



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

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REGION IV  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

April 27, 2018

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Jonathan Hatton  
Superintendent  
Lauderdale County Schools  
P.O. Box 278  
Florence, Alabama 356319

Re: Complaint #04-17-1112

Dear Superintendent Hatton:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint filed by the Complainant on November 17, 2016, against the Lauderdale County School District (District), alleging discrimination on the basis of disability. The Complainant alleged discrimination on the basis of disability against her daughter (Student) and retaliation against the Complainant and the Student by the Lauderdale County School District (District). Specifically, the Complainant alleged that:

- (a) the District denied the Student a free appropriate public education (FAPE) by failing to appropriately evaluate her for eligibility under Section 504 from January 2016 to the present;
- (b) the District treated the Student differently than similarly situated nondisabled students by:
  - i) issuing the student a bad essay grade in XXXX XXXXX class November 2016;
  - ii) disadvantageously calculating her final grade in XXXX XXXXX class in December 2016;
  - iii) not providing consistent Response to Intervention (RtI) for the Student in the fall of 2016; and
  - iv) dismissing her from the XXXX School (School) on or around December 27, 2016;
- (c) the District retaliated against the Complainant and the Student when retaliated against the Student and Complainant by:
  - i) issuing the student a bad essay grade in XXXX XXXXX class November 2016;
  - ii) disadvantageously calculating her final grade in XXXX XXXXX class in December 2016;
  - iii) failing to respond to or responding hostilely to the Complainant's inquiries regarding the Student's XXXX XXXXX essay grade, final grade, and provision of the Student's RtI in XXXX XXXXX;
  - iv) failing to provide consistent RtI for the Student; and
  - v) dismissing the Student from the School on December 27, 2016.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination

on the basis of disability by recipients of Federal financial assistance (FFA); 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. The District receives funds from the Department and is a public entity, and therefore is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether the District failed to evaluate the Student for eligibility from January 2016 through to the present in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §104.35 and the Title II implementing regulation at 28 C.F.R. §35.130.
2. Whether the District discriminated against the Student on the basis of disability by treating the Student differently than similarly situated nondisabled students by issuing the Student a bad essay grade in XXXX XXXXX class November 2016, disadvantageously calculating her final grade in XXXX XXXXX class, not providing consistent RtI for the Student in XXXX XXXXX, and dismissing her from the School on December 27, 2016, 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.
3. Whether the District retaliated against the Student and Complainant by issuing the Student a bad essay grade in XXXX XXXXX class November 2016, disadvantageously calculating her final grade in XXXX XXXXX class, failing to respond to or responding hostilely to the Complainant's inquiries regarding the essay, final exam grade, and the Student's RtI in XXXX XXXXX, not providing consistent RtI for the Student in XXXX XXXXX, and dismissing her from the School on December 27, 2016, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, incorporating 34 C.F.R. § 100.7(e) by reference, and the Title II implementing regulation at 28 C.F.R. § 35.134.

OCR reviews evidence under a preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates the evidence obtained during an investigation to determine whether the greater weight of the evidence was sufficient to support a conclusion that the recipient failed to comply with a law or regulation enforced by OCR, or whether the evidence was insufficient to support such a conclusion. Based on the preponderance of the evidence, OCR determined that there was sufficient evidence to establish non-compliance with Section 504 and Title II on some allegations as alleged and insufficient evidence on others as set forth below.

### **Regulatory Standards**

Set forth below are the Section 504 general nondiscrimination standards related to harassment of students with a disability; relevant Section 504 procedural requirements; and the standard prohibiting retaliation. The Title II implementing regulation is interpreted consistent with the foregoing standards with respect to the complaint allegations.

#### *Prohibition of Disability-Based Discrimination*

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(i)-(iv) and (vii) 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. To establish a *prima facie* case of different treatment, the Complainant must have been treated differently than similarly situated students without disabilities with respect to alleged incidents. If a *prima facie* case of different treatment was established, the District may articulate a legitimate nondiscriminatory reason for the different treatment. OCR would then determine whether the District's stated legitimate nondiscriminatory reason was a pretext for unlawful discrimination.

