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February 10, 2015

Charlie Van Zant, Jr.
Superintendent
Clay County School District
900 Walnut Street
Green Cove Springs, Florida 32043

Re: Complaint #04-14-1557

Dear Mr. Van Zant:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Clay County School District (District), on May 6, 2014, alleging discrimination on the basis of disability on behalf of the Student, a student at Lakeside Elementary School (School) and his Parents. Specifically, the Complainant alleged the following:

1. The District failed to implement the Student's Section 504 Plan;
2. The District removed the Student from his general education classes to part-time Exceptional Student Education (ESE) classes and from part-time ESE to full-time ESE without evaluating him prior to the changes in placement;
3. The Student was placed in ESE where he was not allowed to interact with non-disabled peers.
4. The Student was disciplined for behaviors that were a manifestation of his disability;
5. The Student's placement was changed to full-time ESE without proper notice given to the Parents; and
6. The Parents were excluded from the change of placement meeting in retaliation for complaining about the Student's ESE placement.

As a recipient of Federal financial assistance from the Department, the District is subject to the requirement of 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, which prohibit discrimination based on disability. As a public entity, the District is also subject to the requirements of Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination based on disability. Accordingly, OCR has jurisdiction over this complaint.

OCR proceeded with an investigation of the following legal issues:

1. Whether the District discriminated against the Student on the basis of disability by failing to implement his Section 504 Plan, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.33, and the Title II implementing regulation at 28 C.F. R. § 35.130;

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2. Whether the District discriminated against the Student on the basis of disability by changing his placement in December 2013 from a regular education setting to a part-time general education setting and part time ESE setting, and by changing his placement again in February 2014 from the part-time ESE setting to a self-contained setting without evaluating him prior to these significant changes in placement, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130;
3. Whether the District discriminated against the Student on the basis of disability by failing to place him in the least restrictive environment, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.35, and the Title II implementing regulation at 28 C.F.R. §35.130;
4. Whether the District discriminated against the Student on the basis of disability for punishing him for behaviors that were a manifestation of his disability, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130;
5. Whether the District discriminated against the Student on the basis of disability by failing to provide proper notice and an opportunity for participation to the Parents, in noncompliance with the Section 504 implementing regulation 34 C.F.R. §104.36, and the Title II implementing regulation at 28 C.F.R. § 35.130; and
6. Whether the District retaliated against the Parents by failing to include them in a placement meeting after they complained about the Student's ESE placement, in noncompliance with the Section 504 implementing regulation 34 C.F.R. §104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

During the complaint resolution process, OCR reviewed documents provided by the District, and interviewed District staff and the Complainant. Based on the available evidence, OCR found insufficient evidence to support a finding of noncompliance with regard to Issues 1-5, but found sufficient evidence of non-compliance with respect to Issue 6. Set forth below is a summary of OCR's findings.

Applicable Regulatory Requirements

As the Title II implementing regulation provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations, OCR conducted its investigation in accordance with the applicable Section 504 standards.

The regulation implementing Section 504 at 34 C.F.R. §104.33(a)-(b)(2), requires a recipient that operates a public elementary or secondary education program or activity to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the educational needs of individuals with disabilities as adequately as the needs of individuals without a disability are met and that satisfy the requirements of the regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36 (educational setting,

evaluation and placement, and procedural safeguards). Implementation of an Individual Education Program IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these standards.

The regulation implementing Section 504 at 34 C.F.R. §104.34(a)-(b), requires that a recipient shall educate or provide for the education of, each qualified individual with a disability in its jurisdiction with non-disabled persons to the maximum extent appropriate to the needs of the qualified individual with a disability. The recipient shall place the qualified individual with a disability in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the qualified individual with a disability in the regular environment with the use of supplementary aids and services cannot be satisfactorily achieved. When providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods and activities set forth in §104.37(a)(2), a recipient shall ensure that qualified individuals with disabilities participate with nondisabled individuals in such activities to the maximum extent appropriate to the needs of the qualified individual with a disability.

