



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

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**REGION V**  
ILLINOIS  
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MINNESOTA  
NORTH DAKOTA  
WISCONSIN

November 18, 2016

Dr. Mike Schiffman  
Superintendent  
Freeport School District 145  
500 E. South Street  
Freeport, IL 61032

Re: OCR Docket # 05-16-1331

Dear Dr. Schiffman:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Freeport School District 145 (District) on May 23, 2016, alleging discrimination on the basis of disability (XXXXXXX) with XXXXX and XXXXX) and retaliation. Specifically, the complaint alleged:

- 1) In January 2016, the District subjected Student A to discrimination based on disability when it failed to timely evaluate him to determine if he is an individual with a disability in need of special education or related services;
- 2) During the 2015-2016 school year, the District subjected Student A to discrimination on the basis of disability when it failed to evaluate him to determine whether he is a student with a disability in need of special education and related services prior to suspending him for more than 10 cumulative days;
- 3) From January 2016 until May 2016, the District subjected Student A to a hostile environment on the basis of disability when teachers and students harassed Student A because of his disability, and the District was aware of the harassment but failed to take prompt and effective action to address it; and
- 4) In December 2016, the District retaliated against Student A by increasing his suspension from one half-day to three days after Student A's parents advocated on his behalf as a student with a disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 - 12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of

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disability by recipients of Federal financial assistance from the Department and public entities, respectively. These laws also prohibit retaliation. As a recipient of Federal financial assistance from the Department and as 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.

As a part of its investigation, OCR conducted interviews with Student A's parent and reviewed documents provided by the Student A's parents and the District. OCR also interviewed the Principal of XXXXXXXX (Principal), the Vice Principal of XXXXXXXX (Vice Principal), the District's Director of Human Resources, and Student A's math teacher (Teacher A). For the reasons set forth herein, OCR finds, applying a preponderance of the evidence standard, that the District failed to comply with Section 504 and Title II regulations as they pertain to Allegations 1 and 2, but finds insufficient evidence to establish that the District failed to comply with applicable regulations with regard to Allegations 3 and 4.

### **District Policies and Procedures**

The District's School Board Policies and Special Education Policies and Procedures are available on the District's website at <http://www.boarddocs.com/il/fsd145/Board.nsf/Public>, and <http://freeportschooldistrict.com/Page/463>, respectively. The School Board Policies are also summarized in the Parent/Student Handbook, which is available on the District's website at <http://freeportschooldistrict.com/Page/222>.

Board Policy 700.02, *Equal Educational Opportunities*, which is also printed in the Parent-Student Handbook, provides that equal educational and extracurricular opportunities shall be available for all students without regard to, in relevant part, physical or mental handicap or disability. The policy states that any student may file a discrimination grievance by using the Uniform Grievance Procedure. The District also maintains a separate *Non-Discrimination Policy* (Board Policy 115), that applies to employment and education practices, which states: the [District] will treat all persons equally without regard to, in relevant part, "handicaps unrelated to the function to be performed." Neither of these policies identifies a complaint manager or Section 504 Coordinator.

The District's *Uniform Grievance Procedure* (Board Policy 348) explains how students, parents, or community members may file a complaint of discrimination, sets forth the process for investigating the complaint, including timeframes, and provides for a written decision and the right to appeal up through the Board to the State Superintendent. The procedures state that the Superintendent must appoint at least two Complaint Managers, one of each gender; however, the procedures do not identify or provide contact information for the Complaint Managers.

