



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

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November 8, 2019

VIA ELECTRONIC MAIL ONLY: garrenm@loudoncounty.org

Michael Garren
Interim Director of Schools
Loudon County Public Schools
100 River Road
Loudon, TN 37774

**Re: Loudon County Public Schools
OCR Complaint No. 04-19-1400**

Dear Mr. Garren:

On May 14, 2019, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint filed by the Complainant on behalf of her 12-year-old daughter (Student), a former student at North Middle School. In her complaint, the Complainant alleges that during the 2018-2019 school year, the Loudon County Schools, Tennessee (District) discriminated against the Student on the basis of her disabilities (attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), and intellectual disability) and retaliated against her. More specifically, the Complainant alleges the following:

- The District falsified the test scores in the April 2019 individualized education plan (IEP) and declined to provide the Complainant and her Advocate with the data pertaining to the scores, stating that the Student's previous special education teacher took the data with him when he resigned.
- The Student's previous special education teacher was not qualified to teach sixth grade and special education students.
- The District failed to implement the IEP when it did not provide the Student with science, technology, engineering and mathematics (STEM), gym, and/or library classes.
- The District retaliated against the Student when in April 2019, the Student's teacher yelled at her, made her apologize twice, disciplined her with silent lunch, and threatened to send the Student to the Principal.

OCR investigated the complaint pursuant 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 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, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Individuals filing a complaint, participating in an investigation, or asserting their rights under these laws are protected from intimidation or retaliation. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to the referenced laws. Additional information about the laws OCR enforce is available on our website at <http://www.ed.gov/ocr>.

Based on the complaint and additional information received during clarification telephone conversations with the Complainant, on August 15, 2019, OCR opened for investigation the following legal issues:

1. Whether the District failed to provide the Complainant procedural safeguards when it denied her an opportunity to examine records in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.36, and Title II and its implementing regulation at 28 C.F.R. §35.130.
2. Whether the District denied the Student a free and appropriate public education (FAPE) when it assigned her to a teacher not qualified to teach sixth grade students and students with disabilities in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33(a) and (b), and Title II and its implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District denied the Student a FAPE by failing to implement the Student's IEP, as alleged, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33, and Title II and its implementing regulation at 28 C.F.R. § 35.130.
4. Whether the District retaliated against the Student, as alleged, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61, and Title II and its implementing regulation at 28 C.F.R. § 35.134.¹

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. In its investigation of the above-referenced legal issues, OCR reviewed documentation submitted by the Complainant and the District, including the Student's IEPs, the Student's disciplinary record, other educational records, teacher licenses, District policies, emails between the parties, and information publicly available. Moreover, OCR interviewed the Complainant, her advocate, and several District personnel, and OCR afforded the Complainant an opportunity to rebut the information provided by the District.

¹ 34 C.F.R. § 100.7(e) is incorporated by reference in 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134.

Based on a careful review of all of the information, OCR has concluded that with respect to legal issues 1, 3, and 4, there is insufficient evidence to establish that the District acted in noncompliance with Section 504 and Title II, as alleged. The bases for OCR's determinations are detailed below. Regarding legal issue 2, OCR's investigation to date surfaced concerns regarding the District's provision of FAPE to the Student. Prior to the completion of OCR's investigation on legal issue 2, the District agreed, and OCR determined it was appropriate to resolve this issue with a Resolution Agreement (Agreement) pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*. This letter summarizes the applicable legal standards, the information gathered during the investigation to date, and how the investigation was resolved.

Background - Loudon County School District

The Loudon County School District has nine schools that serve approximately 5,000 students. North Middle School (North Middle or School) is located on the same campus as one of the District's elementary schools and serves around 775 students.

Background – The Student

During the relevant timeframe, the Student was 12 years of age and in the sixth grade at North Middle School. She has ADHD, ODD, and an intellectual disability for which she receives educational services pursuant to an IEP.

While at North Middle, the Student participated in regular and in special education classes. The Student's sixth-grade homeroom class was a special education/comprehensive development class (CDC), where she received direct special education instruction in reading and math. From August 2018 through February 2019, the Student's CDC class was taught by an individual (Teacher 1), who left the employ of the District in February 2019. Effective February 22, 2019, the District promoted a paraprofessional to the position of teacher (Teacher 2), and she assumed responsibility for the Student's special education/CDC class at that time. Two paraprofessionals (Paraprofessionals 1 and 2) were assigned to the class.

Legal Issue 1: Whether the District failed to provide the Complainant procedural safeguards

The Complainant alleges that the District falsified certain test scores listed in the Student's April 2019 IEP. She told OCR that (a) the test scores listed in the April 2019 IEP were the same as those previous IEPs; (b) the Student's reading fluency increased from second grade to fourth grade; (c) the Student's math test scores went from pre-Kindergarten to first grade; (d) she had observed the Student's reading ability, which is inconsistent with the test scores; (e) District personnel told her that Teacher 1 took the Student's test data when he resigned; and, (f) a District staff person told her that the District had not tested the Student and had merely indicated that the Student had progressed from a first grade level to a third grade level. The Complainant further alleges that the District refused to provide her with access to the data pertaining to the test scores referenced in the IEP. In response, the District asserts that it did not falsify the test scores, that it provided the Complainant with copies of all requested documents, and that it does not provide copies of the standardized tests at issue.

