



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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November 5, 2014

Dr. Valeria Silva
Superintendent
St. Paul Public School District
360 Colborne St.
St. Paul, MN 55120

Re: OCR Docket # 05-12-1363

Dear Dr. Silva:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed with OCR against the St. Paul Public School District 625 (District). Specifically, the Complainants allege that the District discriminated against their daughter (Student A) on the basis of disability (Obsessive Compulsive Disorder, Oppositional Defiance Disorder, Attention Deficit Hyperactivity Disorder, and Sensory Processing Disorder) during the 2011-12 school year when:

- (1) Staff at a District school, L'Etoile de Nord French Immersion School (LNFI) failed to implement Student A's Section 504 plan.
- (2) LNFI staff subjected Student A to disability based harassment and the District failed to adequately address the harassment.
- (3) LNFI staff subjected Student A to different treatment by disciplining Student A more severely than similarly situated non-disabled students.
- (4) Because Student A's parents requested a special education evaluation in March 2012 and filed an internal grievance in April 2012, the District retaliated against Student A when it subjected Student A to LNFI staff harassment and prohibited a teacher from providing resource services to Student A in early April of 2012.

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, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation, at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. Section 504 and Title II also

prohibit retaliation. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in this complaint do not provide greater protection than the applicable Section 504 regulations and has, therefore, applied the relevant Section 504 standards in its analysis of this complaint.

During its investigation, OCR reviewed data provided by the Complainants and the District. OCR also interviewed the Complainant, Student A and District staff. Based on this investigation, OCR has determined that the District discriminated against Student A with respect to Allegations #1 and #2 (in part). However, the evidence is insufficient to conclude that the District discriminated against Student A with respect to Allegations #3 and #4. The bases for OCR's determination are summarized below.

Background

For the 2011-12 school year, Student A was a 5th grade student at LNFI, a French language immersion school located within and operated by the District.¹ Student A attended LNFI since Kindergarten.

On September 12, 2012, a group of parents, including the Complainants, filed an internal complaint against the Principal and certain LNFI staff members asserting that they discriminated against six students with disabilities, including Student A. The complaint specifically asserted that the Principal was unaware of Student A's medical conditions despite participating in Student A's special education meetings. According to the District, the complaint is still under investigation.

District Policies and Procedures

Non- Discrimination Policy and Complaint Procedure

LNFI follows the District's Non-Discrimination Policy (Policy) which prohibits disability discrimination and provides procedures for filing complaints. The Policy identifies a complaint recipient, and requires the District to promptly investigate all discrimination/harassment complaints formal or informal, oral or written, and to discipline or take other appropriate action against any student, staff, or member of the school district

¹ Because of treatment at LNFI, Student A left LNFI after the 5th grade and enrolled at a public charter school located in the District. According to Student A's parent, Student A has had no disciplinary issues at the new school.

community who is found to have violated the policy. The Policy is available on line at the District website.²

Section 504 Grievance Procedures

Complainants may submit a grievance (in writing) to the building administrator and the building Section 504 Representative who will attempt to resolve the complaint, investigate, and issue a report (Step One report). The complainant may appeal to the District Section 504 Coordinator within ten (10) days of receiving the Step One report. The District Section 504 Coordinator will conduct an investigation and within ten (10) working days of receiving the appeal will issue a written determination. The complainant may appeal the Section 504 Coordinator's determination to the Superintendent in writing, within ten (10) working days and may appeal to the Chairperson of the Saint Paul Board of Education (BOE) within ten (10) days of receiving the Superintendent's decision. The BOE will conduct a hearing within ten (10) working days after receiving the appeal. The complainant may appeal the BOE determination by requesting an impartial due process hearing. The District will appoint an impartial hearing officer and follow state and federal rules for due process hearings. The District also refers complainants to community, state, and federal agencies.

LNFI Student Discipline

LNFI follows the District's disciplinary procedures that are described in the student handbook and on line.³ There are five categories of behavior violations with Level 1 being the least severe. Level 1 violations include physical aggression with no physical harm, defiance of authority, disruptive behavior, and verbal abuse.⁴ A Level 1 violation will generally be addressed by the classroom teacher, or other staff using interventions that teach correct, alternative behavior so students can learn and demonstrate safe and respectful behaviors. Interventions include; reminders and redirection, written apology, student/teacher conference, and parent/teacher/student conference. A severe or repeated occurrence of any of these violation categories may be treated as a violation at a higher level. Interventions for Level 2-4 violations may include; suspension (in-school and out of school), dismissal, and classroom removal. A Level 5 violation requires a recommendation for expulsion.

Facts

² http://boe.spps.org/uploads/102.00_Equal_Op_Non-Discrimination_.pdf

³ http://www.spps.org/rights_and_responsibilities

⁴ During the 2010-11 school year, LNFI disciplined 22 students on 57 occasions; the violations included bus misconduct, physical aggression, with or without physical harm, defiance of authority, willful disobedience, verbal abuse, fighting, and chronic truancy. Two of the 22 students were students with either a Section 504 plan or an IEP and each of them were involved in one incident. During the 2011-12 school year, LNFI disciplined 17 students on 38 occasions; the disciplinary violations included the same misconduct as in 2010-11. Three of the 17 students (including Student A) had either a Section 504 Plan or an IEP. Two disabled students were involved in two incidents each, and Student A was involved in six disciplinary incidents, with five occurring between February 24, 2012 and April 18, 2012.

Student A's Disabilities

Student A was first diagnosed with a disability at age seven. While in first grade at LNFI, the Complainants requested, and the District developed, a Section 504 Plan for Student A. In 2007 and 2012 Student A was diagnosed with additional disabilities.

Student A's 504 Plan(s)

The November 2011 Plan (Plan)

Student A's Section 504 Plan for the 2011-12 school year (Plan), primarily addressed behavioral challenges caused by Student A's disabilities. While developing the Plan, the Section 504 team (of which the Complainants were a part) noted Student A's struggles with social and behavioral issues during "unstructured times" like lunch, recess, working with specialist teachers, and riding the bus.