Board Policy 630.01, *Education of Children with Disabilities Policy*, states that the District will provide a free appropriate public education in the least restrictive environment and necessary related services to all children with disabilities as required by Section 504 and the Individuals with Disabilities Act (IDEA). The policy further states that the District will ensure that students who are disabled within the definition of Section 504 are identified, evaluated, and provided with appropriate educational services, and acknowledges that students may be disabled within the meaning of Section 504 even though they do not require services pursuant to IDEA. For students eligible for services under IDEA, the District follows the procedures for identification, evaluation, placement, and delivery of services to students with disabilities set forth in the Illinois State Board of Education's *Special Education Rules* and the Illinois Counsel of School Attorneys *Special Education Procedures Assuring the Implementation of Comprehensive Programming for Children with Disabilities*. For students not eligible for services under IDEA, but who are nonetheless disabled under Section 504, the policy provides that the District will establish a system of procedural safeguards for identification, evaluation, and placement of disabled students under Section 504. The procedural safeguards are to include notice, an opportunity for the student's parent(s)/guardian(s) to examine relevant records, and impartial hearing with opportunity for participation by the student's parent(s)/guardian(s), and representation by counsel, and a review procedure.

Board Policy 710.02, *Rights and Responsibilities – Compliance with Section 504*, states that the District will provide a free appropriate public education to each handicapped student within its jurisdiction, and that the District will ensure that students who are handicapped within the definition of Section 504 are identified, evaluated, and provided with appropriate educational services. The policy notes that students may be handicapped under this policy even though they do not require services under IDEA. The policy further states that the due process rights of handicapped students and their parents under Section 504 will be enforced, states that the District will use a Section 504 form to document a student's needs, and names the Director of Personnel Services as the Section 504 Coordinator. The policy does not provide contact information (address, telephone, and email) for the Section 504 Coordinator. The Parent/Student Handbook provides a basic explanation of Section 504, the criteria for a disability under Section 504, and directs individuals seeking additional information to building principals and the Director of Pupil Services whose telephone number is provided.

Board Policy 715.07, *Misconduct by Students with Disabilities*, states that the District will comply with IDEA when disciplining special education students and that no special education student shall be expelled if the student's particular act of gross disobedience or misconduct is the result of his or her disability. The policy further states that a special education student "may be suspended for periods of no more than 10 consecutive school days each in response to separate incidents of misconduct, regardless of whether the student's misconduct is a manifestation of his or her disability, as long as the repeated removals do not constitute a pattern that amounts to a change in placement (considering factors such as the length of each removal, the total amount of the time the student is removed, and the proximity of the removals to one another) and provided that such student shall receive educational services provided by the District to the extent necessary to enable the child to

appropriately progress in the general curriculum and advance toward achieving the goals in the student’s IEP. The policy does not expressly provide for applicability to students who are disabled within the meaning of Section 504, and does include Section 504 among the statutes cited.

Board Policy 702.06, *Prevention of and Response to Bullying, Intimidation, and Harassment*, prohibits bullying, intimidation, and harassment of a student on the basis of actual or perceived physical or mental disability. The policy directs students to report instances of bullying and harassment to the building administrators and staff, and provides the name, email address and telephone number of the principal or designee for each of the District’s school buildings. The policy defines harassment and bullying, provides for a prompt investigation within 10 days of a report, includes procedures governing the District’s investigation of complaints of harassment, outlines the District’s complaint handling and response plan to incidents of bullying and harassment, and states that interventions such as counseling and social work services should be used. Retaliation against any person who reports and act of bullying is prohibited.

## **Allegations 1 and 2**

### Facts

Student A transferred into the District as a XXXX grade student at the beginning of the XXXX school year. Student A attended a private school the prior year. Immediately after the school year began, Student A exhibited behavior problems that resulted in him being disciplined on several occasions. Student A received XXXX suspensions, totaling 4.5 days out of school, from the start of the school year until XXXXXXXX.

On or about XXXXXXXX, Student A’s parents wrote a letter to the District requesting that the District evaluate Student A “for special education provisions, (IDEA) or [S]ection 504 accommodations.”<sup>1</sup> The letter indicated that Student A had been diagnosed by his doctor with XXXX, and that Student A’s doctor had expressed concerns that Student A’s disability was causing “XXXXXXX.” Student A’s parents told the District they were requesting Student A be evaluated partly out of concern that Student A was being disciplined excessively and unjustly.