Legal Standards

The Section 504 regulation, at 34 C.F.R. §104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

Section 504's implementing regulation at 34 C.F.R. §104.36 requires a recipient that operates a public elementary or secondary education program or activity to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of a disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the student to examine relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel, and a review procedure.

Factual Findings

Allegation – Falsified Test Results

The evidence reveals that on April 2, 2019, the parties participated in an IEP meeting during which the team discussed a draft IEP that District personnel had previously provided to the Complainant.² According to the Complainant, in the meeting, her advocate asked for access to the data pertaining to the standardized test scores listed in the draft IEP. According to the Complainant, the District provided her with copies of data from recent testing administered by Teacher 2, but not for testing administered by Teacher 1. At the conclusion of the meeting, the team members, including the Complainant and her advocate, executed the IEP.

After the meeting, according to the Complainant, District personnel told her and her advocate that data from testing administered when Teacher 1 taught the Student's special education/CDC class was not available because Teacher 1 had taken the data with him when he resigned. The Complainant's advocate recalled that they were told that District personnel could not access the data because the information was under Teacher 1's username and password. According to the Complainant, in a later telephone call, the District's Special Education Supervisor (SPED Supervisor) also said that Teacher 1 had taken the tests he had administered to the Student and said that the District did the best it could.

As part of its investigation, OCR interviewed various District personnel. The SPED Supervisor denied saying that Teacher 1 had taken any data. The SPED Supervisor also said that based on her experiences with the teachers at issue, she did not believe that the Student's results had been

² The District's template cover letter for draft IEPs states that the draft is just a proposal.

falsified. Teacher 1 denied taking any test data or District equipment with him upon his resignation, and he denied that any tests had been falsified under his administration. Teacher 3, a more experienced special education teacher whose classroom was next to the Student's class and who provided guidance to Teacher 2, told OCR that she explained the test results at the April 2, 2019 IEP meeting. Teacher 3 had worked with Teacher 2 to prepare the draft IEP. Teacher 3 told OCR that the SPED Supervisor did say that Teacher 1 had taken or discarded some of the testing documents. At the SPED Supervisor's request, Teacher 3 said that she engaged in a search for missing testing data and found all data except for the AIMSweb protocols.

Woodcock-Johnson III Test Results

The Student's September 2018 and April 2019 IEPs indicate that the District administered the Woodcock-Johnson III assessment to the Student on September 13, 2018 and again on March 27, 2019. District personnel told OCR that the Woodcock-Johnson III test measures academic performance and that school personnel are expected to update a student's present levels of performance (PLOP) prior to each IEP meeting. The April 2019 and September 2018 IEPs list the Student's Woodcock-Johnson III test results as follows:

Assessment Areas	Test Administered on 9/13/18	Test Administered on 3/27/19
Math Calculation	Grade Equiv. – 1.9	Grade Equiv. - <K.2
Reading Comprehension	Grade Equiv. – 2.7	Grade Equiv. – 2.7
Reading Fluency	Grade Equiv. – 2.8	Grade Equiv. – 4.7

As noted in the illustration above, the evidence establishes that the Student scored 2.7 on both the September 2018 reading comprehension assessment (administered by Teacher 1) and the March 2019 reading comprehension assessment (administered by Teacher 3). Documentary evidence indicates that on the September 2018 test, the Student answered 24 questions correctly, which per the computer-generated scoring table is a grade equivalent of 2.7. Teacher 1 denied falsifying any test results. On the March 2019 test, the Student also answered 24 questions correctly. The Student did not answer the same questions the same on both tests.³ Teacher 3 told OCR that for the March 2019 test, she put the scores into the computer system and placed the scores into the April 2019 IEP. Teacher 3 denied falsifying test results. Teacher 3 stated that the fact the Student's reading comprehension scores for the September 2018 and March 2019 tests are the same (that is, 2.7) was not usual and not an indication of falsification.

With respect to the Student's reading fluency test scores, the evidence establishes that on the March 2019 test, the Student answered 42 questions correctly and zero incorrectly. Previously, on the September 2018 test, the Student answered 30 questions correctly and four incorrectly for a total of 26 points. The scoring tables indicate grade equivalencies of 2.8 for 26 points and of 4.7 for 42 points.