The Plan required Student A's classroom teachers and specialist teachers to praise specific behaviors, ignore inappropriate behaviors not "drastically outside classroom limits," redirect behaviors before applying consequences, discuss behaviors with Student A and avoid "labeling" Student A. The Plan also required classroom teachers to have a written daily routine and notify Student A of "changes in routine." When Student A became agitated or loud, the Plan required teachers and specialist teachers to "Provide distraction rather than an explanation of consequences." If a classroom teacher was absent, and a substitute assigned, the Plan required the classroom teacher and specialist teachers to inform Student A verbally of the substitute and to insert a copy of the Plan in the substitute teacher's class folder.

The Plan also indicated that if Student A is using a loud voice or becoming agitated, cafeteria staff must try to deescalate the situation by: (1) saying, "it's okay" (2) suggesting Student A, "take a breath," (3) asking Student A if she wants to take a break (get a drink of water or walk somewhere).⁵ The Plan required that the classroom teacher, "help communicate this information to the cafeteria supervisors."

The Plan further required that "[i]n the event of a discussion about [Student A's] behavior with the principal or designee, parents will receive a phone call about the meeting." Finally, the Plan required that in the event of disciplinary action, "504 procedures would be followed."

The Amended Plan

⁵ The Plan as reviewed by OCR did not specifically state whether all three techniques be unsuccessfully attempted before issuing consequences or taking further action. Staff interviewed by OCR asserted the techniques were used as needed, meaning that one technique could be effective in deescalating inappropriate behavior.

In April 2012, as the result of a March 22, 2012 internal disability discrimination complaint, Student A's Plan was rewritten (the Amended Plan) with input from both Student A's parents and their advocate. The Amended Plan included sections that described Student A's strengths, how Student A's disability affects her academics, a list of possible behaviors, positive interventions in the classroom, and a section listing other techniques to be used should Student A's behaviors become "escalated," such as allowing Student A to go to Teacher A's classroom to calm down.

The January 10, 2012 Incident

Disability Based Harassment

The Complainant asserts that on January 10, 2012, the Gym Teacher (Teacher B) told Students A, B and C to end a bowling activity and begin gathering up the equipment. When Student A refused, Teacher B pulled Students B and C aside and told them not to be friends with Student A because Student A was a bad influence. The Complainants claim they informed the Principal of the January 10 incident but the Principal refused to take any action.

Student A told OCR that she was misbehaving with Students B and C on January 10, 2012, and Teacher B separated three students close to the end of the class. Student A also asserted that Students B and C told her that Teacher B said that Student A was a bad influence, that they should not be friends with Student A and that they should "not to tell anyone else" about the admonition.

OCR interviewed Student B, who could not recall the incident. Student C told OCR that Teacher B pulled her aside on the day in question and told her that Student A was a "bad influence," that Student C should not be Student A's friend, and that Student C should not tell anyone what Teacher B had said.

On the day of the incident, one of the Complainants emailed Teacher B about the asserted comments and attached some material about Student A's disability. The following morning, Teacher B responded, stating: "Please know that I did not make those comments about [Student A]." Teacher B's email copied the Principal and Teacher A.

Teacher B advised OCR that on the day at question, Student A had failed to acknowledge Teacher B's request to begin clean-up. Instead, Student A was running around the gym, and encouraged Students B and C to join her. Teacher B called the three aside and told them all that they, "were not making good choices" and "to be respectful of the work the other students are doing." Although Students B and C started to clean up, Student A refused to do so. Teacher B denied making the statements attributed to her. The following day, after receiving the emails from the Complainants, Teacher B pulled Student B out of class to ask

the student what she thought Teacher B had said. Student B told her that she recalled being told to “to be respectful.”

On February 2, 2012, the Complainant emailed the Principal concerning Teacher B’s conduct and in conclusion stated: “We as parents are resigned to know that we will probably never know the truth in this matter, but feel compelled to report it. Now it is documented. We hope that you will investigate it and talk to the teacher and the girls (separately of course).” The Complainants did not suggest that Teacher B’s asserted conduct was based on Student A’s disability.

Two days later, the Principal emailed the parents stating: “Yes, I was made aware of the situation, and have been kept abreast of what was happening, including the email exchanges. It is my understanding that this matter has been settled, which is what I encouraged our teachers to do. Please let me know if the problem persists. Thank you for bringing it to my attention.” The Principal advised OCR that she spoke with Teacher B, but did not recall speaking with the students. The Principal explained to OCR that she did not investigate the matter further or issue a report because she believed that the matter was resolved between the parents and Teacher B.

The February 24, 2012 Incident

Failure to Implement and Disability Based Harassment

On February 24, 2012, while in the cafeteria, Student A became agitated with Student D who was teasing her and in response, Student A threw a piece of a cookie down Student D’s shirt. Cafeteria staff intervened and sent Student A to the Principal’s office. According to the Complainant, the staff did not have copies of the Plan, and failed to follow the Plan, specifically, did not redirect Student A, or provide a quiet place for Student A to take a break.

Additionally, the Complainants assert that the Principal called to discuss the incident while Student A was present. During that call, the Principal admitted that she did not have a copy of the Plan and that the cafeteria staff did not have a copy of the Plan. The Principal also verbally berated Student A during the call, did not allow Student A to speak with the Complainant, or use her fidget items while in the Principal’s office.

Student A asserted to OCR that the cafeteria staff came to her table only after she placed the piece of cookie down Student D’s shirt, but not during the teasing. When Student A declined to move to a different table as instructed, the cafeteria staff member kept asking her if she wanted to move to a different seat or go to the principal’s office. Student A refused both choices; she could not recall receiving any other choices, like taking a break, getting a drink, or taking a walk, as required by her Section 504 Plan.

Staff A and Staff B (cafeteria staff)⁶ told OCR that they received information about how to implement the Plan during a meeting with the Teacher A and other staff prior to the February 24, 2012 incident. They reviewed the Plan section concerning the cafeteria and discussed de-escalation strategies. Staff A said she kept her own copy of the Plan in the cafeteria staff office.

According to District records, Student A was disciplined for defiance of authority with a resolution of parental contact. The disciplinary report stated that during the incident, Student A was given the choice of moving to another table, or going to the Principal's office and Student A chose going to the Principal's office. Student A denied choosing either option.

According to the Principal, Staff C reported that none of the staff observed any anger or escalation by Student A before Student A placed the piece of cookie down Student D's shirt. Staff C was primarily concerned about Student A's refusal to move as requested. A review of District records shows that neither Student A nor B received formal discipline for the cookie incident itself.