After the District’s winter break,<sup>2</sup> in January the District held a domain meeting and initiated an evaluation of Student A. In a meeting on XXXXXXXX, Student A’s parents provided consent for the District to evaluate Student A, and also signed an authorization form allowing the District to obtain Student A’s health information. At the meeting, the IEP team also determined that Student A’s behavior history and discipline would be reviewed, and that a

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<sup>1</sup> Student A’s parent reported that they verbally communicated information about Student A’s disability (specifically, XXXX) before XXXX, but could not provide specific dates or instances of their communications. The District denies receiving any verbal communication of Student A’s suspected disability from either Student A or his parents prior to the written communication on XXXX.

<sup>2</sup> The District’s winter break was from December 21, 2015 to January 4, 2016.

behavior assessment would be completed. In addition, with regard to Student A's health, the team spoke to Student A's parents about Student A's XXXXXXXX, and decided that documentation of Student A's diagnoses and medications was needed.

The IEP team and Student A's parents met again on February 10, 2016 to review Student A's evaluation and determine whether Student A was eligible for services under IDEA. The team determined that Student A's cognitive function was average and his academic achievement fell "comfortably within the average range when compared to district peers." With regard to Student A's daily functioning, one observer noted that Student A was distracted numerous times, fidgeted with items and used avoidance tactics during math class. The other observer noted that Student A was on task during their entire observations. Student A's parents failed to provide the team any documentation of Student A's disabilities; however, they informed the team that Student A's medication had recently been changed and that a psychiatrist was looking into a possible XXXXXXXX for Student A. The Principal reported that school officials contacted Student A's medical providers on several occasions to obtain written documentation of his XXXX and/or other diagnoses, but they were unsuccessful. The Principal stated that the team does not dispute that Student A has XXXX.

On March 3, 2016, the team met again and continued Student A's evaluation. The team discussed whether Student A's poor attendance had any impact on his educational performance. Ultimately, the team reviewed Student A's assessments and determined Student A was not eligible for special education and related services. In lieu of an IEP, the team consulted with Student A and his parents to develop a behavior plan for Student A that was intended to target Student A's disruptive behavior. The team did not consider whether Student A was disabled within the meaning of Section 504, and therefore, entitled to a Section 504 plan. The Principal told OCR that the team felt the behavior plan was "a good starting point" and that, when Student A took his medications, his behavior was not an issue.<sup>3</sup>

From March 3, 2016, until the end of the school year, Student A was suspended eight more times for a total of seventeen days. At no point in time after the March 3 meeting did the team did reconvene to reevaluate Student A or consider whether Student A's continued misbehavior was a manifestation of his XXXX or a disability. As a result of his continued behavioral issues, and with parental consent, the District placed Student A into the Students In Transitional Education (SITE) program, an alternative education program for regular and special education students, on June 29, 2016. Student A is currently enrolled in the SITE program.

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<sup>3</sup> OCR notes that, if a student is taking medication, the school district cannot consider any ameliorative effects of that medication, or any other mitigating measure, when evaluating whether the student is disabled under Section 504. See 42 U.S.C. § 12102 ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to ameliorative effects of mitigating measures such as [] medication...")

Legal Standard

The Section 504 regulation at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance.

The Section 504 regulation at 34 C.F.R. § 104.3(j) defines a person with a disability as a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The Section 504 regulation at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. Major life activities include, but are not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

*FAPE*

The Section 504 regulation at 34 C.F.R. § 104.33(a) states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The development and implementation of an individualized education plan (IEP) or Section 504 Plan is one means by which FAPE may be provided.

