



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

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ATLANTA, GA 30303-8927

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ALABAMA  
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August 31, 2017

Mr. Greg Shehan, Superintendent  
Monroe County School District  
109 Pickens Street  
Monroeville, AL 36460

Re: Complaint # 04-16-7079

Dear Mr. Shehan:

The U.S. Department of Education (Department), Office for Civil Rights (“OCR”) has completed its investigation of the above-referenced complaint against the Monroe County School District (District). Therein, the Complainant alleged that the District denied her son (Student) a Free Appropriate Public Education (FAPE) when staff at Excel Public School (School) failed to fully implement two reading programs, to timely produce study guides in advance of tests, and provided Health instruction in a self-contained setting, contrary to the Student’s Individualized Education Program (IEP). Further, the Complainant alleged that the District failed to appropriately respond to her allegations of disability-based harassment against the Student.

As a recipient of Federal financial assistance from the Department, the District is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability. As a public entity, the District is subject to the provisions of Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. Accordingly, OCR has jurisdiction over this complaint. Additional information about the laws OCR enforces is available on our website at [www.ed.gov/ocr](http://www.ed.gov/ocr).

OCR opened the following issues for investigation:

1. Whether the District denied the Student FAPE when, contrary to the requirements of the his IEP: (1) beginning in June 2016, School staff declined to facilitate the XXX XXXX XXXX XXXX programs according to prescribed schedule and frequency; (2) beginning in August 2016, the School failed to provide the Student with study guides in sufficient advance of tests/quizzes; and (3) beginning in August 2016, the Student received Health instruction in a self-contained rather than general education setting, in non-compliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33 (e) and Title II implementing regulation at 28 C.F.R. § 35.130.

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2. Whether, following the Complainant's reports that the Student was being harassed on the basis of disability, the District took immediate and appropriate steps to investigate the allegations, and if necessary, prompt and effective steps reasonably calculated to end the harassment, eliminate the effects of any resulting hostile environment, and to prevent recurrence, in non-compliance with Section 504 implementing regulations at 34 C.F.R. §§ 104.4 and 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.

## **Legal Standards**

### Free Appropriate Public Education (FAPE):

The Section 504 implementing regulation at 34 C.F.R. § 104.33 provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) 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. For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to procedures that satisfy the requirements of the Section 504 implementing regulations at 34 C.F.R. §§ 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program (IEP) developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in this section.

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 FAPE standards.

### Disability-Based Harassment:

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Similarly, the Title II implementing regulation at 35 C.F.R. § 35.130 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.

Pursuant to the Section 504 implementing regulation at 34 C.F.R. § 104.7(a), a recipient that employs 15 or more people shall designate at least one person to coordinate its efforts to comply with Section 504. The 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 regulations at 28 C.F.R. § 35.107 (a) and (b) contain similar provisions for public entities with 50 or more employees. In evaluating whether a recipient's grievance procedures satisfy the Section 504/Title II requirements, OCR

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reviews all aspects of a recipient's policies and practices, including the following elements that are necessary to achieve compliance with Section 504 and Title II:

1. Notice to students and employees of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints filed by students or on their behalf alleging harassment carried out by employees, other student, or third parties;
3. Provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. Designated and reasonably prompt time frames for the major stages of the complaint process;
5. Written notice to the complainant and alleged perpetrator of the outcome of the complaint; and
6. Assurance that the school will take steps to prevent recurrence of any disability-based harassment and remedy discriminatory effects on the complainant and others, if appropriate.

### **Factual Findings and Conclusions**

**Whether the District denied the Student FAPE when, contrary to the requirements of his IEP: (1) beginning in June 2016, School staff declined to facilitate the XXXX XXXX and Read Naturally programs according to prescribed schedule and frequency; (2) beginning in August 2016, the School failed to provide the Student with study guides in sufficient advance of tests/quizzes; and (3) beginning in August 2016, the Student received Health instruction in a self-contained rather than general education setting, in non-compliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33 (e) and Title II implementing regulation at 28 C.F.R. § 35.130.**

In a November 11, 2016 email and subsequent phone call with OCR staff, the Complainant confirmed that the Student was enrolled and receiving instruction in a general education Health class consistent with his IEP. Therefore, she did not wish for OCR to proceed with an investigation of this allegation. This allegation is dismissed as of the date of this correspondence.

