



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10  
ATLANTA, GA 30303-8927

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November 8, 2018

**Via U.S. & Electronic Mail**

Gregory Adkins, Ed.D.  
The School District of Lee County  
Attn: Office of the Superintendent  
2855 Colonial Blvd.  
Fort Myers, Florida 33966  
XXXXXXXXXXXXXXXXXX

Re: OCR Complaint # 04-15-1014

Dear Dr. Adkins:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint received by this office on October 14, 2014, alleging discrimination on the basis of disability. Specifically, the Complainant alleged the District discriminated against her son (Student) on the basis of disability, when:

1. From August 2014 until October 21, 2014, the School failed to implement provisions of the Student's Individualized Education Program (IEP) including not providing him with occupational therapy for 30 minutes monthly, teachers not collecting assignments, not allowing him to complete assignments in class on a daily basis, not providing extended time on tests or allowing him to re-take tests, not communicating with his parents regarding sleep, mood, and arousal, no daily communication regarding assignments and homework, not providing a reduced number of items and assignments, not providing class notes, not allowing the Student to remove himself from class to a safe location on campus, not implementing his sensory strategies, and not providing his Behavioral Implementation Plan (BIP) provisions for his "Hierarchy of Needs" and "Menu of Reinforcers" such as provisions for situational responses such as walking outside or on the track, visiting other teachers, helping in other class rooms, and doing work in other classes;
2. From August 2014 until October 21, 2014, the School failed to properly evaluate the Student by not including people knowledgeable about the Student and the placement options during his IEP evaluation meetings; and
3. From August 2014 until October 21, 2014, the School treated the Student differently and excluded him from after school activities by not permitting him to schedule with teachers to stay after school, and participate in clubs and sports while students without disabilities were allowed to engage in these activities.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

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

1. Whether the District denied the Student a Free Appropriate Public Education (FAPE) when it failed to implement provisions of his IEP, in noncompliance with Section 504 and its implementing regulation at 34 CFR § 104.33(b) and Title II and its implementing regulation at 28 C.F.R. § 35.130(a).
2. Whether the District failed to properly evaluate the Student by including a group of people knowledgeable about the Student, evaluation data, and the placement options for his IEP evaluations, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35, and Title II and its implementing regulation at 28 C.F.R. § 35.130.
3. Whether the Student was treated differently on the basis of his disability during the 2014-2015 school year when he was not permitted to participate in after-school activities, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4, and Title II and its implementing regulation at 28 C.F.R. § 35.130.

OCR's investigation included a review and analysis of the documents provided by the District and interviewed the Complainant and eleven District witnesses, including the Student's teachers, administrators, Exceptional Student Education (ESE) staff, and his paraprofessionals. After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II regarding implementation of one provision of the IEP under Allegation 1, which OCR proposes to resolve through the attached resolution agreement. However, OCR found insufficient evidence of noncompliance with respect to Allegations 2 and 3. OCR's findings and conclusions are discussed below.

### **Background**

The Student was enrolled in the tenth grade at the School during the 2014-2015 school year. The Student was identified as eligible for an IEP and is identified as having XXXXXXXX XXXXXXXX. The Student had a one-on-one paraprofessional (Aide) assigned to him, and transitioned to a new Aide during the year. He resided XXXXXXXX.

The District held two IEP meetings that school year, including a September 30, 2014, IEP meeting, and a October 16, 2014, IEP meeting. On October 21, 2014, the Student withdrew from the District.

**Issue 1: Whether the District denied the Student a Free Appropriate Public Education (FAPE) when it failed to implement provisions of his IEP, in noncompliance with Section 504 and its implementing regulation at 34 CFR § 104.33(b) and Title II and its implementing regulation at 28 C.F.R. § 35.130(a).**

### **Legal Standard**

The Section 504 regulation at 34 C.F.R. § 104.33 (a) states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability.

The Section 504 regulation at 34 C.F.R. § 104.33 (b) states that provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

Title II implementing regulation at 28 C.F.R. § 35.130(a) states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

### **Factual Findings and Analysis**

The Student's IEP, initiated on September 30, 2014 and finalized on October 16, 2014, contains the provisions at issue. IEP team witnesses and the Complainant confirmed that his prior IEP in place from the beginning of the 2014-2015 school year until October 16, 2014 was substantially similar to the October 16 IEP, containing the same provisions at issue.

#### ***Not Providing Occupational Therapy***

The Complainant alleged that the Student did not receive his IEP provision for 30 minutes of Occupational Therapy (OT) services monthly. OCR verified that the Student's IEP contains this provision. The IEP notes state that OT was to be provided as a consultation service, stating "occupational therapy is recommended to continue as a related service to provide staff training and adaptive equipment/strategies as needed." The District's OT logs for the Student indicate that within the first thirty days of school on both August 19 and September 5, 2014, the Student's Occupational Therapist (Therapist) spent 15 minutes to consult with teachers and conducted

classroom observations. On October 3, 2014, the Therapist logged 90 minutes of OT services to provide “Equip. Material Device modification,” including obtaining therapy items, delivering them, and instructing teachers in their use. On October 16, the Therapist consulted with his teachers again for 30 minutes, noting that use of the “[s]ensory room [was] in progress,” and that the Therapist “instruct[ed] teacher further in sensory strategies.”

Witnesses stated the Student received the appropriate OT services at the school but were unclear on when this occurred and how it was provided. During a follow-up interview on December 16, 2015, the Complainant did not have anything to add regarding this allegation.

Based on a preponderance of the evidence, the District did not fail to provide OT services to the Student as alleged. In particular, the Therapist delivered OT consultation and instruction for 30 minutes in the first 30 days of school from August 19 through September 5, and 120 minutes during the next 30 days from September through October, 2014. Based on the foregoing, there is insufficient evidence of a failure to implement the IEP services for 30 minutes of OT consultation and staff training services monthly during the Student’s enrollment at the School, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

### ***Not Collecting Assignments***

The Complainant alleged that the Student’s IEP provision for school staff or teachers to collect his assignments was not followed. The Student’s IEP includes a provision that teachers will “collect assignments completed in class on a daily basis” under “Accommodations and Modifications.” It further clarifies that “work does not have to be completed at that time,” “his assistant will make a copy and provide it to the appropriate teacher,” and the Student will “take the original home for completion.”

Data and logs indicate that the Student’s Prior Aide, Aide, and teachers made efforts to collect his homework and assignments, but do not specify whether they made a copy of partially completed work to be provided to the teacher, and whether the original was sent home for completion. These records did not document whether there were collection attempts each day, but did indicate that homework or assignments were not completed or begun by the Student regularly. This includes failures to do assignments or work on August 25 and 26, September 2, 12, 25, October 3, continued missing make-up work on October 10 and 13, and that the Student threw away all make-up work on October 15.<sup>1</sup> The data also showed a failure to turn in homework on August 26, September 2 and 12, and October 5, and that the Student had more homework to make up on October 10 and October 13.

