April 29, 2014

Reference: #06131511

Mr. Don Johnston, Superintendent
Marion School District
200 Manor Street
Marion, Arkansas 72364

Dear Mr. Johnston:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint filed against the Marion School District (MSD), Marion, Arkansas, which was received by OCR on May 9, 2013. The complainant alleges that the MSD discriminated against two students (hereinafter Student A and Student B) on the bases of race (African American), disability (Student A ((XXXXXXX disability XXXXXXXXXXXXXXX and XXXXXXX) and Student B (XXXXXXXX disability in XXXXXXXXX)), and sex (female). The investigation was conducted pursuant to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulations at 34 C.F.R. Part 100, Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104, Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulations at 28 C.F.R. Part 35, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulations at 34 C.F.R. Part 106.

Based on the allegations raised in the complaint, OCR investigated the following legal issues:

1. Whether the MSD discriminated against Student A on the bases of sex (female) and disability during the 2012-2013 school year by failing to conduct an adequate, reliable, and impartial investigation regarding a complaint of sexual harassment filed against Student A that resulted in Student A being XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXX in violation of Section 504 and Title II and their implementing regulations at 34 C.F.R. § 104.34(a), 104.35, and 28 C.F.R. § 35.130, respectively, and the Title IX implementing regulations at 34 C.F.R. §§ 106.8(b) and 106.31;

2. Whether MSD discriminated against Student B on the basis of race during the 2012-2013 school year by treating her differently than one or more similarly situated students of another race, color or national origin, in the administration of discipline in violation of Title VI and its implementing regulations at 34 C.F.R. § 100.3(b)(1);

3. Whether the MSD discriminated against Student B on the basis of disability by failing to provide regular or special education and related aids and services deemed necessary to meet the Student's individual educational needs (i.e., speech therapy, repeated instructions, have concepts re-explained, and reading for math, writing and science tests), and thereby denied Student B a free appropriate public education during the 2012-2013 school year, in violation of Section 504 and Title II and their implementing regulations at 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130, respectively;

4. Whether the MSD discriminated against Student B on the bases of race and sex during the 2012-2013 school year by treating her differently than Student C, a similarly situated student of another race and sex, in the implementation of the access to equipment supports (computer usage) accommodation listed in her individualized education program in violation of Title VI and Title IX and their implementing regulations, at 34 C.F.R. § 100.3(a) and (b), and 34 C.F.R. § 106.31(b)(1)-(4), respectively; and,

5. Whether the MSD retaliated against Students A and B and the complainant on the bases of race, disability, and sex by failing to provide the complainant with the Students' special education records upon request during the 2012-2013 school year, because the complainant made complaints to the MSD advocating for the Students' rights in violation of Title VI, at 34 C.F.R. § 100.7(e), Section 504 and Title II, at 34 C.F.R. § 104.61, and 28 C.F.R. § 35.134, respectively, and Title IX, at 34 C.F.R. § 106.71.

In a telephone conversation with OCR on November 19, 2013, the complainant withdrew Issues #1, #2, and #4, which have been dismissed upon the complainant's request. OCR's investigation, therefore, only focused on Issues #3 and #5.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance, either from the Department or from an agency that has delegated investigative authority to the Department (recipients), and certain public entities, are in compliance with Title VI, Section 504, Title II, and Title IX. Title VI, Section 504, and Title IX prohibit discrimination on the bases of race, color, or national origin, disability, and sex, respectively, by recipients. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. The MSD is a recipient of Federal financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to process allegations of discrimination filed against the MSD under Title VI, Section 504, Title II, and Title IX.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that something is more likely to have occurred than not). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

During the course of this investigation, OCR reviewed information provided by the complainant and the recipient, such as documentation from the complainant, educational records, correspondence from the MSD relating to Student A and Student B, and MSD policies and procedures. OCR also conducted interviews with the complainant, MSD faculty, and MSD staff, including principals, assistant principals, teachers, and MSD special education personnel. Based on a review of this information, OCR has determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II regarding Issue #3, but insufficient evidence to support a conclusion of noncompliance with Title VI, Section 504, Title II, or Title IX regarding Issue #5. The bases for these determinations are summarized below.

Issue # 3

Legal Standard

Under the Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.33(a) and 28 C.F.R. § 35.130, respectively, a recipient must provide a free appropriate public education (FAPE) to each qualified student with a disability in the district's jurisdiction. The Section 504 regulations, at 34 C.F.R. § 104.33(b), define an "appropriate education" as the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met, and (ii) are based upon adherence to procedures that satisfy Section 504 requirements. Compliance with this provision is generally determined by assessing whether a district has implemented a student's Section 504 plan, also known as an "individualized education program," or "IEP." When evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: (1) whether the district evaluated the student in accordance with Section 504 requirements and determined that the student was a qualified individual with a disability as defined by Section 504; (2) whether the student's needs were determined on an individualized basis by a group of persons knowledgeable about the student and the information considered; and (3) whether the placements, aids, and services identified by the district through this process as necessary to meet the student's individual needs were or are being provided. If they have not been provided, OCR will determine the district's reason for failing to do so and the impact of the failure.