### *Evaluation of Students*

Pursuant to 34 C.F.R. § 104.35(a), a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of that section of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. When making a placement decision, the recipient shall ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c). A recipient shall establish procedures, for periodic reevaluation of students who have been provided special education and related services. 34 C.F.R. § 104.35(d). A recipient must also provide notice of its procedural safeguards. 34 C.F.R. § 104.36. The applicable Title II implementing regulations at 28 C.F.R. § 35.130 are interpreted consistent with the Section 504 regulations cited above.

### *Retaliation*

OCR enforces the retaliation provision of Title VI of the Civil Rights Act of 1964 at 34 C.F.R. § 100.7(e), which is incorporated by reference into the Section 504 regulation at 34 C.F.R. § 104.61. The regulations provide 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 or other matter in connection with a complaint. Similarly, the regulation implementing Title II of the ADA at 28 C.F.R. Section 35.134 also prohibits retaliation.

## **Factual Findings and Analysis**

### ***Issue 1: Whether the District failed to evaluate the Student for eligibility from January 2016 through to the present in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §104.35 and the Title II implementing regulation at 28 C.F.R. §35.130.***

The Complainant alleged that the District failed to appropriately evaluate the Student for eligibility under Section 504 from January 2016 to the present. Specifically, she alleged she raised various difficulties the Student was having in class in Spring of 2016 as being linked to Attention-deficit/hyperactivity disorder (ADHD), and that she shared her ADHD and dyslexia diagnoses with the School in Fall 2016, but she was not evaluated for eligibility for special education or related services.

OCR first examined whether the District had reason to believe that the Student, because of a disability, needs or may need special education or related services. OCR found that on January 4, 2016, the Complainant emailed the Guidance Counselor regarding the Student's "[Attention Deficit Disorder] ADD tendencies." The Complainant wrote that the Student had never gotten a diagnosis or accommodations for her ADD and that the Student had failed some of the mid-year exams. She also wrote that she received the Student's ADHD test packets from their pediatrician, and that she was willing to "get an official diagnosis of ADD, but I wanted to talk with you [the Guidance Counselor] first."

On January 12, 2016, the Complainant emailed the Guidance Counselor "Meeting Agenda" notes for the Student noting ADD traits and having one line question stating "Dyslexic testing" for the Student. In the month of February, the Guidance Counselor assisted with having teachers complete forms to aid the Student's "Conners" ADHD testing with the Student's health care provider. The Complainant notified the Guidance Counselor that the Student had been diagnosed as ADHD on July 19, 2016, provided a copy of this diagnosis to the Guidance Counselor on August 19, 2016, and a copy of the diagnosis was forwarded to the Principal the same day. On August 22, 2016, the Complainant emailed the Principal and Guidance Counselor requesting "special classroom accommodations" and a 504 plan for the Student due to her ADHD, while noting her diagnosis in the report of "dysphonetic dyslexia." Therefore, OCR finds the District had reason to believe that the Student may need special education or related services due to potential ADHD in January 2016 and dyslexia in August 2016.

The evidence and testimony in this investigation confirm that the Student was not evaluated under the District's Section 504 procedures, but she was screened for dyslexia and placed on a Pupil Support Team (PST) with Response to Intervention (RtI). The District's 504 Coordinator stated in a September 9, 2016, email "if we don't see any improvement with [PST] we may need to consider 504 or IDEA interventions." Therefore, OCR examined whether the District's implementation of PST with RtI for the Student conformed to the requirements of Section 504 at 34 C.F.R. 104.35.

The District conducted dyslexia screening for the Student on September 6, 2016. The District concluded that the Student did not qualify for dyslexia interventions. After, the Student's PST developed her Intervention Plan on September 21, 2016, with one intervention of "weekly reminders of daily assignments." OCR examined the tests and other evaluation materials used for the Student, including a dyslexia screening and San Diego Quick Assessment. Both are general dyslexia screening tools approved by the state. The person conducting the screening was appropriately trained on delivering the screening and delivered it in accordance with its instructions and her training. The Complainant stated that the screening was inadequate because the School did not give the Student a copy of the spelling portion and dysphonetic dyslexia affects the Student's spelling. Although, the screening materials included a diagnostic spelling test that identified the Student as "High Risk" with a 7<sup>th</sup> grade spelling level, the District determined she did not qualify for interventions.<sup>1</sup> OCR finds there is insufficient evidence that the dyslexia screenings were in noncompliance with 34 C.F.R. 104.35(b)(1)-(3).

