



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

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

REGION IV

ALABAMA  
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April 10, 2020

**BY REGULAR & ELECTRONIC MAIL**

Superintendent Jeff Eakins  
Hillsborough County Public Schools  
901 East Kennedy Blvd.  
Tampa, FL 33602  
Jeff.Eakins@sdhc.k12.fl.us

**Re: OCR Reference No. 04-19-1563**

Dear Superintendent Eakins:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on September 6, 2019, against the Hillsborough County Public Schools (the District), in which the Complainant alleged that the District discriminated against her daughter (the Student) on the basis of disability and also engaged in retaliation.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability and retaliation by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability and retaliation by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Additional information about the laws OCR enforces is available on OCR's website at <http://www.ed.gov/ocr>.

OCR investigated the following legal issues:

1. Whether since the 2019 - 2020 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education (FAPE) when it failed to provide her with some related aids and services outlined in her Section 504 plan (i.e., Science and English teachers failed to permit the Student to use extra transition time between classes; Science teacher failed to permitted the Student to XXXXX/XXX in class; Homeroom Teacher required the Student to leave class to XXX/XXXXX; Science teachers gave the Student XXXXX on those assignments the Student utilized her XXXXX XXXX; and on or around XXXXXXXXXX X, XXXX, the Student's XXXXXX XXXXXXXX XXXXXXXX XXXXXXXX XXXXX (XXXXX)

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XXXXX XXXXXXXXX refused to take the Student to the nurse at her request), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130.

2. Whether the District promptly and equitably responded to incidents of disability-based harassment of which it had notice pertaining to the Student on or about XXXXXXXXXX X XXXX, (when the XXXXX XXXXX XXXXXXXXX told the Student to take out her XXXXXXXX and use it in front of the class; when the XXXXX XXXXXXXXX accused the Student of faking her illness; when the XXXXX XXXXXXXXX refused to allow the Student to see the nurse; and when the XXXXX XXXXXXXXX attempted to remove the Student from XXXXX because of her disabilities), 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 after the Complainant reminded the Student's Science teacher of the Student's Section 504 related aids and services when in XXXXXX XXXX, it removed the Student from the teacher's XXXXXXXX class and placed her in another class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

During the course of this investigation, OCR reviewed the Student's educational records, including Section 504 plans, class schedules and transcripts, as well as various communications. OCR also spoke with the Complainant, the Student and District staff.

OCR evaluates evidence under a preponderance of the evidence standard; to establish a violation, the evidence must be sufficient to prove that it is more likely than not that a violation occurred. Based upon the preponderance of evidence, OCR determined that the portion of Issue 1 pertaining to XXXXXXXXXX XXXX between classes and pertaining to XXXXXX/XXXXXXX in class was resolved; that the evidence was insufficient to establish noncompliance with Section 504 or Title II for Issue 1 (pertaining to ungraded assignments) and for Issue 3; and the District requested, pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*, to voluntarily resolve Issue 1 (pertaining to access to the nurse) and Issue 2.

## Legal Standards

### *FAPE*

Section 504, at 34 C.F.R. § 104.33(a) states that a recipient shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Section 104.33(b) states that the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

### *Harassment*

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

receives federal financial assistance. The Title II regulation, at 38 C.F.R. § 35.130(a), contains similar language.

### *Retaliation*

The Section 504 implementing regulations, at 34 C.F.R. § 104.61, refers to the procedural provisions applicable to Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 104.7(e), which states no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The Title II regulation, at 38 C.F.R. § 35.134, contains similar language.

### **Summary of Investigation**

*Issue 1: Whether since the 2019 - 2020 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education (FAPE) when it failed to provide her with some related aids and services outlined in her Section 504 plan (i.e., Science and English teachers failed to permit the Student to use extra transition time between classes; Science teacher failed to permitted the Student to XXXXX/XXX in class; Homeroom Teacher required the Student to leave class to XXX/XXXXX; Science teachers gave the Student XXXXX on those assignments the Student utilized her XXXXX XXXX; and on or around XXXXXXXXXXXX X, XXXX, the Student's XXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX XXXXX (XXXXXX) XXXXX XXXXXXXX refused to take the Student to the nurse at her request), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130.*

The evidence in indicates that the Student attends XXXXXXXXXXX XXXXX XXXX XXXXXXX (School) and is in the XXXXX grade during the 2019 – 2020 school year. She receives services pursuant to a Section 504 plan due to “XXXXXXXXXXXXXXXX” and “XXXXXX.”

