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September 30, 2015

Mr. Don Odom
Director of Schools
Rutherford County Schools
2240 Southpark Drive
Murfreesboro, Tennessee 37128

Re: Complaint #04-14-1396

Dear Mr. Odom:

OCR has completed its investigation of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), on February 4, 2014, against Rutherford County School District (District), alleging discrimination on the basis of disability. The Complainant alleged that the District discriminated against his son (Student), a 2nd grade student with a reading disability while he was enrolled at XXXXX Elementary school (School). Specifically, the Complainant alleged:

1. In XXX XXX 2013, the District failed to properly evaluate the Student under Section 504 prior to a significant change in placement when he was moved from the 3rd grade and retained in the 2nd grade.
2. In XXX 2013, the District failed to implement all of the provisions of the Student's "504 Plan," including but not limited to providing additional time for assignments and grouping or blocking of assignments, thereby, denying him a free and appropriate public education (FAPE).
3. In XXX 2013, the Student's 2nd grade teacher subjected him to a hostile environment by yelling at him in class and keeping him out of recess for the difficulties the student faced with assignments stemming from the District's failure to provide the listed related aids and services in his 504 Plan, and the Principal threatened to evaluate the Student for a behavior problem for not completing his assignments.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR is also responsible for enforcing 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 on the basis of disability by public entities. As a recipient of Federal financial assistance and as a public entity, the District is subject to Section 504 and Title II.

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Based on the allegations raised by the Complainant, OCR investigated the following legal issues:

1. Whether the District failed to properly evaluate the Student prior to a subsequent significant change in placement before he was retained in the 2nd grade in or around XXXX of 2013, thereby failing to comply with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.35, and Title II and its implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District denied the Student a FAPE when it failed to implement all provisions of his 504 plan, thereby failing to comply with Section 504 and its implementing regulation at 34 CFR § 104.33(b) and Title II and its implementing regulation at 28 C.F.R. § 35.130.
3. Whether the Student was subjected to harassment resulting in a hostile environment on the basis of disability from XXXX 2013 through XXXXX 2014, thereby failing to comply with Section 504 and its implementing regulation at 34 C.F.R. § 104.4, and Title II and its implementing regulation at 28 C.F.R. § 35.130.

In reaching its determination, OCR reviewed information requested from and provided by the Complainant and the District. OCR also interviewed the Complainant, two student witnesses, and eight members of the District's staff. OCR reviews evidence under a preponderance of the evidence standard – that is, OCR evaluates whether the greater weight of the evidence was sufficient to support a conclusion that the recipient failed to comply with a law or regulation enforced by OCR, or whether the evidence was insufficient to support such a conclusion.

After a review of all of the available evidence, OCR has determined that there is sufficient evidence to support a finding that the District failed to comply with Section 504 and Title II with respect to the allegations raised in issues 2 and 3 in this matter. With respect to issue 1, OCR finds there is insufficient evidence to substantiate the allegation. In addition, although not expressly raised by the Complainant, OCR's investigation found that the District did not provide the Student with a timely evaluation under Section 504. The factual and legal bases of OCR's determination are set forth below.

LEGAL STANDARDS

FAPE and Evaluation/Placement

The Section 504 regulation at 34 C.F.R. § 104.33 requires recipients of Federal financial assistance operating public elementary or secondary education programs or activities to provide a FAPE to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education is the provision of regular or special education and related aids and services that (1) are designed to meet the individual needs of a student with a disability as adequately as the needs of students without disabilities are met; and (2) are based on the procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards.

Implementation of an Individual Education Plan (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

Pursuant to 34 C.F.R. § 104.35(a), a recipient shall conduct an evaluation in accordance with the requirements of paragraph (b) of that section of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. When making a placement decision, the recipient shall ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c). A recipient shall establish procedures, for periodic reevaluation of students who have been provided special education and related services. 34 C.F.R. § 104.35(d). The applicable Title II implementing regulations at 28 C.F.R. § 35.130 are interpreted consistent with the Section 504 regulations cited above.

Appendix A to the implementing regulation of Section 504 Part 104 states that it is not the intent of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the process requirements of Section 504 concerning identification and location, evaluation, and due process procedures.

Discrimination/Harassment

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(i)-(iv) and (vii) states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. A recipient, in providing any aid, benefit or service may not, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from an aid, benefit or service; (ii) afford a person with a disability an opportunity to participate in or benefit from the aid, benefit or service which is not equal to that afforded to others; (iii) provide a person with a disability with an aid, benefit, or service that is not as effective as those provided to others; (iv) provide different or separate aids, benefits, or services to a person with a disability or class of persons with disabilities unless such action is necessary to provide qualified persons with disabilities with aids, benefits or services that are as effective as those provided to others; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

A violation of Section 504 may be found if a recipient has created or is responsible for harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently serious so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of disability if it has effectively caused, encouraged accepted, tolerated or failed to correct a hostile environment on the basis of disability of which it has actual or constructive notice.

