

December 17, 2014

Ms. Melba Luciano
Superintendent
Osceola County School District
817 Bill Beck Blvd
Kissimmee, FL 34744

Re: Complaint # 04-14-1594

Dear Ms. Luciano:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Osceola County School District (District) on May 20, 2014, alleging discrimination based on disability. Specifically, the Complainant alleged that the District discriminated against her daughter (Student) when, during the 2013-2014 school year:

1. The District failed to conduct an appropriate manifestation determination meeting in XXX XXXX prior to transferring the Student to an alternative school; and
2. After being accused of XXXXXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXX XXXXXXXX XX XXX XXXX, the Student was disciplined more harshly than students without disabilities who committed similar infractions.

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance; and, Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by public entities. The District is a recipient of Federal financial assistance from the Department and a public entity, and therefore is subject to the above-referenced statutes. Accordingly, OCR has jurisdiction over this complaint.

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

1. Whether the District subjected the Student to a significant change in placement without conducting a reevaluation, in noncompliance with Section 504 at 34 C.F.R. § 104.35 and Title II at 28 C.F.R. § 35.130.

2. Whether the District subjected the Student to different treatment based on disability in the area of discipline, in noncompliance with Section 504 at 34 C.F.R. § 104.4(b)(1)(i)-(iv) and (vii) and Title II at 28 C.F.R. § 35.130.

OCR's investigation included a review of documents provided by the Complainant and the District, and interviews with the Complainant and District staff. OCR reviews evidence under the preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the recipient failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. After a thorough review of all of the available evidence, OCR has determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with respect to the allegations raised by the Complainant. However, OCR did find sufficient evidence of noncompliance with respect to the District's policies and procedures related to Section 504 and Title II. The factual and legal bases of OCR's determination are set forth below.

Legal Standards

A. Reevaluation

Pursuant to 34 C.F.R. § 104.35(a), a recipient that operates a public elementary or secondary education program or activity 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. Pursuant to 34 C.F.R. § 104.35(d), a recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of that section, for periodic reevaluation of students who have been provided special education and related services.

The exclusion of a disabled student from his or her program for more than ten consecutive days, or for a total of ten or more cumulative days under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of, the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

The determination as to whether the student's behavior was a result of his or her disability must be made in accordance with the process set forth in the Section 504 regulation. A manifestation determination must be based on the kind of information necessary to a competent professional decision, such as psychological evaluation data related to behavior and not simply a reflection of the Student's special education classification or a determination that the student knew right from wrong. Also, the relevant information must be recent enough to afford an understanding of the student's current behavior. Further, at a minimum, the group making the determination must include persons knowledgeable about the child and the meaning of the evaluation data.

B. Different Treatment

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), (b)(1)(i), (ii), (iv) and (vii), provides 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 that receives Federal financial assistance. A recipient, in providing an aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit or services; (ii) afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iv) provide different or separate aid, benefits, or services to persons with disabilities or to any class of persons with disabilities unless such action is necessary to provide qualified persons with disabilities with aid, benefits, or services that are as effective as those provided to others; and (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. The Title II regulation, at 28 C.F.R. § 35.130(a) and (b)(1)(i), (ii), (iv), and (vii), includes a similar prohibition.

To determine whether a recipient has subjected a student to different treatment on the basis of disability, OCR considers whether there is evidence of intentional discrimination on the basis of disability; evidence of discriminatory intent may be direct or circumstantial. OCR initially examines whether there is direct evidence of discriminatory bias by a recipient based on a student's disability. Direct evidence includes conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. Any direct evidence of discrimination must show that discrimination motivated the denial of an educational benefit or other adverse action. OCR also looks at whether there is evidence that the student was treated differently than students without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of education, services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination based on disability. To find noncompliance, the preponderance of evidence must establish that the recipient's actions were based on the student's disability.

