



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

FLORIDA  
GEORGIA

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

October 28, 2015

Mr. George Tomyn, Superintendent  
Marion County Public Schools  
512 SE 3rd Street  
Ocala, Florida 34471

Re: Complaint #04-15-1031

Dear Mr. Tomyn:

This letter is to notify you of the determination of the U.S. Department of Education (Department), Office for Civil Rights (OCR), in the above-referenced complaint filed by XXXX (Complainant) on October 21, 2014, against the Marion County School District (District), alleging discrimination against her sons, Student 1 and Student 2 (collectively "Students"), on the basis of disability and retaliation because the Complainant filed a complaint with OCR on May 7, 2014, alleging disability and race-based discrimination. In addition, the Complainant alleged that the District discriminated against Student 1's father (Father) on the basis of race (White). Specifically, the Complainant alleged that in retaliation for her May 7, 2014 OCR Complaint:

- a. The District did not enroll the Students at Oakcrest Elementary School (School) until Friday, August 22, 2014, although the Complainant began the enrollment process on Monday, August 18, 2014;
- b. The District did not provide the Students with transportation services to and from School until Tuesday, September 9, 2014, although the Students were enrolled on Friday, August 22, 2014;
- c. The District mistreated the Students while on the school bus between September and November 2014 when:
  1. The XXXX told Student 2 that if he took Student 1's seatbelt off again, he would ride in the back of the bus forever;

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2. The XXXX and XXXX were “mean” to Students (i.e. the bus monitor, among other conduct, engaged in a hitting match with Student 1; routinely put Student 1’s seat belt on too tight; and the bus staff complained about Student 1’s conduct because Student 1 attacked the bus monitor and threw his shoes);
  3. The XXXX did not allow the Students to sit close to the front of the bus after the District informed the Complainant that this accommodation would be made;
- d. The District failed to inform the Complainant that the Father had contacted the School for approximately one and a half months; and
  - e. During Student 1’s October 20, 2014 Individualized Education Plan (IEP) meeting, the District threatened to arrest the Complainant if she boarded the Students’ school bus again and failed to document this threat in the IEP meeting notes.

In a November 14, 2014 interview with OCR, the Complainant further alleged that:

- f. The District discriminated against the Father on the basis of race (White) when it failed to return his phone calls over a period of one and a half months;
- g. The District discriminated against the Students on the basis of disability when it failed to honor their accommodation to sit close to the front of the bus and the District gave the Complainant the impression that it did not want to be bothered with Student 1; and,
- h. The District discriminated against Student 2 on the basis of disability when his XXXX (XXXX 1) bullied him by “fussing” at him daily; pressured him to do well on a test on November 13, 2014 and responded, “That’s your problem,” when Student 2 spoke with XXXX regarding his anxiety about the test; and when XXXX failed to appropriately respond, investigate, or prevent daily bullying against Student 2 by Student 3.

OCR investigated the complaint pursuant to 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 based on disability by recipients of Federal financial assistance; Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, and national origin by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities, such as elementary and secondary education systems. Section 504, Title II and Title VI also prohibit retaliation against individuals who assert or defend a right or privilege secured by the laws OCR enforces or participate in an OCR proceeding. As a recipient

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of Federal financial assistance from the Department and as a public entity, the District is subject to these laws.

Based on the allegations, OCR investigated the following issues:

1. Whether the District retaliated against the Students in response to the Complainant's May 7, 2014 OCR complaint, when the School failed to timely enroll the Students for the 2014-2015 school year, failed to timely provide transportation to the Students, mistreated the Students on the school bus, failed to effectively implement their transportation accommodations, failed to inform Complainant that Student 1's Father had been contacting the School, and on October 20, 2014, threatened the Complainant with arrest during Student 1's IEP meeting, and refused to document the same in the IEP meeting notes, 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, and Title VI regulation at 34 C.F.R. § 100.7;
2. Whether the District discriminated against the Students on the basis of disability by failing to effectively implement their transportation accommodation and by giving the Complainant the impression that it did not want to be bothered with Student 1, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4 and 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130;
3. Whether the District failed to take prompt and equitable steps to investigate and respond to the alleged disability based harassment of Student 2 by XXXX and Student 3, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, 104.7 and the Title II implementing regulation at 28 C.F.R. § 35.130 and 35.107; and
4. Whether the District discriminated against the Father on the basis of race (White) by refusing to return his phone calls, in noncompliance with the Title VI regulation at 34 C.F.R. § 100.3(a).

In reaching a determination, OCR reviewed and analyzed relevant documents and interviewed the Complainant, the Father, and District personnel. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

Based upon a thorough review of the evidence gathered, OCR found sufficient evidence to support a finding that the District is in noncompliance with the Section 504 and Title II regulations with respect to some of the allegations under issue #1 and issue #3. OCR found insufficient evidence to support a finding that the District is in noncompliance with the Section

504 and Title II with respect to the remaining allegations in issue #1, issue #2, and issue #4. The legal and factual bases for our determination are set forth below.

## **Legal Standards**

### Retaliation

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the procedural provisions of the regulation implementing Title VI at 34 C.F.R. § 100.7(e), which provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing in connection with a complaint. The regulation implementing Title II at 28 C.F.R. § 35.134 contains a similar prohibition against retaliation.

When investigating a complaint of retaliation, OCR determines whether: (1) an individual engaged in a protected activity; (2) the recipient had notice of the protected activity; (3) the recipient took a materially adverse action against the individual; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation.

If all four elements are established, an initial or *prima facie* case of retaliation exists. OCR then inquires whether the recipient had a legitimate, non-retaliatory reason for taking the adverse action. If so, the evidence is analyzed to determine whether the proffered reason is merely an excuse or pretext for retaliation. While OCR would need to address all of the elements to find a violation, OCR need not address all of these elements in order to find insufficient evidence of a violation.

### Disability Discrimination

The Section 504 implementing regulation, 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.

Disability harassment under Section 504 and Title II is defined as intimidation or abusive conduct toward a student based on disability that is sufficiently serious to interfere with or limiting a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal conduct, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. When harassing conduct is sufficiently serious that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program.

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Upon notice of possible harassment based on disability a District must conduct an investigation or otherwise determine what occurred. In responding to alleged incidents of harassment, a district has an obligation to take prompt steps that are reasonably calculated to both end the harassment and prevent its recurrence and where appropriate, remedy the effects on the student who was harassed.

The Section 504 regulation at 34 C.F.R. § 104.7(b) requires a recipient that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The Title II implementing regulation at 28 C.F.R. § 35.107(b) contains a similar provision for public entities.

The Section 504 regulation at 34 C.F.R. § 104.33(a) requires a recipient operating a public elementary or secondary education program to provide a free appropriate public education to each qualified person with a disability in the recipient's jurisdiction. Section 104.33(b) requires that the education program be designed to meet the individual educational needs of persons with disabilities as adequately as those of persons without disabilities are met.