With respect to the Complainant's allegation that School staff failed to facilitate computer-based reading programs (XXXX XXXX XXXX XXXX) according to the Student's IEP, OCR reviewed two IEPs that were in place for the Student during the 2015-2016 and 2016-2017 school years, IEP notes produced by the District, and communications between the Complainant and School staff concerning the implementation of the computer-based reading programs.

The IEP the Complainant produced to OCR included the following provisions, in relevant part: "[The Student] will work on a computer based program to remediate his deficit in reading and math. A computer based program will be used to monitor his progress." The IEP shows an anticipated frequency of 4 time(s) weekly. The amount of time should be 275 (presumably minutes), and the duration of the item reads: 08/08/2016 through 05/25/2017. The services are to

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be provided in the resource room. However, the order in which the terms are written make unclear whether the frequency, duration, and location notations relate specifically to the Student's use of XXXX XXXX and Read Naturally programs. The programs were not identified by name. In addition, the terms of the IEP are not clear as to a weekly or daily duration requirement.

In addition to the above, OCR reviewed the terms of a second IEP for the 2016-2017 that was produced by the School District. It included the following provisions relevant to the computer programs: "[the Student] will work on XXXX XXXX 2 days a week and XXXX XXXX 3 days a week;" an anticipated frequency of "5 time(s) Weekly" for 50 minutes ("Amount of time") from 10/14/2016 through 05/25/2017 ("Beginning/Ending Duration date"). In addition, the District produced "IEP Committee Meeting Minutes" dated October 13, 2016 that reflected that the Complainant requested that the Student use XXXX XXXX 2 days of the week and the XXXX XXXX 3 days per week. The notes reflect that the District would modify the IEP language to reflect the "actual remediation programs being used."

With respect to the Complainant's allegation that the School failed to implement an IEP provision that required study guides and notes for tests and quizzes to be sent home in advance, the IEP Committee Meeting Minutes indicated only that the Complainant requested planners and study guides for tests and assignments.

The District produced documentation in support of its implementation of the above IEP provisions. A written statement signed electronically by a Special Education Teacher at the School, states that at the end of the 2015-2016 school year, during an IEP meeting for the Student, it was determined that the Student would receive Extended School Year (ESY) services. The Complainant requested the use of XXXX XXXX and XXXX XXXX computerized programs. The District already had access to the XXXX XXXX program, but told the Complainant that it was unfamiliar with XXXX XXXX and would need to get the information for the program. Minutes from an IEP meeting dated May 13, 2016 reflect a recommendation that the Student "work continuously on reading comprehension skills. Read passages to keep up his reading over the summer. Parent will have access or a code in order to work with him." An email produced by the District showed that the Complainant was provided student and parent usernames and passwords to access the XXXX XXXX program.

Copies of text messages between the Special Education Teacher and the Complainant show that the Complainant informed the Special Education Teacher that as of June 7, 2016, the Student had not begun to access the program due to soreness from a recent surgery. In addition, the text messages show a request from the Complainant for the XXXX XXXX log-in information. The District's production included an email from the Special Education Teacher to the Complainant dated July 7, 2016 including the Student's username and password for XXXX XXXX.

Via text message on July 18, 2016, the special education teacher followed-up with the Complainant about the Student's progress with both reading programs. In response, the Complainant indicated that the Student had not started the "new story" due to illness in her family. The Complainant then requested the XXXX XXXX information a second time. In a text message dated July 25, 2016, it appears that the Student was able to begin working with, at least

one of, the programs. For ESY, there was no specifically identified schedule for the Student to follow. It also appears that, at least at the start of the 2016-2017 school year, no particular schedule for the Student's use of XXXX XXXX and XXXX XXXX was prescribed in the Student's IEP.

The 2016-2017 IEP produced by the District did not provide specific provisions related to the Student's receipt of study guides in advance of tests and quizzes. However, the IEP meeting notes made clear that the IEP team discussed providing the Student study guides and notes. In addition, the documentation provided by the District showed that the Student was provided notes and study guides before his tests. However, the IEP minutes did not reflect discussion of time frames for the delivery of notes or study guides.