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<sup>1</sup> While the screening indicates spelling difficulties and the District determined the Student did not qualify for dyslexia interventions, OCR's policy is to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened pursuant to Section 504 and to refrain from assessing the appropriateness of

OCR next considered whether the District developed the Student's Intervention Plan by drawing upon information from a variety of sources, and that information from all such sources was documented and carefully considered. OCR guidance provides that "a medical diagnosis of an illness does not automatically mean a student can receive services under Section 504," but that "[i]nformation from all sources must be documented and considered by knowledgeable committee members."<sup>2</sup>

One PST member stated the PST considered the fact that the Student may have ADHD and the results of the dyslexia screening, however, it did not discuss the Student's independent ADHD and dyslexia evaluation. Another member similarly did not confirm the team considered the Student's outside, independent evaluation. Two team members stated that the team considered the Student's private ADHD diagnosis. Therefore, OCR weighed these differing responses in consideration with the documents. Based on the documentation, the District had the independent evaluation, yet the Student's Intervention Plan states on its face that the team considered her "Performance Series: Lexile." There was no documentation showing the independent evaluation or data beyond the Performance Series testing data was specifically considered or included in the PST documentation. Based on the a preponderance of the evidence, OCR finds sufficient evidence that the District failed to consider data from a variety of sources, including the Student's outside independent ADHD and dyslexia evaluation, and thus failed to ensure that information obtained from all sources was documented and carefully considered, in noncompliance with 34 C.F.R. §104.35(c)(1)-(2).

OCR next examined whether the placement decision was made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The preponderance of the witness statements and evidence supports that the meeting was attended by counselors, administrators, and a teacher knowledgeable about the Student. All of the witnesses stated that the resulting Intervention Plan was a team decision.<sup>3</sup> The Complainant also confirmed PST members were knowledgeable about the Student and meaning of the evaluation data. Based on the foregoing, OCR has insufficient evidence to find that the Intervention Plan was not a team based decision by a group of knowledgeable persons pursuant to 34 C.F.R. §104.35(c)(3).

OCR finds that the District's PST and RtI Manual (Manual) follows procedures that closely mirror the requirements of 34 C.F.R. §104.35. However, the Manual contains no procedure for providing 504 compliant notice of procedural safeguards. This Manual also states that Special Education Referral should be considered when Tier 3 interventions are not producing gains after implementation for 8-12 weeks. The District also provided a RtI flowchart showing that RtI interventions operate as a pre-requisite to IDEA/504 referral. The Section 504 Coordinator

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pedagogical decisions. *See also* Appendix A of the implementing regulation of 34 C.F.R. § 104. OCR notes the Complainant may have been able to challenge the team's decision to deny dyslexia interventions or accommodations if she had received notice of her procedural safeguards, which is discussed *infra*.

<sup>2</sup> See OCRs *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* at <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.

<sup>3</sup> OCR notes that two of these witnesses were prompted during their responses, but based on the other three witnesses divulging this information without prompting, OCR did not find sufficient basis for an adverse credibility determination.

confirmed that “before [the District] makes a determination on whether a person is eligible for IDEA or 504, we are required to go through the PST process,” and it is “prerequisite to IDEA and a 504 plan.” Additionally, no evidence showed that the Complainant was given notice of her procedural safeguards.

The District stated it used PST/RtI process as a pre-requisite to evaluating a student for eligibility under Section 504. Thus, interventions would be based on partial or incomplete data and occur immediately, constituting an initial placement before completion of an appropriate evaluation, in noncompliance with 34 C.F.R. §104 (a). Similarly, the Student’s evaluation did not appropriately consider data from a variety of sources before her interventions were in place. Furthermore, the District’s PST and RtI Process fails to provide sufficient notice of procedural safeguards, and this failure also occurred in this complaint. Thus, the District therefore cannot rely on its PST/RtI process as a substitute or prerequisite for evaluation under Section 504. Based on these failures, OCR finds sufficient evidence that the District’s RtI/PST procedures do not comply with 34 C.F.R. §§104.35 and 104.36 when implemented independently, as a Section 504 evaluation tool, or, as was done for the Student here, as a prerequisite to Section 504 evaluation.