The regulation implementing Section 504 at 34 C.F.R. §104.35(a) and (c) requires that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with paragraph (b) of this 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. In interpreting evaluation data and in making placement decisions, a recipient shall: (1) draw upon information from a variety of sources, including aptitude tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from such sources is documented and carefully considered; (3) 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; and (4) ensure that the placement decision is made in conformity with §104.34.

As noted in Appendix A, Subpart D of the Section 504 regulation, “It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the “process” requirements of this subpart (concerning identification and location, evaluation, and due process procedures).”

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

The regulation implementing Section 504 at 34 C.F.R. §104.61 incorporates, by reference the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq., (Title VI) at 34 C.F.R. § 100.7(e) which provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any

right or privilege secured by the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing in connection with this complaint.

Background

The Student was 9 years old in the third grade at Lakeside Elementary School (School) during the 2013-2014 school year. The Student was diagnosed with ADHD, Depression, Anxiety Disorder, Mood Disorder and Raynaud's Disease. The Student takes medication before and after school each day. The Student originally started the 2013-2014 school year in a general education setting with a 504 Plan but was placed in ESE full time with a 504 Plan before the 2013-2014 school year ended.

A Section 504 meeting was held on December 2, 2013 to discuss a behavioral incident with the 504 Team (Parents, Complainant, Principal, 3rd grade Teacher, Director of ESE, 2 Counselors, School Psychologist, ESE Specialist, the Assistant Principal and the School Board Attorney). The Parents stated that even though the Student's evaluation was not completed, the Team decided to place the Student in ESE part-time. The Parents did not agree with this and felt that the Team did not have enough information to make this decision. The Parents stated that they repeatedly complained, through the Complainant, about the ESE placement. The Parents stated that the only testing that had been done on the Student at that point was achievement tests to determine where he was academically.

The Parents stated that the Student was placed part-time in an ESE setting from December 2, 2013 until February 23, 2014. The Parents stated that on February 21, 2014, the Student was involved in an incident where he pushed some kids. The Parents stated that no children were hurt in the incident but the Student received one (1) day out-of-school suspension (OSS). The Parents stated that on that same day (a Friday) at 5:39pm an email was sent to the Complainant stating that there would be an "emergency" Section 504 meeting on Monday, February 24, 2014 at 8:30am. The Complainant stated that she did not see the email until Monday morning and that the Parents did not get any advanced notice. The Parents believe this meeting was held without them, and that proper notice was not given because they complained about the Student's ESE placement.

The Parents stated that the School held the meeting without them and made the determination to place the Student in ESE full-time. The Student was placed in a self-contained ESE classroom from February 24, 2014 until the last day of school for the 2013-2014 school year. The Parents alleged that the Student had been disciplined several times during the 2013-2014 school year and that a manifestation determination hearing was never held.

Factual Findings and Analysis

Issue 1: Whether the District discriminated against the Student on the basis of disability by failing to implement his Section 504 Plan.

The Parents stated that on November 15, 2013, the Student became agitated because he was not able to eat lunch during his lunch period. The Parents stated that the Student's 504 Plan has a provision for a "cool out" period if the Student becomes agitated or upset. The Parents stated

that the Student was not provided with this service and as a result, he pushed some chairs out of his way and left the classroom. He was suspended out-of-school for five days.

OCR reviewed the Student's 504 Plans for the 2013-2014 school year. The 504 Plan dated August 22, 2013 provided the following accommodations:

- "Chunking" of Assignments
- Preferential seating to reduce distractions

An additional 504 Plan meeting was held on October 4, 2013 and the team developed a plan which provided the following accommodations:

- Self-monitoring (an opportunity to practice strategies or change his environment)
- "Chunking" of assignments
- Frequent breaks
- Extended time on exams
- Paper and pencil to take tests instead of using the computer
- Tutoring after school for 9 hours per week for 9 weeks

While the Student's March 15, 2013, 504 Plan had "a quiet spot in classroom" and "chill out" as accommodations, and the December 2, 2013, 504 Plan has checked off "cooling off period" as an accommodation, there was no similar provision in the August 22, 2013 or the October 3, 2013 504 plans. The evidence did not provide an explanation for omission of these items from the written plans. Although not included in the plans, the teachers stated during their interviews that this accommodation was provided to the Student throughout the year.