In follow-up communications with the District and Complainant, the parties confirmed that as a result of the October 13, 2016 IEP meeting, the School was on track with the Student's IEP. In a subsequent conversation with the Complainant on January 12, 2017, she indicated that the School had been adhering to the IEP. The Complainant did not identify continued issues with implementation of the IEP. She indicated that the District had been trying to contact her to schedule an IEP meeting to deal with some lingering concerns; however, she did not want to schedule a meeting with the School at that time.

OCR reviewed the District's data reflecting its implementation of XXXX XXXX and XXXX XXXX computer-based programs beginning October 14, 2016 through its production of documents. The data for XXXX XXXX was inconclusive. OCR was unable to determine from the documentation alone whether the District had been implementing this program for 50 minutes 3 days per week. Regarding XXXX XXXX, the District's documentation showed that despite the parties' agreement on October 13, 2016, the XXXX XXXX computer-based program had not been implemented according to the IEP terms.

Specifically, the usage entries for the week of October 17 through October 22, 2016, show that the Student accessed the XXXX XXXX program two days, each for a period of sixteen (16) minutes. The following week, October 24 through October 28, 2016, the Student accessed the XXXX XXXX program three days with a cumulative total of less than 100 minutes. For the week of October 31, 2016 through November 4, 2016, the Student accessed the XXXX XXXX program on three days, with a cumulative usage total of less than 100 minutes. Therefore, the School's implementation of the XXXX XXXX IEP requirement was inconsistent with the terms of Student's IEP.

## **Conclusion**

As noted above, the evidence was sufficient to conclude that the District failed to implement the XXXX XXXX computer-based program in accordance with the Student's IEP. Therefore, OCR finds that the District is not in compliance with the applicable Title II and Section 504 implementing regulations with respect to that allegation.

On January 12, 2017, before OCR concluded its investigation of this complaint, the District offered to resolve the Complainant's allegations through a voluntary resolution agreement.

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Pursuant to OCR's *Case Processing Manual* at Section 302, a complaint may be resolved when, before the conclusion of an investigation, "the recipient expresses an interest in resolving the allegations and issues *and* OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation."

The District entered into the enclosed Agreement and submitted it to OCR on August 31, 2017. The enclosed Agreement, when fully implemented, will resolve all FAPE allegations identified during the course of this investigation. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. Further, the Complainant may file a private lawsuit in federal court regardless of whether OCR finds a violation.

**Whether, following the Complainant's reports that the Student was being harassed on the basis of disability, the District took immediate and appropriate steps to investigate the allegations, and if necessary, prompt and effective steps reasonably calculated to end the harassment, eliminate the effects of any resulting hostile environment, and to prevent recurrence, in non-compliance with Section 504 implementing regulations at 34 C.F.R. §§ 104.4 and 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.**

#### Policies and Procedures

##### **Notice of Non-Discrimination**

OCR reviewed the District's Notice of Non-Discrimination, which is located in its Student Handbook and Code of Conduct (Handbook). The statement states: The Monroe County Board of Education does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The statement designates the Director of Student Services (Director) to handle inquiries regarding the District's non-discrimination policies and provides contact information (physical address and telephone number).

The Handbook also identifies the Director as its compliance coordinator pursuant to Section 504 and other civil rights statutes. The Director's address and telephone number are also listed. The Handbook references, but does not detail, the District's grievance procedures. The District provided screen printouts showing that the Handbook was accessible via its website.

##### **Section 504 Policy**

OCR reviewed the District's Section 504 Reference Manual (Manual). The Manual acknowledges that parents may file complaints with OCR if they believe their student has been discriminated against on the basis of disability. The Manual also identifies the District's Director as its Section 504 Compliance Coordinator and provides her name, address and telephone number (i.e. written into black spaces in the Manual). It is unclear how these provisions are disseminated to parents, students, and stakeholders. OCR was unable to locate this Manual via the District's website.