Background

The Student most recently attended XXXXX XXXXX at XXXX XXXX XXXXX XXXXX (School) but did not complete the school year because she was referred to XXX XXXXXXXXXXXX XXXXXXXXXXXX XXXXX (Alternative School) in XXX XXXX. According to the Complainant, the Student had previously attended XXXX XXXX XXXXXXXXXXXX in the District where she completed the XXXXXXX XXXXX. Then, the Student transferred to XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXXXXXXXXX for part of the XXXXX XXXXX, where she was diagnosed with XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX (XXX) and placed on an Individualized Education Program (IEP) plan, which provided for

XXXXXXXXXX XXXX XXX XXXXX, XXXXX XXXXXXXX XXX XXXXXXXX, and XXXXXXXX XXXXXXXX. The Student then transferred to XXXXXXXX XXXXXXXXXX XXXXXXXX, where she finished XXXXX XXXXX before transferring in XXXXXXXX XXXX to the School where she began the XXXXX XXXXX. Upon the Student entering the School in XXXXXXXX XXXX, the team responsible for the Student's initial evaluation reviewed the Student's previous IEP and, based on its contents, placed the Student in the School's ESE program for "XXX" and began to provide the services specified in the previous IEP on XXXXXXXX XX, XXXX.

On XXX X XXXX, the Student was reprimanded for XXXXXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXX XXXXXXXX XXX, after being questioned by School administration, the Student wrote a statement confirming that she XXXXXXXX XXX XXXX XX XXXXX. The XXXXXXXXXXXX XXXXXXXXXXXX stated during interviews with OCR that he was involved with discovering that the Student XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXX XXXXXXXX. The Student admitted to the infraction in writing, saying that she XXXXXXXX XXX XXXXXXXXXXXX from a student within her housing complex and then XXXX XX XX XXXXXXXX XXXXXXXX at the School. As a result, the Student was then removed from class and charged with XXXX XXXX/XXXXXXXXXXXXXXXX by the School.

The Student had XXX disciplinary infractions prior to this incident that both resulted in XXXXXXXX: the first involved XXXXXXXX XX XXXXXXX XXXXXXXXXXXX with respect to putting her XXXXX XXXX, and the second involved the Student telling an instructor that she XXX XXX XXXX XX XXXXXXXXXXXX XX XXXXXXXXXXXX XXX XXXX XXX XXXXXXXXXXXX along with another XXXXXXX were "XXX."

District Policies and Procedures

A. Disciplinary Procedures

OCR reviewed District policies and procedures regarding discipline for all students and procedures related to discipline of students with disabilities. The District's "Code of Student Conduct" (Code) includes a "Matrix of Infractions and Consequences" (Matrix), which lists "XXXX XXXXXXXXXXXXXXX" as a disciplinary infraction that corresponds to one optional sanction and three mandatory sanctions. The mandatory sanctions are a 6 to 10 day out of school suspension, an expulsion referral and a law enforcement referral; the optional sanction is counseling. In a document entitled "The Expulsion Process," the District outlines the four options from which a Hearing Officer may choose in determining the resolution of a student's case: expelling a student; administratively assigning a student to an alternative setting (i.e., New Beginnings Education Center); granting permission to withdraw in lieu of expulsion at parent request; or overturning the recommendation for expulsion, which immediately places the student in good standing and affords him/her the right to return to his/her home-zoned school.

In contrast, according to the District's "Policies and Procedures for Students with Disabilities:" "Osceola District Schools does not recommend expulsion for students with disabilities." Instead, Exceptional Student Education (ESE) students are automatically recommended for Alternative School in lieu of expulsion. ESE students receive a "Referral for Consideration of Alternative

Educational Placement;" the referral process includes a manifestation meeting. If it is determined that the behavior was not a manifestation of the student's disability, the student is recommended for placement at New Beginnings Alternative School. While the general discipline policies provide for disciplinary due process procedures which may result in overturning the expulsion recommendation or granting a request to withdraw in lieu of expulsion, ESE students who are determined to have committed an expellable infraction are neither informed nor automatically provided the ability to attend a hearing, present evidence, and have the recommendation for placement in Alternative School overturned before the School Board.