Under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives services pursuant to an IEP or a Section 504 plan and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student is being bullied. Accordingly, under Section 504, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team or the Section 504 team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

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

### Different Treatment

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) states that no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which the regulation applies. The Title VI implementing regulation at 34 C.F.R. § 100.3(b)(1)(i)-(iii) states that a recipient under any program to which the regulation applies may not, directly or through contractual or other arrangement, on the ground of race, color, or national origin: (i) deny an individual any service, financial aid, or other benefit provided under the program, (ii) provide any service, financial aid, or other benefit to an individual which is different, or is

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provided in a different manner, from that provided to others under the program; or (iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program.

A conclusion that an individual has been subjected to different treatment requires a finding of intentional discrimination on the basis of an individual's race. Evidence of discriminatory intent may be direct or circumstantial, and "intent cases" usually involve a highly fact-intensive inquiry. Absent direct proof of discriminatory motive, a different treatment inquiry frequently focuses on: (1) whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently from an individual of a different race; and (2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. A recipient's rebuttal or nondiscriminatory justification can be overcome with a showing of pretext.

### **Factual Findings and Analysis**

**Issue One -- Retaliation:** Whether the District retaliated against the Students in response to Complainant's May 7, 2014 OCR complaint, when (a) the School failed to timely enroll Students for the 2014-2015 school year, failed to timely provide transportation to the Students, (b) mistreated the Students on the school bus, (c) failed to effectively implement their transportation accommodations, (d) failed to inform Complainant that the Father had been contacting the School, and (e) on October 20, 2014, threatened Complainant with arrest during Student 1's IEP meeting, and (f) refused to document the same in the IEP meeting notes, 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, and Title VI regulation at 34 C.F.R. §100.7(e).

In investigating the complaint allegations, OCR reviewed the District's response to the complaint and interviewed the Complainant and the Father. In addition, OCR interviewed the School's XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, the District's XXXX and XXXX, and the Students' XXXX and XXXX. In addition, OCR interviewed the XXXX at Dunellen Elementary School, where Student 2 was enrolled during the 2013-2014 school year.

#### Protected Activity

OCR finds that the Complainant engaged in an activity protected by Section 504 when she filed a complaint with OCR on May 7, 2014 (OCR complaint) alleging discrimination on the basis of disability and race. (OCR Complaint No. 04-14-1570.)

#### The District's knowledge of the Protected Activity

The District was aware of the Complainant's protected activity. Several members of the School's staff and administration were aware of the Complainant's OCR complaint as early as August 18, 2014, the first day of the 2014-2015 school year.<sup>1</sup> Having found that the

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<sup>1</sup> The evidence showed that the School's XXXX, XXXX, XXXX, XXXX, XXXX, and XXXX were aware of the Complainant's OCR complaint.

Complainant engaged in protected activity and that the District had knowledge of the protected activity, OCR next determined whether the Students were subjected to an adverse action.

### Adverse Action

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. To make this determination, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had or could reasonably have a deterrent effect. OCR makes this determination on a case-by-case basis and in light of all the facts and circumstances of the case. 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 numerous adverse actions against her that occurred subsequent to her protected activity and contemporaneous with the School's awareness of her OCR complaint. An individual analysis of each of the Complainant's alleged adverse actions is detailed below:

#### **a. Enrollment**

Although the Complainant initiated the Students' enrollment on August 18, 2014, the Students were not able to enroll or to attend classes until August 22, 2014, thereby causing the students to miss four days of instruction. OCR finds that the delay in the Students' enrollment constitutes an adverse action as it significantly disadvantaged the Students' ability to gain the benefits of the District's program.

#### **b. Transportation**

The District did not provide the Students with transportation services to and from School until Tuesday, September 9, 2014, although the Students were enrolled on Friday, August 22, 2014. In response to this allegation, the District contended that because Student 2 had an IEP identifying his need for transportation services, transportation services were immediately available. The Complainant acknowledged that, upon her initial request for transportation services, the School informed her that Student 2 could begin riding the bus at any time. With respect to Student 2, OCR finds that no adverse action occurred. Thus, OCR will not proceed with further analysis of this issue for Student 2

With respect to Student 1, OCR finds that the delay in transportation services is sufficient to establish an adverse action as the delayed transportation services significantly disadvantaged Student 1's ability to gain the benefits of the District's transportation services.

### **c. Mistreatment of Students on the School Bus**

In support of the Complainant's contention that the District mistreated the Students on the school bus, the Complainant identified the following specific allegations of mistreatment to which the District provided specific responses:

- 1. The XXXX told Student 2 that if he took Student 1's seatbelt off again, he would ride in the back of the bus forever.**

OCR concludes that the XXXX threatening to move Student 2's seat qualifies as an adverse action.

- 2. The bus monitor engaged in a hitting match with Student 1.**

With respect to XXXX having hitting matches with Student 1, the Complainant explained that Student 1 often hit and bit the Aide. Further, the Complainant alleged that Student 2 told her that XXXX and Student 1 would hit one another because Student 1 did not want XXXX to touch him. The XXXX and XXXX categorically denied the alleged conduct. The XXXX and XXXX explained that at times Student 1 would resist having the XXXX put him in his car seat. On other occasions, he would attempt to touch or throw things at the bus panels. In those instances, the XXXX explained that she would have to "block" Student 1 from accessing the control panels. The Complainant confirmed that this conduct likely occurred.

Applying the preponderance of the evidence standard, OCR is unable to conclude that the adverse action alleged occurred. Student 1 is non-verbal and was unable to offer a statement with respect to this allegation. OCR declined to interview Student 2 due to his age, 10. The xxx denies ever hitting Student 1 and XXXX also stated that XXXX did not hit Student 1. However, the Complainant admitted that Student 1 frequently hit and bit XXXX. Thus, OCR was unable to corroborate that this alleged adverse action occurred and will not proceed with additional retaliation analysis with respect to this allegation.

- 3. The XXXX routinely put Student 1's seat belt on too tight.**

In response to the Complainant's allegation that XXXX was putting Student 1's seatbelt on too tight, XXXX explained that the Complainant mentioned her concern regarding Student 1's seatbelt on two occasions. In response, XXXX told the Complainant that she had not been buckling Student 1's seatbelt too tight and that she would continue to not do so. XXXX further stated that Student 1 never behaved in a way that would lead her to believe his seatbelt was too tight. Instead, she contended that he simply did not want to be in his car seat.

During an interview with OCR, XXXX was asked about her observations of Student 1's conduct when XXXX buckled him into his seat. She stated that she observed XXXX use two fingers to measure the pressure of Student 1's seatbelt. Additionally, XXXX stated that she did not observe any conduct from Student 1 that would have signaled that his seatbelt was on too tight.