OCR spoke with the Student's teachers, and they all stated that the Student's accommodations as listed in his 504 Plan were implemented. The teachers stated that the Student's assignments were "chunked together" so that he would have a grade for a group of assignments and that he was provided extended time on assignments. District staff stated that the Student had preferential seating, and if that became distracting, if he chose to, he could move to a small table in his classroom so that he could focus better. The Student was able to say that he wanted to go to the Main Office to calm down or if the teachers saw him unable to calm down in class, they would let him know he could go to the Main Office for a little while and return to class when he was calm. The Student was able to use a paper and pencil instead of filling out his test answers on the computer forms, and he did receive tutoring for nine weeks.

OCR spoke with District staff regarding the November 2013 incident in the Student's math classroom. The Math Teacher stated that the Student had come into class and said he had not eaten lunch. The Teacher learned that he did not get lunch because he had gotten out of the serving line and did not get back in line in time to get served. District staff stated that the cafeteria was called to determine if any lunch was still available, and they were told the cafeteria was closed. The Student was given a snack by another student in the class. The Student ate the snack, but continued to be agitated and extremely upset. District staff stated that the Student was told that he could go to the Main Office in order to calm down. District staff stated that when the Student got up to leave the classroom, he walked to the front of the room and then turned around and started throwing chairs towards the other students.

The Math Teacher stated that just prior to the incident the Student had calmed down a little when he was told he could go to the Main Office and gave no indication that he would throw the chairs. The Math Teacher stated that he had never done anything like that before in class. The Math Teacher stated that she was able to move the other students out of the class while a teacher's aide watched the Student. The Teacher's Aide called the Main Office and an Administrator came and took the Student to the office. The Student did not return to the classroom after that. At the next Section 504 meeting, District staff stated the Parents requested that the Student not be in the class anymore.

Based on the foregoing, OCR finds that the Student's 504 Plan was implemented in his classroom. OCR found that on the day of the incident in November 2013, contrary to the Parent's allegation, the Student was told he could go to the Main Office to calm down before the incident occurred. There was no evidence that the incident occurred because the Student was denied the opportunity to go to the Main Office to cool down. Accordingly, OCR finds there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with respect to this issue.

Issue #2: Whether the District discriminated against the Student on the basis of disability by failing to evaluate him prior to significant changes in placement in December 2013 and February 2014.

The Complainant and the Parents stated that on December 2, 2013, the Student was changed from a full-time general education setting to a part-time ESE/general education setting and on February 25, 2014, the Student was changed from a part-time ESE/general education setting to a full-time ESE placement. The Complainant and the Parents allege these changes in placement were made without an evaluation of the Student. The Complainant and Parents stated that they received notice of their due process rights at each meeting.

The Student records provided by the District show that the Parent gave consent on March 15, 2013, to have the Student evaluated. An evaluation was completed on April 9, 2013. The Parent rescinded consent on April 17, 2013; however, a report was still generated, dated April 26, 2013, because of the professional obligation to report the obtained evaluation results. The Complainant gave consent on August 1, 2013 for a Tier 3 Problem Solving Assessment. A Tier-3 Problem Solving Assessment was completed on August 8, and August 13, 2013

District staff stated that the Parents expressed dis-satisfaction throughout the 2013-2014 school year with the Student's progress and felt that the District should be doing more within the parameters of Section 504. District staff stated that they explained to the Parents that if they wanted the Student to have another evaluation, it could be done. However, the Parents stated that they wanted the District to pay for an outside independent evaluator. District staff stated that they refused this offer because they had qualified staff that could conduct the evaluation.

Over the summer there was a request for due process. The request was sent to mediation. The Mediation Agreement (Agreement) dated September 3, 2013, requires both sides to share all the results of earlier evaluations and private evaluation and to consider all information at a Section 504 meeting scheduled on October 4, 2013.