Additionally, the District's procedures entitled "Suspension Exceptional Education Student (ESE)" within the District's Code also include a provision stating that exceptional education students may be removed for more than ten consecutive days in extraordinary and/or extenuating circumstances and on a case-by-case basis after consultation with the Director of Exceptional Student Education. It states that any recommendation for the suspension of a student with a disability will be made in accordance with rules adopted by the State Board of Education and Federal Regulations outlined in the Individuals with Disabilities Education Act (IDEA). However, the procedures fail to specify that the District will provide a manifestation determination meeting for students with disabilities who are subjected to exclusion from their programs for more than ten consecutive days, or for a total of ten or more days under circumstances that show a pattern of exclusion.

The XXXXXXXX for the District asserts that students with disabilities are afforded sufficient procedural due process in the area of discipline because they are disciplined in accordance with a Florida Administrative Rule that permits a parent to request an expedited hearing before the Florida Division of Administrative Hearings if the parent disagrees with a manifestation determination "or with any decision not made by an administrative law judge (ALJ) regarding a change of placement." The evidence shows that the hearing process to which the XXXXXXXX refers is not the same as the evidentiary hearing that students without disabilities undergo during the disciplinary process. Specifically, students with disabilities are denied access to a disciplinary hearing in front of a Hearing Officer who has the authority to make a determination regarding their guilt or innocence, including the authority to overturn the referral; further, students with disabilities are not informed (verbally or through written policy) that they may challenge the determination that they committed the charged infraction.

The District asserts that this process ensures that students with disabilities are never expelled from school, but it also ensures that they never have an opportunity to be exonerated of the alleged disciplinary infraction through a disciplinary hearing. The District also asserts that parents or guardians of students with disabilities can request a hearing before the ALJ regarding their guilt or innocence if they disagree with the manifestation determination. However, according to District policy, only the School Board/Hearing Officer has the legal authority to expel a student from the District or the authority to overturn the recommendation for expulsion, whereas the ALJ's authority is limited to placement decisions regarding the student. Pursuant to the District's procedures the Student was denied the opportunity to challenge the recommendation for Alternative School through a disciplinary hearing.

B. Grievance Procedures

The Section 504 implementing regulation at 34 C.F.R. § 104.7(b) requires a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. Similarly, the Title II implementing regulation at 28 C.F.R. § 35.107(b) requires a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice to students, parents, and employees of the procedures, including where complaints may be filed; application that the procedures to complaints of discrimination, including harassment, carried out by employees, students, or third parties; a provision for prompt, adequate, and impartial investigation of all complaints, including the opportunity for the complainant and subject of the complaint to present witnesses and evidence; designated and reasonably prompt timeframes for the major stages of the investigation; written notification to the complainant and subject of the complaint of the outcome of the investigation; and an assurance that remedial action will be taken to address and resolve any found incident of discrimination and to prevent the recurrence of any discrimination will be taken; such remedial action may include, as appropriate, disciplinary sanctions up to and including termination if the harasser is an employee, strategies to protect the individual subject to the harassment any witnesses from retaliation, counseling for the victim of the harassment, other steps to address any impact on the victim of the harassment, any witnesses and the broader student body, and any other necessary steps reasonably calculated to prevent occurrences of harassment.

OCR reviewed the District's "Section 504 and ADA Grievance Procedures" (Grievance Procedures) and found that they fail to meet several Section 504 and Title II standards, including: a statement that all complaints will be investigated whether verbally or in writing; a statement indicating their application to complaints alleging discrimination and harassment by employees, students, or third parties; a provision for the prompt, adequate, and impartial investigation of complaints, including the opportunity for the complainant and subject of the complaint to present witnesses and evidence; the option to forego an informal complaint process for a formal one; and an assurance that remedial action will be taken to address and resolve any found incident of discrimination and to prevent the recurrence of any discrimination will be taken.

