



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION IV

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REGION IV  
ALABAMA  
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GEORGIA  
TENNESSEE

April 28, 2016

Dr. Walt Griffin  
Superintendent  
Seminole County Public Schools  
400 East Lake Mary Blvd.  
Sanford, FL 32774

**Re: Complaint #04-15-1005**

Dear Dr. Griffin:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on October 6, 2014, against Seminole County Public Schools (District) in which the Complainants<sup>1</sup> alleged that the District discriminated against their son (Student), who attends XXXXXX XXXXXXXXXXXX XXXXXX (School), on the basis of disability and engaged in retaliation. Specifically, the Complainants alleged that, beginning in XXXXXXXX XXXX, the District refused to excuse the Student’s medically-necessary absences. Additionally, the Complainants alleged that, after they requested related aids and services for the Student beginning in XXXXX XXXX, the District engaged in retaliation by: falsifying a progress report for the Student, delaying the provision of a Wechsler IQ test for the Student, and subjecting the Complainants’ older son (Student 2) to overly-harsh discipline for an incident that occurred in XXXXXXXX XXXX.

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 prohibit 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), as amended, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District receives Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdiction over this complaint.

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

1. Whether, beginning in XXXXXXXX XXXX, the District discriminated against the Student on the basis of disability by failing to excuse medically-necessary absences, in noncompliance with the Section 504 implementing regulation, at 34 C.F.R. §§ 104.33

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<sup>1</sup> The Student’s mother and father filed this complaint. References in this letter to the Complainant, in the singular form, refer to the Student’s father.

and 104.4(b)(1)(iii), b(2), and b(4), and the Title II implementing regulation, at 28 C.F.R. § 35.130.

2. Whether, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.134, the District retaliated against the Complainants' sons after the Complainants requested related aids and services for the Student beginning in XXXXXX XXXX when the District allegedly:
  - a. falsified the Student's progress report for his most recent Individualized Education Program plan (IEP);
  - b. delayed the provision of the Wechsler IQ test for the Student; and
  - c. subjected Student 2 to overly harsh discipline for an XXXXXXXX XXXX behavioral incident.

During the course of this investigation, OCR reviewed evidence submitted by the Complainants and the District and interviewed the Complainants and six District staff members to obtain evidence relevant to this complaint.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). As a result of this investigation, OCR determined that there is sufficient evidence to support a conclusion that the District failed to comply with Section 504 and Title II regarding the issues in this complaint. Provided below is an explanation of how OCR reached this determination.

### **Legal Standards**

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b) require a recipient 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. FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with a disability as adequately as the needs of individuals without a disability and are based upon adherence to procedures that satisfy the requirements of subsections 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the standard established above. 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 regulation at 34 C.F.R. § 104.35(c) states that in making placement decisions, a recipient shall: (1) draw upon information from a variety of sources; (2) establish procedures to ensure

that information obtained from all sources is documented and carefully considered; (3) ensure that the placement is made by a group of persons that include persons knowledgeable about the child, the meaning of evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with least restrictive environment requirements.

Pursuant to the Section 504 regulation at 34 C.F.R. § 104.4(b)(1)(iii) and (b)(2), a district may need to make adjustments to its policies to provide a student with a disability aids, benefits or services that are as effective as those provided to students without a disability. The Title II implementing regulation at 28 C.F.R. § 35.130(b)(7) states that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The regulation implementing Section 504 at 34 C.F.R. § 104.61 incorporates by reference the Title VI implementing regulation at 34 C.F.R. § 100.7(e), which states that intimidating or retaliatory acts are prohibited and 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 Section 504, or because she/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Section 504 regulation. The Title II regulation at 28 C.F.R. § 35.134 sets forth a similar prohibition.

To determine whether retaliation has occurred, OCR must find that: (1) the Complainant engaged in a protected activity; (2) the recipient had knowledge of the protected activity; (3) the recipient took adverse action against the Complainant subsequent to or contemporaneous with the participation in a protected activity; and (4) there is a causal connection between the adverse action and the protected activity. If all of these elements are established, OCR then examines whether the District had a legitimate, nondiscriminatory and non-pretextual reason for taking an adverse action against the Complainants.