The Principal acknowledged that during the February 24 call she told the Complainant that she did not have a copy of the Plan at that time. However, the Principal had previously seen the Plan, and knew that there was a copy in a locked file cabinet in the administrative office. She could not immediately access the Plan because the cabinet was locked and the administrator with the key was out to lunch.

Regarding calling Student A, "rude, disrespectful, and a behavior problem," the Principal denied making the comments about Student A. The Principal also asserted to OCR that in instances where parents are called immediately after a disciplinary incident, the offending student is usually present, and may or may not be allowed to speak to the parent depending on the circumstances. The Principal asserts that she offered the phone to Student A on several occasions during the conversation, but that Student A refused the offers. Both the Complainant and Student A deny this characterization. OCR notes that the Plan does not require that Student A be given fidget items during disciplinary conferences (only on the bus).

The March 7, 2012 Incident

Failure to Implement, Different Treatment in Discipline, and Disability Based Harassment

The Complainants assert that on March 7, 2012, LNFI staff failed to contact the Complainants about the substitute teacher assigned to Student A's class as required by the Plan. Additionally, LNFI staff failed to place a copy of the Plan in Substitute A's folder,

⁶ Staff C, no longer a District employee, declined OCR's request for an interview.

which resulted in Substitute A not providing Student A calming activities such as breaks. As a result of this failure, Student A became agitated and slapped Student D who was allegedly teasing her in the classroom. The Complainants further assert that Student A was not allowed to speak with her parents while at the Principal's office, and was wrongfully suspended for one day. Additionally, the Principal falsely accused Student A of hitting Student D and tripping and hitting Student F prior to the March 7 incident.

According to Student A, earlier in the day, Student D had twisted her arm during lunch and said that she was still angry about the February 24 incident. Student A admitted to OCR that she struck Student D once, but denied tripping or hitting Student F.

Student F asserted to OCR that Student A had tripped her on purpose on the day in question and on another occasion. Student F did not recall getting hit by Student A, but observed Student A slap Student D when he objected to Student A's conduct toward Student F.

Teacher C saw the March 7 slapping incident occur just outside the classroom door. Teacher C advised OCR that he was 10-15 feet away, and did not see or hear any activity before the slap. Teacher C told Student A that she needed to come to the Principal's office with him now. Student A silently complied with the request and did not say anything to him on the way to the principal's office. Teacher C described Student A's demeanor as calm.

Substitute A advised OCR that she did not see the slapping incident. Substitute A said she has known Student A for "a couple" of years through her substitute work at LNFI. Although Substitute A recalls seeing some behavior notes about Student A, she does not remember exactly when, and she may have seen Student A's Section 504 plan at some point, she could not recall when, or what plan. Additionally, Substitute A could not specifically recall whether there were behavioral notes about Student A, or Student A's actual 504 Plan in the substitute folder on March 7, 2012.

According to the Complainants, while on the telephone with the Complainants addressing the March 7, 2012 slapping incident the Principal informed Student A that Student A would be arrested for trespassing if she, "set one foot on school property," during the term of the suspension. Finally, the Complainants asserted that the Principal accused Student A of striking and tripping other students prior to the suspension incident and by doing so, wrongfully characterized Student A as a violent and dangerous student, contrary to the requirements of the Plan.

Student A was dismissed for the remainder of the day and the following day as a result of the March 7 incident. The Complainants assert that Student D was not disciplined for his involvement in the incident and that Student A was punished more harshly than a non-disabled student (Student E) who was not disciplined for a physical altercation with Student

A's sister earlier that year⁷. OCR reviewed the District's disciplinary records over the past two years. There were 41 documented incidents of the Level 1 offense physical aggression with no bodily harm committed by 21 different students. Of these 21 students, 4 were disabled students. All 4 of the disabled students received dismissals for a first offence and 11 of 17 non-disabled offenders received dismissals for their first offence. One of the 11 non-disabled students received a suspension (a higher punishment) as a first time offender. The remaining 6 non-disabled students received dismissals on their second offences, but not for the first offence.

The Principal's notes reveal that she interviewed five students including Student A, D and F and two witnesses Student A identified (Student G and Student H). Student F asserted that prior to the incident, Student A had hit her in the back and tripped her as well. Student G said that Student A hit Student D on two other occasions, but only after Student D said mean things to Student A. Student A admitted to hitting Student D on March 7 but denied any physical aggression toward Student F, and could not recall any other incidents involving Student D. The Principal determined that dismissal was warranted, and contacted Student A's parents via phone, with Student A present.

The Principal informed OCR that she asked Student A to speak with her parents, but Student A refused to do so. The Principal left the room, and purposely left the handset on the desk near Student A so that she could talk to the Complainants if she wanted. The Complainants deny this characterization of events, and assert that they were not allowed to speak with Student A. The Principal admits to informing the Complainants about the reports received from other students about Student A hitting other students on other occasions but denies that uttering the threat, "if you set one foot on school property." The Principal explained that she discussed with Student A the policy that restricts students from school property if they are serving a suspension.

The following day, March 9, 2012, the Complainant emailed the Principal asserting that the District had discriminated against Student A based on disability, citing: (1) the January 10, 2012 incident involving Teacher B, (2) the adequacy and impartiality of the investigation of the March 7, 2012 incident (3) a false accusation of physical aggression toward Student F, and (4) the failure to let either of the Complainants speak with Student A when discussing her behaviors. The Complainant also informed the Principal, that Student A's behavioral problems escalate when she has a substitute teacher.

The March 22, 2012 Grievance

⁷ According to District records, the incident was a one-time pushing incident on the playground during escalating play. OCR determined that this was a factually different incident and not comparable to the March 7 incident.

On March 22, 2012, the Complainants filed a formal Section 504 grievance that alleged discrimination and retaliation based on the February 24, 2012 and March 7, 2012 incidents, disability based verbal harassment by the Principal, and a failure to implement Student A's Section 504 Plan. On March 27, 2012, the Principal sent a letter to the Complainant describing her version of the events of February 24, 2012 and March 7, 2012. The letter contained no legal standard or factual determinations based on any independent investigation and did not directly address the FAPE issue (only asserting that the out of school dismissal was warranted under the circumstances, and that Student A's disability was taken into account). The building Section 504 representative advised OCR that she did not investigate the matter even though the Principal was the party accused of the disability based harassment.