Regarding the Student's almost two-grade level increase in reading fluency (from 2.8 to 4.7), the SPED Supervisor opined that the Student's increased reading fluency score could be explained by the fact that the Student had been in school less than a month when she took the initial test in

³ The Student attempted to answer 35 questions on the September 2018 test and 38 questions on the March 2019 test. She answered Question 10(B) correctly on the September 2018 test but did not do so on the March 2019 test.

September 2018. She further said that by March 2019 (when the Student was tested a second time), the Student had been in school for more than six months and was more cooperative from a behavioral standpoint.

On this same point, Teacher 3 stated that at the beginning of the school year, the Student was placed into a small reading intervention class, during which the Student concentrated on reading fluency. For the six to seven months prior to the March 2019 test, the Student worked on reading every day, and as a result, she said the Student made gains in reading fluency. Teacher 3 also said that the Student's increased score was not an indication of falsification. Similarly, Teacher 2 told OCR that she did not know how the tests results could have been falsified.

On rebuttal, the Complainant stated that she was unaware of the Student being placed in a reading intervention class. Her advocate said that six months in a reading intervention class would not have resulted in such a big increase in scores and she found the increase “*odd*.”⁴

AIMSweb Test Results

The Student's IEPs reveal that the District administered various versions of another test, the AIMSweb,⁵ to the Student on August 17, 2018, February 1, 2019, and March 1, 2019. Unlike the Woodcock-Johnson test, which is administered yearly, the AIMSweb test is administered more frequently, generally each month. The Student's IEPs list the following results for the AIMSweb tests administered to the Student:

Assessment Areas	Tests Results Listed in the Final April 2019 IEP	Test Results Listed in the Draft April 2019 IEP
Reading Comprehension	Number correct – 19 Number incorrect – 9 (test administered on 2/1/19)	-----
Reading Fluency	WPM ⁶ – 84 Errors – 2 (test administered on 2/1/19)	WPM – 61 Errors – 2 (test administered on 2/1/19)

Assessment Areas	Tests Results Listed in the March 18, 2019 Addendum	Test Results Listed in the Draft September 21, 2018
Reading Comprehension	Number answered – 19 Number correct – 9 (test administered on 8/17/18)	Number answered – 19 Number correct – 9 (test administered on 8/17/18)
Reading Fluency		WPM – 61 Errors – 2 (test administered on 8/17/18)

⁴ The September 2018 IEP states that the Student “*will receive intervention in the special education setting for reading....*”

⁵ According to information publicly available, AIMSweb® Curriculum-Based Measurement measures take between 1–10 minutes. The testing is administered paper/pencil style; Testing is done individually or in groups, depending on the measure; and Scores are entered or uploaded into the AIMSweb system.

⁶ WPM stands for “words per minute.”

As shown in the illustrations above, the documentary evidence establishes that on the August 2018 reading comprehension assessment, the Student answered 19 questions, and nine of her responses were correct. On the February 2019 assessment, the Student answered 28 questions. Out of the Student's 28 answers, 19 of them were correct, and nine were incorrect.

Finally, the April 2019 IEP indicates that the Student received a score of 84 WPM and 2 errors on the reading fluency portion of the test, which the District administered to her on February 1, 2019. For the same test, however, the April 2019 draft IEP lists a different score (61 WPM and 2 errors), which is the same score the Student received on the test administered to her in August 2018. About these apparent discrepancies, Teacher 3 reiterated that the draft April 2019 IEP was a draft document only. She explained that the computer system, which the District uses to generate the IEPs, automatically maintains the old test scores in the system until manually changed by the user. She said that the results for the February 2019 reading fluency test may not have been inputted or updated at the time the draft version of the April 2019 IEP was created. According to Teacher 3, the draft may have included the Student's previous scores and that the final IEP was different from the draft version were not an indication that test results had been falsified. Upon rebuttal, the Complainant recalled that the SPED Supervisor had stated that the different tests scores for the same test had been a clerical error.

Concerning the Complainant's allegations and the AIMSweb testing, OCR also interviewed the paraprofessionals, who were assigned to the Student's CDC/special education class. Paraprofessional 1 denied telling the Complainant that the District had not actually tested the Student. Also, contrary to the Complainant's assertion, Paraprofessional 1 denied indicating anywhere that the Student had progressed from a first-grade to a third-grade level in any academic area. Paraprofessional 1 said that she had personally administered some of the AIMSweb assessments to the Student and told OCR that she would never falsify student test results. Paraprofessional 2 told OCR that Teacher 1 had failed to administer any AIMSweb tests to the Student. She stated that as a result, in April 2019, School personnel administered to the CDC students numerous AIMSweb tests, as many as 10 tests a day, whereas normally, students would take one AIMSweb test per month. Paraprofessional 2 said that administering 10 tests to students, possibly including the Student, in one day would lead to inaccurate results. Paraprofessional 2 was not able to specify why and how the results would not be accurate under the described circumstances and was not sure how the results were inputted into the system.