If a District employee who is acting (or who reasonably appears to be acting) in the context of carrying out his or her responsibilities over students (i.e., such that the employee has actual or apparent authority over the students involved), then the employee will be considered to be acting in an agency capacity and the recipient will be responsible for any disability-based harassment of a student whether or not the recipient had “notice” of the harassment. The recipient therefore, must remedy any effects of the disability-based harassment on the victim, end the harassment and prevent its recurrence.

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, and the size and administrative structure of the school and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If a school’s investigation reveals that harassing incidents based on disability created a hostile environment, the school must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed

Moreover, for the student with a disability who is receiving FAPE services, disability harassment can result in a denial of FAPE that must be remedied under Section 504. Accordingly, a school’s investigation should include determining whether that student’s receipt of appropriate services may have been affected by the harassment. If the school’s investigation reveals that the harassment created a hostile environment and there is reason to believe that the student’s FAPE services may have been affected by the harassment, the school has an obligation to remedy those effects on the student’s receipt of FAPE. Even if the school finds that the harassment did not create a hostile environment, the school continues to have an obligation to address any FAPE-related concerns, if, for example, the school’s initial investigation revealed that the harassment may have had some impact on the student’s receipt of FAPE services.

The Section 504 regulations at 34 C.F.R. § 104.8(a) and the Title II regulations at 28 C.F.R. § 35.106 require that each recipient publish a statement (notice) that it does not discriminate on the basis of disability in its education programs or activities. The notice must state, at a minimum, that the recipient does not discriminate on the basis of disability in its education program or activity, including in admission to or employment in its education programs or activities. The notice should indicate that inquiries concerning Section 504 and/or Title II may be referred to the Section 504/Title II Coordinator(s) or to OCR. The Section 504 regulation at 34 C.F.R. § 104.8 (b) requires that the notice of nondiscrimination be displayed prominently in each announcement, bulletin, catalog, or application form used in connection with its education program and activity and in recruitment of students or employees and it should include the name, office address, and telephone number for the designated Section 504 and/or Title II Coordinator(s).

The Section 504 regulation at 34 C.F.R. §104.7(a) requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the

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regulation, including any investigation of any complaint communicated to such recipient alleging its noncompliance or alleging any actions that would be prohibited by the Section 504 or Title II regulations. The recipient must notify all of its students and employees of the name, office address and telephone number of the appointed employee or employees. The regulation at 34 C.F.R. § 104.7 (b), further requires a recipient to adopt and publish procedures that provide for the prompt and appropriate resolution of student and employee complaints alleging any actions prohibited by Section 504 and/or Title II and their implementing regulations. Such procedures must provide effective means for preventing and responding to disability-based harassment. In determining whether grievance procedures provide for a prompt and appropriate response

FACTUAL FINDINGS

Background

The Student enrolled in the 2nd grade at the School during XX 2012. In response to the Student's struggles in school, the Student's parents requested that the Student Assistance Team (SAT) meet to discuss the Student's Section 504 eligibility. The SAT met on or around XXXX X, 2013. The team meeting included the Student's parents, the then 2nd grade teacher, the Principal, the School's Response to Intervention Coach and 504 Coordinator (RTI Coach), and the Student's ESL teacher. The SAT discussed possible accommodations that were recommended by the Student's XXXXXXXXXXXX. The SAT was uncertain whether the Student was eligible for a Section 504 Plan after that meeting; however, the Student was placed on a Section 504 Plan approximately one month later, on XXX X, 2013.

Issue 1: Failure to conduct an appropriate evaluation of the Student under Section 504

The Complainant reported that the Student was promoted to the 3rd grade for the 2013-2014 school year, and after the start of the year he was placed back in 2nd grade. The Complainant contends that the Student was not re-evaluated prior to the school's decision to move the Student from 3rd grade to 2nd grade.

The evidence shows that on XXX X, 2013, the RTI Coach and the Student's 2nd grade teacher held a conference with the Student's parent(s) where they discussed possible retention of the Student. The meeting concerning possible retention was not a Section 504 team meeting. The parents objected to retention, at that time, based upon the social impact it could cause for the Student, therefore, he advanced to the 3rd grade for the 2013-2014 school year.