During OCR interviews, District witnesses described the process for assignment and homework collection. The Student’s Aide stated that he would collect assignments and write them down in the Student’s folders. The Student’s Aide had his own folder with copies of the assignments for the Student as a backup. For homework, the Aide would write down the homework in the Student’s folder. The Aide would also make three copies of the homework assignments: one for himself, for the ESE Teacher, and one for the Student to take home. If the Student completed a

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<sup>1</sup> Based on the wording of the notes in the August 26<sup>th</sup> entry, there was no evidence of the extent to which the Student may have partially completed the assignment or indication of the collection of any partially completed work.

homework assignment, it was then provided to the teacher. The Student's Prior Aide turned in homework before class every morning, took his class assignments, put them in his folder, and turned them in for him during the next class. In a separate interview with OCR, one witness also stated that "some teachers took it [homework] when it was done and some didn't," so the Prior Aide "took the assignments [for teachers] who did not accept it when it was done" as the Student "had until the end of the quarter to turn in assignments."

Several of the Student's teachers noted that the Student did not complete many class or homework assignments, and referenced his IEP provisions giving him until the end of the quarter to complete them. During interviews with OCR, a witness stated that when the Student failed to turn in an assignment, the teachers would "give him a list of the assignments, his Aide would ask for a list too, and his Aide would help make sure they were accomplished." Regarding the Student's homework assignments, another witness stated, "if completed, it [the homework] was always collected." A witness noted, "I would try to have him complete and turn in [the homework] at a later date" because "[i]f he didn't do it and [I] couldn't get him to do it in the next couple days, usually it was a lost cause." All of the witnesses denied that the Student's class and homework assignments were not collected if completed.

During a follow-up interview, the Complainant stated that her concern was regarding assignments the Student partially completed in class. She stated that the School collected assignments and sent them to the XXXXXX, but that they "were supposed to collect a copy of what he had done so far, and then the rest would go home." She added that the Aide would not always collect completed assignments to turn in during the next class, and that the Student would have copies that were gone if they got lost, but he usually did not complete lost assignments. The Complainant confirmed that he had a backup folder in case the Student lost his own folder. Finally, the Complainant stated that there was a time when staff were not collecting his assignments, but conceded that if they collected items and issued an incomplete grade, the homework had been collected.

Based on a preponderance of the evidence, OCR finds that the District had a system to track and also made efforts to collect the Student's assignments and homework, but there were incidents of the Student failing to complete or begin assignments. Whether his teachers and aides collected assignments per his IEP provisions stating that "work does not have to be completed at that time [of collection]" is a question of fact that remains. The evidence shows that some failures to collect assignments may be due to the Student not completing any portion of those assignments. Staff stated that assignments were collected "if completed" and that the Student received extended time to complete assignments per his IEP. Thus, testimony indicates that there may have been instances where assignments were not collected until they were completed and partially completed assignments were not collected. Incomplete assignments were also subject to another provision of the IEP permitting him extended time until the end of the quarter to turn in assignments, as discussed below. Because the District had a system in place to collect the Student's assignments, assignments were collected, and other assignments may not have been collected because the Student did not complete them, there is insufficient evidence that the School failed to follow this provision of the Student's IEP resulting in a denial of a FAPE, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

***Not Allowing Assignments to be Completed in Class***

The Complainant alleged that the Student's IEP provision requiring staff to permit the Student to complete assignments in class on a daily basis was not implemented. OCR's review of the Student's IEP shows there is an item for "collect[ing] assignments completed in class on a daily basis," but there is no requirement that the Student actually complete the assignments in class. There is an exception in the Student's IEP stating that "work does not have to be completed at that time," and that the Student can take assignments home for completion." The IEP also contains a provision for the Student to receive "extended time for assignments" that lasted "up to the end of the quarter."

OCR reviewed evidence showing that the Student completed at least some of his work in class. Some evidence showed instances where the Student did not complete assignments in class due to leaving class to visit "safe persons" per provisions in his IEP. A review of the Student's IEP also showed accommodations and provisions for extended time for assignments, visiting "safe persons," and doing work in other classrooms. There was no evidence that the Student was ever denied extended time to complete an assignment. Witnesses stated that the Student received additional time to complete his assignments, as discussed below.

During the follow-up interview with the Complainant on December 16, 2015, OCR reviewed this evidence with her. The Complainant acknowledged that previously, the Student would complete work in the library or ESE classroom, a safe person could assist him there, and teachers would pick the assignments up later. However, she stated this was no longer permitted. She further stated that if his teachers checked notebooks for assignments, and when one was missing or incomplete, then teachers did not collect it, the Student was likely to lose it, and he would not receive credit during later notebook checks, as discussed above.

The preponderance of the evidence shows that the Student's IEP did not include a provision providing for the Student to complete assignments in class as alleged. The evidence also shows that the Student completed at least some of his work in class, and was allowed to leave the classroom to visit "safe persons" and complete work in other classrooms. Based on the foregoing, there is insufficient evidence of failure to implement such an IEP provision, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

***Not Giving Extended Time or Test Re-takes***

The Complainant alleged that the Student's IEP provision for extended time and permission to re-take tests was not followed. The Student's IEP includes separate provisions for him to receive both "extended time for assignments... up to [the] end of the quarter," and to "allow retake of failed tests and take higher grade" as needed. OCR's review of the District's written data did not reveal any written evidence of extended time or opportunities to re-take tests being provided or denied. All District witnesses OCR interviewed stated that extended time was never denied, and the Student was given until the end of the quarter to complete assignments. Several witnesses stated the incomplete assignments would be marked as such, and be sent home for the Student to complete. All of the District witnesses also stated the Student had the option to re-take tests for a higher grade, and that this was never denied. One witness stated the Student was given "double

time” on tests. Another witness stated that the Student re-took a vocabulary test in her class. Another witness indicated that the Student never asked to re-take any tests, but felt there were times where the Student could have re-taken tests for a higher grade if he had chosen to do so. Another witness stated that the Student was going to re-take a test in her class, but the Student then withdrew from the District.

OCR discussed these statements with the Complainant during a call on December 16, 2015. The Complainant agreed that the Student received additional time on assignments. She confirmed that teachers let him take assignments home and gave him additional time to complete them, and would permit him to try to get caught up on assignments in other classes if he completed work early. She was unsure if he received additional time on tests, except for standardized testing and in Algebra. She was also unsure if the Student was given double time on tests, and did not know if the Student knew these accommodations were available to him. The Complainant stated that she did not think there was an instance where the Student retook a test that year.

OCR finds a preponderance of the evidence supports that the Student was given extended time until the end of the quarter to complete assignments, and that there was insufficient evidence that the Student was not permitted to re-take tests as alleged. Therefore, there is insufficient evidence that the Student was denied IEP provisions for extended time on assignments or to re-take tests, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

#### ***Communicating with Parents Regarding Sleep, Mood, and Arousal***

The Complainant alleged that his IEP provisions for “communications with parent regarding sleep, mood, and arousal” were not implemented. OCR review of the Student’s IEP found that the IEP included a provision for “communication to parent/XXXXXX regarding sleep/mood/arousal” on a daily basis. The IEP does not indicate whether all three provisions must be described in each communication to the parent or XXXXXX. The data reflected that District staff had faxed notes regarding the Student’s mood on August 20, from August 25 through August 27, and on September 2, 2014, including facsimile confirmation pages. The District implemented a form for the Student including this information beginning on August 25, 2014. There are no written copies of this communication from September 3 through September 11, 2014, or from September 20 through September 30, 2014, which coincided with the Student’s suspension. For the remainder of the days, the data shows the form was completed, but lacks facsimile confirmation pages confirming transmission. This time period coincides with the start of the Student’s new Aide. The sheets primarily indicate the Student’s mood, activity, and anxiety levels.