Applying the preponderance of the evidence standard, OCR finds the evidence insufficient to support a finding that this alleged adverse action occurred. XXXX denies putting Student 1's seatbelt on too tight, and the Complainant was not present on the bus when XXXX secured Student 1 in his seat. OCR declined to interview Student 2 due to his age, 10. Student 1 is non-verbal and was unable to confirm the Complainant's allegations. Thus, OCR was unable to corroborate that this alleged adverse action occurred and will not proceed with additional retaliation analysis with respect to this allegation.

**4. The XXXX made numerous complaints about Student 1's misconduct on the bus, including a November 3, 2014 incident witnessed by the Complainant, where Student 1 attacked and bit XXXX.**

The Complainant initially alleged that the District retaliated against her when XXXX staff complained about Student 1's conduct because Student 1 attacked the bus monitor and threw his shoes. However, during follow-up interviews with the Complainant, she amended this allegation to allege that the District retaliated against her when the XXXX made numerous complaints about Student 1's misconduct on the bus. OCR finds the District's documentation of Student 1's conduct on the bus sufficient to constitute an adverse action particularly if, as the Complainant contends, the conduct logs could be used to remove Student 1 from the school bus. Removal from the school bus would significantly disadvantage Student 1's ability to access the benefits of the District's programs and services.

**5. The XXXX did not allow the Students to sit close to the front of the bus after the District informed the Complainant that this accommodation would be made.**

The Complainant alleged that the District retaliated against the Students by failing to implement their transportation accommodation for preferential seating on the bus. As of September 9, 2014, Student 1's IEP only indicated the need for a bus aide. This plan was amended pursuant to an October 20, 2014 IEP meeting, to reflect that Student 1 required a seatbelt or harness, could not board the bus with objects in his hands, and was to sit "closer" to the front of the bus so that XXXX could keep an eye on him. The Complainant confirmed her agreement with these accommodations.

Student 2's IEP does not reflect a need for preferential seating nor was there evidence of any agreement that Student 2 sit in the front of the bus. The Complainant confirmed that no such accommodation existed for Student 2. In a follow-up interview, the Complainant confirmed she never observed either Student sitting in the back of the bus. Instead, she confirmed that at the beginning of the school year both Students were sitting near the middle of the bus. Following Student 1's October 20, 2014 IEP meeting, both Students sat near the front of the bus.

Applying the preponderance of the evidence standard, OCR finds the evidence insufficient to support a finding that this alleged adverse action occurred. There was no evidence to support the Complainant's contention that either Student was required to sit in the back of the bus. Thus, OCR will not analyze the additional retaliation elements with respect to this contention.

**d. The District failed to inform the Complainant that the Father had contacted the School for approximately one and a half months.**

The Complainant alleged that School personnel failed to inform her that the Father had been calling for information about Student 1. The Complainant acknowledged that she neglected to identify the Father on any of Student 1's paperwork, including his emergency contact form. Further, she confirmed that no one at the School had ever met the Father in person. The District does not deny that School personnel failed to return the Father's phone calls or to alert the Complainant that Father had been contacting the School. However, it contends that it had no obligation to do so under the Family Educational Rights and Privacy Act (FERPA).

The informed OCR that pursuant to the School's policy, they do not contact parents who are not listed on the School's contact list due to concerns with custody. She further explained that even giving information indicating a student's presence at the School could cause issues. She explained that she did not alert the Complainant to the Father's calls because she was under no obligation to do so. The XXXX stated that she had acted consistently in the past with respect to non-listed parental phone calls. She said that she did not refuse the call (nor fail to notify the Complainant) because of the OCR complaint.

The XXXX also received a voice mail message from the Father. She stated that she was not able to get back with him. Two days later, she learned that the Father left a voice mail message with the XXXX. At that time, the XXXX reviewed the emergency contact form. She saw that the Father's name was not listed. The XXXX said that the XXXX advised her not to call back. The XXXX explained that the school is cautious with respect to non-listed parents. She explained that if she had not spoken to the XXXX about the phone call she would have taken the same steps.

OCR finds insufficient evidence that an adverse action occurred. Declining to extend a courtesy call to the Complainant did not significantly disadvantage the Students' or Complainant's ability to gain the benefits of the District's program. The evidence revealed no restrictions of the Student's educational opportunities as a result of the District's actions. The District's failure to inform the Complainant that the Father was calling had no lasting or tangible harm. Rather, it was merely an unpleasant, transient, or inconvenient incident. As such, it is not an adverse action. Thus, OCR will not analyze the additional retaliation elements with respect to this contention.

**e. During Student 1's October 20, 2014 Individualized Education Plan (IEP) meeting, the District threatened to arrest the Complainant if she boarded the Students' school bus again and failed to document this threat in the IEP meeting notes.**

OCR concludes that the threat of arrest constitutes an adverse action because it could reasonably deter the Complainant from further protected activity.

## Causal Connection

Having established that the Complainant engaged in a protected activity, that the District had knowledge of the protected activity, and that some of the District's conduct constitutes adverse actions, OCR assessed the evidence to determine whether there was a causal connection between the protected activity and the adverse actions.

In determining whether a causal connection exists between the adverse actions and the protected activity, one factor OCR may consider is whether there is close proximity in time between the recipient's knowledge of the protected activity and the adverse actions. OCR finds that there is a causal connection between the alleged adverse actions and the Complainant's OCR complaint. Each of the alleged adverse actions discussed above in parts a, b, c-1, c-4, and e occurred within four (4) months of the School's awareness of the Complainant's protected activity. Thus, OCR finds that the temporal proximity between the School's awareness of the Complainant's OCR complaint and the alleged adverse actions is sufficient to establish a causal connection.

OCR next determined if the District had nondiscriminatory reasons for these adverse actions that are not a pretext for retaliation.

### **(a) Enrollment**

On August 18, 2014, the Complainant arrived at the School to register her Students for school. The Complainant alleged that she was not allowed to enroll the Students because she did not have all of the required documentation. The Complainant contended that she did not have Student 2's birth certificate or Student 1's IEP.

During an interview with OCR, the Complainant alleged that the XXXX told her that the Students could begin classes on Wednesday, August 20, 2014. Instead of bringing her Students to the School on Wednesday, August 20, 2014, the Complainant stated that she gave the School an additional day to get the Students' records together. The Complainant stated that when she arrived at the School on Thursday, August 21, 2014, she was informed that the Students could not begin classes because the School did not have enough teachers. The Complainant maintained that neither Student began classes until August 22, 2014.

### Legitimate Non-Discriminatory Reason

In response to the Complainant's allegations, the District did not deny that the Students could not be enrolled because the Complainant did not have all of the required documentation. The District provided two reasons for the registration delay. First, the School was unable to register the Students on August 18, 2014, because the Complainant did not submit the required medical documentation (shot and physical examination records). Second, Student 1's enrollment was delayed because his IEP was subject to review by the District's Student Services Evaluation Team (SSET) to confirm his placement.