## **BACKGROUND**

The Student was X years old and attending XXXXX XXXXX in a XXXX XXXXXXXXXXXX XXXXXXXX at the School during the XXXX-XX school year. Prior to the Complainant withdrawing the Student from the School in XXXXXXX XXXX, he received services pursuant to an Individualized Education Plan (IEP), including speech, occupational, and language therapies. His identified disability is XXXXXXX XXXXXXXXXXX XXXXXXX, and he is XXXXXXXXXXX according to the Complainants and the District. Student 2 is the Complainants' older son who attended a high school (School 2) at a different location than that of the Student.

**Issue 1: Whether, beginning in XXXXXXX XXXX, the District discriminated against the Student on the basis of disability by failing to excuse medically-necessary absences, 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.**

The Complainants alleged that since XXXXXX XXXX, the Student, for reasons related to his disability, was leaving the School in the middle of the day to receive XXXXXXXX XXXXXXXX XXXXXXXX (XXX) XXXXXXXX<sup>2</sup> from an outside provider.<sup>3</sup> The Complainants contend that the Student's doctor prescribed a five-hour XXXXXXXX session per day and because of the Student's disability-related fatigue, it was not practicable to begin the XXXXXXXX after the end of the regular school day. They further allege that initially the Student's absence from the School for the XXXXXXXX was excused. However, the Complainants contended that, beginning in XXXXXXXX XXXX, the District refused to excuse the Student's absences related to the XXX XXXXXXXX based on its XXXXXXXXXXXX XXXXXXXX. More specifically, the Complainants alleged that the School's principal (Principal) unilaterally denied the Complainants' request for the Student to leave the School each afternoon to receive XXX XXXXXXXX at a private center. The Complainants also alleged that during an IEP meeting the Student's IEP team denied this same request without considering the particular needs of the Student.

Based upon evidence obtained during the investigation of this issue, OCR identified violations with respect to the District's evaluation of the Student concerning his possible need for XXX XXXXXXXX and with respect to failing to consider whether he was entitled to a reasonable modification of the District's XXXXXXXXXXXX XXXXXXXX. The evidence and analysis related to these violations are detailed below.

### **Facts**

The XXXXXXXXXXXX XXXXXXXX specifies, in part, that: a student enrolled in the District "who has attained the age of six (6) by February 1, of any school year, but who has not attained the age of sixteen (16), is required to attend school regularly during the entire school year"; a student shall be considered truant when absent without permission of the parent or when the parent consents to unnecessary absences; an excused absence is defined as "illness, death of a family member, family emergency (approved by the principal), and religious instruction or religious holidays"; "[a]fter three (3) days of unexcused absences or a pattern of absence in a calendar month, with no parental notification to the school, the principal or designee shall contact the parent . . . to notify the parent of the unexcused absences and to discuss the reason for the absences"; and, a student accumulating ten (10) unexcused absences will be referred to the school social worker.

A XXXXXXXXXXXX XX XXXX, email from the Principal to the Complainant confirms that the Principal initially permitted the Student's early departure from school. The email states:

It has been a month now that . . . [the Student] . . . has been pulled from school for XXXXXXXX. I agreed to this temporary arrangement because I know the importance of XXXXXXXX.

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<sup>2</sup> According to XXXX://XXX.XXXXXXXXXXXXXXXXXX.XXXX, XXX XXXXXXXX is intensive XXX XX XXX XXXXXXXX for individuals with XXXXXXXX. XXX XXXXXXXX is "XX XXXXXXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXX XX XXX XXXXXXXXXXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXXXXXX XXXXXXXX."

<sup>3</sup> According to the Complainant, the Student's XXX XXXXXXXX is completely covered through Medicaid (i.e., no decrease in available lifetime coverage, increase in premiums, or payment of other out-of-pocket expenses).

According to handwritten notes in the Student's attendance file provided by the District, between XXXXXX X, XXXX, and XXXXX XX, XXXX, the Student left school between 12:45 p.m. and 1:00 p.m. on one to three days per week; however, from XXXXXXXXXXXX X, XXXX, through September 19, 2014, he was picked up between 11:40 a.m. and 11:55 a.m. on one or two days per week. In a XXXXXXXXXXXX XX, XXXX, email to one of the Complainants, the Principal noted the District still did not have an "XXXXXX XXXX" from the XXXXXXXX provider and that picking the Student up at 11:45 a.m. had not been agreed upon. The email stated further that the Student had to return to school for the full day starting Monday XXXXXXXX XX, XXXX.