### *Extra transition time*

The Complainant alleged that, since XXXXXXX XX, XXXX, the Student's XXXXXXX Teacher regularly failed to permit the Student to leave class early to transition to her next class. Further, on XXXXXXX XX, XXXX, XXXXXXX Teacher did not permit the Student to transition early, which resulted in the Student receiving two tardies to her next class.

The Student's Section 504 plan (Plan) dated XXXXXXXXXXX XX, XXXX, states “[a]llow [S]tudent to have extra time between classes by leaving X-X XXXXXXX early from prior classes.” The Student's Plan dated XXXXXXXXXXX XX, XXXX, states “[a]llow [S]tudent to have extra time between classes by leaving X-X XXXXXXX early from prior classes when [S]tudent requests due to her condition.” Accordingly, since XXXXXXXXXXX XX, XXXX, the Student was required to specifically request to her teachers to leave their classes early for transition if she needed to do so. OCR noted that on XXXXXXX XX, XXXX, the District moved the Student into another Science class (Second Science Teacher).

The Science Teacher submitted a response to notification of this complaint, in which she stated “Student never stated she wanted to leave early, and I NEVER refused to allow her extra transition time between classes on ANY day she was in my class.”

On January 2, 2020, OCR interviewed the Student with the Complainant’s permission. During the interview, the Student confirmed that the Science Teacher did *not* fail to permit her to use extra transition time, explaining that the Complainant notified OCR of the wrong teacher; rather, the Student stated that her English Teacher failed to permit her to use extra transition time. The Student clarified that on one occasion, she asked her English Teacher to leave class early to transition to her next class, but the Teacher did not provide her with permission to do so. The Student stated that she spoke with her guidance counselor and the Student was thereafter permitted to transition early from English. The Student contradicted the Complainant’s claim that she received “two tardies” as a result of not being permitted to leave English class early, stating that she did not receive any such tardies.

OCR reviewed an email to the Principal dated on or around XXXXXXXX XX, XXXX, in which the Complainant wrote “[the Student] is late to [XXXXXX] because the ela (sic) teacher instructs until the bell rings so [the Student] isn’t able to leave early so I want a modification to her extra time if possible. She has received a few tardies from [the XXXXXX teacher] . . . .” The Principal responded by writing that the Student came to see her about the tardies “and we came up with a plan to leave English 30 seconds early because she believes that will be enough time for her to get to 4<sup>th</sup> period without being late. I told her if this does not solve the problem we will look at another solution.”

Based on this information, although OCR did not determine whether the English Teacher failed to permit the Student to transition early from class on one occasion, OCR found that there were no resulting repercussions. Further, the evidence confirms that, either through assistance from her guidance counselor or the Principal, the Student resolved the problem. The Student also confirmed that the alleged failure of the English Teacher to permit early transition was resolved to her satisfaction. Therefore, based on OCR’s CPM, Section 108(j), OCR will close an issue when OCR obtains credible information that it was resolved and no longer appropriate for investigation. Accordingly, based on the information in this investigation, OCR determined that this issue was resolved and is therefore closed.

#### *XXXXX/XXX in class*

The Complainant alleged that it was an almost daily occurrence that the Student’s Science Teacher refused to permit the Student to XXXXX XXXXXXXX in the classroom, stating that she had an ant problem in the classroom and XXXXXXXX XXXXXXXX would attract ants. The Complainant also alleged that the Student’s Homeroom Teacher required the Student to leave the classroom to XXX a XXXXX and the XXXXX instructor required the Student to do push-ups as punishment for XXXXXXXX in class. The Student confirmed these allegations.

OCR reviewed an email to the Principal dated on or around XXXXXXXX XX, XXXX, in which the Complainant wrote that she “sent [the Homeroom Teacher] a message regarding kicking [the Student] out of her classroom to use her accommodations.”

The Student's Section 504 plan (Plan) dated XXXXXXXXXX XX, XXXX, states "[a]llow [S]tudent to XXXXXXXX and XXX XXXXXXXX when needed." The Student's Plan dated XXXXXXXXXX XX, XXXX, states "[a]llow [S]tudent to have access to XXXXXXXX with XXXXXX or XXXXXXXXXXXXXX XXXXXX and XXX XXXXXXXX when needed."