## **Medical Documentation**

The District's "School Enrollment/Registration Checklist" requires that parents, regardless of disability, provide proof of immunizations and physical examinations as a prerequisite to enrollment. The XXXX contends that she told the Complainant that she needed the medical information and explained that she could have her physician send it over. The XXXX informed OCR that the School received the medical information the same day. According to the XXXX, at this point, the School had what it needed to enroll Student 2.

The Complainant reported that the School never informed her that her Students' medical records were the reason for the delayed enrollment. Instead, she contends that between August 18 and 22, 2014, the School provided her with a waiver of shot records form which she signed. In addition, the Complainant contends that she executed an immunization exemption form, which she understood to exempt her Students from immunization on religious grounds. The Complainant stated that she never contacted the Students' physician nor forwarded the requested medical documentation to the school.

In response to a follow-up OCR request, the District provided the medical records for each student that were provided to the School during the week of August 18 through 22, 2014. The documents reflect shot records for Student 2, a vaccination exemption form for Student 1 dated August 1, 2014, and two vaccination exemption forms for Student 2, one dated August 1, 2014 and the other dated August 8, 2014. Via email submitted to OCR through the District, the Guidance Clerk alleged that the Complainant did not request vaccination exemptions from the School and expressed her understanding that exemptions must be sought through a physician.

Notwithstanding, the XXXX contended that Student 2 started school August 19, 2014. Although the Complainant denied this, the District produced the Students' attendance records. The records reflect that Student 2 was present August 19, 2014 through August 22, 2014. Although the Complainant stated that Student 2 did not start school on August 19, 2014, she later said that the Guidance Clerk walked Student 2 to his classroom on August 19, 2014.

## **SSET Process**

With respect to Student 1, the District explained that because Student 1 had an IEP and was not previously enrolled in the District, his records had to be submitted to the School through the SSE Team to confirm proper placement. The SSET is comprised of the School Psychologist, an Educational Diagnostician, a School Social Worker, and several Clerk/Typists who work collaboratively to appropriately place ESE students who transfer from outside of the District and/or state. During an OCR interview, the School's XXXX stated that, during the student registration process, if she is made aware that a student has an out-of-District IEP, it is her responsibility to send the student's IEP documentation to the SSET.

Pursuant to the District's "2010 SSET Team Intake Form Procedures," the XXXX confirmed that she received Student 1's IEP documentation from the IPC and, thereafter, faxed the documents to the SSET. The District's documentation reflects that Student 1's IEP was received on August 21, 2014. The Complainant's allegation on this matter was not consistent. In her

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initial interview, the Complainant alleged that she did not have Student 1's IEP on August 18, 2014; but in a later interview, she contended that she brought Student 1's IEP with her on August 18, 2014, when she initially sought to register her Students.

The District's SSET webpage outlines the process for incoming student who have received ESE services and states that the following:

It is essential that the parents or legal guardians bring with them the Individual Education Plan (IEP) to the Marion County school where he/she is registering in order to insure the continuation of their Special Education Services. If this information is not provided, there may be an interruption of services until such time that verification of Special Education programming from the previous district can be confirmed.

Students whose previous program placement is in question or not verified at the time of enrollment shall be served in a regular class setting until [SSET] is able to verify and confirm the previous E.S.E. assignment.

#### Pretext for Discrimination

If OCR finds that the recipient has offered a legitimate nondiscriminatory reason for the adverse action, OCR further investigates to determine if the reason provided is a pretext for discrimination. Pretext may be shown by evidence that: (1) the explanation for the adverse action is not credible or believable; (2) the individual was treated differently than other individuals who were similarly situated but had not engaged in a protected activity; (3) the treatment of the individual was inconsistent with established practice or policy; or (4) the recipient took adverse action against other individuals who engaged in a protected activity.

With respect to Student 2, OCR finds that there is insufficient evidence of pretext with regard to enrollment. The District followed its "School Enrollment/Registration Checklist" with respect to Student 2's enrollment. It did not enroll the Student until the appropriate medical documentation was received. Although there is some dispute as to who provided the medical documentation for Student 2, the District's documentation supports the conclusion that once Student 2's shot and immunization records were received, he was enrolled that same day.

OCR finds sufficient evidence of pretext with respect to Student 1 because the District's reasons for Student 1's enrollment delay were inconsistent with the District's established practices and policies. The District alleged that the delay in Student 1's enrollment was caused by the requirement that he undergo the SSET process. However, regardless of when Student 1's IEP was received, the District's SSET procedures provide that the student should be enrolled and will be served in a regular class setting until his ESE assignment is confirmed. In this case, the District denied Student 1 enrollment pending receipt of his IEP and confirmation of placement. These actions were contrary to the District's publicized policies with respect to the enrollment of ESE students, making its reason for the registration delay sufficient to evidence pretext.

## Conclusion

OCR finds sufficient evidence to establish that the District retaliated against the Complainant when Student 1's enrollment was delayed for the 2014-2015 school year, in noncompliance with the regulations implementing Section 504 and Title II. The District did not deny that Student 1's enrollment was delayed. However, the District's reasons for the delay were inconsistent with the District's documented policies and practices, which was sufficient to establish that the reasons for the delay were a pretext for retaliation.

### (b) Transportation

On August 25, 2014, the Complainant began seeking transportation services for the Students. The Complainant contends that Student 1 was not provided transportation services until September 9, 2014, fifteen (15) days later.

#### Legitimate Nondiscriminatory Reason

The District explained that Student 1's out-of-District IEP did not provide for transportation services. In addition, the Complainant's documented address was approximately 1.25 miles from the school. Based upon the District's transportation guidelines and Florida law, transportation services were not readily available. In addition, pursuant to the District's courtesy transportation practices, Student 1 would not have been eligible for courtesy transportation services until at least the third week of school, September 1-5, 2014.

When questioned by OCR about the provision of transportation services generally, the XXXX explained that where students have in-District IEPs that reflect the need for transportation services, transportation can be established immediately. On the other hand, if the student has an out-of-District IEP, the IEP documentation must go through the SSET process. If transportation needs are already identified in the IEP, the transportation department would contact the parent. If not, then transportation can be discussed at an IEP meeting, which must occur within thirty (30) days of registration.

Pursuant to its Board Policy 8.31, the District only provides transportation services for "students who live more than a reasonable walking distance from the school to which they are assigned. "A reasonable walking distance shall be defined as two (2) miles from the school by the nearest traveled route." However, "exceptions may be made in the case where a child is handicapped . . ." With respect to Student 1, the District explained that as of August 18, 2014, Student 1 was not automatically eligible for transportation services based upon the Student's out-of-District IEP and the Complainant's documented address.<sup>2</sup>

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<sup>2</sup> Using MapQuest, OCR confirmed that the Complainant's documented address was less than 1.5 miles from the School. In addition, Student 1's Citrus County School District IEP states that Student 1 was enrolled, "to receive itinerant language therapy services as a home-school student." Thus, it does not appear that transportation services were needed the previous school year.