On XXXXXXXX X, XXXX, the Student's IEP team met. OCR reviewed a meeting summary submitted by the District. The summary indicates that the Complainant requested: 1) that the Student be allowed to leave the School early each day at around 12:30 p.m. to receive XXXXXXXX and 2) that outside XXXXXXXXXXXX be able to come to the School and provide 2-3 hours of XXXXXXXX daily. The summary also indicates that the Principal responded by stating that, according to state law, the Student is required to be in school. The District's IDEA XXXXXXXXXXXX XXXXXXXXXXXXXXXX stated that outside XXXXXXXXXXXX may come to the School, but the Student needs to be in school throughout the school day. The summary reflects that the Principal added that after paperwork was approved, the School and XXXXXXXXXXXX can discuss an agreed-upon time to provide XXXXXXXX during the school day. The Complainant reportedly responded that he wanted the Student to leave campus early for XXXXXXXX because the length of the school day and the provider's available hours did not allow the Student to access the amount of XXXXXXXX that is medically necessary. The Complainant also expressed a concern about the Student's fatigue. The summary reflects that a "Notice of Refusal" (Notice) was provided in response to the Complainant's request for the Student to be permitted to leave the School early.

The District provided OCR with the Notice. The Notice set forth the following in the comments section:

This is your written notice of refusal for a shortened school day for parents to provide XXXXXXXX XXXXXXXX XXXXXXXXXXXX. Team agreed to collaborate with approved agencies during the school day. [The Student] is a first grade student attending XXXXXXXX and by law required to attend school . . . [The Student] is not eligible for H/H services at this time and is not confined to his home or hospital therefore needing to be in school so his IEP goals and objectives may be implemented.

In a separate section captioned "other factors considered in making this decision" the document states that "factors considered are. . . [the Student's] progress in the classroom, the requirement that [the Student] is of age to attend school and not identified as a [Hospital Homebound] student that is confined to home or hospital." The IEP developed based upon the October 1<sup>st</sup> meeting shows that the Complainant requested incorporation of XXX services "into [the Student's] instructional time," a "reasonable modification or accommodations" regarding tardiness due to XXXXXXXX off campus, and approval of "XXX one-on-one aide for [the Student]." However, outside of the reference to the denial notice, the IEP does not mention the Team's determination regarding XXX XXXXXXXX.

OCR interviewed the Student's XXXXXXXXXXXXXXXXXXXXXXXXXXXX (XXX) teacher, the XXXXXXXXXXXXXXXXXXXXXXXXXXXX, the Principal, and two of the School's Psychologists (Psychologist 1 and Psychologist 2), each of whom served on the Student's Team. Each stated during interviews with OCR that they attended the XXXXXXXX X, XXXX, IEP meeting. With the exception of Psychologist 2, who left before the meeting ended, all District witnesses confirmed that at the meeting the Complainant requested that the School permit the Student to leave the School midday to receive XXX XXXXXXXX at a private center, and that the request was denied.

When asked why the Team denied the Complainant's request to have the Student attend XXX XXXXXXXX at a private center, the Student's XXX teacher, who teaches the Student all of his subjects within a XXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX, stated that she believed that the Student would be unable to reach his IEP goals if he were to leave the classroom midday to receive XXX XXXXXXXX at an off-site location. She stated that granting this request would necessitate the Student's classes, along with his speech and occupational XXXXXXXX sessions, to be "crammed in" during the morning. She added that the Student had been making progress and she saw a regression after he started leaving at midday. The XXX teacher did not recall the XXXXXXXXXXXXXXXXXXXXXXXXXXXX as being a topic of discussion during the IEP meeting with respect to denying the Complainant's request.