The Science Teacher submitted a response to notification of this complaint, in which she stated "[t]he incident in question was X/XX/XX and I was still setting class norms in the classroom. Three students were XXXXXXXX or XXXXXXXX in the classroom despite our prior discussion of class rules, signs posted and information in syllabus/class rules documents. I made a blanket statement that XXXX and XXXXXX are not allowed in the classroom; (XXXXXX is always okay). [The Student] was one of those individuals." Further, the Science Teacher wrote that she "went to guidance between classes, and asked [a staff member] (she oversees 504 plans) if she had other information as the [S]tudent indicated more information was out there. [The staff member] did research and told me that she searched the old records and found something years ago about Gatorade but that it was not in the current 504 plans and there was nothing about XXXXXXXX. NOTHING else was ever said and there was never a REFUSAL to allow the student XXXXXXXXXX."

OCR determined that the Student's Plan prior to XXXXXXXXXX XX, XXXX, plainly states that the Student is permitted to "XXXXXXX and XXX XXXXXXXX when needed." This information contradicts staff's assertion that the Plans' "said nothing about XXXXXXXX." Moreover, the Plan does not specify the type of XXXXXXXXXX the Student could use to XXXXXXXX herself; therefore, no teacher should deny the Student any XXXXXXXXXX. If an individual teacher believes he or she needs more specific guidance about the type of XXXXXXXXXX the Student is permitted to XXXXXX, then he or she may request a Section 504 meeting so that the Student's Section 504 team may make such decision. Any attempts to prevent the Student from XXXXXXXX or XXXXXXXXXX, or requiring her to XXXXXX only certain XXXXXXXXXX, are in contravention of her Plan.

Prior to the conclusion of this investigation, the District indicated that the Principal met with all of the Student's teachers/coaches in XXXXXXXXXX XXXX to reiterate that the Student is permitted to XXX and XXXXXX in her classes, subject to specific rules regarding no XXXX/XXXXX in Science labs or instrument rooms. In addition, the District provided OCR with an updated version of the Student's Plan, revised pursuant to a Section 504 team meeting on XXXXXXXXXX XX, XXXX. The Plan still states that the Student is permitted "access to XXXXXXXX with XXXXXX or XXXXXXXXXXXXXX XXXXXX and XXX XXXXXXXX when needed." The Plan further clarifies that the Student is allowed a XXXXXXXXXX and XXXXXX "during each class;" however, she is asked to step out to XXX/XXXXX during Homeroom due to it being the band room and, thus, XXXX and XXXXXX are not permitted around instruments. Therefore, based on OCR's CPM, Section 108(j), OCR will close an issue when OCR obtains credible information that it was resolved and no longer appropriate for investigation. Accordingly, based on the information contained in the updated Plan and reiterated to the Student's teachers, OCR determined that this issue was resolved and is no longer appropriate for investigation.

*XXXXX XXXX on assignments*

The Complainant alleged that when the Student was out sick, the Science Teacher refused to accept the Student's assignments turned in online, instead requiring the Student to submit hard copies, which the Student was unable to do due to being sick and out of school. During her interview with OCR, the Student clarified that she turned in assignments using her XXXXX XXX on XXXXXX XX, XX and XX, due to her absences on XXXXXX XX, XX and XX, but that the Science Teacher gave her zeros on those assignments. The Student also alleged that her Second Science Teacher refused to grade an assignment on which she used her XXXXX XXX per her Plan, submitted on XXXXXXXXX XX, XXXX, due to her absence on XXXXXXXXX XX, XXXX.<sup>1</sup>

The Student's Section 504 plan (Plan) dated XXXXXXXXXX XX, XXXX, states "[a]llow additional XXXX (up to X XXXXX XXX) for individual assignments." The Student's Plan dated XXXXXXXXXX XX, XXXX, states "[a]llow additional XXXX (up to X XXXXX XXX) for individual assignments when the [S]tudent isn't feeling well or out due to her condition."