On October 4, 2013, the District convened for the student's Section 504 annual review or re-evaluation. The Section 504 committee determined that the Student's placement would continue to be in the regular education classroom. The Parent signed the plan with a note indicating that no evaluations were conducted prior to August 9, 2013, were valid. The Parent, however, did not withdraw consent for placement and was given notice of due process.

On November 15, 2013, there was an incident where the Student threw a chair across the room in his Math class. As a result, an emergency Section 504 meeting was requested for November 19, 2013. There was no information on whether the November 19, 2013 meeting took place. An emergency meeting was held on December 2, 2013, to determine if the Student could remain in the class and to discuss any changes in required services. The Parents requested that the Student be removed from Math class. The request was approved.

District staff stated that prior to each change of placement, a Section 504 meeting is held so that the team could discuss the reasons for the change of placement and the issues. During the December 2, 2013, 504 meeting, the team considered parent input, grade reports standardized tests, early intervention data, teacher/administrator input, school health information, medical evaluations/diagnoses, student work portfolio, and mitigating measures. District staff stated that when the Student was changed from full-time general education to part-time ESE/general education on December 2, 2013, both parents were at the meeting and signed the 504 Plan. District staff stated that the parents did not request a due process hearing to challenge that change of placement.

District staff stated that the District's Behavior Analyst observed the Student in class on December 17, 2013, February 7, 2014, and February 10, 2014. District stated that there was another incident on February 21, 2014 that involved the Student pushing some other students out of the way resulting in one student injuring her ankle. The District provided a February 21, 2014 notice to the Parent for an emergency February 24, 2014, Section 504 meeting. An emergency 504 meeting was held February 24, 2014, but neither the Parents nor the Complainant were in attendance.

District staff stated that prior to the Student going from part-time ESE/general education to full-time ESE, a meeting was held so that the Section 504 Team could decide what additional services the Student needed and whether a change of placement was necessary. District staff stated that the Complainant and Parents were notified of the Section 504 meeting but were not present and did not ask that the meeting be rescheduled. In attendance at the meeting were the District's ESE Director, the Principal, the Student's General Education Teacher, the Assistant Principal and the Student's ESE Teacher. The team considered grade reports, standardized tests and other tests, teacher/administrator input, student work portfolio, special education records, attendance, point sheets and the observations by the Behavior Analyst. District staff stated that after the change of placement was made from part-time ESE/general education to full-time ESE, the District did not receive a request from the parents for a due process hearing to challenge the change in placement.

District staff stated that based on the evaluations they did have for the Student, his academic records and the observations of teachers and behavior assessments, it was determined that the Student would benefit the most from a full-time ESE program at that time.

At the request of the Complainant and the Parents, another 504 Plan meeting was held on March 19, 2014. In attendance at the meeting were the District's ESE Director, the Principal, the Student's ESE Teachers, the Behavior Analyst, the Assistant Principal, the parents and the Complainant. The parents signed consent for an evaluation but made stipulations as to who they would allow to work with the Student. District staff stated that the evaluation was never completed because the Parents did not return all the necessary paperwork.

OCR contacted the Complainant on October 21, 2014, to determine if she or the Parents had any additional information she would like to add to rebut the District's information. The Complainant stated that the reason that she and the Parents rejected the District's offers to evaluate the Student was because they felt that the District was biased against the Student. The Complainant stated that they wanted the District to pay for an outside independent evaluator and the District refused. The Complainant stated that they still contend the Student was sent to ESE without a full evaluation and that he should be given compensatory services from the time he went to the ESE classroom part-time until he left the School at the end of the 2013-2014 school year. Although the Parent received notice of due process, the Complainant did not state why the Parent failed to request a due process hearing.