The XXXXXXXXXXXXXXXXXXXXXXXXXXXX stated that the Team considered several factors, including the District's XXXXXXXXXXXXXXXXXXXXXXXXXXXX, which "indicated that the Student was of age for mandatory attendance." She also stated that the Student was making meaningful progress toward his IEP goals while attending school for the entire day. She added that the Team considered how departing the School for half the day would affect the Student educationally and that his Teacher spoke about the negative impact of leaving midday in terms of the Student reaching his educational goals. The XXXXXXXXXXXXXXXXXXXXXXXXXXXX added that the Team also considered the fact that the Team was amenable to allowing private XXXXXXXXXXXXXXXXXXXXXXXXXXXX to provide XXX XXXXXXXX in the classroom, thereby making off-site sessions unnecessary.

The Principal notified OCR that the Team considered a variety of factors when making the decision to deny the Complainant's request for the Student to receive XXX XXXXXXXX off-site for the second half of the school day, including the fact that the Student was making progress toward his goals, his attendance, and the fact that outside XXXXXXXXXXXXXXXXXXXXXXXXXXXX were being allowed to come in to provide XXX XXXXXXXX in the school setting. She added that the XXXXXXXXXXXXXXXXXXXXXXXXXXXX mandated that the Student attend the School full time.

The Principal also stated that the Complainant had attempted to have XXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX come to the School since XXXXXXXX XXXX, and she had advised him that this was possible but there was a process that had to be followed. She reported that she gave the Complainant access forms that had to be completed and gave him a description of the process, which included fingerprinting and background checks for the outside provider. She reported that the District received the access forms on XXXXXXXXXXXX XX, XXXX, and as of XXXXXXXX X, XXXX, outside XXXXXXXXXXXXXXXXXXXXXXXXXXXX started coming to the School to provide the Student XXXXXXXX in the morning, usually arriving around 11:00 a.m. The Principal stated that the delay in having the

XXXXXXXXXX come into the School was “on the Complainant’s end” in terms of getting the appropriate forms to the School.

OCR also interviewed Psychologist 1, who stated that the denial of the request to leave for the XXX XXXXXXXX was based on several factors. One factor was that the Student was X years old and was therefore subject to mandatory school attendance. She also stated that the Student was receiving XXX XXXXXXXX inside of class, and she recalled that the Team would allow for outside XXX XXXXXXXXXXXX to come into the School to provide the XXXXXXXX to the Student. She stated that the School had a procedure in place that must be complied with before such XXXXXXXXXXXX may enter the school (e.g., filling out paperwork authorizing the release of information) and that the Complainants were responsible for meeting these prerequisites. She stated that the Complainants did eventually fulfill these requirements and that the outside XXXXXXXXXXXX began providing the XXXXXXXX to the Student in XXXXXXXX XXXX. This witness also reported that the team felt the Student’s needs were being met because his “STAR curriculum” is partially XXX-XXXXX and uses some techniques that are similar to XXX XXXXXXXX, and because some XXXXXXXXXXXX were coming to the School.

The evidence includes an evaluation completed on the Student at XXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX on XXXXXXXX XX, XXXX. The evaluation concluded it was “essential that [the Student] continue in intensive XXXXXXXX XXXXXXXXXXXX XXXXXXXX up to 40 hours a week” and “[I]t is recommended to the parents that they work with the school system to allow [the Student] to attend school, but also be in XXX XXXXXXXX up XX hours a week.” There is no evidence that the IEP team considered this evaluation or other physician recommendations in the development of the Student’s IEP dated XXXXXX X, XXXX.

### **Analysis and Conclusion**

The Complainant presented a concern that the District failed to excuse the Student’s absences of up to a half day to attend medically-necessary outside XXX XXXXXXXX sessions. The evidence demonstrated that the Complainant requested consideration of XXX XXXXXXXXXXXX as a component of the Student’s FAPE services. Although the Complainants disagreed with the School’s educational decision, it is important to note, as set forth in Appendix A, Subpart D, of the Section 504 regulation, 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.

In light of the foregoing, OCR analyzed whether the District’s response to the Complainant’s request was in compliance with (1) Section 504’s FAPE process requirements and (2) the Section 504 and Title II standards concerning reasonable modification of District policies but not whether the District’s final decision itself was appropriate.

#### *Whether the District’s response to the Complainant’s requests complied with the Section 504 FAPE process requirements*

The Section 504 implementing regulation requires timely evaluation of the individual needs of each student with a disability. Further, placement decisions must be based upon information

from a variety of sources, including information about a Student's condition, and must be made by a group of knowledgeable persons, including persons knowledgeable about the student, the evaluation data and the placement options. The overriding rule concerning placement of a student with a disability is that decisions must be individual. Placement decisions should not be based upon factors such as the availability of services or administrative convenience.