OCR reviewed the Student's schedule, which indicated that she took Science/Biology for period six during the fall 2019 semester. OCR reviewed the Student's attendance report, which indicated that she was not absent for Biology on any of the days alleged. In addition, as already stated, the District moved the Student to her second Science class on August 21, 2019; thus, the first Science Teacher could not have given her a zero on the alleged August 29, 2019 assignment, as the Student was not in her class at that time. Further, OCR reviewed the District's calendar, which indicated that fall break occurred from Monday, November 25, 2019, through Friday, November 29, 2019; thus, the Student could not have been absent on November 28, 2019, and could not have turned in any assignments on November 29, 2019, as there was no school on those days or for that week.<sup>2</sup>

Nonetheless, OCR spoke with both Science teachers. In addition, the Science Teacher submitted a written response to notification of this complaint, in which she stated "[X]XXX accommodations were used but [S]tudent did not submit several of her assignments. One incident did occur where the [S]tudent used her X-XXX XXXXXXXXXX but did not submit her assignment in class, rather waited until late in the day/early evening to send me a picture of the assignment on EDSBY.<sup>3</sup> My response was sent via EDSBY and is still in the system. I told her I would accept it but that she needed to submit the hard copy the next day."

OCR reviewed an EDSBY submission of work from the Student on XXXXXX XX, XXXX, in which the Student submitted an electronic photo of her work. To accompany the photo, the Student wrote, "[t]his is in regards to XXXXXX'X homework that was due XXXXXX XXXXXX XXX XXXX<sup>4</sup> and I forgot to physically turn in XXXXXX XXXXXX XX XXXX. [This will] still count as it is XXXXXX XX X:XX XX- Again virtual form as I was distracted from turning in the physical form." The Science Teacher wrote back with "I can accept this time but you need to turn it in this morning so it can be graded. Remember you are supposed to put the due date X/XX (not

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<sup>1</sup> The Student also alleged that on several occasions in her second Science class, she received zeros on assignments turned in using the extra day per her Plan; however, she stated that in those instances, she admittedly refused to write "grade me" on the assignments per classroom policy. OCR, therefore, did not investigate this allegation, as all students are responsible for turning in assignments per their classroom policy(ies) unless otherwise stated in their Section 504 or Individualized Educational Program Plan.

<sup>2</sup> See, <https://www.sdhc.k12.fl.us/calendar/> (last accessed February 12, 2020)

<sup>3</sup> Note that EDSBY is referenced in the School's grading system; it is not an acronym.

<sup>4</sup> Note that Friday was actually dated XXXXXX XX, XXXX, with the following Monday being XXXXXX XX, XXXX.

X/XX) and under that the submitted date X/XX. This is a class normal and required by all students as stated in class, posted on board and in the class syllabus. Please note that you will need to turn in hard copies for all assignments based upon your XXXXXXXX XXXX, videos and pictures will not be sufficient in the future.”

During an interview with OCR, the Student stated that her Science Teacher’s classroom policy is for students to submit homework and classwork in person. Regarding the XXXXXX XXXX assignment, she confirmed she was absent from school due to her disability on Friday, XXXXXX XX, XXXX, and that she was in school that following Monday. She stated that “we had an issue about something, probably eating in class, and I got distracted and forgot to turn it in altogether.” She remembered about the assignment that evening, so she photographed the entire assignment and submitted it electronically directly to the teacher. The Student stated that she received half credit, due to not submitting the assignment in person per classroom policy. OCR determined that the Science Teacher did not violate the Student’s Plan as it pertains to the XXXXXX XXXX assignment, due to the Student’s admitted failure to submit the assignment in person per classroom policy.

During an interview with OCR, the Science Teacher stated that, regarding the assignment submitted on XXXXXX XX, XXXX, the Student did not turn in the assignment; thus, she did receive a grade of zero. But, as already stated, the Student was not absent for this class as she alleged.

Based on this information, the evidence was insufficient to establish that the Science Teachers failed to grade the Student’s assignments she alleged were submitted XXX XXX XXXX due to absences from her disabilities per her Section 504 plan. In particular, she was not absent on any of the days alleged for sixth-period Biology, or on any of the days subsequent or prior to those alleged. Accordingly, OCR found insufficient evidence of noncompliance with Section 504 or Title II for this issue.

#### *Request to see the nurse*

The Complainant alleged that on XXXXXXXXXXXX X, XXXX, the Student’s XXXXX instructor (the Instructor) refused to permit the Student to see the nurse, despite the Student’s request to do so.

The Student’s XXXXXXXXXXXX XX, XXXX, Plan states “[w]hen not feeling well, the [S]tudent will provide a cue to an adult in order to offer health assistance. The clinic will respond and bring her to the clinic in a XXXXXXXXXXXX. She will be permitted to lie down for 15 minutes and parent(s) will be contacted immediately.”