Issue 1: Whether the District subjected the Student to significant change in placement without conducting an appropriate reevaluation.

There are two components to the Complainant's allegation regarding the School's failure to conduct a proper manifestation meeting. First, the Complainant alleged that the Student's manifestation meeting was largely held during what the School called – and what the Complainant initially believed to be – an ESE reevaluation on XXX XX XXXX. The Complainant stated that on April 29, 2014, prior to the XXX X XXXXX XXXXXXXXXXXX XXXXXXXXXXXX, she had signed a document to confirm that she would not be attending the XXX XX XXXX, reevaluation and that this form indicated the meeting was an ESE reevaluation, not a

manifestation or permanent placement meeting. The Complainant believes the School took this opportunity to discuss the Student's May 9, 2014, charge of XXXX XXXXXXXXXXXX and to refer the Student to Alternative School during the XXX XXXX meeting without the Complainant's presence.

A document, submitted by the District and Complainant, entitled "Notice of Conference," is signed by the Complainant and dated April 29, 2014. The form indicates that an IEP Review was scheduled for May 12, 2014, and at the bottom near her signature, the Complainant has checked an option that read, "No, I cannot attend, but give permission for that meeting to take place."

Another document, which is dated May 12, 2014, and also submitted by the District and the Complainant, is entitled "Educational Planning Conference" and a box with the description "Develop and/or change IEP" is checked. On an additional box corresponding to "Permanent Placement," there appears to be scribbling over a checkmark and the initials "XXX" nearby. At the center of the page, under "Results and Recommendations," are notes from the meeting, the first line of which reads, "This meeting was held to discuss [the Student's] progress and develop a new IEP." The notes go on to review the progress of the Student in various classes, to detail her growth since October 2013, and to conclude with a recommendation for the Student to continue with her current general education classes with support in Math and Language Arts and for the School to develop a new IEP. There is no indication on this form that a manifestation meeting took place.

The three District staff members in attendance at the XXX XX XXXX, meeting, the Student's XXXX XXXXXXXX, the School's XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX (XXX), and the Student's XXX XXXXXXXX / XXXX XXXXXXXX (XXXX XXXXXXXX), each indicated this meeting constituted a reevaluation of the Student for special education services. For example, the Student's XXXX XXXXXXXX stated that the purpose of the meeting was to update the Student's IEP and that the Student's progress was discussed at the meeting. In addition, the XXX stated that the purpose of the meeting was to discuss the Student's academic progress and to develop a new IEP, that the Student's recent XXXX XXXXXXXX was not discussed during the meeting, and that "no pre-decision was made" prior to the May 20, 2014, meeting. The XXXX XXXXXXXX stated that during the meeting the Student's progress was reviewed and that the Student's XXXX XXXXXXXXXXXX was not discussed "at all." The Complainant alleged the document with the scribbles over the "Permanent Placement" checkmark constituted proof that this meeting was a manifestation meeting. When asked about this, the Student's XXXX XXXXXXXX stated that a computer program would automatically place a checkmark in the box next to "Permanent Placement" and that this space was scribbled out and initialed to override the error. Similarly, the XXX stated that this form automatically generates a checkmark in the box and that the meeting was not regarding permanent placement.

After the Student was charged with XXXXXXXXXXXXXXX XXXXXXXXXXX, the District scheduled a manifestation meeting for the Student on May 20, 2014. The second component the Complainant raised with respect to the manifestation meeting was that, by the time she arrived at the meeting on May 20, 2014, School staff had already decided to place the Student in Alternative School without considering Complainant's input. With respect to this issue, the

XXXXXXXXXX XXXXXXXXXXXX stated that the Complainant attended the meeting and “we would not start without her.” Additionally, the XXXXXXXXXXXX XXXXXXXXXXXX stated that when making the decision for alternative placement, the team referred to the Matrix, which lists various infractions along with possible disciplinary consequences, with “M” indicating a mandatory discipline and “O” referring to an optional one. The Student was reprimanded for XXXX XXXX X XXXXXXXXXXXX, an infraction that the Matrix dictates carries the mandatory punishments of XXXX XXXX XX XXX, recommendation for XXXXXXXX, and XXXXXXXXXXXX to XXX XXXXXXXXXXXX. And while the XXXXXXXXXXXX XXXXXXXXXXXX stated that “We use the Matrix 100%,” he also noted that ESE students have the option to attend Alternative School in lieu of expulsion.