On or about XXXX X, 2013, the Student's 3rd grade teacher had a conference with the Student's mother, and expressed her concerns regarding the Student's readiness for 3rd grade level instruction. The Student's mother then met with the Principal and expressed concerns about the Student advancing to the 3rd grade. The Principal stated she would support retaining the Student in the 2nd grade if both parents agreed. The Principal told OCR that the Student's mother confirmed the parents' agreement to retain the Student after a brief telephone conference with the Student's father.

In OCR interviews, the Principal stated that there was no reason to reevaluate the Student prior to retention because “there was not more we needed to do as far as the reasonable accommodations that needed to be made.” The RTI Coach for the School made the following statements, “there is no need to reevaluate for a change in grade;” “[t]here was no change in program,” the Student “remained in the same general education program,” and “he moved to the 2nd grade and then they would just implement that curriculum;” and there was “no change in the required accommodation based on his individual education.”

The District’s Promotion and Retention Policy 4.603 provides for retention to be recommended by a teacher, and subject to Principal review and approval. The policy states that parents shall be informed in writing before retention and requested to participate in a conference at least six weeks before the end of the school year. Factors considered in retention for kindergarten through 8th grade include the teacher’s recommendation, judgment and evaluation, grades/daily work, effort, maturity (age/social), and mastery of grade appropriate skill in core curriculum.

Analysis and Conclusion

The Section 504 regulation does not specifically address standards for retention or promotion of students with disabilities. A promotion decision is not synonymous with a placement decision for Section 504 purposes and it is not necessary for the decision to be made by a Student’s Section 504 team. In this matter, the evidence shows that the initial promotion decision concerning the Student was made by the Principal following a conference with the Student’s parents. Similarly, change of the promotion decision was a decision made by the Principal following a meeting with the Student’s mother. Thus, the retention was not a placement decision triggering the Section 504 FAPE process requirements.

The Student’s Evaluation

OCR noted concerns regarding the evaluation of the Student for purposes of determining his eligibility for services under Section 504 and development of a 504 Plan. As noted above, the Student’s SAT was uncertain whether the Student was eligible for a 504 Plan after the XXX X, 2013, meeting. After that meeting, the RTI Coach determined that the Student would qualify for a Section 504 Plan as a Student with a “XXXXXXXX, XXXXXXXXXXXXXX XXX.” The eligibility determination was made solely by the RTI Coach, rather than by a team. After making the eligibility decision, the RTI Coach asked the parents in an email if they wanted to have a meeting to draft the Plan or have the school draft it and send it to them for review. The parents responded by email that the School could draft the Plan and then set a meeting to review the Plan, which was scheduled for XXXX X, 2013. However, the parents emailed the RTI Coach on XXXX X, 2013, stating they could not make it to the meeting. The RTI Coach drafted a 504 Plan using potential related aids and services discussed in the SAT meeting.

In interviews, the RTI Coach stated that she sent home two drafts of the Plan prior to enacting it in XXX 2013. The RTI Coach further stated that when they found the Student qualified under Section 504, the School wrote a plan and sent it to the parents on XXXX X, 2013; the Complainant asked her to correct the extended time accommodation from 20 minutes to time and

a half and the extended time provision was changed. The parents signed and returned the drafted plan, and it took effect on XXXX X, 2013.

In XX 2013, the Student was evaluated for eligibility for an Individualized Education Program (IEP). On XXXXXX X, 2013, the Student was found eligible and an IEP was developed, but the Complainant did not consent to placement until XXXXX X, 2014. The Complainant received a copy of his due process rights at this meeting and at the other Section 504 meetings. The Complainant states that the District followed the subsequent IEP provisions in XXXX and XXXXX 2014 until he withdrew the Student from the School. He was withdrawn to homeschooling for that year until he would eventually re-enroll at the District at a different school.

Analysis and Conclusion

The RTI Coach determined whether the Student was eligible for a 504 Plan. However, this eligibility determination for the Student must be made by a team of individuals knowledgeable about the Student. Further, the RTI Coach drafted the Student's 504 Plan unilaterally, decided which related aids and services were included, and the Student's parents were the only other team members who were given the opportunity to provide input on the document before it was signed and took effect. The 504 team did not meet to consider the relevant data and determine the appropriate placement for the Student in light of his specific disability, or to provide input on how the related aids and services should be implemented in the Section 504 Plan. The District was on notice of a need to evaluate the Student at least as early as XXXX 2013. Yet, the first occasion on which a team determined the Student's eligibility and identified his disability-related needs through an appropriate process was the XXXXXX X, 2013, IEP eligibility and placement meeting. Based on the foregoing, there is sufficient evidence of noncompliance with Section 504 and Title II with regards to the School failing to timely evaluate and place the Student through a process that comports with the Section 504 regulation.