The District acknowledged that the Complainant requested courtesy transportation services for Student 1 so that he could ride the bus with Student 2. However, the District's XXXX explained that as a practice, the School does not extend courtesy transportation services (for siblings of students in receipt of special transportation services) until *after* the second week of school so that it can ensure that students requiring special transportation are accommodated first. Further, she confirmed that between August 18 and 29, 2014, she spoke with the XXXX concerning transportation services for Student 1. She understood that the XXXX and Complainant agreed to set up transportation services for Student 1 in an upcoming IEP meeting.

In an OCR interview, the XXXX explained that the Complainant questioned her about transportation services for the Students. In response, she explained that Student 2 could begin riding the bus at any time. However, the two would need to discuss Student 1 at an IEP meeting. In response, the XXXX contends that the Complainant said, "Never mind, because I have to bring [Student 1] anyway." In a follow-up interview, the Complainant confirmed the content of this conversation. Following a September 8, 2014 IEP meeting, Student 1 was approved for his own transportation services. Thereafter, both Students began riding the bus together.

### Pretext for Discrimination

The evidence is insufficient to establish that the District's legitimate non-discriminatory reasons were pretextual. The District's legitimate non-discriminatory reason for the delay is supported by the District's policies and documentation. Immediately following Student 1's IEP meeting wherein it was determined that transportation services would be provided, Complainant was able to have both Students ride the school bus. The District's actions were consistent with its policies.

Although Student 1 was not considered for courtesy transportation services, OCR finds that the conversation between the Complainant and the XXXX sufficiently explains why Student 1 was not extended courtesy transportation services. Had Student 1 received transportation services as a "courtesy," his services would likely not have begun much sooner than when they started pursuant to his September 8, 2014 IEP. There was no evidence that the District has deviated from this policy with regard to providing transportation services to other students.

### **Conclusion**

OCR finds that there is insufficient evidence to establish retaliation with respect to the allegation that the District failed to timely provide transportation services to the Student 1. The District's legitimate non-discriminatory reasons for the delay were believable and supported by its policies and practices, and, therefore not a pretext for retaliation.

### **(c) Mistreatment of Students on School Bus**

The Complainant alleged that once transportation services were provided for her Students, the bus staff began "mistreating the Students" in retaliation against them for her OCR complaint. Specifically, the Complainant alleged that XXXX XXXX told Student 2 that if he unbuckled his brother's seatbelt again, he would sit in the back of the bus forever.

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### Legitimate Nondiscriminatory Reason

In interviews with OCR, XXXX and XXXX denied telling Student 2 that if he unbuckled Student 1's seatbelt again, he would sit in the back of the bus forever. However, XXXX recalled that XXXX told Student 2 that if he unbuckled Student 1's seatbelt again, his seat would be moved. XXXX stated that she told Student 2 that if he unbuckled his brother's seatbelt again, she would move him across the aisle.

XXXX provided a legitimate non-discriminatory reason for her statement. She explained that she told Student 2 that she would move his seat to discourage him from unbuckling Student 1's seatbelt, which typically resulted in a disruption on the bus.

XXXX stated that initially when Student 1 would board the bus, he would get out of his seat, crawl on the floor, and throw things. When XXXX put Student 1's seatbelt on he would resist and fight to keep the seatbelt off. Both XXXX and XXXX stated that they reported these incidents to their boss in support for their request that Student 1 be placed in a car seat. XXXX explained that the car seat helped, but Student 2 would take Student 1's seatbelt off. XXXX explained that each time Student 2 removed Student 1's seatbelt XXXX would have to put Student 1 back in his seat, which caused a distraction. Notwithstanding, XXXX stated that she would never put an ESE student in the back of the bus. The Complainant confirmed that she has never seen either Student sitting in the back of the bus.

### Pretext for Discrimination

OCR could not identify any evidence of pretext with respect to XXXX explanation. Disruptions caused by Student 1's conduct were confirmed by bus staff and the Complainant. Despite XXXX threat to move Student 2 across the aisle, OCR could find no evidence that Student 2 was required to sit in the back of the bus after this comment. Thus, XXXX explanation for her conduct was credible and believable.

### **Conclusion**

Applying the preponderance of the evidence standard, OCR finds that the evidence is insufficient to substantiate the Complainant's allegation of retaliation. XXXX remark was aimed at a gaining compliance with a reasonable request, in light of the undisputed circumstances. There was no evidence that XXXX ever followed through with the threat to move Student 2's seat across the aisle. In addition, XXXX's explanation of her conduct was credible. OCR could not find evidence that the Driver's explanation was pretext for retaliation, and thus that retaliation occurred.

#### **(d) Complaints about Student 1's conduct on the School Bus**

The Complainant alleged that in response to her OCR complaint, the XXXX began complaining about Student 1's misconduct on the bus, including a November 3, 2014, incident witnessed by the Complainant, where Student 1 attacked and bit XXXX.

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### Legitimate Nondiscriminatory Reason

The evidence revealed that XXXX and XXXX documented Student 1's conduct as directed to do by school policy with any student that had to be consistently redirected on the bus. XXXX explained that Student 1 was not the only student that had to be redirected. XXXX and XXXX explained that they kept conduct logs for every student that required consistent redirection. Consistent with XXXX's understanding of the purpose of the Conduct Logs, she documented Student 1's misconduct as support for her recommendation that he be placed in a car seat.

XXXX explained that Student 1 is not the only student that has conduct concerns on the bus. She explained that she keeps a conduct log for the each student that she must consistently redirect. XXXX explained that by keeping a log of student conduct, they can show a pattern of conduct to support their requests for changes. The District was given an opportunity to produce conduct logs for all students assigned to the same bus route as Student 1 and Student 2. The District was unable to produce any additional conduct logs.

The District's XXXX confirmed that conduct logs are not uncommon in the context of ESE transportation. She further confirmed that no penalty results from documentation contained in the logs. Further, pursuant to the District's "Transportation Operations Handbook Revised 2014-2015," (Bus Manual) "Transportation Operating Procedure No. 24," located at page 58, "Incidents which involve student conduct or injury should also be reported to the appropriate school authority." The definition of "incident" includes "any students fighting and/or misconduct on the bus that requires corrective action stronger than verbal counseling." In addition, the District's Bus Manual, Procedure 33, provides that "Serious conduct problems should be referred to the principal or designee of the students assigned school on a Student Bus Conduct/Disciplinary Referral form."

XXXX's conduct logs indicated that between October 3 and October 8, 2014, Student 1 engaged in multiple instances of throwing items XXXX, getting out of his seat, and attempting to access the buses control panels. It was reported that on multiple occasions, XXXX put her hand up to block Student 1 from touching the control panels. The Complainant acknowledged that the conduct complained of with respect to Student 1 likely occurred. Despite the documentation, neither XXXX nor XXXX submitted a "Student Bus Conduct/Discipline referral" to the School regarding Student 1. In addition, the District never sought to remove Student 1 from the bus.