District witnesses stated that the provisions pertaining to sleep and mood communications related to effects of the Student’s medication. Witnesses stated that the Student’s Aide was responsible for communicating this information. One witness stated staff communicated this information to the XXXXXX because he lived at the XXXXXX. Staff contacted the XXXXXX regarding missed assignments and gave them further notice about him not having homework. Witnesses asserted that the Student’s Aide would fax this communication to the XXXXXX every school day.

The Complainant confirmed that the School would fax the sheet to the XXXXXX, and the XXXXXX sometimes provided her with a copy. She alleges the intent of whether this was to be provided to the XXXXXX or to the parents was never clarified by the IEP team, but that it was designed so that the Student's doctors would have this information. She asserts that when the form was changed, there was a period of time when this provision was not followed.

OCR finds that the District provided communications about the Student regarding his sleep, mood, or arousal, and that these communications were provided to the Student's XXXXXX from August 20 through October 16, 2014. Although the IEP states that this communication was to be provided to the "parent/XXXXXX," there was insufficient evidence about whether it was to be provided to both parties and that any failure to provide this communication to the Student's parents violated the IEP, particularly because the Student lived at the XXXXXX. Although witnesses stated that this communication was sent to the XXXXXX on a daily basis, the written data indicates there may have been gaps in time, noted above, when this communication was not sent. There was no data indicating that any failure to communicate with the XXXXXX regarding the Student's sleep, mood, or arousal had denied the Student a FAPE or impacted his educational opportunities. OCR therefore finds any such failures to be a *de minimis* failure to implement this provision. Thus, there is insufficient evidence that the District denied the Student a FAPE with regards to providing daily communications regarding the Student's sleep, mood, or arousal, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation. However, OCR will provide technical assistance to the District regarding this issue.

#### ***Not Communicating Daily Regarding Assignments and Homework***

The Complainant alleged that that the Student's IEP provision for "daily communication regarding assignments and homework" was not implemented. The IEP includes a provision for "daily communication supplied to XXXXXX regarding assignments and homework." The evidence reflects that the Student's Prior Aide and Aide would provide communications about his assignments and homework in each of his classes. Communications beginning on August 20, 2014, included only sparse assignments and quiz information in the notes, but from September 2, 2014, the daily communications began including specific homework and assignment information. The Complainant emailed the Student's prior ESE Teacher on September 11, 2014, stating that she received a daily communication, but that "it does not contain information on assignments and homework." Assignment and homework communications became regular beginning on September 11, 2014, through a "daily assignments/homework" form. However, this form was missing on September 17, 19, 22, 23, 24, 26, 29 and 30, and October 8, 9, 14, 15, and 16, 2014.<sup>2</sup> Class assignment data for one of the Student's teachers from August 29 through October 3, 2014, shows various methods of communication for assignments and homework for the Student, including communications with ParentLink and documentation of phone calls to parents regarding homework.

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<sup>2</sup> The Complainant alleged that the Student was suspended nine (9) days that year. The first day of school was August 18, 2014. September 1 and 25, 2014, were school holidays. See [https://web.archive.org/web/20141030191025/http://www.leeschools.net:80/calendar/14-15/2014-15\\_instructional\\_calendar.pdf](https://web.archive.org/web/20141030191025/http://www.leeschools.net:80/calendar/14-15/2014-15_instructional_calendar.pdf)



Witnesses stated that the Student's Prior Aide completed checklist sheets including assignments, and a copy was faxed to the Student's XXXXXX. Witnesses stated the Aide would also write the Student's daily assignments, homework, and behavior in his folder, make copies of the assignments for him to take home, and fax the information to the XXXXXX. Witnesses stated this was the Aide's responsibility. One teacher also detailed her own means of providing communication regarding assignments and homework to the Student through an "Edmodo" account that was accessible by parents. The District did not provide any documentation regarding Edmodo assignments, but it did provide a behavior data sheet dated September 9, 2014, recommending that parents sign up for "Edmodo."

In a follow-up interview, the Complainant stated the communications regarding assignments from staff were sometimes incomplete, such as "only including the name of the assignment," not saying "what the assignment was," and only having "the instructions part of the assignment setting it up." She stated there were missing assignments the Student did not receive, and that he did not receive all of the worksheets. The Complainant stated some teachers had online access, but they "wouldn't post the information," and "wouldn't update the assignments timely," and that she "wouldn't know at any given time what he was missing." She was unsure which teachers were failing to communicate this information. She also stated that online assignments would say things such as "notebook check - assignment number 10," but that she would not know what assignment 10 was and so the Student could not complete it. Finally, she stated that assignment information was only faxed intermittently to the XXXXXX with the Student's behavior sheets.

Based on the preponderance of the evidence, OCR finds sufficient evidence of noncompliance regarding this allegation. The evidence does not support that the Student's assignments were communicated to the XXXXXX on several dates in September and October, 2014, as discussed above. Although the testimony conflicts regarding whether the assignments were communicated on a daily basis and the effectiveness of this communication, the written data does not support that the assignment communications were done on a daily basis with fidelity. While the Student has IEP provisions for extended time to complete assignments, appropriate and sufficient notice of these assignments is necessary for permitting the Student a full opportunity for participation in each of his classes particularly in light of the Student's absences on occasion connected with his IEP and BIP provisions for leaving class. Based on the foregoing, OCR finds sufficient evidence that the District denied the Student a FAPE by failing to provide daily communication regarding assignments and homework, in noncompliance with Section 504 and Title II.

### ***Not Providing Reduced Number of Items in Assignments***

The Complainant alleged that the Student's IEP provision for "reduced number of items and assignments" was not implemented. The Student's IEP states that the Student was to have a "reduce[ed] [number] of items in assignments to amount needed to show mastery." During a September 15, 2014, meeting with the Complainant, District staff asserted he was being given reduced items. Meeting notes state that "work is being reduced in math and other classes when there is way to show he has mastered a skill." The Complainant disagreed, and in emails to the District, on September 9, 11, and 22, and on October 14, 2014, she reiterated the Student's need to have the number of assigned items reduced to show mastery. She raised these issues again during the September 15, and the October 14, 2014, IEP meetings. There is little written data

showing whether the Student was or was not provided with reduced number of assignments. Data shows the Student was assigned even numbers for math homework and assignments on August 27, September 11-12, 15-16, and 18, and October 2, 2014, and odd numbers on October 10, 2014. Data also reflects that the Student was to catch up on missing work by doing the “odd” numbers of assignments on October 6 and 16, 2014. Two teachers’ notes listing accommodations for the Student included the reduction of items in assignments, another teacher noted that the Student was “given [a] list of missing assignments to make up” that “was adjusted to be shorter and more concise,” and that the “Student[’s] assignments were shortened but very few [were] returned.”