Issue 2: Failure to implement Section 504 Plan

The Complainant alleged that in XX 2013, when the Student was retained in the 2nd grade, his Teacher did not provide him with additional time for assignments and grouping or blocking of assignments. The Complainant alleged the Teacher stated she did not have a way of managing the class and allowing those related aids and services. The Complainant states he never received actual evidence that any of the Student's 504 Plan related aids and services were being provided.

The Student's 504 Plan contained the following related aids and services: (i) extended time to complete assignments; (ii) "chunking" – provide timelines for completing tasks in chunks; (iii) visual cues – visual graphics used to explain daily schedule/tasks; (iv) preferential seating – close to instruction; (v) verbal checks for understanding – Student should repeat tasks/directions back to teacher to ensure understanding; (vi) use of manipulatives – Student given opportunities to use them as much as possible; and (vii) for standardized testing – time and a half and individual/small group administration of test.

Extended time to complete assignments

During interviews with OCR and in a supporting memo, the Teacher stated that she provided each related aid and service. The Teacher stated that a copy of the 504 Plan stayed on her desk every day. She stated she provided extended time for the Student on all assignments, but the amount varied depending on the assignment and its difficulty. She also acknowledged withholding the Student from part of recess approximately 10 times in order to provide him with extra time to complete assignments. However, notes from an IEP meeting on XXXXX X, 2014, contradict her assertion. The IEP notes reflect that the Teacher stated she withheld the Student from recess two times a week. The teacher added that he received as much time as he needed to complete tests in her classroom. The Teacher's Educational Assistant (EA) stated she had no role in implementing his 504 Plan, but observed the Student getting "whatever it took," stating he received extra time often and he was never denied extra time. Finally, OCR was able to interview two student witnesses in the Teacher's class: one witness stated that the Student did not get extra time except for when he was held out for recess, and the other witness stated that the Student received extra time on assignments.

During a follow up interview, the Complainant stated that there were some assignments that were not completed, but that he believes that the Student received extra time on them. He reasoned that providing extra time is ineffective if the other related aids and services, such as chunking, visual cues, and repeating directions back, are not provided. He stated that only providing extra time, but failing to check whether the Student understands the assignment would be an example of the ineffective approach.

The Teacher's grade book shows that for spelling, reading, math and language, the Student did not have any incomplete tests, his grades remained largely consistent, and he received comparable grades as his peers. The Complainant disagreed, stating that some assignments were incomplete for the Student, but he believes that the Student received extra time on them. Copies of the Student's agenda entries reflect nine instances where the Student did not finish work or work was sent home for completion, but the agenda notes do not show whether this was intended to provide extra time.

In summary, while the Teacher stated that the Student consistently received extra time, she acknowledged that on some occasions the "extra time" was recess time and one witness to events in the classroom said that the Student only received extra time during recess. In light of the foregoing, the preponderance of evidence supports a finding that the District failed to consistently provide extended time during class for the Student in accordance with his 504 Plan.

Chunking—Provide Timelines for Completing Tasks in Chunks

The Teacher stated when an assignment was too long she would explain a section and give her students small parts of the section at a time. She states she provided just a couple of questions to complete at a time, and that sometimes she would give the Student timelines and a set number of items to complete while writing, under the clock, a set time for him to complete them. She said that she would, for example, chunk the first two items of a 20 item assignment. She stated that not all assignments were chunked; when only 10 things were required in an assignment, the

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assignment may not be chunked. She did not explain why chunking was not necessary for a 10 item assignment. She stated that there were times when the Student did not finish an assignment despite being given extra time or having it chunked. When that occurred, she would help him go over it and finish it or the Educational Assistant (EA), parent volunteer, or peer tutor would pull him back to her table to finish it with him. The EA stated that the Student received timelines where the Teacher would write for him what needs to be done and when, and that he often had his assignments broken into chunks. The EA stated that there were times when the Student did not finish and ran out of time after receiving assignments in chunks, and being prompted and given extra time. She stated it was a fairly usual occurrence.

The Complainant acknowledged that there were times that he saw the Teacher chunking assignments. He stated he did not allege that they did not do it and that they did do it at times.

The 504 Plan and supporting documents, although stating that timelines will be provided for the student to complete assignments in chunks, does not specify whether chunking was limited to assignments of a certain length. As noted previously the Plan was developed by the RTI Coach without convening a team to determine the Student's placement or the related aids and services needed to meet the needs related to his identified disability. Thereafter, the Teacher, also acting unilaterally, determined that chunking was not needed for assignments with 10 items or less. As a consequence, chunking was provided for some, but not all multi-item assignments.