Instead, based upon the XXXX's Conduct Logs, the District convened an October 20, 2014 IEP meeting to put additional transportation accommodations in place for Student 1 (a harness or car seat). Following the IEP meeting, the Complainant agreed with the additional accommodations.

### Pretext for Discrimination

OCR finds sufficient evidence of pretext within the District's legitimate non-discriminatory reason. Despite XXXX acknowledging that there were other students that behaved similarly to Student 1, the District was unable to produce any additional conduct logs in support of this contention.

## **Conclusion**

Although the District articulated a legitimate non-discriminatory reason for the conduct logs, the District could not produce conduct logs for students that behaved similarly, which indicates that the District's treatment of Student 1 was inconsistent with its policies and practices and thus that its legitimate non-discriminatory reason was not credible. Accordingly, OCR finds that there is sufficient evidence to establish that the District's retaliated against the Complainant when XXXX documented Student 1's conduct using conduct logs.

### **(e) Threat of Arrest**

The Complainant alleged that in retaliation for her OCR complaint, during an October 20, 2014 IEP meeting, the School threatened to arrest her if she boarded the school bus again. In response to this allegation, the District's XXXX confirmed that she told the Complainant that she could be arrested for trespassing if she boarded the bus again. The XXXX stated that she did not make the threat of arrest to the Complainant in retaliation for her prior complaint against the District, because she was not aware of the Complainant's previous OCR complaint.

### Legitimate Nondiscriminatory Reason

The District articulated a legitimate non-discriminatory explanation for the XXXX's threat of arrest as well as several policies in support thereof.

In support of the XXXX's comments, the District referred OCR to its Board Policy 9.60, which states in part, "any person entering the premises of a school shall report to the principal of his/her supervisory designee and make known the purpose of the visit . . . Any person who enters or remains upon District property without legitimate purpose may be found to be trespassing and, therefore, in violation of Florida Statutes and subject to arrest and penalties as defined by statutes." In addition, the District's Bus Manual, procedure 33, states that, "No unauthorized persons are allowed on the bus, *including parents.*" (Emphasis added)

### Pretext for Discrimination

OCR asked the District to "list any and all parents threatened with arrest (or actually arrested) for boarding a District school bus within the last five (5) years . . ." as well as a "statement of whether the parent at issue has a record of any complaint with the District." In response, the District identified seven (7) incidents of parent arrests for boarding a school bus between December 2014 and March 2015. The District stated that it was unaware that any of the parents involved in these incidents had previously filed complaints or engaged in a protected activity with the District. The evidence revealed that the District treated other parents similarly to the Complainant with respect to boarding the school bus.

## **Conclusion**

Because the District produced a number of policies in support of its threat towards the Complainant, in addition to evidence that similarly situated parents that had not engaged in

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protected conduct had been treated consistently or less favorably than the Complainant, there was insufficient evidence to establish that the District's legitimate non-discriminatory reason was pretextual. The District's explanation was supported by its documented policies and practices. Thus, OCR finds that there is insufficient evidence to establish that the District retaliated against the Complainant following her OCR complaint when it threatened her with arrest if she boarded the bus.

**Issue Two – Disability-Based Discrimination:** Whether the District discriminated against Students on the basis of disability by failing to effectively implement their transportation accommodation and by giving Complainant the impression that it did not want to be bothered with Student 1, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

**(a) Failure to implement transportation accommodations**

As indicated above, there was no evidence that the District declined to implement the Students' transportation accommodations. Thus, there is insufficient evidence to establish that the District discriminated against the Students on the basis of disability in this regard.

**(b) Different treatment of Student 1**

The Complainant alleged that School personnel gave her the impression that they did not want to be bothered with Student 1 because of his disability. In response, the District provided documentation of frequent staff interventions with Student 1. Specifically, Student 1 frequently threw himself to the ground, threw his shoes, kicked at teachers, and refused to get up. His XXXX frequently discussed Student 1's conduct and progress with the Complainant. The XXXX's written account of conversations with the Complainant reflected that the Complainant appreciated talking with her and what she was doing to help Student 1. The Complainant confirmed her admiration for the XXXX and the way she worked with Student 1. The Complainant explained that she and Student 1 were comfortable and confident in the XXXX's instruction.

On November 18, 2014, the Complainant contacted the XXXX and objected to the XXXX bringing Student 1 to the car after school. The contact logs reflect that the Complainant stated that she didn't know the XXXX, but did not want to sound like she was nit picking. Although the XXXX confirmed that the XXXX was great with Student 1, she agreed to maintain the responsibility for bringing Student 1 to the car after school. The Complainant could not provide any additional evidence to support her contention that the School, XXXX, or XXXX did not want to be bothered with Student 1.

During her interview with OCR, the School's XXXX confirmed that she witnessed the XXXX's interactions with Student 1. She said that she had observed Student 1 in class and explained that the XXXX thought he was wonderful and very smart. The XXXX explained that there were a lot of kids that behaved similarly to Student 1 at the school. She stated that the XXXX loved Student 1. In addition, the XXXX confirmed that the XXXX and XXXX were excellent with Student 1.

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## Conclusion

The evidence was insufficient to establish that the District treated Student 1 differently than non-disabled students. First, the Complainant was not able to identify any instances of different treatment nor did she allege that Student 1 was denied any the educational services, benefits, or opportunities. Absent direct proof of discriminatory motive, OCR evaluated circumstantial evidence of discrimination. The evidence was insufficient to establish that District treated Student 1 differently by excluding or denying Student 1 a program, service, or benefit. Thus, OCR finds that the District did not subjected Student 1 to different treatment on the basis of his disability.

**Issue Three -- Prompt Investigation:** Whether the District failed to take prompt and equitable steps to investigate and respond to the alleged harassment of Student 2 by the XXXX and Student 3, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, 104.7 and the Title II implementing regulation at 28 C.F.R. § 35.130 and 35.107.

### (a) Analysis of Applicable District Procedures

OCR reviewed the District's notices of non-discrimination, anti-harassment policies and procedures, and grievance procedures under the applicable Section 504 and Title II regulations.

#### Notice of Non-Discrimination

The District maintains a notice of non-discrimination codified at School Board Policy 2.80. The policy sets forth a general prohibition against discrimination, but uses the term "handicapping condition" and states that no person shall be excluded from participation in, be denied the benefits of, or in any employment conditions or practices conducted by this School District "except as provided by law." There is no explanation of what "except as provided by law means."

#### Notice of 504 Coordinator

The District identified its "Section 504 Federal Compliance Contact" in response to this complaint.<sup>3</sup> The Code of Student Conduct (Code of Conduct) provides the contact information for the "Section 504 Coordinator."