The evidence shows that the Team's discussion of XXX XXXXXXXX services for the Student had two components: on-campus services during certain portions of the school day<sup>4</sup> and leaving the campus early to begin extended sessions at an off-campus location. Although the Complainant first requested XXX XXXXXXXX in XXXXXXXX XXXX, and discussed the Student's need for XXX XXXXXXXX with the Principal in XXXXXXXX XXXX, the IEP team did not discuss the Student's need for the XXXXXXXX until XXXXXXXX X, XXXX. The District allowed the Student's XXXXXXXXXXXX to come on campus to provide services beginning XXXXXXXX X, XXXX; however, the evidence does not establish that the District conducted a timely or proper evaluation of the Student to determine whether such services are necessary to provide the Student a FAPE. For example, while there was discussion of whether to allow the Student's private provider to come on campus to provide services during the date, the District's documentation does not demonstrate that there was discussion of whether the Student needed XXX XXXXXXXX to receive a FAPE. Moreover, if the services were necessary to provide the Student a FAPE it was the District's responsibility to provide those services. However, the District placed the onus on the Complainant to take the first steps in making the services available, and the services did not begin until almost 15 months after the Complainant's initial inquiry about the services.

With respect to the Student leaving campus early to begin extended XXXXXXXX sessions, the evidence shows that the decision reached during the XXXXXXXX X, XXXX, IEP meeting was based on the District's compulsory XXXXXXXXXXXX XXXXXXXX and the fact that he was not in a homebound status, rather than the Student's individual disability-related needs. While District witnesses told OCR that there were several factors considered, the District's summary of the XXXXXXXX X, XXXX, meeting mentioned only one factor – the attendance requirement. Further, the first rationale cited in the Notice of Refusal is that the Student was in first grade, "by law required to attend school," and needed to be in school since he was not eligible for homebound services or confined to home or a hospital. The "other factors" section of the Notice similarly referenced "the requirement that [the Student] is of age to attend school and not identified as a [Hospital Homebound] student that is confined to home or hospital." The evidence shows that during the XXXXXXXX XXXX IEP meeting the Complainant stated that attending school for the full day would not allow for the amount of XXXXXXXX "medically necessary" for the Student. Nevertheless, there is nothing in the documentation related to the IEP meetings, the Notice of Refusal, or the explanations provided by District witnesses during OCR interviews that reflects consideration of whether the Student had a disability-related need to leave school early. Also, there is no evidence that the IEP team gave consideration to medical information, physician recommendations, or input from the Student's XXXXXXXXXXXX, all of whom were present for the XXXXXXXX XXXX IEP meeting.

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<sup>4</sup> While the Complainant's allegation did not address the on-campus services, OCR is examining the evaluation of the Student with respect to these services, in light of the evidence obtained during the course of the investigation.

Based upon the foregoing evidence viewed under the preponderance standard, the evidence supports a conclusion that the District is in violation of the Section 504 regulation with respect to evaluation of the Student's need for XXX XXXXXXXX and/or his need to have a shortened school day so that he could participate in extended outside XXXXXXXX sessions.

*Whether the District Failed to Consider a Reasonable Modification of Its XXXXXXXXXX XXXXXXXX*

A district may need to make a reasonable modification to a policy or procedure in order to provide a student aids, benefits or services that are equally effective with those provided to students without a disability. According to a sign-out sheet provided by the District, at the beginning of the XXXX-XXXX school year, the District permitted the Student to accumulate approximately 26 hours of absences to attend XXXXXXXX sessions off campus from the beginning of the school year until XXXXXXXXXXXX XX, XXXX. In her XXXXXXXXXXXX XX, XXXX, email the Principal withdrew permission for the Student to continue leaving campus early and stated that effective XXXXXXXXXXXX XX, XXXX, the Student had to return to attending school for the full day. The evidence shows that, although the Complainant advised District staff that it was medically necessary for the Student to have more XXXXXXXX than he could obtain if he attended school for a full day, and provided supporting documentation, the District gave no consideration to whether the Student had a disability-related need for continued modification of the XXXXXXXXXXXX XXXXXXXX, which cites the following bases for an excused absence: illness, death of a family member, a family emergency, and religious instruction or holidays. Accordingly, OCR determined that there is sufficient evidence of a violation of Section 504 and Title II, as alleged.