Finally, OCR examined whether the evaluation was completed within a reasonable time after the District first had notice of a need to evaluate the Student. The District’s earliest notice of potential ADHD was in January 2016, and discussions regarding potential ADHD with the Guidance Counselor through the spring semester of 2016. No data or testimony indicates the District evaluated the Student under Section 504 until after notice of her independent dyslexia and ADHD evaluation in August 2016 when the District conducted dyslexia screening and placed the Student on RtI. Given the delay from January 2016 to August 2016, OCR finds sufficient evidence that the District unreasonably delayed its evaluation of the Student for ADHD, in noncompliance with 34 C.F.R. § 104.35.

In sum, a preponderance of the evidence supports that District did not appropriately evaluate the Student when it unreasonably delayed conducting an evaluation until fall semester of 2016, failed to consider data from a variety of sources, including the Student’s outside independent ADHD and dyslexia evaluation, failed to ensure that information obtained from all such sources was documented and carefully considered, initially placed the Student on an intervention or accommodation prior to completing an appropriate evaluation through its PST/RtI process, and failed to provide notice of procedural safeguards in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §§104.35(a), (c)(1)-(2), 104.36, and the Title II implementation at 20 C.F.R. § 35.130.

*Issue 2: Whether the District discriminated against the Student on the basis of disability by treating the Student differently than similarly situated students without disabilities by issuing the Student a bad essay grade in XXXX XXXXX class November 2016, disadvantageously calculating her final grade in XXXX XXXXX class, not providing consistent RtI for the Student in XXXX XXXXX, and dismissing her from the School on December 27, 2016, 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.*

The Complainant alleged disability discrimination against the Student when, in her 11<sup>th</sup> grade XXXX XXXXX class, she received a 20 on an essay about XXXXXXXX in October 2016; when she did not receive RtI assistance consistently; and, when she did not receive “as much of a boost in her final grade average” as other students. The Complainant also alleged disability discrimination against the Student when she was dismissed from the School on or about December 27, 2016.

To establish a *prima facie* case of different treatment, the Complainant must have been treated differently than similarly situated students without disabilities with respect to the alleged incidents. If a *prima facie* case of different treatment is established, the District may articulate a legitimate nondiscriminatory reason for the different treatment. OCR would then determine whether the District’s stated legitimate nondiscriminatory reason was a pretext for unlawful discrimination.

#### *XXXXX Essay Grade*

The Complainant alleged that the Student received a twenty (20) on the XXXXX Essay (Essay), but classmates that had received negative grades, received bonus points and their grades were “rounded up” to a zero (0). The Complainant also alleged that because the Student wrote more than most of the other students the Teacher had more content to find grammatical errors. The Complainant alleged that the conduct was different treatment against the Student based on her disability.

OCR first examined whether the District had a reason to believe that the Student, because of a disability, needed or may need special education or related services. The Teacher acknowledged in interviews that the Student’s alleged ADHD and dyslexia were discussed during the PST meetings in September 2016.

OCR next examined whether the Student suffered an adverse act not suffered by one or more comparators without disabilities; was treated more harshly than one or more comparators without disabilities for comparable conduct; or, one or more comparators without disabilities received a benefit that the student did not receive. The documentation established that the Student received a “20” on the Essay. The Student’s Essay was 3 pages long. Due to the fact that many students in the class received poor grades, the Teacher provided all students an opportunity for revision and resubmission of the Essay and to also earn improvement points calculated as 50% of the grade on the subsequent essay added to the original grade. The Student did not revise and resubmit her essay and she earned 37 improvement points from a subsequent assignment, raising the prior “20” to a “57.”

Based on the data, there are no other students in these classes that have been identified as having a disability.

On the Essay first submission, thirteen (13) students without disabilities scored lower than the Student, with ten (10) of those students receiving zero (0). After the resubmission opportunity and addition of improvement points, fifteen (15) students without disabilities still received lower grades than the Student, ranging from zero (0) to a fifty-four (54). Since all students in the class

were offered an equal opportunity to revise and resubmit the essay and earn improvement points, and students without disabilities received worse grades than the Student, OCR was unable to identify a comparator to demonstrate that the Student was treated differently on the basis of disability. During a follow-up interview with OCR, the Complainant alleged that students who received negative grades initially and had their grades rounded up to zero (0) equated to those students having points added. The Complainant alleged that rounding negative grades to a zero (0) was inequitable to students that received positive grades on the Essay. OCR finds this to be unpersuasive because the School did not enter any grades as a negative number in the grading system. Additionally, any students without disabilities with positive grades would, similar to the Student, not receive the alleged benefit of “having points added.” Based on a preponderance of the evidence, OCR cannot substantiate that the Student was subjected to different treatment based on disability when she was issued a bad essay grade. Therefore, there is insufficient evidence that the District is in noncompliance with 34 C.F.R. § 104 as it relates to this allegation.