#### District's Bullying and Harassment Policy and Student Grievance Policy

The District maintains a "Bullying and Harassment Policy," which includes procedures for reporting "bullying and harassment of any type" (Policy 2.15) and is located on the District's website.

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<sup>3</sup> During the course of the investigation, the XXXX was out on medical leave. Therefore, OCR was unable to schedule an interview with the XXXX.

In addition, the Code of Conduct includes a “Student Complaints and Grievances” policy (Student Grievance Policy), which applies to grievances of “actual or perceived” discrimination on the basis of disability, among others. The Code of Conduct is disseminated to students at the beginning of each school year as well as to newly enrolling students.

The Student Grievance Policy references a “Section 504 Grievance Procedure,” but does not provide specific information about the policy. The District provided OCR with a copy of its Section 504 Grievance Procedure, which prohibits discrimination on the basis of disability and directs complainants to document their allegations of “actions prohibited by Section 504” to the principal (or designee).

#### Bullying and Harassment Policy 2.15:

Policy 2.15 indicates to whom applicable complaints should be directed. Further, its definition of bullying includes conduct perpetrated by a student or adult. However, its definitions of cyberbullying, harassment, and cyberstalking are non-specific. Policy 2.15 specifically references expected standards of “student behavior,” and states that it holds its employees to the same standard, but articulates no behavioral expectations for third parties. In its “Consequences Section,” Policy 2.15 articulates consequences and remedial actions applicable to students, employees, and third parties (visitors and volunteers).

Policy 2.15 dictates that the party to whom the report is made may not be the accused. The policy does not provide an opportunity for both the complainant and the alleged perpetrator to present witnesses and evidence. Policy 2.15 provides that the maximum of 15 school days shall be the limit for the initial filing of incidents and completion of the investigative procedural steps.

Policy 2.15 does not require the District to provide the complainant and alleged perpetrator with written notice of the outcome of the complaint. Specifically, Policy 2.15 requires that the complainant and perpetrator be notified. However, the policy does not require that the notice be in writing. Policy 2.15 includes a provision for consequences and appropriate remedial action in cases where bullying is substantiated. In addition, it includes provisions for referring involved students for counseling.

Policy 2.15 contains a provision which lists a range of consequences for students, school employees, and volunteers who “wrongfully and intentionally” accuse another as a means of bullying or harassment.

#### Student Grievance Policy

The Student Grievance Policy broadly states its applicability to “specified individuals,” which could include employees, students, or third parties and indicates to whom applicable complaints should be directed. However, the policy does not explicitly define the scope of its application. Further, the Student Grievance policy requires that a student-complainant attempt to discuss their complaint informally with the person against whom it is directed prior to elevating the complaint to the school principal or counselor and does not provide an opportunity for both the complainant and the alleged perpetrator to present witnesses and evidence.

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In addition, the Student Grievance policy requires a student-complainant to undergo a series of “informal” steps prior to filing an actual “grievance” under the policy. If the complaint cannot be resolved informally, then the student may file a grievance. The policy sets forth prompt and reasonable time frames for the some, but not all, major stages of the complaint process. The Student Grievance Policy does not require the District to provide the complainant and alleged perpetrator with written notice of the outcome of the complaint; rather, it only requires that written notice be given to the student.

The Student Grievance Policy does not contain assurances that the school will take steps to prevent reoccurrence of any disability-based discrimination or harassment reported pursuant to its provisions nor does it contain any provisions purporting to remedy the effects of discrimination or harassment on the complainant and others, if appropriate.

#### Section 504 Grievance Policy

The District’s Section 504 Grievance Procedure does not indicate whether it applies to complaints filed by students or on their behalf alleging discrimination carried out by employees, other students, or third parties. The Section 504 Grievance Procedure provides that the principal will initially review the complaint and facilitate a resolution. However, if the complainant is dissatisfied with the principal’s resolution terms, the Section 504 Coordinator (or designee) will intervene and conduct an investigation of the complaint, which affords all interested parties an opportunity to submit evidence relevant to the complaint. There is no provision, however, permitting the complainant or alleged perpetrators to present witnesses.

Further, the 504 Grievance Procedures provides reasonably prompt time frames for some, but not all, major stages. For example, the policy states that the initial complaint should be submitted to the principal (or designee) within a specified time, however, there is no time frame governing how long the principal may take to propose a resolution of the complaint.

The Section 504 Procedure does not require that a decision be issued in writing to the complainant and alleged perpetrator if resolution is reached at the principal review or 504 Coordinator review stages. Rather, the policy’s only reference to a written decision is in response to the complainant’s written appeal to the Superintendent. The policy does not indicate to whom the Superintendent’s written decision should be delivered.

The Section 504 Grievance Procedure does not contain assurances that the school will take steps to prevent reoccurrence of any disability-based discrimination or harassment reported pursuant to their provisions nor does it contain any provisions purporting to remedy the effects of discrimination or harassment on the complainant and others, if appropriate.

Thus, OCR finds sufficient evidence that the District policies and procedures are in noncompliance with the regulations implementing Section 504 and Title II.

## **(b) Bullying Allegations**

### **Teacher on Student Bullying:**

The Complainant alleged that Student 2's XXXX was "mean and picked on him." The Complainant alleged that she had similar problems with Student 2's XXXX. With respect to Student 2's XXXX, the Complainant alleged that towards the beginning of the year, the XXXX came to Complainant's car to speak with her. Complainant stated that, "She could see right through her, and that the XXXX knew it." The Complainant did not furnish any additional examples of bullying or harassment by the XXXX.

During OCR's investigation, the XXXX explained that at the beginning of the school year, Student 2 was assigned to XXXX's class. After the 10-day count required for student enrollment, there were a high number of self-contained students in the XXXX class. In response to the 10-day count, the School split the XXXX class into two. The XXXX retained students who were assigned to a high-functioning autism unit. The remaining students, including Student 2, were assigned to the XXXX's classroom, a varying exceptionality unit. The XXXX stated that she never received any complaints that the XXXX bullied or mistreated Student 2.

During an OCR interview, the XXXX explained that on September 11, 2014, the Complainant contacted the School and expressed that she wanted to schedule a conference with the XXXX. During the conference, the Complainant expressed concern that the XXXX used a stern voice with Student 2. The Complainant alleged that the XXXX used a stern voice when requesting that Student 2 complete his assignments. The XXXX recalled that at the conclusion of the conference, the Complainant seemed fine. The Complainant confirmed that she did not file any complaints of bullying against the XXXX.

With respect to the XXXX, the Complainant alleged that on November 13, 2014, Student 2 reported that he asked the XXXX about an upcoming test and expressed that he was "scared" that he did not know how to complete the work. The Complainant alleged that, in response, the XXXX stated, "That's your problem." The Complainant stated that after this, Student 2 did not want to take the test and was afraid that the XXXX would "fuss" at him if he did not do well.