Interviews of District staff indicated that the number of assignments given to the Student’s had been reduced, and staff asserted this provision of the Student’s IEP was never denied. One witness stated this provision was “based on teacher discretion depending on the specific assignment,” as it would be difficult to shorten certain assignments, such as writing assignments. Another witness was clear that the Student was given “half assignments,” but indicated some assignments were not reduced when all items were necessary for a test, such as vocabulary items. During a follow-up interview, the Complainant indicated that she was not sure if this provision of the Student’s IEP was implemented, stated that she did not know if “anyone ever told him he had to write a shorter essay or anything along those lines,” stated that it was implemented well in math, and indicated that implementation of this provision “wasn’t consistent throughout classes.”

OCR finds that there is evidence that the Student’s assignments were reduced in math. Given the conflicting testimony and lack of written data as to other assignments, in addition to testimony of difficulties associated with reducing vocabulary and writing assignments, OCR finds that there is insufficient evidence of a failure to reduce items to an amount needed to show mastery for assignments. Therefore, OCR finds insufficient evidence that the District failed to implement this IEP provision as alleged and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

### ***Not Providing Notes in Classes***

The Complainant also alleged that the Student’s IEP provisions for receiving “notes in classes” was not implemented. She alleged that the Student had a laptop that teachers would use to “provide hard copies of notes on it, and he wasn’t getting copies of his notes.” The Student’s IEP states he was to receive a “hard copy of all class notes” every day. The IEP did not state this was a copy of the material being taught or notes of the classroom lecture delivered. The Complainant began alleging that the Student needed hard copies of notes with the District by email on October 20, 2014, but did not indicate which teachers or classes were not providing notes.

During OCR interviews, all teachers stated they provided copies of class notes for the Student when notes were taken during class, including PowerPoint presentation slides or notes written by other students as appropriate. One witness stated that these notes were to be provided to the Student “whenever there was note taking in class, and whenever teachers had notes to give.” The Student’s Aide would take notes for him as well, and teachers sometimes encourage the Student to take notes for himself just so that he could progress individually as a student. This

witness was clear that “whenever teachers took notes, they had a hard copy for him,” and that this provision of the IEP was never denied.

In a follow-up interview, the Complainant stated that the Student would sometimes not receive a copy of notes until after class or they would be faxed to the XXXXXX, but he would not have them in class when he needed them. She acknowledged that one of his math teachers implemented this provision well. However, she said that the Student was not supposed to write notes on his own because he does not retain them, and taking the notes himself could increase his levels of frustration and aggression.

Based on a preponderance of the evidence, there is insufficient evidence that the Student was not provided with hard copies of notes. Testimony conflicted between teachers and the Complainant regarding whether he was consistently given copies of notes. However, witness testimony consistently showed that the Student was provided notes from class. Therefore, there is insufficient evidence that this IEP provision was not implemented as alleged and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

### ***Not Allowing the Student to go to Safe Places***

The Complainant alleged the Student’s IEP included provisions to “allow the Student to remove himself from class to a safe location on campus,” and that only the Student’s Algebra Teacher implemented this provision. The Student’s IEP includes a provision for the Student to “remove himself from class to a predetermined safe location on campus.” It also includes an accommodation to “provide options and actions to safe places and adults.” It further provides that the “predetermined locations [would be] outlined in meeting minutes,” and the Student “should not be punished for leaving class for safe place.” It concludes that the Student’s Aide “will locate available preferred staff member and go with Student to safe place.” The Student’s “Hierarchy of Responses” in his BIP includes situational responses for when he leaves a space, to “verbally remind to choose a safe area.” In an e-mail from a Learning Resource Specialist dated October 3, 2014, she acknowledged during a meeting with the Student earlier that week to develop his safe places, safe people, and list of reinforcers. On September 30, 2014, IEP conference notes list his safe places as including the bus ramp, gym, IEP office, and library. Documents show the Student requested safe places from his Prior ESE Teacher, a Coach, the track, and the media center. The official list showing his preferred safe places included “IEP room, under a stairwell, bus ramp, and the teachers [sic] lounge upstairs.”

The data shows the Student was permitted to go to safe places or leave class on several occasions, including on August 20, 25 through 28, October 3, 5, 6, and 14, 2014. There was one incident where the Student requested to leave class at 8:00 a.m. on August 27, 2014, and not being permitted to leave class, but it is not clear from the data why he asked to leave and if this was related to this IEP provision. The Student was permitted to leave class and go for a walk later that day. Witnesses for the District stated the Student’s safe place locations were changed during his IEP reevaluation to select safer places, and the Student walked around the School and helped select his safe campus locations. Witnesses asserted he had safe places to go that included the bus ramp, the IEP meeting room, the lobby by the gym, a particular stairwell with a lot of space, and at one point, the media center. District witnesses all agreed that he was never

denied the chance to go to a safe place when needed or requested. Three teachers stated the Student never needed or requested safe places in their classrooms.

The Complainant disagreed with these assertions. She reiterated her allegations, stating that the Student could no longer visit the track, the library, or a “cubby” area under the stairs. She also asserted that the Student was no longer allowed to stay out of class as long as he wanted, and had to return to class right away.

The evidence shows that the Student was permitted to go to safe places on several occasions as noted above, and that District staff members were familiar with the safe places where the Student could go. All of the witnesses interviewed stated that he was never denied the opportunity to go to a safe place. OCR could only substantiate one occasion when the Student requested to leave class and was denied. OCR considered whether this denial constituted a denial of a FAPE. The Student requested to leave class at 8:00 a.m. that morning, and was allowed to leave class at a later time that same day. There was no evidence that the denial of this request on the day in question was an adverse action against the Student, had an adverse impact upon him, or limited or denied the Student’s ability to participate in or benefit from the educational program in any way. Based on the foregoing, there is insufficient evidence that this incident resulted in a denial of a FAPE. Based on the foregoing, there is insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

#### ***Not Providing BIP Provisions for Hierarchy of Responses/Needs***

The Complainant alleged that the Student’s “Hierarchy of Needs” in his BIP was not being followed. She clarified that the “Hierarchy of Needs” is a guide for how the School is supposed to respond to the Student’s behaviors, and the provisions in this hierarchy were not provided for him. For example, she alleged that the Student’s Aide was not supposed to “verbally engage him, was supposed to avoid confrontation, and was not supposed to be physical with him, but that the Aide would do all of those things and escalate situations. The Student’s IEP includes a provision for daily “use of positive behavior/intervention strategies,” referring to the provisions of his BIP. The Student’s BIP includes a list of responses as de-escalation strategies. The evidence showed that this hierarchy of responses was distributed to all of the Student’s teachers. The hierarchy includes situational responses to the Student’s behavior issues, including “let him pace,” “give him personal space to work out the energy,” “prompt to take a break,” “verbally remind to choose a safe area” when he leaves an area, “visiting other teachers,” and a note for the school to “pre-arrange... preferred people to assist” the Student. Provisions relating to preferred persons, safe areas, and visiting other teachers are all analyzed as stand-alone allegations in other parts of this letter, so this analysis will focus on the unaddressed hierarchy provisions of pacing, personal space, prompting to take a break, and verbal reminders to choose safe areas.