The Instructor provided a written response to the complaint allegation, as follows:

. . . on XXXXXXXXXXXX X, XXXX, [the Student] approached me and patted her chest a couple of times and complained that the heat was aggravating her XXXXXX and requested to go inside. . . . I then offered to take her to the nurse, and she declined. I then had her stand under an awning out of direct sunlight while I called roll. After

I called the roll, I joined her under the awning and asked if she had her XXXXXXXX with her. She said, 'Yes.' and I asked to see it. After showing it to me and I asked her if she needed to use it and she said, 'No.' I then decided to take her to the nurse anyway because I could not leave her without adult supervision. . . . Once we arrived at the nurse's station, I assumed the nurse was out of the office because [the nurse] had a poster in the window of her office with a solid black portion at the bottom. It appeared to me that the lights were off and that she was gone. Since I was only seeking adult supervision for [the Student] at this point, I walked her to Student Affairs and asked if she could sit in their area until the bell rang."

Despite the Instructor's written statement that the Student did not request to see the nurse, OCR reviewed an audio recording of a XXXXXXXXXX X, XXXX, voicemail message left for the Complainant, in which the Instructor stated "during XXXXXX that day the Student came to her and said, 'it was too hot and it was messing with her XXXXXX.'" The Instructor also stated that she then escorted the Student to the nurse.

During an interview with OCR, the Student stated that on that day she specifically requested to the Instructor to see the nurse due to her disabilities and that 10 minutes later the Instructor took her to see the nurse. When they arrived at the nurse's office, the Instructor saw that the door to the office was closed, so the Instructor had the Student sit in the Student Affairs Office for the remainder of the class period. The Student stated that she did not receive any medical assistance and that she used her nebulizer at home after school that day. She also stated that the Instructor did not knock on the nurse's door and when the Student discussed this incident with the nurse at a later date, the nurse confirmed she was in her office at that time.

Based on this information, on XXXXXXXXXX X, XXXX, the Student, in conformance with her Plan, provided a cue to the Instructor that she was not feeling well, but she did not receive any medical assistance. Prior to the conclusion of this investigation, the District requested to resolve this issue pursuant to Section 302 of OCR's CPM.

*Issue 2: Whether the District promptly and equitably responded to incidents of disability-based harassment of which it had notice pertaining to the Student on or about XXXXXXXXXX X, XXXX, (when the XXXXX XXXXX XXXXXXXXX told the Student to take out her XXXXXXXX and use it in front of the class; when the XXXXX XXXXXXXXX accused the Student of faking her illness; when the XXXXX XXXXXXXXX refused to allow the Student to see the nurse; and when the XXXXX XXXXXXXXX attempted to remove the Student from XXXXX because of her disabilities), 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.*

OCR determined that harassment based on disability that creates a hostile environment is a form of discrimination prohibited by Section 504 and Title II.

The Student confirmed the allegations as stated by the Complainant, except that she stated that the Instructor did not ask to see her XXXXXXXX in front of the class. As already stated in OCR's discussion of Issue 1 above, OCR determined that the evidence supports that the Student sufficiently provided a cue to the Instructor on that day that she needed medical assistance. Both



the Instructor and the Student confirmed that the Instructor first took roll before escorting the Student to the nurse. Both parties also admit that the Student did not receive any medical care on that day. The Instructor denied accusing the Student of faking her illness. The Instructor also indicated that on XXXXXXXXXX X, XXXX, she recommended that the Student speak with a counselor for information on options for other electives out of concern that XXXXX “activities outside may have a negative impact given her medical condition.”

OCR reviewed an audio recording of a XXXXXXXXXX X, XXXX, voicemail message to the Complainant from the Instructor, summarized and quoted as follows:

The Instructor notified the Complainant that during XXXXX that day the Student came to her and said, “it was too hot and it was messing with her XXXXXX.” The Instructor then stated that she had the Student stand under a walkway. She then asked the Student if she had her XXXXXXXX, which she did, and then walked the Student off the track to the nurse; however, the nurse was not the office; thus, the Instructor had the Student sit in the Student Affairs Office until the bell rang. The Instructor stated that she was concerned with the Student being in XXXXX, as they are outside often and in direct sunlight. She said “XXXXX is not [going to] work for her physically;” thus, the Instructor stated that she emailed the Student’s counselor “to try to put her in a class where she is not [going to] be outside that much in direct sunlight.” The Instructor stated that “she is a great student, I just don’t think this is [going to] work out for her right now.”

