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive 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.

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.

This concludes OCR's investigation of the complaint and 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.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this matter, please contact XXXXX XXXXXXX-XXXXXXXX, Esq., at (XXX) XXX-XXXX, or XXXXX XXXXXXX, Esq., XXXXXXXXXX XXXX XXXXXX, at (XXX) XXX-XXXX.

Sincerely,

Cynthia G. Pierre, Ph.D.
Office Director
Atlanta Regional Office

Enclosure