The April 2, 2012 Incident

Failure to Implement, Retaliation, and Disability Based Harassment

According to the Complainants, on April 2, 2012, Student A's Science Teacher (Teacher C) required that Student A sit next to Student H, a situation which the Complainants claim heightened Student A's anxiety and stress. As a result of being forced to sit near Student H, Student A left the classroom for the remainder of the period. According to the Complainants, Teacher C made no attempt to de-escalate Student A's behavior before she left the classroom and made no attempt to get Student A to return the classroom. Additionally, the Complainants assert that Teacher C shared with the rest of the science class that Student A required "special treatment."

Student A explained to OCR that on April 2 the students were switching seats and when it was her turn to select a seat the only one left was objectionable to her. When Student A attempted to inform Teacher C of her objections, Teacher C told her that she could go sit in the seat, or go out into the hall. Student A then went to the bathroom until the class was over. Student A could not recall Teacher C saying that Student A required "special treatment."

According to Teacher C, on April 2, 2012, Student A requested to move her assigned seat. Teacher C found a volunteer student to switch seats with Student A. Shortly after moving, the volunteer student said she did not want to switch when told that the switch would be permanent. When Student A began questioning switching back, Teacher C ignored the behavior and allowed the whole class to switch seats. According to Teacher C, Student A then left the classroom and went to the restroom.

Students B and C who were also in the science class told OCR they had no recollection of the April 2 incidents. However, Student B recalled that at some point she learned that Student A had a disability because of a presentation that Student A and the Complainant gave about

Student A's disability during a prior year. Neither student recalled hearing Teacher C make any comments in class about Student A needing "special treatment."

Grievance Appeal (April 3, 2012)

On April 3, 2012, the Complainants sent a letter to the Director of Special Education at the District, listing "some of the things we need to happen." The letter includes recommendations as to procedures that should be in place when the behavioral interventions in Student A's Section 504 Plan fail and requests 10-15 specific amendments to Student A's Section 504 Plan. The Complainant asserted to OCR that although recommendations were made regarding the Plan and future discipline, the Complainants still wanted their allegations of past harassment and retaliation, including the April 2, 2012 incident, investigated. In the letter, the Complainants stated that their concerns had not been met. Additionally, they wrote an email on that same date to the school ombudsman alleging that the treatment by the Principal was harassment and discrimination.

According to the Complainants, after the April 2, 2012 incident in science class, they were seriously considering the possibility of homeschooling Student A for science. As such, they contacted Student A's primary teacher (Teacher A) regarding the possibility of having Student A stay in Teacher A's room during the assigned time for science (Teacher A's lunch/prep time). Although initially receptive to the idea, Teacher A later informed the Complainants that she would not be able to watch Student A, "now that her parents had gone to the District." The Complainants advised OCR that they did not believe that Teacher A herself was acting based on retaliatory motives and acknowledged as she was consistently supportive of Student A and her family; rather they believed that when the District administrators learned that Teacher A had agreed to watch Student A during science class period, the administrators pressured Teacher A to change her mind.

Teacher A informed OCR that the decision of whether to give up her lunch/prep time was hers to make; while she was initially receptive to the idea of giving up her prep period, on further reflection she decided she would not do so. Teacher A explained that she did not want to give the impression that she did not trust Teacher C's qualifications, character, or ability to teach science or work with disabled students. Teacher A also informed OCR that she believed that pursuant to the terms of her employment, she was required to use her prep time for class preparation only, and could not supervise Student A. Teacher A indicated that neither the Principal nor the District influenced her in making this decision and the District administrators denied any involvement in the decision. As for the "gone to the District" comment, Teacher A asserted that she did not recall what she said to the Complainants, but asserted to OCR that while she would not want to get in the middle of a dispute between the District and the parents, her decision that that she would not watch Student A during her lunch/prep period was based on the above described rationale and not because of any grievances filed by the Complainants.

The April 12, 2012 Incident

Disability Based Harassment, Retaliation, and Different Treatment in Discipline

According to the Complainants, on April 12, 2012, Students A, B, and C were referred to the Principal's office for leaving the cafeteria without permission. According to the Student A, Student C's lunch had been stolen, and the other two girls escorted Student C to the Principal's office to report the theft. Student A and Student B, both disabled students were disciplined for leaving the cafeteria without permission, and the Principal called Student A, "stupid" and blamed Student A for getting Student B in trouble. However, Student C (a non-disabled student) was not punished. The Complainants further assert that the Principal allegedly asked Student A in a sarcastic tone, "[Student A] why would you come to me when you are not supposed to talk to me"⁸. OCR interviewed the students about the incident but none of them, including Student A recalled it.

The Principal asserted to OCR that Student C, whose lunch was allegedly stolen, was redirected back to the cafeteria and complied. Student C's disciplinary records however, show that he was disciplined for leaving the cafeteria without permission, at the same level as Student A. According to the Principal, while she was trying to address the issue, Student B left the office and exited the school through a side entrance. Once this was discovered the school contacted the police and Student B's parent. However, within a short time, before police response and Parent B coming to the school, Student B returned to the school and went back to the office. According to the Principal, Student B was suspended for leaving the school. The Principal denied making any negative statements to Student A.

The April 13, 2012 Incident

Disability Based Harassment and Retaliation

Complainants assert that On April 13, 2012, the Principal allegedly told Student F, "...do you really want to be friends with a person like [Student A]? She is not a good person and you should stay away from her." According to Student A, the students were at a lunch table talking about the April 12 incident, and she told the group that the Principal does not know how to follow the Plan and that she was "pure evil."

⁸ During this time, the Complainants did not want Student A to speak with the Principal about discipline without a parent or another adult present and accordingly when Student A went to the office, Student A did not speak with the Principal and would not answer her questions. Although this communication protocol was stated as a recommendation in the Step 2 grievance, it was not part of the Section 504 Plan in effect at the time.

Student F told OCR that on April 13, 2012, Student A called the Principal “a fat BS.” Student F told Student A that she should not talk about the Principal in that manner. Student A then made an derogatory generalization about African Americans. Student A then told Student F to get away from the rest of the group at the table. Student F informed OCR that she was upset by the Student A’s statement and wanted to tell the Principal. Student F received permission from the cafeteria staff and described the conversation to the Principal.