OCR reviewed written information regarding implementing the hierarchy. One teacher’s response to the Complainant stated the Student was permitted to pace in class when and if needed. Daily mood communications included notations that he was permitted to walk on August 27, 2014, and “cool off” in the gym on October 14, 2014. His OT service notes for September 15, 2014, stated he was permitted to go walk in his safe areas. These indicate instances where he could pace and was given personal space, but the notes did not state whether he was prompted by staff to do so. Another teacher’s notes stated only that he was given

“frequent breaks, both in and out of the classroom.” There is no further evidence addressing these matters.

District witnesses stated that the hierarchy was how to respond based on when the Student “displayed different types of behavior,” including de-escalation tactics for when the Student would get mad. One witness stated that when the Student “got angry and mad,” the Aide “follow[ed] him all around the campus,” “stayed back,” “trailed him,” and “[tried] to talk to him calmly and nicely to and try to calm him down.” Two other witnesses stated that the Student was permitted to pace, or walk around “if he was getting antsy,” or appeared agitated or “fidgety.” Another witness stated that the “hierarchy was followed as much as the Student would allow,” and the Student would have to ask if he needed a break or to go a safe place, but that it was up to staff to make sure the behavior plan was followed. Another witness stated that the Student’s Aide was “always intervening as necessary.” No District witnesses were aware of incidents where the hierarchy was not followed. Four witnesses stated the hierarchy was never really needed in their classes.

During a follow-up interview with the Complainant, when asked about whether staff gave him space when he left class, and watched his body language to follow the behavior plan hierarchy, the Complainant stated some teachers would do so, but then reiterated that with the Principal and Aide, he was not allowed to walk out of class anymore. She confirmed that teachers knew to leave him alone when he was pacing.

Based on the preponderance of the evidence, OCR was unable to find any specific incidents where District staff failed to permit the Student to pace, failed to give him “personal space,” failed to prompt him to take a break, or failed to give him verbal reminders to choose safe areas when he was agitated, angry, or upset. Therefore, there is insufficient evidence that this provision of the Student’s IEP was not followed, and there is insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

### ***Not Implementing Sensory Strategies***

The Complainant alleged that the District did not implement the Student’s sensory strategies in his IEP. The Student’s IEP includes a provision for “use of sensory/calming strategies” every day, but does not list any specific strategies or otherwise indicate what this provision entails. One District witness stated that sensory strategies can include “a sensory blanket... listening to music, using headphones while working... weighted vests, squishy stress balls, and that type of thing.” Staff members stated that these strategies were provided to the Student on an as-needed basis. The Student’s OT notes indicated that some sensory strategies were used for the Student, including using a “music player,” and that the therapist had consultations with a teacher regarding implementing sensory strategies on October 16, 2014.

One witness indicated that the Student was always allowed to go to a sensory room, and was allowed to pace “if he was getting antsy,” which was all he really needed. Another witness stated that if the Student “came to me as a safe place,” he would use “calming behaviors.” Another witness was not aware of this provision ever being denied to the Student. However, the Student’s Aide stated that he was not aware of this provision, and that the only thing he saw with the Student was his laptop. However, several witnesses stated that the Student was allowed to

visit “safe places” as a behavior intervention strategy, as discussed above. OCR followed up with the Complainant regarding these assertions. She stated that although the Student was previously provided some accommodations, such as movement activities, helping out in other rooms, and crawling in dark places, those activities were no longer allowed because District staff believed he needed to be in class and should not be going into other teachers’ classes because it was disruptive.

Based on the foregoing, the evidence shows that some sensory strategies were used to assist the Student with behavior modifications. Staff members stated that sensory strategies, including using a music player, were provided to the Student on an as-needed basis. The Student’s Aide stated that he was not aware of this provision in the Student’s IEP. However, several witnesses stated that the Student was allowed to access safe persons and safe places, and that pacing and walking were implemented to address the Student’s behavior through other BIP or IEP provisions. Therefore, any failure to implement a sensory strategy in these circumstances would constitute a *de minimis* violation. Thus, OCR finds insufficient evidence that the District failed to implement this provision of the Student’s IEP or that the District is noncompliant with Section 504 or Title II as alleged.

#### ***Not Providing BIP Provisions for Menu of Reinforcers***

The Complainant alleged the Student did not receive any of his items from his “Menu of Reinforcers” in his BIP, which included various items such as walking outside on the track, visiting other teachers, helping in other classrooms, and doing his work in other classes. OCR’s analysis will focus on the implementation of the specific reinforcers alleged to have been denied in detail below.

#### ***Not Permitting Walking Outside on the Track***

The Complainant alleged that the Student’s IEP provides for him to have “preferred safe places,” and that this included walking on the track. She alleged that District staff denied the Student the ability to walk on the track. The Student’s IEP does not include a specific provision for “walking outside on the track” or “preferred safe places.” However, the IEP does call for the Student to be able to go to “predetermined” locations on campus outlined in the meeting notes. Meeting notes dated September 15, 2014 identified the safe places as the “bus ramp, gym, IEP office, and library.” These locations do not include the track. The other places identified in a final list of places provided in a stand-alone document include the first floor receiving hallway, the bus ramp under the covered walkway, the athletic lobby, the second floor emergency exit hallways, and the in-school suspension room. The safe areas list and the Student’s OT log notes show that he was permitted to walk on the bus ramp. The Student’s IEP notes also indicate the Student has received discipline referrals for “leaving campus/unauthorized area.”

Witnesses confirmed that the Student was previously allowed to walk on the track. Three witnesses stated that permission for the Student to walk on the track was changed to the bus ramp for safety reasons due to the Student’s history of elopement. The Student’s BIP recorded two incidents of elopement during the 2014-2015 school year. The OT notes indicated that the Student attempted to leave the campus on September 15, 2014. One witness was unsure if this change was made by the IEP team or as an administrative decision, but recalled discussing it as part of the IEP.

The Complainant confirmed that safe places were limited and the school took away walking outside on the track. She confirmed that his ability to walk on the track was changed to the bus ramp, and alleged she was unaware of the Student eloping.

The evidence shows that the Student's IEP did not include provisions for walking on the track, but merely included a reference to a list of safe areas. The list of safe areas also did not include a provision that the Student was allowed to walk on the track. Therefore, there is insufficient evidence to establish that the Student's IEP included this provision, or that his IEP was not followed as alleged and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

### ***Not Permitting Visiting Other Teachers***

The Complainant alleged that the Student was denied the provision of "visiting other teachers" in his "Menu of Reinforcers." The Student's IEP includes a provision for the Student to have "options and actions to safe places and adults." The Student's BIP references his Menu of Reinforcers, but does not include the final menu. However, the Student's reinforcers that were distributed to his Student's teachers included a provision for "helping a class or student." The Learning Resource Specialist met with the Student during the week of October 3, 2014, to develop his safe places, safe people, and list of reinforcers. Some daily communications with the XXXXXX showed the Student was permitted to visit other teachers on August 20 and 26, that he left class on October 3, and that he needed to visit a teacher October 14, 2014, because he was upset. On August 27, the Student was not permitted to leave class, but it is not clear from the notes why he requested to leave and if this was related to the provision on "helping a class or student" in his Menu of Reinforcers. There was no further written data indicating whether a reinforcer for visiting other teachers was provided or denied when needed or earned.