### *Final Grade*

The Complainant alleged that the Teacher did not “give the Student as much of a boost in her final grade average” as other students in the class. She specified that the Student’s “average up to the final exam was a 58. . . she received a final exam grade of an 81,” and “her grade average increased 9 points to a 67.4.” She alleged that “other students got a greater average increase for the semester,” and provided an examples of a student that received “an increase of 38 points” on their final grade for the class. The Complainant alleged this was different treatment on the basis of disability.

OCR found that the first and second nine (9) weeks average together constituted 80% of the course grade. The final exam constituted 20% of the course grade. Every assignment in the eighteen (18) weeks had a maximum point value. The calculation for students in the eighteen (18) weeks was the sum of all earned points as the numerator and the sum of all assignments’ maximum points as the denominator. Grades with a decimal of .5 and above were rounded up.

OCR calculated that the Student earned a seventy (70) for the first nine (9) weeks, a fifty-eight (58) for the second nine (9) weeks, and a final exam grade of eighty-one (81), which resulted in a final semester average of sixty-seven point four (67.4) that was recorded as a “67.” No other students in the Complainant’s class have been identified as having a disability. OCR calculated the averages for all other students in the Student’s class and did not find a difference between the calculated grades and the recorded grades, except for two (2) students. For the first student, OCR calculated the final semester average as a 78.8, however, this student’s grade was recorded as a 78. This student was treated less favorably than the Student, as their grade should have been rounded up to a seventy-nine (79). OCR calculated the second student’s final semester average as a forty-nine (49), but was recorded as a fifty (50). However, the one (1) point did not confer a benefit that the Student did not receive since it was a failing grade based on the District’s grading scale.<sup>4</sup> Based on the foregoing, the second student’s grade increase of one (1) point did not produce any benefit to this student. OCR finds it cannot substantiate that the Student was subjected to different treatment based on the calculation of her final semester grade in the class.

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<sup>4</sup> See: [http://www.lcschools.org/uploaded/Departments/Human\\_Resources/Parent-Student\\_Handbook\\_2016-2017\\_\(1\).pdf](http://www.lcschools.org/uploaded/Departments/Human_Resources/Parent-Student_Handbook_2016-2017_(1).pdf) at Section 3.19. (Last accessed by OCR on 5/7/2017).

Therefore, OCR finds insufficient evidence of different treatment against the Student as it relates to this allegation.

### *Inconsistent RtI*

The Complainant alleged that when she learned of the Student's Essay grade, she requested documentation of the RtI provision for the Student in that class, but was not given any documentation. The Complainant also alleged that when she asked, during a meeting about the provision of RtI and assistance provided to the Student, the Teacher said she did not provide assistance consistently for the Student because "she didn't have time . . . because of all the students in the class. . . she didn't have differential instruction or written instruction to send home for the Student, and didn't want to call the Student up to the front of the class for assistance because it would embarrass her."

OCR finds that the Student's Intervention Plan contained only one intervention stating that the "student and parent will receive weekly emails with daily assignments" to achieve a goal of "improv[ing] time management skills." No witnesses supported that the Student was supposed to receive the sorts of assistance alleged by the Complainant through RtI unless it was written in her plan. Furthermore, the evidence establishes that the Teacher provided this RtI intervention by creating a Google document that was accessible by both the Complainant and the Student, and she updated the assignments, "each day as [she] tweaked the lesson plans for the week." She believed that the Google Document would provide automatic email notices when it was updated, and the document updates in real time and is accessible at any time. The Complainant received an invitation to collaborate on this document, but confirmed to OCR that she never did so. The sharing settings for the Google document included the Student's email and was "only accessible by collaborators," indicating the Student accepted her invitation.

Based on a preponderance of the evidence, OCR finds that the Student was not provided inconsistent RtI assistance of differential or written instruction and individualized assistance as alleged, and that the Teacher provided an effective means of notice of assignments. Therefore, OCR finds insufficient evidence of that the Student received inconsistent RtI as alleged.