The Section 504 regulation at 34 C.F.R. §104.34 requires school districts to place a student with a disability in the regular educational environment operated by the district unless the district demonstrates that educating the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

*Evaluation and Placement*

The Section 504 regulation at 34 C.F.R. §104.35(a) requires a recipient to conduct an evaluation in accordance with the requirements of 34 C.F.R. §104.35(b) of any person who, because of disability, needs or is believed to need special education or related services, before taking any action with respect to initial placement of the person in regular or special education, and any subsequent significant change in placement. OCR's interpretation of this requirement is that an

exclusion of more than 10 days (*e.g.*, a long term suspension or expulsion) is a significant change in placement. Therefore, in order to implement discipline that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student in accordance with the provisions of 34 C.F.R. §104.35.

A series of suspensions that are each ten days or fewer may also constitute a significant change in placement. The determination of whether a series of suspensions creates a pattern of exclusion that constitutes a significant change in placement must be made on a case-by-case basis taking into consideration factors including: (1) the length of each suspension; (2) the proximity of the suspensions to each other; and (3) the total amount of time the student is suspended.

#### *Manifestation Determination*

Where a proposed suspension or expulsion would constitute a significant change in placement, after providing notice, a school district must conduct a reevaluation of the student. The school district must first obtain information to determine whether the behavior in question is caused by or related to the student's disability. A group of persons who are knowledgeable about the student and the meaning of the evaluation data must make the determination about whether the student's behavior in question is caused by or related to the student's disability. This determination is often referred to as a "manifestation determination." Because the manifestation determination is part of a FAPE-required reevaluation, a parent has the right to contest the determination.

If the group responsible for the manifestation determination decides that the behavior that resulted in misconduct is a manifestation of the student's disability, the proposed suspension or expulsion for the student's behavior would be on the basis of the student's disability. Section 504 prohibits long-term suspension (more than 10 days) or an expulsion for behavior caused by or related to the student's disability. The group responsible for placement decisions must then decide if the student's current placement is appropriate. The school district must comply with the Section 504 requirements applicable to placement, including tailoring the decision-making about services and setting to the individual student's behavior, caused by or related to the student's disability. Consideration of whether the current placement is appropriate necessarily includes whether the school implemented the student's current Section 504 plan, including by providing services required by the plan to address the student's behavior. To the extent that the group determines that there are additional services necessary to provide FAPE to the student and that those services would also enable the student to be in the regular education setting, the school is responsible for ensuring that the student receives these services. To the extent that the group determines that placement in the regular education environment with supplementary aids and services cannot be achieved satisfactorily, the school must nonetheless place the student so that she or he is educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability. The student's parent can contest the placement decision through the District's due process procedures.

*Compensatory Services*

If a school did not implement the Section 504 plan with respect to services to address the behavior of a student who is subject to discipline for behavior that was a manifestation of the student's disability, the school is responsible for remedying its violation of Section 504. An appropriate remedy could include the school convening a group of knowledgeable persons who carefully consider information from a variety of resources to determine academic instruction and related aids and services necessary to compensate for what was denied to the student and expunging the student's disciplinary records, where determined necessary.

*Analysis and Conclusion*

Under Section 504, a school district is required to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services, before taking any action with respect to initial placement of the person in regular or special education, and any subsequent significant change in placement. A finding that a student with XXXX or other XXXXXXXX is ineligible for special education under the IDEA does not relieve a school district of its obligation to evaluate the student under Section 504. If the student is evaluated for the provision of services under the IDEA and is found ineligible because he or she does not need special education or related services because of a disability, the school district must still consider if the student could be covered by Section 504. Moreover, a student with a disability cannot be disciplined for behavior that is a manifestation of the disability if the disciplinary action constitutes a significant change in placement.