Allegation – Refusal to Provide Copies

The District has a Student Records Policy (6.600) that provides for the release of information for student records when a parent gives written consent for the disclosure. Parents may obtain copies of any records disclosed under this provision. The District's Use of Student Records Policy (6.603) contains similar release provisions.

The District's Special Education Manual states that once IEP team members execute an IEP, parents should receive copies of the IEP and any requested assessment information discussed in the meeting or pertaining to the IEP development. The District's practice is to provide parents with access to student assessment results and not to assessment protocols and progress monitoring probes. According to the District, the assessments used in special education evaluations are static

and unchanging, and release of those test items could result in public overexposure and possible tutoring related to the specific test items. The District also signs copyright agreements with the companies that provide the testing materials and understands that external distribution of protocols and probes would violate its agreement with the vendor of the assessment and progress monitoring tools.⁷

The Complainant told OCR that she and her advocate asked for the data behind the test scores listed in the April 2019 IEP to no avail. Specifically, the Complainant wanted the data for the tests administered when Teacher 1 taught the Student's CDC/special education class. On rebuttal, the Complainant told OCR that the District had provided her summaries of the data that she requested, namely, the 2018-2019 AIMSweb progress monitoring improvement reports.

Consistent with the Complainant's recollection, Teacher 3 told OCR that in the April 2019 IEP meeting, the Complainant and the Advocate did ask for copies of all the testing that the School had done and the TCAP test. Teacher 3 said that she made copies of everything that they asked for that afternoon during her planning period and gave the copies to the Complainant that afternoon when she arrived to pick up the Student. She recalled providing the Complainant with copies of documents on three or four different occasions.

The SPED Supervisor and Teacher 2 recalled that the Complainant and her Advocate did not ask for copies of documents at the April 2019 IEP meeting. Rather, they recalled that after the April 2019 IEP meeting, the Complainant requested copies of documents, which the District provided her. On this point, documentary evidence reveals that on April 17, 2019, the Complainant emailed Teacher 2 requesting copies of all testing done with the Student and all data. The next day, she clarified that she wanted "*all recent testing and data that has been done on [the Student].*" Later that day, Teacher 2 responded, stating that:

Ms. ... is working to make the copies you have asked for from [the Student]'s last IEP. I wish your previous advocate was not charging you to return the material you gave her, but our school's personnel will get new copies for you so you do not have to pay the fee.

About two weeks later, on May 3, 2019, the Complainant emailed Teacher 2, "*I am requesting a copy of [the Student]'s Final IEP with the signature page. When I asked last time, I was given a draft copy with the data.*" A few days later, on May 6, 2019, Teacher 2 wrote, "*I had that for you Friday afternoon, but you picked [the Student] up early....I will hand it to you today along with the draft you had.*" In an August 15, 2019 email to the SPED Supervisor explaining what had occurred, Teacher 2 wrote, in relevant part:

[Teacher 3] put the packet together. I handed the packet to the student's mother. She gave it to her child's advocate. [Teacher 3] made another copy for the parent so she did not have to pay to get

⁷ About this, the advocate told OCR that in her experience, school districts will not provide copies of a student's actual Woodcock-Johnson test. She said that other school districts do provide copies of the AIMSweb tests, because it is merely a story read by the student. The SPED Supervisor indicated that she reached out to 10 neighboring districts, which all responded that they do not provide parents with copies of test protocols or progress monitoring probes.

her copy back from the advocate. I handed it to her that afternoon....

Analysis and Conclusions

In short, the Complainant alleges that the District falsified some of the test results listed in the April 2019 IEP. OCR carefully considered each of the reasons that the Complainant provided in support of her allegation and meticulously reviewed the record evidence.

The documentary evidence shows that while the Student did score 2.7 on both the September 2018 test and March 2019 tests and answered 24 questions correctly on each, she did not answer the same 24 questions the same, which does not support the allegation of tampering. Additionally, witnesses denied falsifying any tests. As for the increased Woodcock-Johnson reading fluency score from 2.8 to 4.7, the evidence reveals that the Student was enrolled in a reading intervention class between the administration of the two tests and the increased time and emphasis on reading could explain the increased score. While the Complainant found that explanation unconvincing, OCR notes that the record is void of evidence showing that these results were altered or not the Student's true test results. About the score discrepancy in the draft and final IEPs, the evidence reveals that the draft IEP was intended to be a non-final document and the scores in the draft were likely clerical errors that had not been updated from the last IEP. Lastly, the paraprofessional denied the remarks attributed to her by the Complainant, and the former teacher denied taking any data or equipment when he resigned. Based on a preponderance of the evidence, OCR is unable to conclude that the District falsified test results, as alleged.

With respect to the Complainant's allegation that she requested copies of the data behind the tests administered during Teacher 1's employ and which were listed in the April 2019 IEPs, OCR finds that there is insufficient evidence to conclude that the District violated Section 504 and Title II. The applicable Section 504 and Title II regulations do not require school districts to provide copies. Rather, districts are required to implement procedural safeguards that include an opportunity for parents and guardians to examine educational records. Evidence shows that the recipient sufficiently complied with the Complainant's requests. Accordingly, OCR cannot conclude that the District failed to comply with Section 504 and Title II, as alleged.