### *Dismissal from School*

The Complainant alleged the Student was an out-of-district student who received a letter mailed on December 27, 2016, dismissing the Student from the School District. She further alleged that on December 16, 2016, she met with the Principal and Guidance Counselor and discussed the Student's dyslexia and potential accommodations. According to the Complainant, the Principal read the District's out-of-district student policy and said, "any out of district student may be dismissed, for any reason, and at any time." She stated that the Principal told her she was "welcome to withdraw her and take her to XXXXX High School... because they might have something to offer them." She alleged that this dismissal was discrimination on the basis of disability.

OCR examined whether the Student was treated differently based on her disability. The evidence shows that on December 27, 2016, the Principal sent a letter to the Complainant stating

her address was “outside of XXXX’s School’s (sic) district,” and instructed her to “make appropriate plans for [the Student] to attend the school assigned to [her] current address for the second semester.” The evidence established that numerous out-of-district students were permitted to remain at the School during the 2016-2017 school year and students without disabilities withdrew or transferred from the District. The Student was the only student that was involuntarily dismissed during the 2016-2017 school year. A preponderance of the evidence supports that the Student was treated differently than similarly situated students when she was dismissed.

OCR next examined whether the District articulated a legitimate nondiscriminatory reason for the Student’s dismissal. During interviews, the Principal stated that the Student was dismissed because he felt like the school “could not provide the services her mother was demanding,” and because the Complainant indicated the student’s zoned school district could “[meet] her accommodations.” As detailed above, the District is required to evaluate a student it suspects may have a disability for eligibility under Section 504, and when a student is found eligible, to provide regular or special education and related aids and services. Uncertainty about the school’s ability to provide services does not absolve the District of this responsibility.

The District dismissed the Student in direct opposition to its legal obligations to appropriately evaluate the Student and, if eligible, provide her a free and appropriate public education. OCR finds the District did not have a legitimate, nondiscriminatory reason for dismissing the Student and treated her differently on the basis of disability when it did so. Therefore, OCR there is sufficient evidence of noncompliance with 34 C.F.R. §104.4 as it relates to this issue.

*Issue 3: Whether the District retaliated against the Student and Complainant by issuing the Student a bad essay grade in XXXX XXXXX class November 2016, disadvantageously calculating her final grade in XXXX XXXXX class, failing to respond to or responding hostilely to the Complainant’s inquiries regarding the essay, final exam grade, and the Student’s RtI in XXXX XXXXX, not providing consistent RtI for the Student in XXXX XXXXX, and dismissing her from the School on December 27, 2016, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, incorporating 34 C.F.R. § 100.7(e) by reference, and the Title II implementing regulation at 28 C.F.R. § 35.134.*

The Complainant alleged that the Student’s Essay grade; inconsistent RtI assistance; the fact that the Student did not receive “as much of a boost in her final grade average;” and, the Student’s dismissal from school were examples of retaliation by the District. The Complainant also alleged that the Teacher retaliated against her when the Teacher was hostile and intimidating towards her during a meeting about the Student’s Essay grade. OCR will examine each of these allegations in turn.

In order to establish a prima facie case of retaliation, OCR must determine that: 1) an individual engaged in a protected activity; 2) the recipient had notice of the individual’s protected activity; 3) the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and 4) there was an inference of a causal connection between the protected activity and the adverse action. If these elements are found to have occurred, OCR then considers whether the reason asserted by the recipient for its adverse action is a pretext for discrimination.

*Prior Protected Activity*

As discussed above, the evidence establishes that on August 22, 2016, the Complainant emailed the School requesting accommodations and a 504 plan for the Student pursuant to ADHD and dysphonetic dyslexia. OCR finds that the Complainant engaged in a protected activity prior to all alleged retaliatory incidents, and that the District had notice of this protected activity.

*Essay Grade*

OCR next considered whether the Student suffered a materially adverse action when she received a 20 on the Essay, as discussed above. The preponderance of the evidence supports that the Student initially received a 20 on the Essay, but that the Student was given an opportunity for re-submission of the Essay and chose not to do so. During a follow-up interview, the Complainant stated that for the grading resubmissions, “if you resubmit it... [the maximum grade] started at a 90 instead of a 100,” and future re-submissions would reduce the maximum possible grade by 10 points per resubmission. The Complainant reasoned that “if [the Student] had resubmitted it, she would have had a 10.” The Complainant stated that the “Grammar Checker” the Teacher recommended and the Student used on her essay “came back with very few errors, and she thought based on that, she would come out better by not resubmitting it.” In an interview with OCR, the Teacher stated that the resubmission opportunity occurred “prior to [the essays] being graded officially.”