Some District witnesses interpreted this provision as referring to his hierarchy of responses for de-escalation of the Student's behaviors. One witness stated that his list of safe people was given on an as needed basis, that it was based on teacher availability, and that they would provide an alternative person if one staff member was not available. Another witness stated that the Student was permitted to visit other teachers and classes as a reward, but that if he did not earn it or was in volatile mood, then it would not be safe for other children and it would be denied. Five witnesses did not recall any requests or visits to other teachers. Two other witnesses stated the Student would come to visit their classes. All other witnesses confirmed that he was not denied the opportunity to visit other teachers.

During a follow-up interview, the Complainant stated that she had to call the School and see if safe people were available before the Student could see them, and he was not allowed to see anybody who was not on the list, which was approved by the Principal. She also stated that the list of safe persons was changed.

The evidence shows that the Student visited other teachers and classes on several occasions during the 2014-2015 school year. Although there was an incident where the Student was not permitted to leave class on August 27, 2014, there was insufficient data to establish that it was related to this IEP provision. There was no further evidence of a specific denial of an

opportunity to visit a safe person or visit another classroom. Based on a preponderance of the evidence, there is insufficient evidence that the Student was not permitted to visit safe persons or visit other teachers, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

***Not Permitting Helping in Other Classrooms***

The Complainant alleged that the Student was denied his Menu of Reinforcers provision of “helping in other classrooms.” The Student’s IEP does not include a provision for “helping in other classrooms,” but does include a provision for “provid[ing] options and actions to safe places.” His BIP and Hierarchy of Responses included a notation to arrange for a menu of reinforcers such as “helping a class or student.” Several School staff members acknowledged the existence of a provision for helping in other in other classes as part of the Student’s “menu.” OCR’s review of the written evidence did not show any instances of the Student requesting or being denied the opportunity to help in other classrooms. OCR again noted the August 27, 2014, denial of permission to leave class, which was unclear as to whether it was related to this accommodation.

Witness statements supported that the Student’s Prior Aide and Aide were familiar with this accommodation, and that it was previously provided to the Student. One witness stated that he was “permitted to assist in other classes,” had “left class to go help out with other classes or make deliveries... or help out in the library,” and that this provision was never denied. However, one witness stated that if the Student was in volatile mood, then it would not be safe for other children for him to enter that classroom, so it would be denied in that sort of an instance. However, the witness did not provide any incidents where this provision was denied. This witness also stated the Student would receive a “menu” rewards such as assisting with cooking food, such as brownies, in the Life Skills class in order to assist him with behavior issues.

In a follow-up interview, the Complainant reiterated her allegation, and stated that the Student was no longer permitted to help with other classes during the 2014-2015 school year. Regarding cooking in Life Skills, the Complainant responded that they were only allowed to prepare healthy items that year, but did not refute that the Student was permitted to cook with the Life Skills class. The Complainant stated he helped in other ESE classes previously, but did not believe it happened in the 2014-2015 school year.

The evidence shows that the Student was allowed to help in other classrooms during the 2014-2015 school year. Both the Student’s Prior Aide and Aide stated that the Student was allowed to help in other classes, make deliveries, and help in the library. Although one witness stated that this provision could be denied if the Student was volatile, that witness did not provide any specific instances of this provision being denied. The written data only supported the single instance of a request to leave class being denied, and there is insufficient evidence that the denial was related to a request to help in another class. Based on the preponderance of the evidence, there is insufficient evidence that the Student was denied the chance to help in other classes, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.



***Not Permitted to Work in Other Classes***

The Complainant alleged that the Student was denied his Menu of Reinforcers provision of “doing his work in other classes.” The Student’s IEP does not include a provision for “doing his work in other classrooms,” but does include a provision for “provid[ing] options and actions to safe places,” as discussed above. The Hierarchy of Responses in his BIP included a notation to arrange for a Menu of Reinforcers such as “helping a class or student.” Some School staff acknowledged the existence of a provision for doing work in other classrooms either as part of the Student’s “menu” or as an accommodation he was permitted. OCR’s review of the written evidence did not show any instances of the Student requesting or being denied the opportunity to do work in other classrooms. The data showed that on August 20, 2014, the Student was permitted to do work in the library.

During OCR interviews, several witnesses stated that the Student was allowed to do his school work in other classes. One witness stated that “teachers were good with letting him do work in other classes.” One witness stated the Student’s Aide would encourage the Student to go do work in other classes where he needed to make-up work. Witnesses stated he was not denied the opportunity to do work in another class, and one witness indicated that if the class was busy or a teacher was unavailable, the Student was provided with an alternative. Another witness recalled an activity involving significant social activity with peers where the Student asked if he could have a different assignment, which was provided, and then exited the room with his Aide, completed it, and returned.

The Complainant said the Student was previously allowed to do work in other classes, but not during the 2014-2015 school year. She stated that the date of August 20, 2014, when the Student was allegedly allowed to work in the library, was before the new Principal came in and said, “we’re not doing any of this.” She confirmed that some teachers were good about letting the Student go to other classes to do homework and catch up if he finished an assignment, and that she believed that if he finished work in other classes, he would go do work in computer class.

Based on a preponderance of the evidence, OCR finds that data and documentation shows instances where the Student was permitted to do work in other classes, including going to the library to work on August 20, 2014. There is insufficient evidence of any denials of this provision either as a positive reinforcement through his Menu of Reinforcers or otherwise. Therefore, there is insufficient evidence that the Student was not permitted the opportunity to do his work in other classes, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

***Failing to implement BIP on Date of Suspension***

The data reflects that the Student was suspended from school during the fall of 2014 “for threats and intimidation.” Although it was not specifically alleged in the complaint, OCR examined whether the Student’s BIP was not followed during the incident on September 19, 2014, that resulted in the suspension.

The Student’s BIP and Hierarchy state that when he “breathes hard, clenches fists, and/or begins pacing,” staff responses include “let him pace,” “distract him by talking about his preferred topics,” “give him personal space to work out the energy,” “verbally remind him in a non-

judgemental (sic), firm, calm voice to use calming strategies,” or “prompt [him] to request a break.” The BIP further states that when the Student leaves for a safe area, staff are to “remind [him] to choose a safe area,” “limit verbal interactions,” tell him “staff will be close by to help if needed but will not approach him,” and “call parent to alert her to the situation, keep her informed.” When the Student “becomes verbally, physically aggressive or threatening,” the BIP states to “continue being non-confrontational,” “continue limited verbal exchanges,” and “use district approved de-escalation techniques.” On September 19, 2014, the Student became upset, left the classroom, walked around the building, and was cursing. His discipline referral states he called his Aide a “nigger,” a “bitch,” told him to “fuck off,” and then threatened his daughter. There was no written data regarding the implementation of BIP or hierarchy provisions during the incident. One District witness confirmed that “he threatened [the Aide] in some way and threatened his daughter as well.” Another witness stated that the Student became upset and “threatened to physically and sexually assault the Aide’s daughter.” This witness stated they believed the Aide’s response was to “give him space, take him to a safe person and location, and utilize his hierarchy of responses, but did not remember specifics from the incident.