Prior to the conclusion of this investigation, the District requested to resolve this issue pursuant to Section 302 of OCR’s CPM.

*Issue 3: Whether the District retaliated against the Student after the Complainant reminded the Student’s Science teacher of the Student’s Section 504 related aids and services when in XXXXXX XXXX, it removed the Student from the teacher’s XXXXXXXX class and placed her in another class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.*

To establish whether retaliation occurred, OCR must establish the following elements: 1) the complainant was engaged in a protected activity, i.e., exercised a right or took some action that is protected under the Federal laws that OCR enforces; 2) the recipient had knowledge of the complainant having engaged in the protected activity; 3) the recipient took adverse action contemporaneously with or subsequent to the protected activity; and 4) there is a causal connection between the protected activity and the adverse action. If any one of the foregoing cannot be established, a retaliation allegation fails. If, however, a prima facie case of retaliation is established, OCR would investigate to determine whether the recipient has a legitimate, nondiscriminatory reason for its actions, which is sufficient to rebut the inference of discrimination created by the taking of an adverse action after the complainant engaged in a protected activity. OCR would also determine whether any reason presented by the recipient is merely a pretext for discrimination in the form of retaliation.

#### Protected Activity and Knowledge of Protected Activity

A protected activity is one in which a person either opposes an act, policy, or practice that is unlawful under any of the laws OCR enforces; files a complaint, testifies, assists, or participates in an investigation, proceeding, or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR. The Complainant alleged that she sent the XXXXXXXX Teacher emails reminding her that the Student's Plan needed to be followed. OCR XXXXXXXX that the Complainant engaged in a protected activity on XXXXXXXX XX, XXXX, when she emailed the XXXXXXXX Teacher reminding her to follow specific related aids and services in the Student's Plan. OCR determined that the District had knowledge of this protected activity on XXXXXXXX XX< XXXX, when the Science Teacher received the Complainant's email.

### Alleged Adverse Action

OCR next determined whether the District took adverse action against the Complainant contemporaneous with or subsequent to his protected activity. To be an "adverse action," the District's action must significantly disadvantage the Complainant, or his ability to gain the benefits of the District's program. In the alternative, even if the challenged action did not meet this standard, the action could be considered retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the Complainant was, because of the challenged action, precluded from pursuing his discrimination claims. To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) whether the alleged adverse action caused lasting and tangible harm or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse.

OCR determined that, based on the particular facts in this matter, moving the Student into another XXXXXXXX class did not constitute an adverse action. In particular, the Complainant notified the District's Executive Compliance Officer that she requested to an Assistant Principal for "an immediately effective schedule change" based on the XXXXXXXX Teacher's alleged failure to comply with the Student's Section 504 Plan. The Complainant also notified the District that the Student was "not comfortable" with the XXXXXXXX Teacher. In addition, the Student confirmed that she wanted to be moved to another XXXXXXXX class. Based on this information, the Complainant and the Student wanted the Student moved out of the XXXXXXXX Teacher's class; thus, OCR determined that moving the Student into another XXXXXXXX class was not an adverse action, as it was the requested outcome. The evidence, therefore, is insufficient to establish that the District engaged in retaliation as alleged. Accordingly, OCR found insufficient evidence of noncompliance with Section 504 or Title II for this issue.

### **Conclusion**

Based on the evidence reviewed in this matter, OCR determined that Issue 1 (pertaining to XXXXXXXXXXXX XXXX between classes and XXXXXXXX/XXXXXXXXXX in class) was resolved; that the evidence was insufficient to establish noncompliance with Section 504 or Title II for Issue 1 (pertaining to ungraded assignments) and for Issue 3; and the District requested, pursuant to Section 302 of OCR's *CPM*, to voluntarily resolve Issue 1 (pertaining to access to the nurse) and Issue 2.

Pursuant to the attached Resolution Agreement (Agreement) the District has agreed to train staff on disability-based harassment and to offer counseling to the Student.

On April 9, 2020, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the complaint. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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

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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Stephanie Pessin, at (404) 974-9343, or me, at (404) 974-9367.

Sincerely,

Ebony Calloway, Esq.  
Compliance Team Leader

Enclosure

cc: XX XXXXXX XXXXXXXXXXXX, XXXXXXXXXXXX XXXXXXXX, by electronic mail