To remedy these issues, District faculty and staff will be trained regarding the Section 504 standard requiring timely evaluation of students with disabilities, the District's responsibility to provide services instead of placing the onus on parents to arrange for services, and the standards requiring reasonable modification of policies and procedures. Additionally, the District will convene a group of persons knowledgeable about the Student, the evaluation data, and the placement options, including the Student's parents, to evaluate the Student's need for XXX XXXXXXXX to receive FAPE and to evaluate his need for a shortened school day using a process that comports with the Section 504 regulation. The District will also determine the compensatory education or other remedial services the Student requires, if any, for the time period that the District delayed evaluating the Student's possible need for XXX XXXXXXXX to receive a FAPE.

**Issue 2: Whether, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.134, the District retaliated against the Complainants' sons after the Complainants requested related aids and services for the Student beginning in XXXXXXX XXXX.**

**Protected Activity and Knowledge of Protected Activity**

To be protected from retaliation, an individual must have engaged in a "protected activity." An individual engages in a protected activity if he or she opposes any act or policy that is believed to

be discriminatory or unlawful under one of the civil rights laws that OCR enforces. The protected activity can also take the form of making a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing conducted under any of the civil rights laws that OCR enforces.

The Complainant provided OCR with a copy of a XXXXXXXXX XXX XXXXXXXXXX XXXXXXXXXX XXXXX (Petition) filed against the District. The Petition included a copy of an email to the Principal on XXX XX, XXXX, questioning the District's decision to not provide a Wechsler IQ Test (Test) to the Student due to it being "inappropriate." Based on this information, OCR determined that the Complainant engaged in a protected activity on XXX XX, XXXX, and that the District had notice of the protected activity.

### **Adverse Action 1: Falsifying a progress report for the Student**

In determining whether an action is adverse, OCR examines whether the recipient's action significantly disadvantaged an individual 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 alleged that the District falsified a progress report for the Student to suggest that the Student did not need XXX XXXXXXXX. The Complainant submitted to OCR a copy of the progress report, which indicates that the Student's grades for his classes for the period between X/XX/XX – X/XX/XX were as follows: XX% in Social Studies, Math, and Science; XX.XX% in Reading; and XX% in Language Arts. The Complainant alleged that the Student could not possibly have received these scores, as he is unable to XXXX, XXXXX, or XXXXX. During interviews, several District staff members stated that the District considered the Student's progress under his IEP when denying the Complainant's request. Insofar as this progress report was used as evidence to deny the Complainant's request, OCR may consider the report, should OCR determine it to have been falsified, as an adverse action. Therefore, OCR continued to the next step in its retaliation analysis.

### **Causal Connection**

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

OCR determined that the Complainant engaged in a protected activity on XXX XX, XXXX. The adverse action occurred from XXXXXX through XXXXXXXXXX XXXX. Accordingly, OCR finds that there is a causal connection between the Complainant's protected activity and the

District's alleged adverse action based on closeness in time. OCR will proceed to the next step in its retaliation analysis.

**Legitimate Nondiscriminatory Reason and Pretext**

During an interview with OCR, the Student's XXX teacher stated that this progress report reflected grades in a curriculum that was based on the individual needs of the Student. She stated that the Student's educational goals are about adaptation and repetition. She said that the Student is working on XXXXX XXXXX standards and is struggling but that a participation factor makes up XX% of his grade and includes a behavioral component. She stated that the Student's grades were in no way inflated, are based on lessons individualized to the Student, and that the grading standards for regular education students are not applicable to the Student. Students in the XXX teacher's class are not graded like students in the regular education classes – they are not given a grade based upon the outcome of a test or homework. If a student is actively participating in class, the lowest grade the student can receive is a XX%. Based on the above, OCR finds the District provided a legitimate nondiscriminatory reason for its actions regarding this allegation.