Student F told the Principal that she did not want to be Student A’s friend. According to Student F, the Principal told her to calm down and stay away from [Student A] for a “little bit.” After she left the office, Student A followed her, constantly asking her what happened in the Principal’s office. Student F asserted that she told Student A that the Principal told her (Student F) to stay away from Student A for a while. According to Student F, when she told Student A about the discussion with the Principal, Student A said to her that the Principal cannot tell her to do that. Student F does not recall speaking with either Complainant about this incident.

OCR interviewed Staff B, the cafeteria staff member who allowed Student F to go to the office. Staff B along with Staff A had just made Student A clean some milk that the student had spilled on the table. Staff B recalled that Student A was making insulting comments about Staff A and Staff B (which they ignored) and recalled hearing Student A say that the Principal is a, “big fat B.S. who does not follow the plan” to the rest of the lunch table. Staff B ignored that comment and walked away from the table. According to Staff B, few minutes later, Student F came up to her crying and asked to see the Principal. Staff B asserted to OCR that Student F told her that Student A was bullying her and that Student A told Student F to sit away from the rest of the group at the table and “shut up.” Staff B brought Student F to the Principal’s office, and filled out a referral form.

The Principal denied making any comment regarding Student A being a “not a good person,” or questioning Student F’s selection of friends. The Principal does recall Student F saying that she did not want to be Student A’s friend anymore (referencing the March 7, 2012 incident and the statements about African Americans) and other times that Student F said she felt bullied by Student A. The Principal recalled telling Student F that it was up to choose her friends, but she should make this decision after staying away from Student A for a bit while she calmed down.

The April 18, 2012 Incident

Failure to Implement, Retaliation and Disability Based Harassment

The Complainants assert that on April 18, 2012, Student A was not allowed to sit in the cafeteria with Student B. According to the Complainants, Student A was not given advance notice of this change in routine and became agitated when told that she could not sit with

Student B.⁹ Because of the cafeteria staff's failure to implement the Plan provisions designed to help Student A calm down, the situation escalated to the point where Student A slapped a cafeteria tray out of a cafeteria aide's hand. As a result, Student A was sent to the Principal's office. The Complainants also assert that informing Student A of the arrangement in front of all the other students constituted disability based harassment in retaliation for their prior protected activity.

Parent B advised OCR that on April 12, 2012, she asked Teacher A to separate Student B (who had cafeteria disciplinary issues) from those with whom she got in trouble (including Student A). On April 13, 2012, Teacher A forwarded Parent B's request to cafeteria staff. On the morning of April 17, 2012, Teacher A received an email from the Complainant reiterating current strategies and providing additional strategies for dealing with Student A's behaviors, and attaching an article about her disability. Teacher A forwarded the email to Staff A. Teacher A advised OCR that she spoke with Student A prior to lunch on April 17, 2012, about not sitting with Student B. According to Staff B, they (Staff A, B, and C) were able to help Student A accept not sitting with Student B by speaking calmly to Student A, offering to take Student A to see Teacher A, and offering to take Student A to the office to call her mother, as Student A said she did not believe Staff A or Staff B when they told Student A about not sitting with Student B. Teacher A indicated that after lunch that day Staff B advised Teacher A that she and Staff A were successful in separating Student A and Student B.

On the evening of April 17, 2012, the Complainant sent another email to LNFI staff and District staff complaining about Student A not being allowed to sit with Student B. The email calls the separation of the two students, "school sanctioned discrimination" and stated, "We are not going to tell our child to keep away from her best friend."

On April 18, 2012, Students A and B were again sitting together in the cafeteria. According to Staff A, she calmly asked Student A to move to another seat as they did the day before. Student reacted in an angry manner. Staff A calmly offered to speak with Teacher A and confirm that Students A and B could still not sit together. Student A accepted the offer. Staff A left the cafeteria and verbally confirmed with Teacher A that Students A and B were still to be separated. After returning to the cafeteria, Staff A confirmed with Staff B that the students were to be separated. Staff B then told Student B that Teacher A confirmed that they could not sit together. Student A challenged Staff B's authority to separate the students Staff B informed Student A in a calm voice that she was simply trying to do what Teacher A had asked them to do. Student A then became angry, challenged Staff A's authority, and made a disparaging remark to Staff A.

⁹ The Section 504 plan applicable at the time (the Plan) provides that Student A's teachers and specialist teachers were supposed to "Provide a daily routine (written somewhere) and notify of changes in routine." However, this requirement is not listed under the "In the Cafeteria section."

After requesting that Student A not speak to her in that manner, Staff B began to implement the Plan. Staff B told Student A that, it was going to okay, and asked Student A whether she wanted some water or a place to calm down. According to Staff B, Student A continued to challenge Staff B. Staff B then asked Student A again if she wanted a place to calm down and Student A refused. Staff B then asked Student A if she wanted to call her mother, to which Student A responded, “this does not concern my mother.” Staff B then calmly asked Student B if she would be willing to move. Student B answered in the affirmative and started packing her things. While this was occurring, Student A told Staff B to “get out of here” and mind her own business. Staff B ignored the comments and started to assist Student B in moving. Student A slapped Student B’s lunchbox out of Staff B’s hand and said, “That [lunchbox] does not belong to you.” Staff A, confirmed Staff B’s description of events. According to Student A, during both incidents, the staff refused to tell Student A why she had to move, and as a result she “lashed out.”

Grievance Procedure Step Three (April 22, 2012)

On April 22, 2012 the Complainants sent an email to the District Assistant Superintendent asserting that the Principal was still not following the Section 504 Plan, citing the April 12, 2012 incident. Additionally, the Complainants alleged that the April 13, 2012 incident was part of a continuing pattern of harassment by the Principal. The also grievance states, “We believe our daughter to be a victim of hazing by [the Principal]. In terms of relief, the Complainants state in the last page of the grievance:

“Ultimately what we are asking for is a culture change. For this to happen, we feel that policies need to be readdressed and new ones created. We feel disciplinary action and training needs to take place for the building administrator. Continuing education of all staff needs to take place. Sensitivity training and education needs to happen around students with disabilities, especially disabilities like the ones our daughter suffer from.”

Based on the email traffic between the Complainants and the group reviewing the grievance for the District, the groups’ primary focus was on developing a Section 504 Plan for Student A. In one email regarding 504 Plan drafting, the District’s Special Education Coordinator states, “The [Section 504] is not a place to write anything about past incidents, I will address these when I meet with staff at LNFI.”