Here, the evidence established that the District evaluated Student A in response to his parents' written request for an evaluation on December 14, 2015, and the team determined that he was not eligible for special education services under the IDEA. However, the evidence established also that the IEP team failed to consider whether Student A was disabled under Section 504, *i.e.*, has a physical or mental impairment that substantially limits one or more major life activities such as thinking or concentrating. Student A continued to engage in inappropriate behavior for which he was suspended for a total of 21.5 days during the 2015-2016 and was eventually placed in the SITE alternative program. Because a pattern of suspensions that are each ten days or fewer, but which total more than 10 cumulative days, may be a significant change in placement, and because Student A's placement was later changed to an alternative program, the District should have conducted a reevaluation and manifestation determination to ascertain whether Student A's misconduct was related to a disability and to determine whether the alternative program was an appropriate placement. The District did not do so in this case. Accordingly, OCR determined that the District failed to implement proper evaluation and placement procedures in December 2015, and thereafter when Student A was suspended for more than 10 cumulative days and placed in an alternative program. Accordingly, OCR concludes that the District did not comply with the requirements of the Section 504 regulation with respect to Allegations 1 and 2.

### **Allegation 3**

#### Facts

The complaint alleged that, during the XXXX school year, the District subjected Student A to a hostile environment because of his disability when students and teachers harassed Student A, and the District failed to take prompt and effective action to address the harassment. Specifically, Student A's parent reported that, on two separate days, Teacher A took Student A's chair away from him and made him stand for a portion of her class period while the rest of the classroom took a test. According to Student A's parent, Teacher A made Student A stand as a punishment for behaving anxiously and moving in his chair, which were symptoms of his disability. Student A's parent also alleged that Teacher A made Student A take off his shoe whenever he asked for permission to sharpen his pencil. Student A's parent also reported that Teacher A asked Student A whether he had taken XXXX in the presence of other students, which led to other students teasing Student A. Lastly, Student A's parent reported that, on one occasion, Teacher A used profanity in redirecting Student A when she told him to "get your ass over to the door [and] don't forget your shit too" and to "sit your ass down." Student A's parents complained about this incident to the Principal, and Student A was removed from Teacher A's class in or around mid-XXXX.

In an interview with OCR, Teacher A denied that she ever asked Student A about his XXXXX in class. According to Teacher A, since Student A did not have an IEP or Section 504 plan, she was not aware that Student A had a disability. Teacher A explained that she only became aware that Student A XXXX after he told her during class one day that he had not XXXXX that morning. Student A did this on a few occasions according to Teacher A, but Teacher A stated that she never asked him about his medication. Teacher A told OCR that, although Student A was a bright student, he was difficult to manage in class and would get into conflicts with other students, but she never witnessed Student A being teased by other students because of his disability, and Student A's parents never complained to her that Student A was being teased by other students because of his disability.

Regarding Student A's discipline, Teacher A stated that she could not recall whether she required Student A to stand during her class, but acknowledged that it was possible because one of her classroom management techniques was to remove a student's chair if the student was caught leaning back in their chairs or balancing on two legs. She explained that she thought this behavior was dangerous and, when she witnessed students doing this in class, she required that they stand up or kneel for the remainder of the class period so that they would not continue to engage in the dangerous behavior. Teacher A told OCR that she implemented this practice for the entire class, and not to single out Student A. She added that nondisabled students were made to stand or kneel too when they were caught leaning back in their chairs or balancing it on two legs. Likewise, Teacher A reported that she did not single out Student A when she required him to take off his shoe. She explained that another of her classroom management techniques was to require students who needed to borrow a pencil to turn in one of their shoes as "collateral." She indicated she did this in an effort to encourage

her students to bring a pencil to class. Again, she stated that this practice applied to everyone, not just Student A.

Regarding Teacher A's use of profanity, Teacher A admitted that she told Student A to "sit your ass down" sometime in mid-October when he was "jumping around" during class time and ignored her requests to stop. Teacher A said she recognized her choice of language was a mistake, and that she received a verbal reprimand from the Principal as a result. Teacher A said that Student A was moved out of her classroom shortly thereafter, on or about the second week of October, and she did not have him in class for the remainder of the school year.