Based on the foregoing, the preponderance of the evidence establishes that the District failed to consistently "chunk" the Student's assignments as required under the Student's Plan.

Visual Cues—Visual Graphics Used to Explain Daily Schedule/Tasks

The Teacher stated she would write the time up on the board as a visual cue for the Student to explain his schedule, and placed "sticky notes" on assignments with reminders on how and what to do on each section as a way of providing visual cues to explain tasks. She alleged this was done on an "as needed" basis. The EA confirmed that the Teacher would "teach with the clock" somewhat regularly by telling the Student what time he should try to "aim for" on tasks. Student witnesses varied regarding the use of post-it notes, with one, who sat sufficiently close to the Student to observe his RTI schedule on his desk, saying "no," and the other saying, "yes, he received post-it notes on his assignments."

During a follow-up interview, the Complainant stated he knew at one time there were some visual cues, but when the Teacher was working with the Student, he did not understand the assignments. Regarding post-it notes, the Complainant stated he was not present in the classroom to witness this.

Based on a preponderance of the evidence, OCR finds there is insufficient evidence that the District failed to provide visual cues for the Student.

Preferential Seating—Seated Close to Instruction

Regarding preferential seating, the Teacher and the EA affirmed that the Student sat right in front of the dry erase board where most instruction occurred, off to the right side, and that she walked around a lot when she teaches. The Complainant confirmed the Student sat towards the front of the class. Therefore, based on a preponderance of the evidence, OCR finds there is insufficient evidence that the District failed to provide preferential seating close to instruction for the Student.

Verbal Checks for Understanding

The Teacher stated and the EA corroborated that the Student received frequent verbal checks for understanding and that the Teacher would sometimes say to the Student, “do you understand what we’re doing,” or “please repeat the directions to me, tell me what I just said to do.” One student witness confirmed that the Teacher would check that the Student understood directions. During a follow-up interview, the Complainant stated he would check his emails on this issue, but he was not in the classroom and “not entirely sure if it was not done.” OCR did not receive further information on this subject from the Complainant.

Based on a preponderance of the evidence, OCR finds there is insufficient evidence that the District failed to provide verbal checks for understanding for the Student.

Use of Manipulatives—Opportunity to Use Manipulatives (as much as possible)

Provisions for manipulatives applied mainly to mathematics, according to the Teacher. She stated the class takes part in hands-on instruction, uses flash cards, makes their own cards, uses word sorts on their desks, and also uses spelling tiles. When asked to describe the manipulatives provided to the Student, the Teacher described the types of manipulatives that were used with the entire class for a lesson when the need arose, but the Teacher stated she did not provide any manipulatives to the Student unless she was providing them to the entire class. The EA stated that in reading and language arts, the Teacher would make cards that say “yes,” “no,” and “maybe” for the students, including the Student, to use to answer questions. She would also have the students use “thumbs up” or “thumbs down” to make sure they were paying attention. Student witnesses were unsure on the provision of “yes” and “no” cards or spelling tiles, with one witness stating “I don’t know anything about that,” and the other stating they used “yes” and “no” popsicle sticks to practice tests, but alleged the Student never got to use them because they were at the end of the year after the Student left for home school.

The Complainant stated he was sure manipulatives were used with other students, but disagreed that they were used with the Student. He stated he saw little supporting evidence of extra items used in class, but had also noted that he was not present in the classroom to witness implementation of several provisions of the Student’s Plan.

Based on a preponderance of the evidence, and inconsistencies between student witnesses and District staff regarding use of manipulatives, there is insufficient evidence to establish the Student was not provided with manipulatives.

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Standardized Test Accommodations

The Student's 504 Plan reflects that the Student would take the Stanford 10 standardized test in the 2nd grade. The "accommodations" needed were extended time up to time and a half and individual/small group administration.

The Principal stated in interviews that the only test the Student would have had at the beginning of the 2013-2014 school year would have been a cognitive abilities group IQ test. Regarding standardized test accommodations, there was no data indicating that the specific standardized tests listed in the 504 Plan were administered during the relevant time frame. The Complainant also stated he was not aware of any standardized tests that were given in the XX 2013.

Based on the preponderance of the evidence, there is insufficient evidence to establish that the Student was not provided standardized testing accommodations.