During an interview with OCR, the XXX referred OCR to a document submitted by the District entitled “Manifestation Determination Review.” This document indicates the following sources of information were considered in making the Manifestation Determination: Assessment/evaluation(s), Teacher Documentation, Police/Incident Records, Cumulative Record, Discipline Records, and Information Supplied by the parents. The witness reiterated these sources as those that were considered during that meeting, and she stated that she guided those in attendance regarding the data. The witness stated that the Student had previously been charged with XXXXXXXXXXXX XX XXXXXXXX XXXXXXXXXXXX and for having XX XXXXXXXXXXXX XXXXXXXXXXXX. The document includes a statement that reads “The conduct in question was caused by or had a direct and substantial relationship to the student’s disability” and the box adjacent to “Disagree” is checked. Below this, there is an explanation that indicates that the Student’s behavior history and documentation do not show a direct relationship to the Student’s disability, which the XXX confirmed during an interview.

The documentation from the District also shows that the Complainant, on the day of the manifestation meeting, signed paperwork that she would be attending the meeting; however, any paperwork involving the Alternative School placement remained unsigned. On rebuttal, the Complainant stated that she did sign some paperwork, but that she disagreed with the team’s decision that the XXXX / XXXXXXXXXXXXXXXXXXXX XXXXXXXX was not a manifestation of the Student’s disability and refused to sign paperwork after this decision was made. She further stated that she was unaware if she had been given her due process paperwork but that she has a pile of paperwork from the several School meetings she attended but has not looked at them out of frustration. After OCR informed the Complainant of her due process rights she indicated that she may wish to pursue a due process hearing.

Analysis and Conclusion

The Complainant did not attend the XXX XX, XXXX, meeting and has no information to contradict the claims of School staff, which include that: 1) nothing with respect to the Student’s XXXX XXXXXXXXXXXX XXXXXXXX or Alternative School placement was discussed and 2) the “Permanent Placement” checkmark was a computer error. With respect to the XXX XX XXXX, manifestation meeting, the District indicated that it reviewed relevant and appropriate information regarding the Student when it made its determination that the Student’s misconduct was not related to her disability. Furthermore, the paperwork from the District confirms this and

also that indicates that the Complainant attended the meeting and provided input that the team took into consideration when making its determination.

Based on the preponderance of the evidence, OCR found insufficient evidence of noncompliance with Section 504 or Title II with respect to the first issue that the School failed to conduct a proper reevaluation prior to subjecting the Student to a significant change in placement. Although the Complainant disagreed with the School's educational and disciplinary decision, it is important to note that the Department, except in extraordinary circumstances, does not review the results of individual placement and educational decisions made by a recipient as long as the process requirements of the Section 504 regulation are met. If the Complainant disagrees with any of a recipient's decisions regarding the educational placement of his/her child or the services provided to the child, the Complainant has the right to request an impartial hearing or an appeal from the District. The determination of what services a student should receive is an educational decision. It seems that in this matter, the Complainant has been advised of her procedural safeguards rights. The District's decision and the Complainant's issue seem to be a placement decision. Therefore, it seems that the allegation is not appropriate for complaint resolution and should be dismissed.

If the Complainant disagrees with the District's placement decision, the Complainant has the right to request an appeal of the District's impartial due process hearing. The Section 504 regulation at 34 C.F.R. § 104.36 requires the District to provide procedural safeguards that includes notice, an opportunity for the parents or guardian 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. This applies 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.