The Principal told OCR that she was not aware of anyone at the school asking Student A whether he XXXXX. According to the Principal, the staff at the school receives training on the confidentiality of student records in the beginning of each school year. The Principal stated that Student A's parents never complained that teachers or students were making comments to Student A about his disability or because he XXXXX related to his disability. Student A also never complained to the Principal that teachers and students were teasing him because of his disability or because he XXXXX. She noted that Student A twice complained to her that students were "picking on him" or "bothering him," but that she investigated both incidents and determined that the general name-calling and inappropriate behavior was mutual, and not related to Student A's XXXX or medication.

According to the Principal, Student A's parents complained in October 2015 about the inappropriate language Teacher A directed at Student A in her classroom. The Principal stated that, when she received the complaint, she immediately investigated and determined the conduct occurred and verbally reprimanded Teacher A. The Principal indicated that she never received any complaints from Student A's parents about Student A having to stand for two days or turn in his shoe.

### Legal Standard

Disability harassment can constitute a form of discrimination prohibited by Section 504. 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 recipient'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.

In analyzing claims of disability harassment, OCR considers the totality of the circumstances to determine whether a hostile environment has been created, *i.e.* whether the harassing conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on disability. These circumstances include the context, nature, scope, frequency, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved. When harassing conduct is

sufficiently serious that it creates a hostile environment, it can violate a student's rights. If a staff member who is acting (or who reasonably appears to be acting) in the context of carrying out their responsibilities engages in harassment on the basis of disability that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, then the recipient is responsible for the discriminatory conduct whether or not it has actual notice of it.

School districts have a legal responsibility to prevent and respond to disability harassment. When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action reasonably calculated to end the harassment, eliminating the hostile environment if one has been created, preventing it from recurring and, where appropriate, remedying the effects on the student who was harassed.

While disability harassment must involve the bullying or harassing of a student "on the basis of" disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefits constitutes a denial of FAPE that must be remedied, regardless of the nature of the bullying or harassment. Section 504 imposes on a recipient an ongoing obligation to provide FAPE to students with disabilities, and that obligation exists whether or not school officials know or reasonably know about harassment or bullying of a student with a disability that may be causing a denial of FAPE.

### *Analysis and Conclusion*

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. OCR weighed the conflicting testimony of Student A's parent and that of the Teacher A and determined that the preponderance of the evidence does not substantiate that Teacher A or Student A's classmates harassed Student A on the basis of his disability or that the District failed to take prompt and effective action to address it.

Teacher A denied asking Student A about his medications in class or in the presence of others, and testified that Student A raised the issue of his medication when he said in front of the class that he had not taken it on some days. The Principal testified she never received a complaint from Student A or his parents that Student A was being teased or harassed about his medication. To the contrary, the Principal reported, and provided documentation showing, that she investigated two incidents wherein Student A reported that classmates were picking on or bothering him, and that she concluded he engaged in mutual misconduct and the incidents were unrelated to any possible disability or Student A's medication. Student A parents did not provide, and OCR did not find evidence sufficient to establish, that they made any other reports of student harassment. Consequently, the evidence is insufficient to

establish that Teacher A and Student A’s classmates made harassing comments about Student A’s XXXXXXXX.

OCR finds that Student A was made to stand during class on at least one occasion for moving in his chair, and was required take off his shoe whenever he asked for permission to borrow a pencil. However, the evidence established that Teacher A utilized these classroom management techniques on the entire class, and did not single out Student A because of his disability. Nondisabled students were subject to the same consequences when they used their chairs inappropriately or asked to borrow a pencil, and OCR notes that Student A had not yet been referred for evaluation at the time Teacher A imposed these consequences on him. Thus, the evidence is insufficient to establish that Teacher A’s implementation of these classroom management techniques subjected Student A to harassment based disability. Even assuming arguendo that Student A received his consequences because of his XXXX symptoms, the evidence is insufficient to establish that those instances created a hostile environment, *i.e.*, was sufficiently serious that it denied or limited Student A’s ability to participate in or benefit from the class, given that Student A was moved to another class shortly after the beginning of the school year.