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The Manual contains the District’s “Section 504 Grievance,” policy, which provides that if a parent or guardian believes their student’s Section 504 rights are being violated, he or she may file a complaint with the Director. Differences that cannot be resolved informally will be addressed via a formal due process hearing, wherein the grieving party may submit objections. Hearing notifications should be provided to parents at least ten (10) before the scheduled hearing. Hearings should be scheduled no later than sixty (60) days following the request. The hearing officer shall provide his or her decision within 30 days of the conclusion of the hearing. Grieving parties may appeal the decision within thirty days of its issuance. The District also offers mediation as an informal means of resolving complaints alleging violations of Section 504. It does not appear that these procedures are applicable to complaints of bullying or harassment on the basis of disability. OCR could not locate any other policy, within the District’s documentation or on its website that provided for the investigation of complaints of discrimination or harassment.

### **Bullying, Harassment or Intimidation Reporting Form**

The District’s 2016-2017 Handbook<sup>1</sup> contained a conduct policy related to harassment, violence, and threats. The policy defines harassment and includes a provision, which states: “Violence, threats of violence, harassment, and intimidations are prohibited and will subject to disciplinary consequences and sanctions if the perpetrator of such action is found to have based the prohibited action on one or more of the following personal characteristics of the victim of such conduct:

- The student’s race
- The student’s sex
- The student’s religion
- The student’s national origin
- The student’s disability”

The Handbook’s “Reporting, Investigating, and Complaint Resolution Procedure” for allegations of bullying, harassment, or intimidation provides that complaints “must be made on Board approved complaint forms available at the principal’s and/or counselor’s office.” Also, complaint forms must be signed and delivered to the principal. The policy states that at the request of the complaining student or parent, minor allegations may be presented and resolved informally. The policy prohibits retaliation as a violation of the bullying, harassment, and intimidation policy. Lastly, the complaint resolution procedures state that false reports under the policy will result in disciplinary sanctions. There is a separate complaint procedure for sexual harassment.

OCR reviewed the District’s Bullying, Harassment or Intimidation Reporting Form (Form), which is included in its Student Handbook and Code of Conduct. The Form allows identification of the date of the incident, the School of the Student victim, the location of the incident, an option to select from nine general descriptions of the conduct complained of.

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<sup>1</sup> <http://www.monroe.k12.al.us/common/pages/DisplayFile.aspx?itemId=9134821>

## Conclusion

The 2016-2017 Handbook's "Reporting, Investigation, and Complainant Resolution Procedures," do not indicate to whom the policy applies (i.e. student on student harassment, teacher-on-student harassment, or harassment by third parties). In addition, the procedures do not provide an opportunity for complainants or accused parties to present witnesses or evidence nor do the procedures provide for impartial handling. For example, if the principal was the individual alleged to have subjected a student to harassment, there is no avenue by which the student could have his or her complaint evaluated by another party. The procedures do not provide any investigative time frames, written notice to parties of the outcome of applicable complaints, or assurances that the school will take steps to prevent recurrence (of any harassment) and to correct discriminatory effects on the complainant and others, if applicable.

Therefore, OCR finds the evidence sufficient to establish that the District does not have prompt, equitable, and impartial grievance procedures for investigating complaints of harassment on the basis of disability.

### Disability-Based Bullying (Student)

As evidence that the District was notified that the Student was bullied on the basis of disability, the Complainant and District produced an email the Complainant submitted to the Student's case worker (Case Worker) dated August 25, 2016. Therein, the Complainant alleges that the Student had been "picked on" by another student (Student 2) for some time, that Student 2 suggested that the Student eat a cricket, and that as a result of being picked on, the Student was having episodes and wanted to "move." The email also suggests that the issues between the Student and Student 2 had been discussed with the School previously, but indicates the Complainant's opinion that the previous discipline issued to Student 2 was insufficient.

The District produced documentation that showed that School staff investigated the incident with Student 2 involving a cricket as well as the Complainant's prior allegations that Student 2 bullied the Student. The documentation showed that the Student's Case Worker immediately investigated the Student's allegation that Student 2 was "playing with a cricket" and "messing with" another student to determine what occurred. The incident was discussed with the Student, the "other student", and Student 2.

Upon receipt of the Complainant's August 25, 2016 email, the Case Worker followed-up with the Student about the incident. The Student reported that the students were just playing with the cricket and that he told his mother that Student 2 put the cricket on him because "he didn't like [Student 2.]" Another teacher, who watched the students during a break, asked them about the incident. The Student again reported that they were just playing with the cricket. Thereafter, she sent the email to the Complainant indicating that the situation had been handled.