On May 3, 2012, the District responded in writing to the Complainants’ grievance, stating that the District was, “supporting the 504 Coordinator’s decision that the updated 504 Plan be implemented and additional support be added by the [504 Coordinator] to the school.” The District did not make a written determination concerning the harassment complaint.

The May 15, 2012 Incident

Failure to Implement and Disability Based Harassment

According to the Complainants, on May 15, 2012 a substitute teacher (Substitute B) would not allow Student A back into the classroom after Student A had requested to go out into the hall to retrieve an item left outside. Student A could not return to the classroom because she had been locked out. Student A had to ask a school custodian to unlock the classroom door. When asked by other classroom students as to why the door had been locked, the Substitute B pointed at Student A and announced, “because of her.” The Complainants assert that the staff failure to implement the Amended Plan resulted in Student A’s behavior escalating while waiting to be readmitted to the classroom. According to Student A’s disciplinary records, Student A received no discipline for this incident.

According to Substitute B, on the date in question, Student A had made a mess on the floor with cut up pieces of paper close to the end of class as the rest of the class was trying to clean up the room. Substitute B asserted that it was close to the summer break, and there were no academic lessons. Student A asked to go to the hallway to retrieve her backpack, which he allowed. Substitute B asserted to OCR that he let her go because it was close to the end of the class, and they were all getting ready to leave. Substitute B asserted that the door locked behind Student A as she left the room. According to Substitute B, he thought it would be better to let her stay outside as they cleaned up the mess that she made, and that in a minute or so, the whole class would be dismissed. Substitute B was not given a copy of Student A’s plan or instruction on handling her behavior. Neither Substitute B nor the school custodian could recall what specifically was said.

The May 31, 2012

Disability Based Harassment

According to the Complainants on May 31, 2012, LNFI staff posted a document entitled, “[Student A’s] Cafeteria Expectations. The document lists specific rules that applied to Student A in the cafeteria, including a list of consequences for each infraction. Prohibited behaviors included playing with food, and budging in line. According to the Complainants, they were not involved in the creation of the document, nor did they agree with the document’s contents when they did see the document. The Complainants asserted that even if the document had comported with the Amended Plan, the Complainant’s would not have agreed to the document being posted at the entrance to the cafeteria. According to the Complainants, when the separate set of rules was discovered, several of Student A’s friends asked Student A why she had separate rules for the cafeteria. As a result, Student A suffered embarrassment and anxiety, tearing down the postings. The Principal and her staff deny that any rules other than the general rules posted in the cafeteria for all students was on the door, and that it interviewed Student A’s witnesses to the event, who could not verify the

occurrence. The Complainants did not provide OCR copy of the list of rules applicable to Student A.

Student A left LNFI after the 5th grade and enrolled at a public charter school located in the District for the 2012-13 school year. According to Student A's parent, Student A has had no disciplinary issues at the new school.

Legal Standards and Analysis

Allegation #1 Failure to Implement

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

The Section 504 implementing regulation, at 34 C.F.R. § 104.33(a) and (b), requires, in relevant part, that a recipient operating a public education program provide to each qualified person with a disability in the recipient's jurisdiction a free appropriate public education (FAPE) that is designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met, regardless of the nature or severity of the disability. Implementation of a Section 504 Plan developed in accordance with the Section 504 implementing regulation is one means of meeting this standard.

OCR determined that Student A's Section 504 Plan was not implemented in a number of respects. More specifically on February 24, 2012, according to the LNFI disciplinary procedures, Student A was subject to being moved from her seat for the behavior observed by the cafeteria staff. When Student A's behavior escalated after being asked to move from her seat, the Plan should have been implemented. Based on Student A's account, and upon staff interviews, Student A was not given the required de-escalation opportunities. The evidence indicates that Student A was given only two choices, move or go to the Principal's office for discipline.¹⁰

OCR determined there is insufficient evidence to establish that the District failed to implement the Plan with respect to the asserted comments by the Principal on March 7, 2012. The Principal denied making the asserted comments and Student A could not recall what was said with respect to the March 7 incident.

¹⁰ The evidence is disputed as to what the Principal said to Student A on February 24. As OCR has determined that the February 24 incident was not handled appropriately under the Plan it is not necessary for OCR to rely on this disputed evidence or make a determination as to its sufficiency.

OCR also determined that that Student A's Section 504 Plan was not implemented during the April 2, 2012 incident. Teacher C could not describe any specific ways that she tried to calm down Student A during the seating incident, as required in the Plan e.g., offering a quiet space in the classroom, where she could have sat in the meantime.

Regarding the April 18, 2012 incident, the evidence showed that prior to the incident cafeteria staff received the Plan, discussed additional strategies to deal with Student A, and received an article about Student A's disability from the Complainant. The evidence also showed that the Complainant and Student A were advised of the seating change prior to implementation as required by the Plan. The evidence further showed that cafeteria staff also had successfully moved Student A on April 17 using the Plan's prescribed de-escalation techniques. While these techniques were unsuccessful in deescalating Student A's conduct on April 18, the evidence is insufficient to establish that cafeteria staff failed to implement the Plan as asserted.

OCR determined that on March 7, 2012, and May 15, 2012, the District failed to implement the requirement that copies of Student A's Section 504 Plan be given to substitute teachers. Student A had conduct issues on both days and the substitutes did not use the required de-escalation techniques. The failure to instruct the substitutes and provide a copy of the Plan was particularly problematic because Student A tended to misbehave for substitutes more than with her regular teachers.

Based on the forgoing, OCR determined that there is sufficient evidence to establish that the District discriminated against Student A as alleged in allegation # 1.

Allegation #2 Disability Based Harassment

Disability harassment under Section 504 is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.

Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of disability. 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8.

Schools are responsible for taking prompt and effective action to stop disability harassment and prevent its recurrence. The extent of a school's responsibilities if a school employee

harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context. The factors include the type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally; the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place; where and when the harassment occurred; the age and educational level of the student involved; and as applicable, whether, in light of the student's age and educational level and the way the school is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

In cases involving allegations of harassment of school-age students by an employee during any school activity, consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services. If a school employee who is acting in the context of carrying out these responsibilities over students engages in disability harassment, then the school is responsible for the discriminatory conduct. The school is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. More specifically, it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action and whether or not the recipient has "notice" of the harassment.