Lastly, the evidence established that Teacher A used profanity on one occasion when speaking to Student A. The evidence also established, however, that the Principal promptly investigated the incident and, upon finding that the inappropriate conduct occurred, took prompt and effective measures to address it. Teacher A was verbally reprimanded and Student A was removed from her classroom and placed in another class. Therefore, the evidence is insufficient to establish that, even assuming Teacher A’s conduct amounted to harassment, the District failed to take prompt and effective action to address it. Accordingly, OCR finds evidence is insufficient to establish that the District failed to comply with the requirements of the Section 504 regulation as alleged in Allegation 3.

#### **Allegation 4**

##### *Facts*

The complaint alleged that, in December 2015, the District retaliated against Student A by increasing the length of his suspension from 1.5 days to three days after Student A’s parents advocated on his behalf as a student with a disability.

On XXXXX, Student A was removed from his classroom to the Dean’s office for disrupting class and punching another student. While the Dean was processing paperwork about the incident, Student A became insubordinate and went behind the Dean and grabbed the pen out of his hand. Student A was moved to the front office and picked up by his parents. He was given a 1.5 day suspension for the classroom incident.

Student A’s parents complained to the Principal about the discipline and disputed the underlying facts of the classroom incident. Student A’s parents also emailed Superintendent to criticize the Dean’s handling of the incident and stated their belief that the Dean did not

listen to Student A's version of the incident. According to the Student A's parents, later that evening, the Dean called them, and left two voicemail messages. In the second voicemail message, the Dean allegedly stated that, if Student A's parents complained to the District and defended Student A's actions, he would increase Student A's suspension from 1.5 days to three days for "battery against a faculty member." Student A's parents did not provide a copy of the voicemail recording to OCR.

Later that evening, Student A's parents sent an email to the Principal informing her about the voicemails, and asked her to look into the Dean's behavior. The Principal indicated to OCR that she reached out Student A's parents with a phone call when she received their complaint, but never got a response. In the meantime, on December 14, 2015, Student A's parents sent an email to the Superintendent complaining about the Dean's voicemails. The Superintendent responded to Student A's parents, offering a meeting with the District.

On December 15, 2015, Student A and his parents met with the Director of Human Resources and the Director of Pupil Personnel for the District. The Director of Human Resources told OCR that Student A's parents played the voicemail messages left by the Dean during the meeting. According to the Director of Human Resources, the Dean used an inappropriate tone in the voicemail message, and referred to Student A as "awful." At the meeting, Student A's parents also expressed fear of retaliation. According to the Director of Human Resources, although the Dean did state in the voicemail message that Student A's conduct in his office could be considered "battery against staff," the Dean did not threaten to increase the length of Student A's suspension if Student A's parents complained about him to the District.

The Principal told OCR that she was not involved in the investigation of Dean's voicemails, but the Director of Human Resources did play the voicemail message for her. The Principal indicated she did not recall the Dean threatening to increase Student A's suspension if Student A's parents complained to the District. However, she did agree with the Director of Human Resources that the call was inappropriate. The District reported to OCR that it does not possess a copy of the voicemail recording.

On December 17, 2015, the Director of Human Resources, along with the Principal and Assistant Principal, met with the Dean and informed him that his conduct was inappropriate and issued him a written reprimand, which was placed in his employment file. According to the Principal, the Dean admitted that the phone calls were inappropriate and that he was upset when he made the calls. The Human Resources Director told OCR that, in March 2016, the District informed the Dean that they would not be renewing his contract for the following school year. The Human Resources Director indicated that the decision to not renew the Dean's contract was due to performance issues, including the Dean's communication with Student A's parents. The Principal told OCR that the incident with Student A's parents was largely the reason why the District decided to terminate the Dean.