In addition, in his written narrative produced through the District's representative, the Principal wrote that the cricket incident was also discussed with the Complainant during the October 13, 2016 IEP meeting. Therein, the Complainant was informed that the incident with the cricket had

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not been determined to constitute bullying. The Principal's statement indicated that during the meeting, the Complainant reported a previous incident wherein Student 2 sat in the Student's seat during a math class and that the two students began arguing thereafter. According to the Principal's account, the Student's math teacher, also in attendance at the meeting, responded to the allegation. Specifically, she stated that she was aware of the incident and that it was addressed and resolved in the classroom when Student 2 was required to move to another desk. The math teacher reported that no other issues had arisen in class.

In a January 12, 2017 follow-up call with OCR staff, the Complainant said the Student experienced bullying by Student 2 throughout the last few years. When asked to identify the conduct specifically, she only identified one additional instance of conduct directed towards the Student (i.e. Student 2 took the Student's belongings when he left the classroom to see the nurse). She detailed a number of other issues the Student had with Student 2; however, none involved direct comments or contact with the Student. In addition, the Complainant alleged that Student 2 had referred to the Student as "retard" over the years. However, she could not confirm that this conduct was reported to the District. She indicated that she felt the Student's father *may* have reported this conduct, but did not know when or to whom. In an OCR interview, the Student's father could not confirm that he reported Student 2's use of the term "retard" towards the Student to District staff.

The Complainant told OCR that each of her concerns regarding Student 2 was discussed with School officials during IEP meetings to re-evaluate the Student's needs. In addition, she identified strategies she discussed with staff during IEP meetings to address the issues with Student 2, including counseling sessions and extracurricular activities to build the Student's self-confidence. An emailed statement from the School's 2015-2016 Assistant Principal corroborated that he addressed a number of concerns by the Complainant about the Student's alleged mistreatment during the course of IEP meetings for the Student.

OCR reviewed documented reports of bullying and harassment within the School during the 2014-2015, 2015-2016, and 2016-2017 school years. None of the discipline referrals produced reflected reports of discrimination on the basis of disability, or any other basis protected by the laws OCR enforces. Thus, OCR was unable to draw any conclusions about the School's climate in this regard.

## **Conclusion**

OCR would 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. OCR concludes that, during the relevant time period, the District had notice of two specific incidents of alleged harassment directed towards the Student: (1) Student 2 put a cricket on the Student; and (2) Student 2 took the Student's belongings. These incidents did not involve bullying or harassment on the basis of disability.

Applying the preponderance of the evidence standard to these facts, OCR could not conclude that the District had notice of bullying towards the Student *on the basis of disability*. OCR

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analyzed whether the District took steps to determine whether the alleged bullying impacted the Student's receipt of FAPE.

Bullying or harassment on any basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504. For the student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services, a school's bullying or harassment investigation should include determining whether that student's receipt of appropriate services may have been affected by the bullying. If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services or Section 504 FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE.

Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services. 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 evidence was conclusive that in each instance where the Complainants alleged that the Student was bullied or indicated their general frustrations with Student 2's classroom behavior, an IEP meeting was convened and the incidents discussed. In addition, there was evidence that each of the incidents with Student 2 were investigated and immediately addressed, albeit, at times, not to the Complainant's satisfaction. As a result of at least one such IEP meeting, the Student was provided counseling services through the School to address the impact of alleged bullying. In addition, the Student attempted participation in the School's archery team as a means of building his confidence, which was discussed in an IEP meeting to address alleged bullying.

Therefore, the evidence is insufficient to establish that the District is not in compliance with Section 504 or Title II with respect to this allegation.

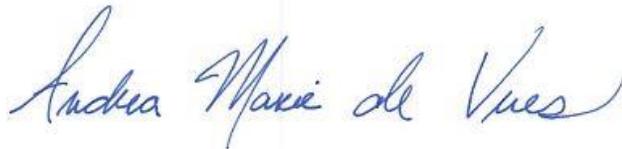
OCR will monitor the District's implementation of the resolution agreement in this case to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. Further, the Complainant may file a private lawsuit in federal court regardless of whether 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 Cerrone Lockett, General Attorney at 404-974-9318.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Marie de Vries". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Andrea de Vries  
Compliance Team Leader