Issue 2: Whether the District subjected the Student to different treatment based on disability in the area of discipline.

Specifically, the Complainant alleged that students with disabilities are punished more harshly than students without disabilities at the School who committed similar infractions to the Student (i.e., XXXX XXXX XXXXXXXXXXXXX). The Complainant stated that she was unaware of any other students, with or without disabilities, who were punished for XXXX XXXXXXXXXXXXX but that she nevertheless believed that the School preferred to "get rid" of the Student rather than accommodate her disabilities. The Complainant pointed to her allegation under Issue 1 above (i.e., conducting a manifestation meeting without her consent or presence) as evidence of disability-based different treatment.

School staff members referenced the Matrix during interviews as a point of reference for making disciplinary decisions. For example, XXX XXXXXXXXXXX XXXXXXXXXXX stated that he was unaware of any student who committed an expellable offense not being recommended for expulsion or Alternative School and that the Matrix was followed "100 percent." The XXXX similarly stated that there was no flexibility regarding mandatory punishments, with the exception that ESE students are placed in Alternative School rather than expelled.

The District also submitted a summary of students referred to Alternative School during the 2013-2014 school year, which includes each student's disability status, the infraction for which each was charged, the Alternative Placement site, the number of days assigned, and the manifestation meeting date. Based on this data, which corresponds to the individual student files the District also submitted, every offense for which the Matrix designates referral for expulsion as mandatory (including "Threatening Behavior to Staff," "False Accusation against School Staff," "Drug Sale / Distribution" and "Drug Use / Possession") did result in the respective students who committed the offense being placed in Alternative School or expelled, with the exception of one student, XX, who XXXXXXXX XXXX XXX XXXXXXX XXX XXXXXXXX XX XXXXXXX XXXXX rather than attending Alternative School. Moreover, the School highlighted another student, Student 2, who was the only other student aside from the Student to be charged with XXXX XXXX X XXXXXXXXXXX during the 2013-2014 school year. Student 2, who does not have a disability, received XX XXXX XX XXX compared to the Student's X XXXX, and both were ultimately referred to Alternative School.

However, as noted above in the discussion regarding the District's disciplinary policies, students with disabilities who are charged with an infraction mandating expulsion are automatically referred to Alternative School. In comparison, the District's general disciplinary procedures allow students without disabilities to attend a hearing in front of the School Board during which students and parents have the opportunity to produce evidence and witnesses to challenge a recommendation for expulsion and potentially have that recommendation overturned. The procedures also require students without disabilities who are charged with certain infractions, including XXX XXXX XXX XXXXXXXXXXXX XX XXXX, to attend such a hearing. When asked whether a parent of a student with a disability may challenge the decision for Alternative School placement, the XXX replied that students may alternatively choose to withdraw, be homeschooled, or go to virtual school. She stated she did not know whether a parent of a student with a disability had ever been advised of the ability to challenge in front of the School Board, on the basis of guilt or innocence, that a student committed an infraction itself, except to say that a parent may go through due process proceedings. The XXXX also stated that the District refers to the Matrix when making disciplinary decisions and that for an infraction that corresponds to mandatory expulsion, the District is always called, but ESE students are referred to Alternative School, never expelled.

Analysis and Conclusion

The Complainant alleged that students without disabilities who committed a similar infraction to the Student were given more lenient penalties, but Complainant was unaware of other students who had been expelled due to similar infractions as the Student. However, the School provided disciplinary information about the one other student who was also charged with XXXX XXXX XXXXXXXXXXXX during the 2013-2014 school year: Student 2. Student 2 did not have a disability and was sent to XXX for XXX XXX compared to the Student's XXXX XXXX. According to the District, both the Student and Student 2, along with all students (regardless of disability status) who committed an offense that carries a mandatory expulsion recommendation pursuant to the Matrix, with the exception of one student, XX, who XXXXXXXX XX XXXXXXX XXXXXXX XXXXXXX, were sent to Alternative School or expelled during the 2013-2014 year.