Based on the foregoing, OCR finds that meetings were held to discuss the Student's change in placement before each change was made. OCR found that the Section 504 Team was made up of persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options. The Team did consider information from a variety of sources as set forth above, as well as behavioral observations to determine what services the Student needed at the time. The records show that the Parents attended the December 2, 2013 meeting and signed the revised 504 plan. The records also show that the Parents did not attend the February 24, 2014 meeting due to insufficient notice, but another meeting was held on March 19, 2014, which the Parents attended and the 504 Plan that was developed on February 24, 2014 was not changed. Although the notes from the March 19, 2014 meeting indicate that the Parents objected to the placement and wanted the Student placed back in a general education placement with supports, OCR did not find any evidence that the Complainant or the Parents filed a due process hearing request to dispute the changes made to the Student's 504 Plan in December 2013 or February 2014. As indicated under the legal standards set forth above, OCR does not review educational decisions as long as the District has followed the process requirements of the Section 504 regulation. Accordingly, OCR finds there is insufficient evidence to support a finding of noncompliance with Section 504 with respect to this issue.

Issue #3: Whether the District failed to place the Student in the least restrictive environment.

The Complainant and the Parents stated that the Student was removed from a part-time general education setting to a full-time ESE setting where he had no interaction with nondisabled peers.

From February 25, 2014 until the end of the 2013-2014 school year, the Student's schedule was as follows in the self-contained classroom:

- Homeroom – Edwards
- Basic Grade Reading – Edwards
- 3rd Grade Math – Edwards

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- 3rd Grade Science – Edwards
- 3rd Grade Social Studies – Edwards
- 3rd Grade Language Arts – Edwards

According to District staff and the Student’s written schedule, while he was in the full-time ESE placement at the School, he continues to participate in some classes (music, physical education, recess and library time) with general education students.

The Complainant failed to provide information to support the allegation that the Student had no interaction with nondisabled peers on a daily basis.

Based on the foregoing, OCR finds that the evidence does not corroborate the Complainant’s allegation that the Student had no interaction with his nondisabled peers. . If the Complainant continues to disagree with the full time ESE placement, a request for a due process hearing is the appropriate forum in which to raise this issue. However, at this time, the Student no longer attends the School. Accordingly, OCR finds that there is insufficient evidence to support a finding of noncompliance with Section 504 with respect to this issue.

Issue #4: Whether the District discriminated against the Student on the basis of disability for punishing him for behaviors that were a manifestation of his disability.

The Complainant and the Parents alleged that the Student was disciplined for more than 10 days during the 2013-2014 school year but that there was no manifestation determination meeting held for the Student.

The evidence presented by the District showed that the Student had: 7 days of out-of-School suspension (OSS), 7 days of in-School suspension (ISS) and 1 School Service Work day¹. The OSS sanctions were imposed on November 19, 2013 (5 days), February 21, 2014 (1 day), and June 2, 2014 (1 day). The ISS sanctions were imposed on January 24, 2014 (1 day), January 27, 2014 (1 day), February 18, 2014 (2 days), April 28, 2014 (1 day), and May 27, 2014 (2 days). The School Service Work day occurred on May 16, 2014.

OCR reviewed the ISS days to determine if these resulted in the Student’s exclusion from the Student’s educational program and should, therefore, be “counted” as disciplinary actions for purposes of requiring a manifestation determination after there has been an exclusion of 10 or more days. In-school suspensions typically are served in a classroom within the school setting. Some recipients do not provide the students with any services while serving an ISS while other recipients may remove the student from the educational program for one period, for part of the day, or all day.

The District provided documentation to show that the Student received educational work and his IEP was implemented while serving ISS. District Staff stated that when the Student was in ISS, his teachers provided the work to the ISS Teacher for the Student to complete, so while the Student was removed from his classroom setting, he continued to receive all of the services required in his IEP. OCR has, therefore, determined that the 7 ISS days will not be counted as exclusions. The Student, therefore, was only excluded for 7 days of OSS.

¹ The Work Day was served on a Saturday.

District staff stated that they were aware of the 10 days rule with regard to manifestation determination meetings but did not think the Student had reached that requirement. District staff stated that the Student's behavior in School on occasion did require suspension out of school (OSS), but that the School tried to work with the Student to minimize his behavior problems through setting a behavior plan for the Student.