In response to the Complainant's allegations, the XXXX denied the bullying allegations. She explained that in mid-November 2014, the Complainant wrote her a note expressing her concern that the XXXX was "fussing" at Student 2. The Complainant wrote, in relevant part:

[Student 2] told me about a test today. He is very nervous about this test, and feels he will be fussed at if he doesn't do well on it. Please do not fuss at him, cause he doesn't know how to do it. He told me you are mean to him, please don't be mean to my son, he can't help he is in special needs classes. . .

Upon receiving the note, the XXXX took it to the XXXX and XXXX to see how to handle the situation, and then had a parent phone conference. During the call, the XXXX tried to put the Complainant's mind at ease. The XXXX explained that she tries to encourage students to do their best. She contends that the Complainant expressed that she was glad the XXXX called.

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Following the call, the XXXX spoke with the Student 2 to make sure that he felt comfortable coming to her if he had issues.

## **Conclusion**

With respect to the XXXX and XXXX, OCR finds that there is insufficient evidence to establish that the conduct occurred, as alleged. Further, assuming, arguendo, that the conduct occurred as alleged, harassing conduct must be sufficiently serious as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by the school, in order to violate the provisions of Section 504. OCR finds that the conduct complained of was insufficient to establish that the XXXX or XXXX engaged in conduct sufficiently serious as to create a hostile environment for Student 2.

Thus, OCR finds insufficient evidence to establish that Student 2's XXXX bullied, harassed, or otherwise created a hostile environment for him, such that the School was required to investigate the same pursuant to the Section 504 regulations.

### Student-on-Student Bullying:

The Complainant alleged that the XXXX refused to appropriately intervene when she reported that Student 2 was being bullied by Student 3. The Complainant explained that Student 3 pushed and punched Student 2 daily. The Complainant stated that she reported the alleged bullying to the XXXX in October 2014. As a result of the alleged bullying, Student 2 had a decreased desire to go to school and complete homework, as evidenced by his conduct at home. For example, the Complainant stated that Student 2 was sluggish when he was getting ready for school and was reluctant to complete homework assignments. In her OCR interview, the XXXX confirmed that around or following the Complainant's report of bullying by Student 3, Student 2 began engaging in defiant behavior.

In a written statement during the School's investigation of the allegations, Student 2 reported only that Student 3 hit and pushed him. In addition, Student 2 alleged that Student 3 called him "bat" and "bad hair." In response to the Complainant's allegations of bullying, the XXXX told OCR that the School did not convene an IEP meeting, or arrange for Student 2 to receive counseling or other services. The XXXX also confirmed that no counseling or other services were provided to Student 2 following the Complainant's report of bullying.

## **Conclusion**

OCR will find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.

Here, the facts were insufficient to establish that Student 3's conduct towards Student 2 was related to or based on Student 2's disability. Specifically, the Complainant reported physical bullying and harassment by Student 3. Student 2 reported physical hitting and pushing, and that

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Student 3 called him “bat” and referenced him having “bad hair.” Applying the preponderance of the evidence standard to the facts, OCR finds insufficient evidence of disability-based bullying or harassment.

OCR next considered whether the non-disability based bullying denied the Student FAPE under Section 504. OCR considers several factors, including, but not limited to, whether the school knew or should have known that the effects of the bullying may have affected the Student’s receipt of FAPE services (i.e. adverse changes in the Student’s academic performance or behavior indicating that the Student may not be receiving FAPE). If so, OCR would then consider whether the school met its ongoing obligation to ensure FAPE by promptly determining whether the Student’s educational needs were still being met, and if not, making changes, as necessary, to his IEP.

First, the XXXX acknowledged a change in Student 2’s behavior at or around the time the Complainant reported the bullying. Thus, there is sufficient evidence that the School knew or should have known that the alleged bullying may have been impacting Student 2’s receipt of FAPE. Second, following the Complainant’s report of bullying (and the XXXX’s observations) the School failed to convene an IEP team meeting to determine whether Student 2’s educational needs were still being met.

Accordingly, OCR finds sufficient evidence to establish that the District failed to provide Student 2 with FAPE, following the District’s knowledge that bullying may have impacted his FAPE needs, in violation of the regulations implementing Section 504.

**Issue Four Race-based Discrimination:** Whether the District discriminated against the Father on the basis of race (White) by refusing to return his phone calls, in noncompliance with the Title VI regulation at 34 C.F.R. §100.3(a).

The Complainant alleged School personnel failed to return Father’s phone calls on the basis of race (White). The Complainant acknowledged that she neglected to identify the Father on any of Student 1’s paperwork, including his emergency contact form. Further, she confirmed that no one at the School had ever met the Father in person. In an OCR interview, the Father explained that he thought the District was aware of his race because he was sure the Complainant divulged it. In addition, he noted that Student 1 looks “mixed.” He confirmed his participation in Student 1’s October 20, 2014 IEP meeting, where he alerted the District to its failure to return his calls. In response, the Father confirmed that he was told that he needed to be placed on Student 1’s contact form.

OCR reviewed Student 1’s initial registration documents. The Father was not initially identified. Despite the District’s contention that no one at the School had a reason to know the Father’s race, OCR reviewed Student 1’s initial registration documents, which identified Student 1 as both Black and White. The School has had substantial contact with the Complainant, who is Black. As discussed in detail above, the District’s legitimate non-discriminatory reason for not returning Father’s phone calls was that it was under no obligation to do so under the Family Educational Rights and Privacy Act (FERPA).

## Conclusion

The record contained no direct evidence of discriminatory intent by the School. Thus, OCR evaluated circumstantial evidence to determine whether the School had a discriminatory motive. The evidence was insufficient to establish that the School treated the Father differently from other parents who had not been identified by the custodial parent on a student's emergency contact form. The District's response to this allegation is supported by the requirements of FERPA. In addition, the School's practice was consistent with respect to non-listed parents and supported by reasonable concerns regarding student custody and safety.

Despite the School's knowledge of the Father's race, the evidence was insufficient to establish that the School's decision not to call Father was motivated by any discriminatory motive. Thus, OCR finds that the evidence insufficient to establish that the School discriminated against the Father on the basis of race.

The District entered into the enclosed Resolution Agreement to correct the areas of noncompliance found with regard to issues 1 and 3. The Resolution Agreement requires the District to convene meetings consistent with Section 504 to determine whether either student requires special education or related services to meet disability-related needs, to provide Section 504 and Anti-Retaliation training to its faculty and staff, to revise its disability harassment policies, and to train its faculty and staff on the revisions. When fully implemented, the Agreement entered into by the District will resolve the issues of noncompliance. OCR will monitor the implementation of the agreement until the District is in compliance with the statutes and regulations at issue in the case.

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This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

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

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

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 provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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 matter, please contact the assigned OCR Investigator, Cerrone G. Coker at (404) 974-9318, or Andrea de Vries, Compliance Team Leader at (404) 974-9314.

Sincerely,

Melanie Velez  
Regional Director