Another witness provided a more detailed account. This witness stated that while the Aide was trying to help the Student with computer class work, and the Student “flipped out... and left the classroom.” This witness asserted that the Aide “trailed behind him and kept his distance,” while the Student was cussing, swearing, and walking around the first and second floors of the building. The Student then went to his prior ESE teacher’s room on his own without prompting and talked to his safe person, but did not want the Aide to enter. When the Aide entered the room, the Student “flipped out, threw books and cussed and swore,” “got in [the Aide’s] face” to try and intimidate him, and was “kicking the desk and throwing things.” The Aide “backed away and kept [his] distance,” and “left the room for [the Student] to calm down, and so [that the Aide] would not do anything crazy.” The witness stated the Aide did not raise his voice and backed away when the Student got in his face, but did not remember what else the Aide did in response to the Student’s actions. The Aide left the Student with his safe person to calm down and reported then incident to administration.

Based on a preponderance of the evidence, OCR finds that when the Student became angry and walked around the building, the Aide took a number of steps that provided the interventions listed in the Student’s BIP and hierarchy. Specifically, the Aide gave the Student personal space to work out the energy, followed the Student around the building, permitted him to go to a designated safe area and safe person, was non-confrontational, did not raise his voice, and gave the Student further space when he became physically and verbally aggressive. Although the Aide did not “continue limited verbal exchanges” or use “de-escalation techniques” when he became aggressive in the safe area, the Aide instead chose to be non-confrontational despite being the direct object of the Student’s anger and verbal attacks. Based on the foregoing, there is insufficient evidence that the Student’s BIP was not followed during this incident, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this incident.

## **Resolution**

In regard to the violation described above regarding the District's failure to communicate the Student's assignments and homework to him on a daily basis, the District has agreed to enter into the attached Resolution Agreement, which, when fully implemented, will resolve this allegation.

**Issue 2: Whether the District failed to properly evaluate the Student by including a group of people knowledgeable about the Student, evaluation data, and the placement options for his IEP evaluations, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35, and Title II and its implementing regulation at 28 C.F.R. § 35.130.**

## **Legal Standard**

The Section 504 regulation at 34 C.F.R. § 104.35(a) states that 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 this section of any person who, because of handicap, 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.

The Section 504 regulation at 34 C.F.R. § 104.35(b) states that a recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that: (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

The Section 504 regulation at 34 C.F.R. § 104.35(c) states that a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all 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.

Title II implementing regulation at 28 C.F.R. § 35.130(a) states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the

benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

### **Factual Findings**

The Complainant alleged that the Student's general education and ESE teachers were not present at an IEP meeting on September 15, 2014, when the notification for this meeting said it was to develop, review or revise the Student's IEP. She stated that the appropriate staff was present at later IEP meetings, but at the September 30, 2014, IEP meeting, nobody at the meeting worked with the Student, the therapist did not show up, and the ESE teacher was not present. The Complainant alleged that this group revised the Student's BIP. The Complainant further alleged that at every meeting, the staff that worked directly with the Student and provided his present academic levels, but the teachers were not present to discuss what supports, accommodations, or placements were needed.

#### ***September 15, 2014 Meeting***

OCR reviewed data regarding the meeting on September 15, 2014. There was no evidence that his meeting was an IEP meeting, other than meeting notes being recorded on an "IEP Minutes" form. This form referred to the meeting as a "parent conference" and "IEP review." There were no accompanying IEP forms for this meeting in the files. Use of the "IEP Minutes" form appeared to be the practice for meetings regarding the Student, as it was also used for a phone "Parent Conference" on August 18, 2014. The September 15 meeting was attended by two assistant principals, two behavior specialists, an occupational therapist, the Student's ESE teacher, the Student's guidance counselor, the Student's prior ESE Teacher and safe person, a staffing specialist, the Complainant, and an advocate. The group discussed parental concerns, working on developing a new assignments form and checklist, reduction of work in classes to show mastery of a skill, access to safe persons and safe places, end of course exam waivers, the Student assisting in other classes when his work was completed, the Aide collecting worksheets and assignments, and the procedure for when the Student leaves campus. District witnesses stated that this was a parent conference which was held in order for the parent to raise her concerns, review logistics regarding the Student's work and assignments, and consider work reduction. The witnesses stated that no changes to the Student's IEP occurred during this meeting.

During a follow-up interview, the Complainant was asked about these District responses, and she stated this meeting was an "an IEP team meeting that we didn't finish on that date... [and] the IEP meeting was continued." OCR notes that an IEP meeting on September 30, 2014, which is discussed below, was not finished on that date and was continued at a later date.

#### ***September 30 and October 16, 2014 Meetings***

The data shows that an IEP meeting was held on September 30, 2014, which was attended by an assistant principal, the prior ESE Teacher and safe person, the ESE Teacher, the Student's math teachers, history teacher, Aide, prior Aide, guidance counselor, the Complainant, and an advocate. However, the signature page for this meeting does not include their signatures, but refers instead to the signature page for the IEP meeting conclusion on October 16, 2014. The IEP meeting notes reflect that teachers discussed observations of the Student's behavioral

progress, extended school year, diploma focus, classwork performance, missing assignments, classroom observations of his behavior, present behavior levels, IEP goals, expectations for data collection and daily sheets, and initiating requests for counseling services. One teacher came and left the meeting so that another teacher could attend, and the guidance counselor arrived late, at 12:48 p.m. The team reviewed and revised the Student's BIP and his safe places, and then adjourned the meeting at 2:00 p.m. The revised BIP's signature page is dated September 30, 2014, was only signed by the behavior specialist and the staffing specialist, and then states, "see signatures from eligibility page." That page has handwritten notes that the prior ESE teacher and guidance counselor attended and left early, that two math teachers, and that the prior Aide attended the meeting, but it does not include the signatures of any of these persons. The BIP states that the team also considered the Student's discipline reports.

One District witness stated that a few of the teachers were present for this meeting, including the ESE Teacher, and the team discussed the Student's present academic levels, looked at teacher reports, reviewed his test scores and state testing results, and that teachers discussed how the Student was doing presently. He stated that a few of the teachers were present, including the ESE teacher. This witness confirmed that the team considered the Student's BIP and accommodations, but could not recall if this occurred at this meeting or the following meeting. Another witness stated she attended an IEP meeting in September, that the IEP team discussed the Student's goals, parental concerns, relevant data, IEP services and accommodations, and that he believes he came into the meeting after the teachers had left. Another witness listed as attending the meeting stated did not recall the "particulars about what was discussed at each meeting." This witness could not recall if this was a parent conference, but when asked if evaluation data was discussed, he stated that the IEP meetings would have "included that [information] from general education teachers." Another witness confirmed that at the meeting, the team discussed the Student's grades and behaviors, and his teachers' observations, and noted that one teacher did have to leave early to go to class.

Data shows that the continuation of the IEP meeting was held on October 16, 2014, and the IEP re-evaluation was finalized on that date. This IEP meeting was attended by the Student's IEP team comprised of several District staff members, including the Student's general education teachers. The IEP team discussed the Student's prior IEP and interventions, staff observations, prior evaluation materials dated May 30, 2014, classwork performance, behavior observations, academic history, course grades, standardized testing, and remediation performance. The team also considered parental input. Evidence shows and the Complainant confirmed this meeting was a continuation of the IEP meeting on September 30, 2014, and finalized the IEP.