Legal Issue 2: Whether the District denied the Student a FAPE when it assigned her to a teacher not qualified to teach sixth grade students and students with disabilities.

The Complainant told OCR that Teacher 1, who taught the Student's special education/CDC class from August 6, 2018 to February 27, 2019, did not have a special education endorsement and did not have an endorsement to teach sixth grade students. In response, the District asserted that Teacher 1 was qualified to teach his assigned students.

Legal Standards

The Section 504 regulation at 34 C.F.R. §104.33(b)(1) that 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 students with disabilities as adequately as the

needs of students without disabilities are met. Appendix A of the Section 504 regulation, in discussing the requirements of 34 C.F.R. §104.33(b)(1), states that the quality of educational services provided to students with disabilities must equal that of services provided to students without disabilities and that, as such, the teachers of students with disabilities must be trained in the instruction of persons with the disability in question.

Investigation Thus Far

The Tennessee Department of Education (TNDOE)'s office of Educator Licensure and Preparation is responsible for the issuance of Tennessee educator licenses. The office's procedures provide for provisional special education endorsements. With a provisional endorsement, an educator may teach in a special education classroom for three years while pursuing the relevant endorsement. The District's website states that its "*teachers ... are 100% highly qualified as mandated by the state department of education.*"

At the beginning of the 2018-2019 school year, the District hired Teacher 1, the sole applicant for the School's special education teacher vacancy. Teacher 1 was working on his master's degree in special education. Teacher 1 had a May 2018 bachelor's degree in education and a May 2016 associate degree in teaching. Teacher 1 had approximately one year of experience working as an educational assistant in an elementary CDC classroom, and he had an elementary education endorsement to teach students in grades K-5.

Upon his employment, the District assigned Teacher 1 to provide direct special education services to the Student in the areas of reading and math. The District provided Teacher 1 with additional supports and resources including a mentor, a licensed special education teacher, and a special education compliance mentor, who is a speech language pathologist. In addition, Teacher 1 met monthly or more with CDC level teachers employed at other schools to collaborate on best practices in instruction and behavior management of severely disabled students. About Teacher 1's ability to teach sixth graders with a K-5 endorsement only, the District has asserted that he was certified to teach the Student's grade level equivalents. The SPED Supervisor told OCR that Teacher 1, having a K-5 endorsement, was legally allowed to teach sixth grade students because the School included a fifth grade. The Principal provided similar testimony. Teacher 1 resigned in February 2019.

Pursuant to the Student's September 21, 2018 IEP, during the 2018-2019 school year, the Student was to receive instruction in math and reading by special education personnel. More specifically, on a weekly basis, a special education teacher was to provide the Student with five sessions of reading and five sessions of math for a combined total of 15 hours. Though the Student's report card shows that she passed all of her courses, other evidence indicates that the Student's math calculation abilities decreased from a grade equivalent of 1.9 (her score on the September 2018 math calculation portion of the Woodcock-Johnson test) to a grade equivalent of less than K.2 (her score on the March 2019 math calculation portion of the Woodcock-Johnson test).⁸

⁸ District personnel told OCR that the test results indicated that the Student's math calculation abilities were lower than a kindergarten student in his/her second month.

Analysis and Conclusions

OCR's investigation to date indicates that Teacher 1 had a K-5 endorsement and that for the 2018-2019 school year through his resignation in February 2019, he taught the Student, a sixth-grade student, reading and math in a special education setting. Testimony from District personnel establishes that with a K-5 endorsement, Teacher 1 was able to teach sixth graders under the circumstances.

OCR's investigation to date further indicates that the Student's IEP mandated that she receive educational instruction in the subjects of math and reading by a special education teacher. OCR's investigation to date further reveals that the TNDOE rules allow teachers to work as special education teachers with provisional special education endorsements. While Teacher 1 had relevant coursework and some experience, was working on a master's degree, and had been assigned a mentor, Teacher 1 did not have a provisional or other special education endorsement, as required by the TNDOE. The initial findings indicate that Teacher 1 was not a qualified special education teacher.

Before OCR completed its investigation, the District agreed to a voluntary resolution agreement to resolve the allegation. To complete its investigation, OCR would need additional evidence to determine if Teacher 1 was in fact qualified to teach sixth grade students and to determine whether the Student's educational progress was inhibited as a result of being taught for approximately six months by Teacher 1, an uncertified special education teacher.