Provision of 504 Related Aids and Services in the RTI Setting

The Student's RTI Coach stated that the Student came to her for 30 minutes of RTI pull-out sessions per day since his initial placement in Tier III RTI on XXXXX X, 2013. The sessions continued after he received a Section 504 Plan. Regarding extra time, she stated that since RTI was provided as remediation, the Student received however long it took to finish, if he needed extra time. She stated that she would start the Student early or give him time to finish work the following day, and he was given however long it took to complete the work. The RTI Coach stated that the Student was often given his assignments in chunks, where they would ask him to do portions of an assignment at a time. For the visual cues, she stated this was provided for all students in the RTI setting. She stated that cues setting out the order of tasks and how they would be broken down were on the board next to the schedule showing what the 30 minutes would look like. She stated that when explaining tasks the Student had visual models and examples of completed assignments to use as a guide. For preferential seating, the Student was next to the RTI Coach's assistant, or next to the RTI Coach, which meant the Student was seated at the front of the class. For verbal checks for understanding, she stated she would have the Student repeat instructions back to her. The RTI Coach stated she used blocks for the number of words in a sentence, highlighters, and other manipulatives with him "a couple" of times a week. The RTI Coach explained that math manipulatives involve using objects to hold while doing problems. The Complainant confirmed that in RTI the Student was getting more work with manipulatives. He stated there was no testing and in RTI and, therefore no testing accommodations. During a follow-up interview, the Complainant confirmed the provision of all related aids and services in the RTI setting; he said he felt RTI did much more that met the intent of the 504 Plan and possibly beyond what was written, and that the issues were in the Teacher's classroom and not in the RTI setting.

Based on the preponderance of the evidence, there is insufficient evidence that the Student was not provided his listed 504 Plan related aids and services in the RTI setting.

Analysis and Conclusion

Based on a preponderance of the evidence, including District records, interviews, and statements by the Complainant, District officials, staff, teachers, and student witnesses, there is sufficient evidence that the District failed to implement the related aids and services of extra time on assignments and chunking of assignments in the Student's 504 Plan. Furthermore, providing additional time on assignments by denying access to recess was done for reasons related to the Student's disability. While this was not a violation of the 504 Plan's provisions, it was a denial of FAPE. Finally, as discussed above, the plan was not developed through an appropriate process; thus, the evidence does not support a conclusion that provision of those services would constitute the provision of FAPE as defined in the applicable regulation.¹ Therefore, there is sufficient evidence of noncompliance with Section 504 and Title II as it relates to providing the Student a FAPE as it relates to how the extended time was provided.

Issue 3: Failure to take appropriate responsive action to complaints of disability harassment

Notice of Nondiscrimination/Section 504 Coordinator/Grievance Procedures

The District's notice of nondiscrimination provides the title, phone number and address for the Section 504 Coordinator. Specifically, the Coordinator is also the XXXXXX XXXXXX (Coordinator) of the Rutherford County School System.² The contact information is also provided in the District's Notice of Parent and Student Rights under Section 504.

The District's procedures as it relates to Section 504, including its notice of nondiscrimination, and harassment procedures were reviewed in a prior OCR complaint, OCR Complaint #04-13-1038. Pursuant to the Resolution Agreement in that matter, the procedures are being revised and OCR is currently monitoring the corrective actions in the prior complaint. Therefore, concerns that have surfaced in this matter regarding the District's policies will be addressed through the monitoring of the Resolution Agreement in OCR Complaint #04-13-1038.

Alleged Harassment of the Student

The Complainant alleged that the Student's 2nd grade teacher subjected him to a hostile environment by yelling at him in class and keeping him out of recess for difficulties with assignments stemming from the District's failure to provide the listed related aids and services in his 504 Plan. The Complainant also alleged that the Principal threatened to evaluate the Student for a behavior problem for not completing his assignments.

Evidence Concerning Alleged Harassing Incidents

¹ As noted in the legal standards, one component of the definition of FAPE is that identified services are based on the procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards.

² The XXXXXX XXXXXX does not decide appeals and OCR's investigation revealed no evidence that her role as Coordinator has created a conflict of interest.

Recess

OCR interviewed the Teacher, who stated that she estimates the Student only sat out of recess 10 times for incomplete assignments out of a total of 86 days in her class. She stated that he sat out for 5 to 10 minutes each time and after completing his work he was allowed to participate in recess. The EA corroborated this, adding that he was held out of partial recess to provide extra time to finish his morning work and incomplete assignments. The Teacher's supporting memo stated that if any of her students needed extra time, they sat out during outside or indoor recess and that she never allowed students to miss their entire recess. The Teacher stated that her recess policy was not a punishment; it applied to all students. The EA stated that she does not know if the students perceived the recess policy as punishment, but that a lot of students liked to utilize the opportunity. Interviews with other students in the class confirm that the Student was held out from recess to finish assignments, that he would be allowed to participate when he finished, and that the policy applied to all students in class. One student witness stated it happened to the Student "a lot," but that it also happened to other students "a lot."