The Title VI regulations, incorporated by reference in the regulations under Section 504, provide that no recipient or other person shall, “intimidate, threaten, coerce, or discriminate against” any individual for a protected activity. The term discriminate includes treating someone differently than others. When considering whether an action was materially adverse, OCR considers whether it was likely to dissuade a reasonable person in the Complainant’s position from pursuing or exercising a right or privilege secured under the statutes or regulations enforced by OCR.

OCR finds the essays were not graded officially until after the resubmission opportunity and the Student did not revise and resubmit her Essay. OCR also finds the Complainant’s argument that the Student would receive a grade of “10” or could potentially do worse on the resubmission to be unpersuasive. OCR finds that a reasonable person in the Complainant’s or Student’s position would feel that review and revision of the Essay would, in most cases, correct errors, refine content, and present a chance for a higher grade regardless of the outcome of putting the Essay into the recommended grammar checker. Finally, OCR finds that the Student was not discriminated against because multiple students received worse initial grades than the Student, and revision, resubmission, and improvement points were provided to all students. For all of these reasons, OCR finds that a reasonable person in the Complainant’s or Student’s position would not be likely to be dissuaded from pursuing or exercising their rights due to the Student’s initial grade, and this it did not constitute a materially adverse action for purposes of retaliation. Therefore, there is insufficient evidence that the District is in noncompliance with 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134 as it relates to this allegation.

*Final Grade Calculation*

OCR next considered whether the Student suffered an adverse action when she did not receive “as much of a boost” as other students as alleged. As discussed above, OCR finds that the Student was not provided a “boost” in her final semester average, other students generally did not receive any alleged “boost,” and that only one other student from her class received a one point boost.

OCR examined whether this other students’ receipt of one point would have intimidated, threatened, coerced, or discriminated against the Student and the Complainant. This action is not overtly intimidating, threatening, or coercive. OCR finds that this one point increase did not result in any actual benefit to this other student, who still received a failing grade as discussed above. OCR also finds that no other students received a similar point increase either. Therefore, OCR finds that this action was not likely to dissuade a reasonable person in the Complainant’s position from pursuing or exercising a right or privilege secured under the statutes or regulations enforced by OCR. Based on the foregoing, OCR finds insufficient evidence that the Student suffered a materially adverse action of inconsistent RtI, as alleged. Therefore, there is insufficient evidence that the District is in noncompliance with 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134 as it relates to this allegation.

*Inconsistent RtI*

OCR next considered whether the Student suffered a materially adverse action when the Teacher provided the Student with inconsistent RtI. As discussed above, OCR finds that the Student was not supposed to receive RtI assistance of differential or written instruction and individualized assistance as alleged, and for her intervention written in the plan, the Teacher provided a means of notice of assignments that was updated in real time. Based on the foregoing, OCR finds insufficient evidence that the Student suffered a materially adverse action of inconsistent RtI, as alleged. Therefore, there is insufficient evidence that the District is in noncompliance with 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134 as it relates to this allegation.

*Hostile Response to Grade Inquiries*

The Complainant alleged that after the Essay grade, the Complainant emailed the Principal regarding the Teacher’s grading methodology and asking for documentation of the provision of the Student’s RtI. The Complainant alleges that her inquiries were met with a response from the Teacher asking to talk about the Essay grade. The Complainant alleged that they had a meeting where the Teacher notified the Complainant that the Principal had forwarded the Complainant’s emails to her, stated that the Complainant’s emails were scathing, that the Teacher was intimidating, told the Complainant she had it “up to here” with her, was angry, and that she felt intimidated. The Complainant stated that when she suggested they get a mediator, the Teacher eventually calmed down. The Complainant alleged that the Teacher retaliated against her when she was intimidated her at this meeting.

OCR considered whether the Complainant suffered a materially adverse action of intimidation for purposes of retaliation during this meeting. The Teacher drafted a November 8, 2016, memo

stating that the Complainant was “very confrontational in this meeting, talking over me... cutting me off when I tried to explain her daughter’s performance, and repeatedly insinuating that I was negligent in my duties,” that “she became... irate and disrespectful.” During interviews with OCR, the Teacher denied the allegations, and stated the Complainant was the one who was angry and raised her voice. There was no independent or third party documentary evidence to confirm the allegations or what occurred in this meeting.