To remedy this legal issue under investigation, on November 8, 2019, the District signed an Agreement consenting to: (1) have a group of knowledgeable persons, including the Student's parent(s), will convene an IEP meeting to determine whether the Student requires compensatory and/or remedial services for any alleged failure by the District to provide the Student a FAPE during the timeframe when it may have assigned her to a teacher not qualified to teach sixth grade students and did assign her a teacher not qualified to teach students with disabilities during the 2018-2019 school year, and if so, develop a plan for providing timely compensatory and/or remedial services; (2) provide training to District and School personnel, who have responsibility for hiring special education teachers, on the following: (a) the State of Tennessee's requirements for provisional special education endorsements for teachers; and (b) the Section 504/Title II requirements that Districts provide FAPes to students with disabilities by implementing their Section 504 plans or IEPs that require instruction by qualified special education teachers.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and are consistent with applicable regulations. When fully implemented, the Agreement will address the complaint allegations. OCR will monitor the implementation of the Agreement.

Legal Issue 3: Whether the District denied the Student a FAPE by failing to implement the IEP

The Complainant alleges that the District did not follow the Student's IEP because the Student did not have gym, STEM, or library classes. She told OCR that the Student had STEM class once and

gym class a few times at the beginning of the year. The District alleges that it is properly implementing the Student's IEP.

Legal Standards

The District's failure to implement aids, services, accommodations, or modifications identified in the IEP of a student with a disability may deny the student a FAPE and, thus, violate Section 504 and Title II. Yet, not every failure to implement an aid, service or accommodation/modification in an IEP automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the student's ability to participate in or benefit from a school district's services, program and activities.

Factual Findings

The evidence establishes that the School has nine special area class offerings (referred to as "specials"), including STEM (where students build robots and perform experiments), art, physical education, guidance, and music, through which the students rotate over the course of four nine-week terms. Students are enrolled in two specials during each nine-week period. Specials are 45-minutes in length and are taken daily by the students. School personnel, not parents, dictate the scheduling of specials. For the 2018-2019 school year, the Student's schedule lists the following specials: art and PE in Term 1; Guidance and PE in Term 2; art and Guidance in Terms 3 and 4.

"Program Participation" Section of the IEPs

The evidence establishes that the Student's September 2018 IEP lists under the "*Program Participation*" section of the document the following programs: reading, english/language arts, math, science, social studies, physical education (PE), music/art, lunch, library, and guidance. The April 2, 2019 IEP (which indicates that it is effective through April 2020) includes STEM under the "*Program Participation*" section.

On these issues, District personnel told OCR that the "*Program Participation*" section of a student's IEP allows the student and District flexibility in that if the student participates in any of the referenced classes, the student would be appropriately accommodated. Teacher 3 said that it would be inefficient to convene an IEP meeting every time a schedule change occurred and a student found him/herself in an unexpected special areas class. Likewise, Teacher 1 told OCR that he put specials and any necessary accommodations for said classes in IEPs so that if the District did place a student into one of the listed specials, they would not have to reconvene the student's IEP team. To the contrary, the Complainant told OCR that the "*Program Participation*" portion of the IEP is the Student's schedule, and her advocate mirrored her understanding of this part of the IEP. The Complainant said that she understood that the programs listed in the IEP were the programs in which the Student is participating or will participate. The advocate said that this section meant that the District would place the Student in the listed programs at some point during the IEP year.

Art Class

About Art, one School official recalled that in the September 2018 IEP meeting, it was discussed that the Student was a fan of art and that it was a way for her to express frustration. That official remembered the Student's counselor recommended Art class for the Student. Likewise, another School official said that the Complainant requested that the Student be placed in Art class and said that the Student seemed to thrive in the class. On rebuttal, the Complainant denied that she requested the District place the Student in Art.

PE Class

About PE, one of the paraprofessionals, whom OCR interviewed, reported physically taking the Student to PE. Teacher 2 also recalled the Student attending PE and said the Student visited the library when in Guidance class. Teacher 2 also indicated that there was a small library in the CDC classroom. The SPED Supervisor told OCR that the Student and her CDC class were permitted to visit the library frequently.

STEM Class

With respect to STEM class, Teacher 2 told OCR that on occasion, she took the Student to STEM but the Student was not assigned to STEM, where the students work with computers and more expensive equipment. Teacher 3 told OCR that while the Complainant did complain about the Student not having STEM, the STEM class for the Student's grade level was the same time as the social studies or science class that the Student attended. Teacher 3 told OCR that she listed STEM in the Student's IEP, in the event the front office happened to place the Student in STEM. She explained that in April 2019 (when STEM was added into the IEP), it was not contemplated that the Student would be enrolled in STEM until the 2019-2020 school year, as the last nine-week period for the 2018-2019 school year had commenced in March 2019 (prior to the April 2019 IEP meeting).

According to the District, the addition of the STEM class to the April 2, 2019 IEP was program planning for the upcoming school year as the IEP is in effect from April 2, 2019 to April 2, 2020. For fall 2019, the Student is not enrolled in STEM, but she is scheduled to be enrolled in STEM in spring 2020.