During a follow-up interview, the Complainant stated that the Student told him that missing recess was punishment for not getting his work finished. He stated he was unaware of how many total times he was held from recess, but alleged it was starting to happen more consistently. He stated that the Student missed all of the recess rather than only part of it, but did not know if this policy is applied to other students. He stated there was no evidence that the Student was more efficient in completing assignments if he was held out of recess. The Complainant added that the Student should not have been held from recess to finish work when it was "an obvious learning disability issue" and there were other ways to improve that issue.

Based on the preponderance of the evidence, there is sufficient evidence that recess was withheld from the Student based upon incomplete work that was related to his disability.

Threat to Evaluate

The Complainant alleged that the Principal threatened to evaluate the Student for a behavior problem because he was not completing his assignments. During interviews, the Principal denied that she threatened to evaluate the Student or stated that the best way to motivate him was for him to lose his recess. The Principal stated that at a meeting the Teacher said she noticed that the Student seemed to be more motivated to finish work in recess because he wanted to be in recess. In light of the Teacher's remark, the Principal inquired about whether there had been instances in which the Student had been off task and should have received "conduct marks." The Principal told OCR that the School uses codes to track behavior and incidents impeding academic and social tasks, such as being off task (OT). The Principal claimed that when conduct marks are not given in an intervention situation the School does not have a baseline to determine if an intervention strategy was effective for the Student. The Principal stated she was concerned that behavior tracking conduct marks that might have alerted the School to a need for additional interventions were not being used with the Student, but there was never a discussion of doing a behavioral evaluation.

The Teacher also reported to OCR that conduct marks were the School's behavior tracking policy. The Teacher also alleges the Principal was upset because during the meeting, "she asked how many conduct marks I've given the Student," and she replied, "only one OT," and "she asked me why I wasn't giving him more OT conduct marks." She said out of the 86 days he was in her class, the Student received one homework mark, one responsibility mark, and one off task mark. Both the Teacher and Principal stated he was never given a behavioral evaluation. The District witnesses also asserted that the terms "behavior" or "conduct" as used in the context of tracking off task behavior are not synonymous with misconduct that is subject to the School's discipline code.

OCR determined that "conduct codes" are not referenced in the District's discipline code; however, the School's 2013-2014 Student handbook states that "when the need for a behavior correction occurs....codes will be used to reflect the nature of the behavior." Based on the handbook, assignment of "Behavior Codes" can result in discipline "if there are ten (10) or more corrections in one week," and can also result in honors or awards if few conduct marks are received over an extended duration of time.

During a follow-up interview, the Complainant confirmed his belief that the conduct marks and alleged behavioral evaluation threat arose out of him stating it was inappropriate to take away the Student's recess because of the student's disability. He alleges he asked why it was appropriate, and the Principal replied, "maybe there are behavioral issues" and they needed to look at it differently. He stated that the Principal asked the Teacher why she was not documenting any behavioral issues by the Student when holding him out of recess, since that was an option. The Complainant stated this was harassment because the Principal was suggesting the Teacher document behavioral issues that previously never existed to protect themselves for why the Student was missing recess. The Complainant confirmed that it seemed accurate that the Student only got three conduct marks from the Teacher.

The Student was not present for the discussion during the meeting, was not in fact evaluated for his behavior, and received no behavior or conduct marks subsequent to the meeting. Based on the preponderance of the evidence, there is insufficient evidence that any statements made during a meeting regarding possible use of conduct marks to track the Student's behaviors were instances of harassment, or that any threats were made to the Student.

Yelling

The Complainant alleged that the Student stated that the Teacher would yell at him because he was not getting his work done, and that she would express frustration, and yell the Student's name "with a tone of 'why are you not doing it [the work].'"

The Teacher stated that she never yelled at the Student, but stated it was frustrating teaching him at times. The Principal stated she has never witnessed the Teacher yelling at the Student. The EA stated that the Teacher would raise her voice with all students if she needed to get her point across after prompting students, but that she never yelled and she never saw a negative response from the Student if this occurred. Student witnesses differed in their statements. One student witness stated that the Teacher has yelled at the Student about not finishing assignments or

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various other things, and that it was so loud a few times that a teacher from next door had to come see what was going on. OCR interviewed the teacher this student identified; she stated that she never heard the Teacher yell during the 2013-2014 academic year. She stated she visited the Teacher's room at different times, sometimes for questions about scheduling, curriculum, and procedures with dismissal, but did not witness yelling. The other student witness stated the Teacher was "kind of raising her voice but not really," and it was not "really bad like yelling." The Teacher and Principal stated that the Student's parents never complained about alleged yelling at the Student, and the EA stated she did not know if they complained of this before.