On rebuttal, the Complainant was unable to provide any additional information with regard to these allegations, except to submit copies of paperwork already submitted by the District, including the Student's evaluation from her previous school and the documents cited under Issue 1 above: "Educational Planning Conference" and "Notice of Conference." The Complainant believed that the documentation from the Student's previous school showed that the Student could XXXXX XXXXX XXXXXXXXXX as a manifestation of the Student's disability, and Complainant claims that she stated this during the manifestation meeting for the Student. This also constitutes an educational decision for which the Complainant's appropriate method of action may be a due process hearing. Therefore, based on a preponderance of the evidence, OCR found insufficient evidence to conclude the District is in noncompliance with respect to Section 504 and Title II with respect to this issue.

While OCR did not find any noncompliance issues with respect to the particular allegations raised by the Complainant, the evidence shows that under the District's current disciplinary policies and procedures, students without disabilities who are recommended for expulsion receive an automatic right to address their disciplinary infraction before a Hearing Officer who has the authority to render a decision regarding their guilt or innocence and to determine a resolution of their case in a variety of ways that range from expulsion to overturning the recommendation for expulsion. The evidence also shows that students who have disabilities are not afforded the ability to address their disciplinary infractions in the same manner as students without disabilities because they are not given a right to address their disciplinary infraction before a Hearing Officer. Students with disabilities automatically have their placement changed to the Alternative School if it is determined that the behavior that resulted in the expellable infraction was not a manifestation of their disability. While students with disabilities are never subjected to expulsion, they are denied their opportunity to be exonerated during a disciplinary hearing.

The District asserts that students with disabilities have a similar right to due process as students without disabilities through a hearing before the ALJ. However, there is no evidence that the ALJ has the authority to determine the resolution to the case as it relates to the student's guilt or innocence regarding the alleged disciplinary infraction. The ALJ is only authorized to address placement decisions. Moreover, there is no evidence that the ALJ's jurisdictional authority is the same as that of a Hearing Officer. Based on a preponderance of the evidence, OCR has determined that there is sufficient evidence to support a finding that students with disabilities are subject to different treatment on the basis of disability, in noncompliance with Section 504 and Title II as it relates to this issue.

Proposed Resolution

To remedy these noncompliance issues, the District has agreed to implement the provisions of the attached Resolution Agreement (Agreement) which, when fully implemented, will resolve OCR's findings of noncompliance. The proposed Agreement will require the District to implement the following: 1) students with disabilities and their parents, including the Student and the Complainant, will be notified of their right to attend a school board hearing when they have been charged with a disciplinary infraction that requires a recommendation for expulsion;

2) the District will change its disciplinary rules with respect to students with disabilities so that it is clear that students have this option; 3) the District will train those responsible for disciplining students that students have the ability to contest a charge mandating expulsion in a disciplinary hearing in front of the school board; and 4) the District will amend the language in its Code to specify that the District will provide a manifestation determination meeting for students with disabilities who are subjected to exclusion from their programs for more than ten consecutive days, or for a total of ten or more days under circumstances that show a pattern of exclusion.

Additionally, the Agreement stipulates that the District modify its Grievance Procedures to reflect the requirements of Section 504 and Title II. Specifically, the District has agreed to include: a statement indicating their application to complaints alleging discrimination and harassment by employees, students, or third parties; a provision for the prompt, adequate, and impartial investigation of complaints, including the opportunity for the complainant and subject of the complaint to present witnesses and evidence; the option to forego an informal complaint process for a formal one; and an assurance that remedial action will be taken to address and resolve any found incident of discrimination and to prevent the recurrence of any discrimination will be taken

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation, and are consistent with applicable regulations.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may 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 one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact Ebony Calloway-Spencer, Esq., Compliance Team Leader, at (404) 974-9367.

Sincerely,

Cynthia G. Pierre, Ph.D.
Regional Director