OCR finds that the Student was only excluded from school for 7 days for the 2013-2014 school year and, therefore, the District did not have to conduct a manifestation determination since the Student had not been excluded for more than 10 days. Accordingly, OCR finds there is insufficient evidence to support a finding of noncompliance with Section 504 with respect to this issue.

Issue #5: Whether the District discriminated against the Student on the basis of disability by failing to provide proper notice and an opportunity for participation to the Parents.

The Complainant and the Parents stated that the District held an emergency Section 504 meeting and that the District failed to provide sufficient advanced notice. The Complainant and the Parents alleged that the School sent out notice for a meeting by voicemail, email and through the regular mail, late on a Friday (February 21, 2014) for a meeting that was going to be held early Monday (February 24, 2014) morning.

District staff stated that there was an incident involving the Student on Friday, February 21, 2014 and the District determined that an emergency Section 504 meeting needed to be held to address the Student's behavior and to determine if he could remain in the classroom. District staff stated that the Student pushed other students down. One child hurt her ankle and had to go to the Nurse's office. District staff stated that the Student's behavior became a safety concern in the class and felt that an emergency meeting was necessary. The District stated that notice is usually provided to parents via regular mail. District staff stated that because of the nature of the incident and their desire to address the issue immediately, the School notified the Complainant and the Parents additionally by email and by voicemail.

The Parents and the Complainant requested another meeting because they were unable to attend the February 24, 2014 meeting. A meeting was held on March 19, 2014. At the March 2014, meeting the team considered the parents' input. The District stated that the Parents signed consent for evaluation but the evaluation was not completed because the Parents did not return all the documentation. The remedy for the lack of notice for the February 24, 2014, meeting was holding another meeting in March when the same information was considered along with the Parent input.

The Complainant failed to provide any additional information to support the allegation that the Parent failed to have an opportunity to participate in the educational plan for the Student.

Based on the foregoing, OCR finds that the District did not provide proper notice to the Complainant and the Parents for the February 2014 Section 504 meeting. However, the District held a meeting on March 19, 2014 because the Parents and the Complainant were unable to attend the February 24, 2014 meeting and the same information was considered. The convening of the March 2014 meeting resolves the lack of notice for the February 2014 meeting.

Accordingly, OCR finds there is insufficient evidence to support a finding of noncompliance with Section 504 with respect to this issue.

Issue #6: Whether the District retaliated against the Parents by having an “emergency” placement meeting after they complained about the Student’s ESE placement.

In order to determine if unlawful retaliation occurred, OCR must determine: (1) whether the complainant engaged in an activity protected by the laws OCR enforces; (2) whether the recipient was aware of the protected activity; (3) whether the recipient took adverse action against the complainant contemporaneous with or subsequent to the protected activity; (4) whether there is a causal connection between the adverse action and the protected activity, and if so, (5) whether the recipient has a legitimate, non-discriminatory, non-pretextual reason for the adverse action.

Protected Activity/Knowledge of Protected Activity

The Complainant and the Parents stated that because they have advocated on behalf of the Student, the 504 Plan services he was receiving and the additional educational services they believed he needed, the School held a 504 meeting without their presence on February 24, 2014.

OCR finds that the Complainant and Parent’s complaints to the School about the Student’s 504 services constitute protected activity that the District had knowledge of, and continues its analysis of this issue using the above-referenced retaliation analysis.

Adverse Action

In determining whether an action is adverse, OCR examines whether the recipient’s action significantly disadvantaged the complainant or student in his or her ability to gain the benefits of the recipient’s program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual’s opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims.

The Complainant and the parents stated that they have been complaining to the School and advocating on behalf of the Student for the entire 2013-2014 school year. They contend that this was an on-going problem. The Complainant and the Parents contend that because they advocated on the Student’s behalf, they were excluded from an emergency 504 meeting held on February 25, 2014. OCR finds that being excluded from the 504 meeting constitutes an adverse action. Further, the exclusion was subsequent to the protected activity.

Causal Connection

Because OCR determined that the District’s actions constituted an adverse action, we then proceeded to determine if there was a causal connection between the adverse action and the Student’s participation in the protected activity. OCR considers a variety of factors in assessing whether a causal connection exists. OCR may infer a causal connection based on the close proximity in time between the protected activity and the adverse actions.