### **Analysis and Conclusion**

Based on a preponderance of the evidence, OCR finds the September 15, 2014, meeting did not constitute an IEP meeting for purposes of re-evaluating or revising the Student's IEP, placement, and accommodations or services. Additionally, OCR finds that the September 30, 2014, meeting was an IEP meeting and that this meeting was continued to and finished on October 16, 2014. OCR finds that the meetings on September 30 and October 16, 2014, to re-evaluate the Student and revise the IEP and BIP drew from information from a variety of sources, including teacher observations, the Student's present levels for various IEP goals, and testing scores. They were

attended by persons familiar with the Student, the data, placement options, and the placement decision was made by the IEP team. Based on the foregoing, there is insufficient evidence that the District failed to properly evaluate the Student by not including people knowledgeable about the Student and the placement options, and insufficient evidence of noncompliance with Section 504 and Title II as it relates to this allegation.

**Issue 3: Whether the Student was treated differently on the basis of his disability during the 2014-2015 school year when he was not permitted to participate in after-school activities, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4, and Title II and its implementing regulation at 28 C.F.R. § 35.130.**

### **Legal Standard**

The Section 504 implementing regulations, at 34 C.F.R. § 104.4(a), provides that no qualified individual 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 received Federal financial assistance.

The Section 504 implementing regulations, at 34 C.F.R. §104.37(a)(1), require that school districts provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity to participate. In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications to 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.

Title II implementing regulation at 28 C.F.R. § 35.130(a) states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

### **Factual Findings**

The Complainant alleged that she asked for “after school support,” for the Student, such as “working with teachers before school, during other classes, and after school, including tutoring, homework/classwork assistance and support.”<sup>3</sup> She stated that she “asked for after school support,” because “without one-on-one support [for the Student] it might not be possible [for him to attend after school programs].” She alleged that she attempted to schedule after school tutoring or assistance for the Student, but the Principal would not allow him to stay after school because they did not have a one-on-one assistant for him after school, which presented a safety issue. She alleged that they did not provide him an aide after school, but acknowledged that they discussed finding after-school support at his final IEP meeting. She alleged that the School’s failure to provide the Student with after school support constituted different treatment based on disability.

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<sup>3</sup> OCR has examined allegations regarding allegations of working with other teachers during classes in its investigation of the allegation of denials of BIP provisions for “doing work in other classes,” discussed *supra*.

The evidence shows that the Complainant asked the prior ESE Teacher by email on September 8, 2014, to schedule “after school tutoring/study time” for the Student. The Student’s ESE Teacher responded the next day, stating she would provide tutoring information at their next meeting. The Student was then suspended on September 19, 2014, as discussed previously. After the suspension, on October 3, 2014, the Complainant emailed the Principal requesting supplementary aids and services appropriate to the Student, such as a paraprofessional, for extracurricular or non-academic settings. On October 7, 2014, the ESE Teacher emailed the Complainant stating that the Student would not be staying after school, and that she was “told that due to the fact that staying after school will require additional support, that the entire team will need to work together to successfully coordinate.” The Student’s IEP accommodations include “continuous supervision for safety of self and others,” and services for “adult supervision to insure personal safety.” District emails instructed the Principal to schedule an IEP meeting to review the request for after school services with the Principal, confirming an October 16<sup>th</sup> IEP meeting. On October 13, 2014, the Complainant emailed about help with class instruction and the Student’s preferred clubs. On October 15, 2014, the ESE Coordinator emailed the Principal saying she had spoken with the District’s after school support official about the need for someone to be with the Student, and about initiating a process to secure support for the Student during that time. During the October 16, 2014, IEP re-evaluation, the team discussed the issue and determined that the Student’s appropriate placement would involve “adult support for access to appropriate clubs/sports and after school activities.” However, the Student then withdrew from the District on October 21, 2014.

One witness stated that the Student was not denied after-school opportunities, and that since the Student’s Aide was unavailable due to “other after school obligations,” “there was a process to set it up” since the person had to be trained per the Student’s IEP. The District had to arrange to hire or compensate a person for this role. The witness stated that the School “start[ed] the process and got a list of what he wanted to stay after for, and [then] he withdrew.” The witness further stated that any delay was because it takes time to make arrangements. Another witness corroborated the efforts to secure an aide through “a process to ensure we had someone who was trained and available.” Another witness stated that the School was trying to “figure out which staff would stay and arrange contract hours for that,” since the Student’s Aide had scheduling conflicts. Three other witnesses confirmed this information, and each of them stated that there was no decision to bar the Student from participating in after-school activities.

During a follow-up interview, the Complainant stated these statements were untrue. She stated that at the beginning of the year, she let District staff know what programs the Student wanted to participate in, but that after-school participation was “strictly barred,” that she requested support, but it was not provided, and it was not until October that they said it could be coordinated.

### **Analysis and Conclusion**

Based on the above, OCR finds that the District did not subject the Student to different treatment based on disability by barring him from and refusing to provide the Student with one-on-one support to access after-school activities as alleged. The evidence shows that the Student’s IEP team determined that the Student required one-on-one assistance at all times. After the

Complainant requested after-school support services for the Student, the School took steps to locate and train a person to provide one-on-one assistance after school. Although the Student was not permitted to stay after school for a short period of time, the evidence shows that this was due to the provisions in his IEP requiring an aide at all times, combined with the logistics of securing and training an aide. Based on the foregoing, there is insufficient evidence that the District did not permit him to participate in after-school programs and failed to provide him with after school support as alleged.

OCR also considered whether any failure to provide an aide sooner constituted an unreasonable delay in evaluating the Student or a denial of a FAPE or an equal opportunity to participate in the District's after-school activities. The Complainant's first informal inquiry about after-school tutoring occurred on September 8, 2014, and then the Student had an out-of-school suspension on September 19, 2014. The Complainant's first written request came on October 3, 2014. The District began the process to locate an after-school aide on October 15, 2014, and conducted an IEP re-evaluation that included an IEP placement and after-school assistance accommodations on October 16. Shortly after the re-evaluation, the Student withdrew on October 21, 2014. Given the loss of time from the intervening suspension, the District's ongoing efforts to evaluate the Student and its efforts to secure an appropriate person not long after the suspension ended, OCR finds any delay to be reasonable. Furthermore, due to the short time period between the IEP team's re-evaluation determining the Student's placement requires an assistant for after school activities on October 16, 2014, and the Student's withdrawal a couple of days later on October 21, 2014, OCR finds there was no denial of FAPE or an equal opportunity to participate in after-school activities. Based on the foregoing, OCR finds there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard to this issue.

On November 6, 2018, the District entered into the enclosed resolution letter to address the compliance concerns identified during this investigation. OCR will monitor the District's implementation of the resolution agreement in this case 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.

This concludes OCR's investigation of the complaint. This letter 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. 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. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, 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.

OCR appreciates the District's cooperation in this matter and looks forward to receiving the monitoring reports, as required by the enclosed Agreement. If you have any questions, please contact Michael Bennett, General Attorney at 404-974-9274.

Sincerely,

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Andrea de Vries  
Compliance Team Leader

Enclosure

cc: XXXXXXXXXXXXXXXXXXXX (via email only)