In some situations, if the school knows of incidents of harassment, the exercise of reasonable care should trigger an investigation that would lead to a discovery of additional incidents. The specific steps in a recipient's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. At the conclusion of a school's investigation, both parties must be notified, in writing, about the outcome of the complaint, i.e., whether harassment was found to have occurred.

Where the recipient learns of harassment based on disability by a student's peers, the recipient must investigate the incident(s) promptly and respond appropriately. The responsibility to respond to harassment based on disability, when it does occur, includes taking prompt and effective action reasonably calculated to end the harassment, eliminating any hostile environment that has been created, preventing it from recurring, and where appropriate, remedying the effects of the harassment on the student who was harassed. These

duties are a recipient's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination. The corrective action taken by the recipient should be tailored to the specific situation and may include the imposition of disciplinary measures, development and dissemination of a policy prohibiting disability harassment, provision of grievance or complaint procedures, implementation of awareness training, and provision of counseling for the targets of harassment. A series of escalating responses, including escalating consequences for the harasser, may be necessary if the initial steps are ineffective in stopping the harassment.

If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.

For the student with a disability who is receiving FAPE services, a school's investigation should include determining whether that student's receipt of appropriate services may have been affected by the bullying. If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE. Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

Finally, the recipient should take steps to stop further harassment and prevent any recurrence. At a minimum, the recipient's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents, and responding promptly and appropriately to address continuing or new problems.

OCR determined that Teacher B's comments about Student A to Students B and C on January 10, 2012 were made in the context of her teaching responsibilities. While Teacher B denied she made the asserted disparaging statement and Student B could not recall the incident, Student C said that Teacher B told Students B and C that Student A was a bad influence, and they should not be her friend. The remark was triggered by Student A's disability related conduct.

OCR determined that under the instant circumstances the indirect comments by Teacher B were in and of themselves insufficient to create a hostile environment based on disability. OCR notes that the evidence is disputed as to what Teacher B said, and Student A was admittedly misbehaving and apparently influenced two other students to do likewise. Teacher B's comments to the other students about not allowing Student A to influence them to engage in misconduct may have been misinterpreted as a warning not to associate with Student A as a friend. OCR notes that Teacher B was admonished for the remark she made and OCR found no evidence that she repeated the conduct.

The asserted comments by Teacher C (Student A needs special treatment) on April 2, 2012, and by the Principal (during the February 24, 2012 call to Complainants and in conversation with Student F) were not corroborated by independent witnesses. In fact, Students A, B and C did not recall Teacher C making the asserted comment and Student F denied that the Principal made the comments attributed to her. As to the asserted posting of rules on April 18, 2012, District staff disputed that special rules were posted regarding Student A and OCR found no documentary or other corroborative evidence supporting that the allegation that the posting occurred as alleged. The evidence regarding the alleged acts of disability harassment on March 7, April 12, April 13 May 15, and May 31, 2012, was conflicting. In all but the incident of January 10, 2012, the evidence obtained by OCR did not corroborate the Complainants' version of the events.

In making a determination regarding compliance with the regulations OCR enforces, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. Based on all the information obtained during its investigation, OCR has concluded that the evidence is insufficient to establish that the District engaged in disability harassment, as alleged. Additionally, OCR determined that the District will redress any FAPE-related concerns pertaining to the alleged conduct under the resolution of allegation #1.

Nevertheless, OCR determined the District failed to adequately respond the harassment as alleged in internal complaints by the Complainants and their attorney during the spring 2012 semester. OCR further determined that the District failed to provide a prompt and equitable grievance procedure as required by 34 C.F.R. § 104.7(b). More specifically, between January and May of 2012 the Complainants and their attorney made numerous allegations of disability based harassment by LNFI and District staff through emails, letters, and telephone calls.¹¹ The evidence also showed that the Complainants made a formal complaint through the District's Section 504 Procedure. OCR noted that for each level of the Section 504

¹¹ OCR's investigation revealed that the Complainants filed an internal grievance complaining of disability discrimination and retaliation on March 22, 2012, filed an internal grievance complaining of disability harassment and discrimination on April 3, 2012, and filed an internal grievance of disability harassment on April 22, 2012.

grievance process, the Complainants made allegations regarding specific incidents of disability based harassment and retaliation but the grievance committee worked solely on developing Section 504 Plan provisions. OCR noted that Complainants followed up during the step three process specifically noting recent incidents and past un-investigated events. The evidence also showed that the Complainants requested relief consistent with disability based harassment and/or retaliation as opposed to the creation of additional 504 Plan provisions. Finally, the evidence also showed that in September of 2012, a group of parents, including the Complainants, made another complaint alleging disability-based discrimination, but the District still has not made a determination with regard to this group complaint. OCR also noted that for two of the incidents, the February 24, 2012 and the March 7, 2012 incidents, the alleged discriminator (the Principal) responded to the complaints. Based on the foregoing evidence OCR determined that the District has failed to provide the Complainants with grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of disability discrimination and harassment complaints.

Based on the forgoing, OCR determined that there is sufficient evidence to establish that the District failed to provide a prompt and equitable response to Complainants' disability harassment claims as alleged in allegation # 2.¹²

Allegation # 3 Different Treatment in Discipline

The Section 504 regulation at 34 C.F.R. §104.4(b)(1)(i)-(iv), prohibits the denial of any service or benefit, or the provision of different services or benefits, or separate treatment in a program, on the basis of disability.

In analyzing allegations of different treatment based on disability, OCR ascertains whether there were any apparent differences in the treatment of similarly situated individuals on the basis of disability. If true, then OCR assesses the recipient's explanation for any differences in treatment to determine if the reasons offered are legitimate and non-discriminatory or whether they are a pretext for discrimination. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with its established policies and procedures and whether there is any other evidence of disability discrimination.

Here, the Complainants asserted that Student A was treated differently based on her disability in the February 24, March 7, 2012, and April 12, 2012 incidents. However, the evidence shows that in all of these instances, the students allegedly treated differently from Student A were not similarly situated to Student A. Regarding the February 24, 2012 incident, the

¹² OCR completed the investigation of the allegations filed with the District. As such, the remedy secured for this violation redresses the systemic violation and does not include additional individual relief for the Complainants. The agreement will address District's prompt and equitable response to future complaints of disability harassment.

record reflected that neither student (Student A nor Student D) were punished for the cookie incident itself. Student A was punished for her conduct towards staff after the incident. OCR found no evidence to show that Student D spoke with staff in a similar manner, or refused a request from staff. OCR's review of disciplinary incidents at LNFI shows that both disabled and non-disabled students, received discipline for insubordination and failure to follow directions.