The District provided OCR documentary evidence that the length of Student A's suspension was never actually increased to three days. Student A served a 1.5 day suspension for his misconduct on December 9, 2015. OCR also determined that, although Student A's parent

alleged that the Dean's threat of retaliation was a result of their advocacy for Student A needs as a student with a disability, the Principal told OCR that Student A's parents did not put the District on notice of Student A's suspected disability until their December 14, 2015 letter to the District requesting that Student A be evaluated. Although Student A's parent told OCR that they verbally communicated information about Student A's disability to the District prior to December, Student A's parents did not provide OCR with specific dates or instances of their communications. The District denied receiving any verbal communication of Student A's suspected disability from either Student A or his parents prior to their written communication on December 14, 2015.

### Legal Standard

The regulation implementing Title VI at 34 C.F.R. § 100.7(e) provides that a recipient may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI or its implementing regulation, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted under Title VI. The Section 504 regulation at 34 C.F.R. § 104.61 incorporates this Title VI prohibition against retaliation by reference. The regulation implementing Title II at 28 C.F.R. § 35.134 contains a similar prohibition against retaliation.

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 took a materially adverse action contemporaneous with or subsequent to the protected activity; and (3) a causal connection between the protected activity and the materially adverse action can be inferred.

If all of the elements of a *prima facie* case are established, OCR then considers whether the recipient has a legitimate non-retaliatory justification for its action, and whether the justification is a pretext for retaliation. 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.

### Analysis and Conclusion

Although the record is in dispute regarding whether Student A's parents informed the District of Student A's XXXX prior to December 9, 2015, OCR assumed for the purposes of analysis that the parents engaged in a protected activity by verbally communicating to District staff their disability-related concerns regarding Student A's behavior in school sometime prior to December 9. Similarly, although the parties dispute whether the Dean threatened to increase Student A's suspension in the voicemail as the parents' contend, OCR assumed for purposes of this analysis that the parents suffered an adverse action in that the Dean made some kind

of threat on the voicemail message. OCR determined, however, that a causal connection cannot be inferred between Student A's parents' prior protected activity and the Dean's threat regarding further discipline to Student A. Although a causal connection between a protected activity and an adverse action may be inferred based on the proximity of time between the protected activity and the adverse action, in this case, the Dean's alleged threat immediately followed the parents' email to the Superintendent complaining of the Dean's unprofessional handling of the incident. Thus, the evidence suggests that, insofar as that the Dean made a threat to increase Student A's suspension, it was made in response to a complaint about his lack of professionalism, and not because of Student A's disability or his parents advocacy for his treatment as a disabled student.

Moreover, OCR finds that the District responded appropriately to the parents' complaint about the voicemail. The Human Resources Director immediately investigated the complaint, and upon learning of the Dean's inappropriate actions, formally reprimanded the Dean and ensured that Student A's punishment was not increased as a result of Student A's parents' advocacy. Student A served only 1.5 days for the suspension, not three days. The Dean's employment contract was not renewed at the end of the year due, in part, to this incident. Accordingly, the evidence is insufficient to establish that the District retaliated against Student A or his parents as alleged in the complaint.

### **Overall Conclusion**

For the foregoing reasons, OCR has determined that the District failed to comply with Section 504 and Title II with regard to issues raised in Allegations 1 and 2 of the complaint. OCR found insufficient evidence to conclude that the District violated Section 504 and Title II with respect to Allegations 3 and 4. 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.

The District has signed the enclosed resolution agreement (Agreement), which, when fully implemented, will correct the compliance problems found in this investigation. OCR will monitor the Agreement to ensure compliance.

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

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

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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.

We wish to thank the District for the courtesy and cooperation extended by its staff during this investigation. In particular, we wish to thank XXXXXXXX, counsel for the District. If you have any questions or concerns about OCR's determination, you may contact Mr. Roberto Flores, Equal Opportunity Specialist, at (312) 730-1527 or Roberto.Flores@ed.gov.

Sincerely,

Marcela Sanchez-Aguilar  
Supervisory Attorney

cc: XXXXXXXX