During a follow-up interview, the Complainant stated that the Teacher raising her voice to the Student is the same thing as yelling. He stated that he did not file a complaint or make oral complaints on the yelling allegations other than the instant complaint.

Based on the evidence, there is evidence that the Teacher raised her voice in class with all students, including the Student, but the preponderance of the evidence is insufficient to establish that she yelled at or targeted the Student as alleged, or singled him out with respect to raising her voice. However, there is sufficient evidence that she raised her voice with the Student in response to behaviors related to his school work and she acknowledged that at times it was frustrating to teach him. The Student's Section 504 Plan and supporting documents reflect that the behaviors or patterns that resulted in the Teacher's frustration and raising of her voice were identified as related to his disability. Specifically, the disability-related needs addressed through the plan included accommodating his learning and XXXXXXXX function with accommodations such as extra time on assignments, chunking assignments, verbal checks for understanding, and like accommodations. Thus, based on the preponderance of the evidence, there is sufficient evidence that the Teacher raised her voice in response to the Student's academic performance related to his disability.

District's Notice and Response to Alleged Harassing Incidents

The evidence does not show that the Complainant filed any formal complaints with the District regarding the alleged harassing incidents. During an IEP meeting, the Complainant raised concerns that the Student perceived his limited recess time as punitive. However, the Complainant did not make any other complaints about this, other than the instant OCR complaint. However, the alleged harassing incidents involved District staff and as noted in the legal standards, the recipient is responsible for any disability-based harassment of a student by an employee and, therefore, must remedy any effects of the disability-based harassment on the victim, end the harassment and prevent its recurrence. Nevertheless, the District received notice of the allegations of disability harassment when it received notice of the OCR complaint. OCR's investigation presented no evidence that the District took action to independently investigate these alleged incidents of harassment after receiving notice of the complaint from OCR.

Conclusion

OCR reviewed the evidence to determine whether any flaws in District policies regarding harassment or whether the District's failure to respond promptly and appropriately to alleged

incidents of disability harassment resulted in the Student being subjected to a hostile environment.

To analyze whether the Teacher's withholding the Student from recess and raising her voice in response to the Student's academic performance relates to his disability and thereby created a hostile environment, OCR must consider the type, frequency, and duration of the conduct; the age of the alleged harasser and the victim; and the identity of and relationship between the alleged harasser and the victim. The denials of recess happened as much as twice a week over the course of nearly half a school year. The exact frequency of the Teacher raising her voice was not established by the evidence; however, the evidence shows that this occurred in response to his not completing his assignments, and according to District witnesses, there were multiple occasions on which the Student did not complete assignments. The Teacher was in an authority role over the Student, and the Student was of a young age where the loss of recess reasonably could be perceived as punishment. The evidence shows that the Student was withheld from recess for actions that are directly related to his disability. Following this treatment, the Student was withdrawn from the District to be homeschooled during February of the 2013-2014 school year.

Based upon the foregoing, OCR finds that the Teacher's withholding the Student from recess and raising her voice in response to his academic performance constitutes harassment based on disability that was sufficiently serious to interfere with or limit the Student's ability to participate in services or opportunities in the School's program. 34 C.F.R. §104.4. The District has failed to take action to address the harassment or provide a remedy for the Student. Moreover, the District did not assess the impact of harassing incidents upon the Student's receipt of FAPE.

On September 17, 2015 the District entered into a Resolution Agreement, which once implemented, will fully address the issues in this complaint in accordance with the requirements of Section 504 and Title II. The Agreement, among other things, requires the District to draft a statement that the District will respond to harassment at the School; invite the Student to be evaluated for eligibility for a FAPE and compensatory educational services; and if the parents' consent, conduct an evaluation of the Student to determine the necessity of compensatory educational services or remedial services; conduct a "climate check" or series of climate checks with students at the School to assess the effectiveness of steps taken pursuant to the Agreement or otherwise by the School to ensure a campus free of disability harassment.

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. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy, and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. A complainant may have a 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.

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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.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact Michael Bennett, General Attorney, at 404-974-9274, or Wendy Gatlin, Compliance Team Leader, at 404-974-9356.

Sincerely,

Melanie Velez
Regional Director

Enclosure