Next, OCR reviewed the evidence to determine whether the District's articulated reason was a pretext for retaliation. Pretext may be shown when, among other things: (1) the District's reasons regarding the validity of the progress report were not believable; (2) that similarly-situated individuals were treated differently; or (3) deviation from the District's procedures or other guidelines concerning the subject matter of the proffered legitimate, nondiscriminatory reasons.

Based on interviews with several staff members, including the XXX teacher, the XXXXXXXXXXXXXXXXXXXXXXXXXXXX, and the Principal, the Student was working toward goals on his IEP that were specific to the Student. The XXX Teacher explained that the Student was graded the same as the other students in his self-contained class. Additionally, the ESE teacher stated that participation representing XX% of a student's grade was true for all the students in the Student's class, all of whom were either XXXXXXXXXXXX or exhibited significant limitations in XXXXXXXXXXXXXXXXXXXX. During a discussion with OCR, the Complainant expressed dissatisfaction with the methods by which the Student was being taught; however, he did not provide information that would negate the District's proffered reasons for the validity of the progress report. OCR found no evidence of modification of the Student's grades to manipulate the Student's performance standards. Therefore, OCR has determined that the reasons were not a pretext for unlawful retaliation against the Student. Thus, OCR concluded that there is insufficient evidence to support a conclusion that the Student was subjected to retaliation in violation of Section 504 or Title II with respect to this allegation.

**Adverse Action 2: Delaying the provision of the Wechsler IQ test for the Student**

In XXX XXXX, during an IEP meeting, the Complainant requested that the District provide the Student with the Test. OCR's review of a psychoeducational evaluation of the Student reflects that the Test was performed as a part of that evaluation and the evaluation report is dated XXXXXX XX, XXXX. OCR notes that the Student's next IEP meeting, which was scheduled for the purpose of re-evaluating the Student, did not occur until XXXXXXXX X, XXXX. Accordingly, OCR considers the delay to constitute an adverse action and continued with its retaliation analysis with respect to this allegation.

### **Causal Connection**

OCR determined that the Complainant engaged in a protected activity on XXX XX, XXXX. The evidence shows that the District completed the Test on XXXXXX XX, XXXX. Accordingly, OCR finds that there is a causal connection between the Complainant's protected activity and the District's alleged adverse action based on closeness in time. OCR will proceed to the next step in its retaliation analysis.

### **Legitimate Nondiscriminatory Reason and Pretext**

During an interview, School Psychologist 1 stated that the Team, including the Complainant, agreed during a XXX XX, XXXX, IEP meeting that the Test would be performed at the beginning of the next school year. She also indicated during an interview that any delay was due to summer break falling during the months of June and July XXXX and that the Test was completed in XXXXXX XXXX.<sup>5</sup> Based on the above, OCR finds the District provided a legitimate nondiscriminatory reason for its actions regarding this allegation.

OCR also determined that the District's proffered justification for the delay was not pretext for unlawful retaliation. Specifically, during interviews, School Psychologist 2, as well as the Principal, stated that the delay was due to the summer months falling shortly after Complainant's request. School Psychologist 2 also stated that such tests are not typically performed during the summer months. OCR determined that, based on the consistency and credibility of interviews with staff, there is insufficient evidence of pretext. Based on the above, OCR concluded that there is insufficient evidence to support a conclusion that the Student was subjected to retaliation as alleged with respect to this allegation.

### **Adverse Action 3: Subjecting Student 2 to overly-harsh discipline for an XXXXXXXX XXXX behavioral incident**

The Complainant alleged that the District retaliated against Student 2 by punishing him in an overly-harsh manner for a disciplinary incident that occurred on XXXXXXXX XX, XXXX. Specifically, the Complainant alleged that the District suspended Student 2 for two days for possessing an X XXXXXXXXXXXX. OCR determined that a two-day suspension is an adverse action and continued with its retaliation analysis.

### **Causal Connection**

The Complainant engaged in a protected activity on behalf of the Student XXX XX, XXXX. The evidence shows that Student 2 was given a two-day in-school suspension (ISS) on XXXXXXXX XX, XXXX. Therefore, OCR finds that there is a causal connection between the Complainant's protected activity and the District's adverse action based on closeness in time. OCR will proceed to the next step in its retaliation analysis.