The Complainant and the Parents stated that they have been complaining to the School and advocating on behalf of the Student for the entire 2013-2014 school year. The Complainant alleged that the last 504 meeting was held on December 2, 2013 and the Parents had been very vocal in their displeasure with the way the School was addressing the needs of the Student. The Complainant contends that because they voiced their disagreement on this and several other occasions, they were not provided notice properly for the February 24, 2014 meeting. OCR finds that there was a causal connection between the adverse action and the protected activity.

Legitimate Non-Discriminatory, Non-Pretextual Reason for the Adverse Action

In OCR's interviews with District staff, it was confirmed that during the 2013-2014 school year, the School, the Complainant and the Parents had many meetings with regard to the Student and his 504 Plan. District staff stated that the Parents were very vocal in their belief that the School was not doing enough to help the Student to be successful. District staff stated that on Friday, February 21, 2014, the Student was involved in an incident in his regular education classroom where he pushed several students down and one student injured her ankle. District staff stated that the Student left the classroom and went back to his ESE class. District staff stated that the Student was removed from the class, his mother was called and he received one (1) day OSS for the incident.

District staff stated that because of the serious nature of the incident (a child being injured and the Student running out of the classroom), they determined that an emergency Section 504 meeting needed to be held to address the Student's behavior for his own safety as well as the safety of other students in the class. District staff stated that a notice of the meeting was sent out by regular mail the same day as the incident and in addition, a voicemail message about the emergency meeting was left on the cell phone of the Student's father, a call was made to the cell phone of the Student's mother but her cell phone would not accept any voicemail messages, and an email was sent to the Complainant. The District stated that they wanted to have the emergency meeting as quickly as possible so that when the Student returned to School, a plan would be in place.

OCR determined that an incident did occur on February 21, 2014 according to the evidence presented by the District. The Student's mother was informed and he did receive one day OSS. OCR also found that the documents presented by the District showed that on February 21, 2014 notice of an emergency meeting was sent out by U.S. Mail and email and that a voicemail was left on the cell phone of the Student's father. A notation on the notice states that the voicemail on the cell phone of the Student's mother was full. The notice contained the date and time of the emergency meeting.

However, OCR finds that, because the notice was sent on a Friday and the meeting was held very early on Monday morning and the importance of the emergency meeting, the District could have allowed for more time to make sure that the Complainant and the Parents could be available for the emergency meeting. The District could have held the meeting later in the day on Monday or Tuesday morning before the Student reported to class. The resulting change in the Student's placement that took place after the meeting was of such significance that the Complainant and the Parents should have been allowed to participate in the decision that resulted in a change in placement for the Student.

For the reasons stated above, OCR concludes that the District did not provide legitimate nondiscriminatory reasons for scheduling the meeting for Monday morning instead of later that day or on another day. Even though notice was provided, there was not enough notice given to the Complainant and the Parents to give them an opportunity to attend and participate in the emergency meeting. Accordingly, OCR finds that there is sufficient evidence to support a finding that the District retaliated against the Parents in noncompliance with Section 504 and Title II, with regard to this issue.

The District has agreed to remedy this compliance issue with the attached Resolution Agreement.

Conclusion

Accordingly, OCR finds, using a preponderance of the evidence standard, that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II with regard to issues 1, 2, 3, 4 and 5 as alleged but does find sufficient evidence to support findings of noncompliance with Section 504 and Title II with regard to issue 6.

On January 29, 2015 OCR received the enclosed signed Resolution Agreement (Agreement) that when fully implemented, will resolve issue 6 of the complaint. OCR will monitor the 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 complainant may file a private suit in federal court whether or not OCR finds a violation.

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.

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

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. A complainant may file a private suit in Federal court whether or not OCR finds a violation.

This concludes OCR's consideration of your complaint, which we are closing effective the date of this letter. OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact Virgil Hollis at (404) 974-9366.

Sincerely,

Deborah Floyd
Acting Regional Director