On rebuttal, the Complainant said that if the addition of STEM to the April 2019 did not mean that the District would place the Student into STEM immediately, the District would not have had the STEM teacher participate in the April 2019 IEP meeting. In response, the SPED Supervisor stated that in the mornings, the CDC students took turns walking through the STEM lab to look at the baby chickens and at the robotic creations made by students. The STEM teacher was trying to develop a relationship with those students because he was frequently involved with that class in the gym and at recess. Also, Teacher 2 felt that the Student had a growing fondness for the STEM teacher, and the Student was scheduled to attend STEM classes in the fall 2019 semester. The School was then unaware the Student would change schools in the coming year and not attend the STEM teacher's class.

Analysis and Conclusions

OCR concludes that the preponderance of the evidence establishes that the Student attended PE and library during the 2018-2019 school year. District witnesses recalled taking the Student to PE and recalled the Student visiting the library. Furthermore, the Student's specials schedule lists PE. OCR further concludes that the evidence shows that the September 2018 IEP did not list STEM. Thus, the District certainly could not have breached any obligation to place the Student in a STEM class during the seven-month period from September 2018 through April 2019, as STEM was not listed in the September 2018 IEP. Additionally, the evidence establishes that the Student will be enrolled in a STEM class at her new school within the effective period of the April 2019 IEP (namely, through April 2020). Accordingly, OCR finds that a preponderance of the evidence does not establish that the District failed to implement the Student's IEP, as alleged.

Legal Issue 4: Whether the District Retaliated against the Student

The Complainant's final allegation is that the District retaliated against the Student when in April 2019, Teacher 2 yelled at and disciplined the Student by giving her silent lunch and by having her write a statement of apology. The Complainant alleges that Teacher 2 engaged in retaliation because the Complainant brought a private advocate to the April 2019 IEP meeting and because shortly thereafter the Complainant requested a copy of the final IEP. The District denies that Teacher 2 acted with retaliatory animus and asserts that the consequences received by the Student were not formal discipline.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, 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.

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 an 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.

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.

Factual Findings

The investigation establishes that prior to the April 2019 IEP meeting, the Complainant brought an advocate to at least two other IEP meetings at the School and that as noted in preceding sections of this letter, the Complainant participated in the April 2, 2019 IEP meeting with an advocate. It is undisputed that Teacher 2 attended the April 2, 2019 meeting.

The Complainant told OCR that about a week after the April 2, 2019 IEP meeting, the Student informed her that Teacher 2 had been mean to her. The Student reported that she had accidentally stepped on another School official's feet and that as a result, Teacher 2 had disciplined the Student with two days of silent lunch and had the Student write twice, *"I called Ms. Brown a liar and stepped on Mrs. Janice's foot. I'm sorry."* The Student also reported that Teacher 2 told her that if she (the Student) passed out, she would send the Student to the Principal. The Complainant said that when she emailed her concerns, Teacher 2 responded by claiming that she sent the Student to the office for medication. The Complainant informed OCR that the Student does not take medication at school. According to the Complainant, the Student was traumatized by this incident and so fearful of Teacher 2 that the Complainant transferred the Student to another school. The Complainant told OCR that both paraprofessionals witnessed the incidents.

In an email on April 17, 2019, Teacher 2 described the Student's behavior that day as follows:

..., [the Student] pushed over [Paraprofessional 2] to enter the classroom this morning and stomped both my feet as I stood holding the door open for her. I called her back to the door to immediately explain this is not acceptable to act like this....

The silent lunch was a consequence for her because she refused a number of times to begin reading the second book in a series she was to start today. I currently attempt to help her read one on one with me daily to afford her the opportunity to increase both her reading comprehension and fluency as we discussed in her last IEP meeting. She became irate and called me a "liar" for not permitting her to sit and not do her reading today.

Teacher 2 provided a similar version of the events to the SPED Supervisor via separate email and to OCR when interviewed.⁹ Teacher 2 also told OCR that she had given silent lunch to other students. During silent lunch, Teacher 2 said that she would sit with the student and talk with him or her about the behavior, which had occurred. Teacher 2 confirmed having the Student write, *"I will not [Teacher 2] a liar, and I will be careful so I do not knock [the paraprofessional] down."* Teacher 2 denied disciplining the Student because the Complainant brought an advocate to the IEP meeting. About this, she said that they encouraged the Complainant to bring an advocate because advocates helped the Complainant understand. Teacher 2 also denied disciplining the Student because the Complainant had asked for a copy of the IEP. She stated that the events were not connected and that in the IEP meeting, they had printed a copy of the final IEP for the parent at

⁹ In an April 29, 2019 email to the SPED Supervisor, the Complainant wrote that the Student *"had stated to me that when she stepped on [the paraprofessional]'s foot that it was an accident & that when she said [Teacher 2] lied about letting her pick a book from a different series, that she corrected herself & said I meant to say fibbed."*

that time. Documentary evidence reveals that the District did not consider either consequence official discipline and neither is noted in the Student's disciplinary record.