In a follow-up interview with OCR, the Complainant offered an audio recording of the Teacher allegedly intimidating the class as corroborating evidence of the Teacher intimidating others. The Complainant stated that in the recording, the Teacher closes the door to her classroom because she does not want the whole school hearing her discussion with her class, and tells her class, “don’t hang me out to dry.” OCR’s review of this audio recording reveals the Teacher did close the door, but did not yell or raise her voice in a hostile manner. In the audio recording, the Teacher stated that she “welcomes people wanting to know about their kids grades... but out of five to six parents that emailed over the first essay grade, they were told un-truths and not told the full story... [and] don’t try to hang me out to dry because you all did not do what you are supposed to do,” regarding putting sufficient time or effort into the essays. OCR finds this statement was used colloquially and there was no threat of adverse action for such “un-truths,” but rather that she would not cover for students and would tell their parents her side of the story. OCR finds this recording does not tend to make it more likely that the Teacher intimidated the Complainant during their meeting. Based on a preponderance of the evidence, OCR finds insufficient evidence to establish that the Complainant suffered an adverse action of intimidation by the Teacher as alleged. Therefore, there is insufficient evidence that the District is in noncompliance with 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134 as it relates to this allegation.

#### *Dismissal from School*

OCR finds that a total removal from the District’s educational programs is likely to dissuade a reasonable person in the same position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. OCR also finds that the dismissal occurred in December of 2016, which was after the Complainant’s requests for a 504 plan. Therefore, OCR finds that the Student suffered an adverse action subsequent to the Complainant’s protected activity.

OCR next examined whether there was a causal connection between protected activity and materially adverse action. A causal connection can be established through direct or circumstantial evidence. As discussed above, OCR found that the Principal acknowledged dismissing the Student because he felt the school could not provide the services the Complainant was requesting. Due to the unambiguous nature of this statement, OCR finds sufficient evidence of direct causal connection between the protected activity and the adverse action. OCR next considered whether the reason asserted by the District for its adverse action was legitimate, or whether it was a pretext for discrimination. Based on OCR’s findings discussed above regarding different treatment, the reasons proffered for the dismissal were not legitimate because they circumvented the District’s duty to evaluate students suspected of having a disability and to provide free and appropriate public education to eligible students under Section 504. Based on a preponderance of the evidence, the District did not have a legitimate, non-retaliatory reason for

dismissing the Student. Therefore, OCR finds sufficient evidence that the District retaliated against the Student when it dismissed her in December 2016, in noncompliance with 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134.

The District has offered to remedy any concerns as a part of the enclosed Resolution Agreement (Agreement), which when fully implemented, will fully resolve the issues in this complaint. The Agreement requires the District to: 1) invite the Student to re-enroll in the District and notify the Student's parent or guardian that the District; 2) if the Student accepts this invitation, to convene an appropriate group of persons to determine whether the Student is eligible under Section 504, and if eligible, determine whether the Student needs compensatory and/or remedial services as a result of the District's failure to conduct an appropriate evaluation; 3) send a letter of apology to the Student for the Student's discriminatory and retaliatory dismissal; 4) reimburse the Complainant for costs incurred for independent psychological evaluation of the Student for ADHD and Dyslexia and for private compensatory or remedial educational services for the Student, including private tutoring, from January 2016 through January 2017 due to the District's delay in conducting an appropriate evaluation; 5) revise its PST and RtI Manuals, policies and procedures, forms, and the Student Handbook to ensure RtI is not used as a pre-requisite that must be exhausted before a Section 504 or IDEA evaluation referral; and 6) provide training to District staff on the obligations to evaluate students suspected of having a disability for eligibility under Section 504 and Title II, and on the prohibitions against disability discrimination and retaliation.

OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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

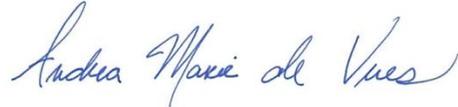
This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant 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. In the event that OCR receives 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.

OCR appreciates the District's cooperation. If you have any questions about this letter, please contact Michael Bennett, General Attorney, at (404) 974-9274.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Marie de Vries". The signature is written in a cursive style with a large initial 'A'.

Andrea de Vries  
Compliance Team Leader

Enclosure

cc: XXXXXXXX (*via electronic mail only*)