### **Legitimate Nondiscriminatory Reason and Pretext**

The District denied that Student 2 was subjected to overly-harsh discipline. According to a discipline referral for Student 2, he was given 2 days of ISS for a "XXXXXXXX XXXXXXXX Violation." Additionally, according to a statement from the Assistant Principal at School 2, a

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<sup>5</sup> According to the District's XXXX-XXXX Student Calendar, the first day of student attendance is August 11 and the last day is May 27.

XXXX saw Student 2 XXXXXXXX XX X XXXXXXXXXX or XXXXXXXXXX, admitted to possessing the X XXXXXXXXXX, and produced the device to the Assistant Principal. The District submitted its XXXX - XXXX “Student Conduct and Discipline Code,” which includes a “Matrix of Infractions and Consequences,” detailing possible Code violations and corresponding mandatory and optional consequences. There are five optional consequences for a XXXXXXXX XXXXXXXX Violation: ISS, Out-of-School Suspension (OSS), Administrative Assignment, Recommended for Expulsion, and Referred to Law Enforcement. Accordingly, OCR determined that the District proffered a legitimate, nondiscriminatory reason for disciplining Student 2.

OCR also determined that the District’s proffered justification for the discipline was not pretext for unlawful retaliation. In particular, OCR reviewed discipline reports for other students charged with a XXXXXXXX XXXXXXXX Violation during the XXXX - XXXX year. The document indicated that there were six additional students, aside from Student 2, who were disciplined, some more than once, for a XXXXXXXX XXXXXXXX Violation. Of these, aside from one infraction that resulted in detention, every infraction resulted in either ISS or OSS; specifically, nine infractions resulted in 2-days ISS and three resulted in OSS. Additionally, according to the District, none of the parents of these students engaged in a protected activity.

In considering Student 2’s punishment in conjunction with the possible consequences outlined in the Code for a XXXXXXXX XXXXXXXX Violation and in comparison to other students at School 2 charged with the same infraction, OCR determined that Student 2’s discipline was provided in accordance with the District’s Discipline Code and that the discipline imposed was the same, or lesser, than the discipline imposed on other students for the same infraction, with the one exception noted above. Accordingly, OCR found insufficient evidence to establish a violation of Section 504 or Title II as alleged.

### **Conclusion**

As noted above, OCR found that the District failed to evaluate the Student until XXXXXXXX XXXX after being notified of the Student’s need for XXX XXXXXXXX in XXXXXXXX XXXX and failed to use a process that comports with the Section 504 regulations. In order to provide a FAPE, the Student’s IEP team should have conducted a timely evaluation, including a determination of not only whether the Student had an individualized need for off-site XXX XXXXXXXX for half the school day but also a modification of policies with respect to absences due to the Student’s disabilities. Modification of XXXXXXXXXX XXXXXXXX may be necessary to ensure that the District’s program is as effective for students with disabilities as it for those without disabilities. The evidence shows that, while the District did consider a variety of factors when denying the Complainant’s request for XXX XXXXXXXX, one of the factors that played a significant role in its decision was the XXXXXXXXXX XXXXXXXX. However, the District’s XXXXXXXXXX XXXXXXXX does not provide for any reasonable modifications to be made for students, who may have absences due to a disability, on a case-by-case basis as determined by the students’ IEP or Section 504 team, which is not in alignment with the requirement that the individual needs of the student be assessed as required by 34 C.F.R. § 104.35.

To remedy these noncompliance issues, the District has agreed to a Resolution Agreement (Agreement) which, when fully implemented, will resolve OCR’s findings of noncompliance.

The proposed Agreement requires that the District train its staff on Section 504 and Title II requirements regarding the provision of FAPE. Additionally, should the Complainant reenroll the Student in a District school during the XXXX - XX school year, the District will convene a group of persons knowledgeable about the Student, the evaluation data, and the placement options, including the Student's parents, to determine whether the Student needs to receive XXX XXXXXXXX in order to receive a free appropriate public education (FAPE) and whether he has an individual disability-related need for a shortened school day. Lastly, the District will determine whether the Student needs compensatory and/or remedial services as a result of the District's failure to evaluate the Student's need for XXX XXXXXXXX or a shortened school day prior to the date of this evaluation.

OCR will monitor the implementation of the agreement until the recipient is in compliance with the statutes and regulations at issue in the case. 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,

Melanie Velez  
Regional Director