One paraprofessional told OCR that on the day at issue, Teacher 2 and the Student had been reading, when the Student said that Teacher 2 had lied to her. According to the paraprofessional, Teacher 2 responded by screaming that the Student would not call her a liar. The paraprofessional said that initially, Teacher 2 refused to permit the Student to go the bathroom and said that she did not care when informed that the Student was crying in the bathroom. When the paraprofessional saw the Student later, the Student remained upset and seemed as if she was hyperventilating. The paraprofessional felt that Teacher 2 escalated the situation inappropriately.

The other paraprofessional recalled seeing the Student upset but was uncertain what had taken place. She believed it may have been reading time for the Student. She told OCR that at some point, the Student was in the bathroom crying. Like her colleague, the paraprofessional felt that Teacher 2 failed to de-escalate the situation. She, too, recalled that Teacher 2 would not permit the Student to call her mother and would not allow the removal of another student. She remembered that the Student started rocking and crying at her desk, and she thought that the Student might pass out. She said that Teacher 2 told the Student that if she passed out, she would call the nurse.

Analysis and Conclusions

Protected Activity

OCR first determines whether a complainant engaged in a protected activity and whether the recipient had knowledge of the protected activity.

Here, the Complainant alleged that she brought an advocate to the April 2, 2019 IEP meeting and requested a copy of the final April 2019 IEP. OCR finds that the Complainant may have engaged in a protected activity and finds that the District had knowledge of the protected activity.

Adverse Action

To determine whether an action is adverse, the recipient's action must significantly disadvantage the Student as to her status as a student, or her ability to gain the benefits of the program or the action must have a chilling effect on the person who has engaged in a protected activity. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational 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. 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. Merely unpleasant, transient, or inconvenient incidents usually are not considered adverse.

It is undisputed that Teacher 2 gave the Student silent lunch and had the Student write a statement twice. Teacher 2 and other witnesses characterized the two punishments as “consequences.” The Complainant told OCR that the Student was traumatized and feared Teacher 2, and the Complainant transferred the Student to another school. While OCR finds that neither consequence is considered official discipline and neither is listed on the Student’s disciplinary record, under these circumstances, OCR finds that the two consequences may be adverse actions.

Causal Connection

OCR next determines whether there was a causal connection between the adverse action and the Complainant’s participation in the protected activity. OCR considers a variety of factors in assessing whether a causal connection exists. OCR may infer a causal connection based on the close proximity in time between the protected activity and the adverse actions.

In this case, the Complainant alleged that the adverse actions occurred after she engaged in protected activity in early April 2019. The Student received the consequences about two weeks later on April 17, 2019. Accordingly, based on the close temporal proximity between the protected activity and the adverse action, OCR determines that there was a causal connection between the adverse action and the protected activity.

Asserted Non-Retaliatory Reasons

The District stated that the Student received the two consequences because on April 17, 2019, the Student called Teacher 2 a liar and refused to read, as instructed.

Pretext

Pretext may be shown when, among other things: (1) the District’s reasons for imposing consequences on the Student are not believable; (2) similarly situated students, whose parents did not engage in protected activity, were treated differently; or (3) deviation from the District’s procedures or other guidelines concerning the subject matter of the proffered legitimate, non-discriminatory reasons.

The evidence establishes that the reasons for Teacher 2’s imposition of the two consequences are plausible. Consistent with Teacher 2’s statements to OCR, the paraprofessionals corroborated that around the time for reading was when the Student was upset and said Teacher 2 had lied. Also, in an email, the Complainant acknowledged that the Student said that Teacher 2 had lied/fibbed about letting her pick a book from a different series. In addition, there is evidence that Teacher 2 imposed silent lunch on other students and that silent lunch was a consequence for general education students, as well. OCR is unaware of evidence demonstrating that the reasons for the imposition of the two consequences upon the Student were not the true reasons for the two consequences and pretexts because the Complainant brought an advocate to the April 2019 IEP meeting and asked for a copy of the final April 2019 IEP.

Conclusion

In summary, based on the preponderance of the evidence, OCR determines that there is insufficient evidence to establish a violation of Section 504 and Title II for legal issues 1, 3, and 4. With respect to legal issue 2, on November 8, 2019, OCR received the attached Agreement, which contains monitoring provisions to address the allegation that the District failed to provide the Student with a FAPE when it assigned her to the teacher in question. 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.

With respect to legal issues 1, 3, and 4, the Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

This concludes OCR's consideration of this complaint, which we are closing the effective date of this letter. If you have any questions about this complaint, please contact Michelle Reid, General Attorney, at 404.974.9386 or at michelle.reid@ed.gov.

Sincerely,

Arthur Manigault
Compliance Team Leader

Enclosure

cc: XXX, Esq. [w/ encl.]