Regarding the April 12, 2012 incident, the evidence shows that the three students received discipline based on their respective level of involvement in the incident, consistent with District policy. Leaving the cafeteria without permission is prohibited by LNFI disciplinary policy. The evidence showed that one student, Student C, returned to the cafeteria after a request from a staff member and was disciplined for leaving the cafeteria without permission. Disciplinary records reflect that the student's parents were not contacted, and the student was counseled by staff. The records also reflected that Student A was likewise disciplined, however, the Complainants were contacted pursuant to Student A's Plan. Student B however, was most severely punished because Student B left the building through a side door, requiring the Principal to contact the authorities. Student B's parent confirmed this with OCR. Therefore, based on the level of offences, Student A and Student C (a non-disabled student) were disciplined similarly and Student B (a disabled student) received a different punishment for a different incident.

Regarding the March 7, 2012 incident, Teacher C observed Student A slap Student D. None of the witnesses saw Student D react to Student A striking him, or verified that Student A was previously hit by Student D. Therefore, the evidence shows that the two students, Student D and Student A, were not similarly situated students. Additionally, OCR determined that the District treated Student A consistent with its established policies and procedures and there was no other evidence of disability discrimination.

Based on the forgoing, OCR determined that there is insufficient evidence to establish that the District discriminated against Student A as alleged in allegation #3.

Allegation # 4 Retaliation

Complainants assert that because Student A's parents requested a special education evaluation in March 2012 and filed an internal grievance in April 2012, the District retaliated against Student A when it subjected Student A to LNFI staff harassment and prohibited a teacher from providing resource services to Student A in early April of 2012.

Retaliation is prohibited by the regulation implementing Section 504 at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI) at 34 C.F.R. § 100.7(e). The regulation implementing Section 504 prohibits a recipient from retaliating against an individual for the

purpose of interfering with any right or privilege secured by Section 504 or because the individual has made a complaint, testified, assisted or participated in any manner in an investigation, hearing or proceeding under this part. The regulation implementing Title II contains similar prohibitions against retaliation at 28 C.F.R. § 35.134(a) and (b).

A *prima facie* case of retaliation is established when it is determined that (1) an individual engaged in a protected activity (opposed a discriminatory policy, asserted protected rights, or participated in an OCR complaint or proceeding); (2) the recipient knew of this activity; (3) the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and (4) there is an inferable causal connection between the protected activity and the adverse action. If all of these elements are met, OCR then considers whether the recipient presented a legitimate, non-retaliatory justification for taking the adverse action, and whether the reason is a pretext for retaliation. Pretext may be shown by evidence demonstrating that the explanation for the adverse action is not credible or believable or that treatment of the person was inconsistent with the treatment of similarly situated individuals or established policy or practice.

The evidence showed that the Complainants engaged in protected activities in March through April of 2012, when the Complainants filed numerous complaints of harassment, retaliation, and discrimination with the District. Based on the timing of events, a causal connection can be inferred between the protected activities and the adverse actions. OCR has determined that the April 2 incident constituted an adverse action, the evidence is insufficient to establish that the April 12 and 13 incidents occurred as alleged, and the evidence is insufficient to support that the April 18 incident was retaliatory.

Regarding the denial of resources services, the Complainants assert that the administrators pressured Teacher A to rescind her offer to watch Student A during the scheduled science class and cited Teacher A's reference to their dispute with the District. Teacher A asserted to OCR that it was her personal decision to rescind her offer to allow Student A to use her classroom during Science time. Teacher A explained that she changed her mind because she did not want to give up her lunch and prep time or create the impression that her fellow instructor was not doing a good job. Teacher A also indicated that her interpretation of the terms of her employment prohibit her from supervising a student during her lunch and prep time. Teacher A asserted that at no time did the Principal, other staff, or District officials influence her decision to rescind her offer to allow Student A to use her room and the administrators OCR interviewed denied doing so. The Complainants indicated that they do not believe that Teacher A herself had retaliatory motives and her conduct towards Student A and Complainants belies such motivation. OCR determined that the evidence is insufficient to establish that the District denied Student A resources services because they had engaged in protected activities.

Regarding the April 12 and 13, 2012 statements by the Principal, there was insufficient evidence to show that the Principal made the statements as alleged. For the April 12, 2012 incident, none of the student witnesses (Student A, B, or C) could recall the nature of the conversation, when the conversation occurred, or what alleged comments were made. Additionally, the Principal denied making comments attributed to her. Other than the Complainant's statement that the comments were made to her by Student A, OCR found no other independent evidence what comments were made. For the April 13, 2012 incident, the evidence likewise is insufficient to show that the Principal made the statements about Student A to Student F as alleged.

Regarding the April 18, incident, OCR's investigation verified that Student B's parent requested that the District not let Student B sit with students with whom she misbehaved. OCR's interviews of LNFI staff and reviews of discipline records shows that Student A was involved in numerous incidents, including making messes in the cafeteria, and one where Student B left the building, requiring LNFI to contact the police. As a result, LNFI staff made a decision to not let Student A sit with Student B in the cafeteria. Therefore, in honoring Parent B's request, the Principal had a legitimate, non-retaliatory reason to keep Student A and Student B separated at lunch.

Based on the foregoing, the evidence is insufficient to show that the District retaliated against the Complainants, as alleged in allegation # 4.

On October 30, 2014, the District executed the enclosed Resolution Agreement, which, when fully implemented, will correct the compliance concerns identified during OCR's investigation of allegation # 1 and allegation # 2. OCR will monitor the District's implementation of the Resolution Agreement. OCR anticipates receiving the District's first monitoring report on January 15, 2015.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

Dr. Silva
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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. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

We thank the District for the cooperation extended to OCR in this investigation. If you have any questions about this letter, or seek further information, you may contact Miguel F. Figueras, Attorney, of my staff, at 312-730-1578 or miguel.figueras@ed.gov.

Sincerely,

Ann Cook Graver
Supervisory Attorney