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

Facts and Analysis

According to the complainant, during the 2012-2013 school year Student B's teachers did not provide many of the accommodations listed in the Student's individualized education program (IEP), such as repeating instructions, re-explaining concepts, and reading the math, writing and science tests to Student B. The complainant also alleged that the MSD did not provide speech-therapy services to Student B as required by her IEP.

OCR's review of Student B's educational records and information provided by the complainant revealed that Student B was in the eighth grade at Marion Junior High School (MJHS) during the 2012-2013 school year. The Student's records show that she was evaluated by the MSD when in elementary school and was determined to be a qualified individual with a disability and received special education speech services for language intervention and vocabulary. Student B's records revealed that she was re-evaluated by the MSD in 2008 and in the fall of 2012, and in addition to speech services, Student B also qualified for special education instruction due to a specific learning disability in reading comprehension. OCR's review of Student B's IEP for the 2012-2013 school year, developed on May 9, 2012, by her IEP committee (committee), a group of knowledgeable people that included the complainant, showed that the services identified as appropriate for Student B were speech therapy for thirty minutes once per week, repeated instructions, preferential seating/close proximity to the teacher, the opportunity to have concepts re-explained, copies of notes/PowerPoint presentations or other materials from curriculum, reading for the math/writing/science test upon student request, small group testing/alternate location, extended time, reduction of multiple choice, and calculators.

The Student's records show, and the complainant confirmed, that on or about September 26, 2012, the complainant requested a conference to discuss Student B's progress in English and math, and the committee (including the complainant) met on October 3, 2012, to discuss Student B's academic progress in those classes. According to the complainant and as confirmed by the Student's records and interviews with MSD staff, the complainant requested that the committee provide Student B with additional assistance in math. The investigation revealed that the committee considered information from a variety of sources, including information provided by the complainant, to determine that the Student's appropriate placement would include an inclusion co-teaching math class, and the committee also ordered additional evaluations (Key/Math and the Brigance Language Arts tests) to determine if Student B had any additional educational needs.

The investigation revealed that a mediation conference with the MSD was held at the complainant's request on November 13, 2012, by the Arkansas Special Education Mediation Project from the Bowen School of Law, to discuss the Student's IEP and her additional educational needs. Documentation from the MSD show that an agreement was reached between the complainant and the MSD that changed the Student's IEP to include use of the computer in the library at the English co-teacher's discretion, that the speech pathologist would use the Student's general education for vocabulary and language in speech therapy, instructional level reading materials would be loaned to the Student to practice reading at home, the Student would be given copies of notes and PowerPoint presentations from her general education teachers, and that missing assignments would be noted and sent to the complainant or a telephone call to the complainant would be made to ensure the Student's homework and missing assignments were completed. The November 13, 2012, mediation agreement also indicated that the MSD was to provide a copy of the draft IEP to the complainant by November 16, 2012, the complainant was to complete the attention deficit disorder (ADD) evaluation screener and have Student B's doctor complete the ADD form and return those documents to the MSD.

OCR's review of the MSD's Section 504 policies and procedures showed that the evaluation procedures that were applied to the development of Student B's IEP conformed to those

specified in the Section 504 regulations. OCR, therefore, concluded regarding the first two elements of the FAPE analysis, that Student B's committee and the mediation teams made their decisions regarding Student B on an individualized basis after having considered a variety of sources, including input from the complainant, MSD administrators, and Student B's teachers.

To determine if the related aids and services identified in Student B's IEP were provided to her, OCR interviewed the following teachers: the math and English inclusion co-teacher 1, the math inclusion co-teacher 2, the science teacher, and the business education teacher. OCR also interviewed the speech language pathologist (SLP) who provided speech-therapy services to Student B during the 2012-2013 school year. The math and English inclusion co-teacher 1, math inclusion co-teacher 2, science teacher, and the business education teacher informed OCR that they provided all of the related aids and services listed in Student B's IEP, including repeating instructions and re-explaining and re-phrasing instructions and concepts to help Student B understand her classwork. The math inclusion co-teacher 2 informed OCR that she would regularly ask Student B to tell her what she was working on to ensure that Student B understood the instructions for her classwork. The math inclusion co-teacher 2, the science, and the business education teachers advised OCR that Student B did not take her tests in their classrooms but at an alternate location as specified in her IEP. The math and English inclusion co-teacher 1 informed OCR that she was the co-teacher for Student B's math and English classes and that she administered Student B's tests. She stated that she did not always read the tests to Student B but would read the tests aloud if Student B asked to have specific things read to her. The evidence obtained during OCR's investigation revealed that, contrary to the complainant's assertion, Student B's IEP was implemented by her academic teachers.

The complainant also alleged that Student B did not receive speech-therapy services approximately four times during the first semester of the school year, although she did not identify the exact dates, and further alleged that Student B did not receive speech-therapy services on March 15, 2013, March 22, 2013 (spring break), March 29, 2013 (Good Friday), April 5, 2013, and April 12, 2013, during the second semester of the school year. According to Student B's IEP, Student B was to receive thirty minutes of speech therapy once a week. OCR's interview with the SLP revealed, and the complainant confirmed, that the SLP scheduled Student B's speech services each Friday during the 2012-2013 school year.

OCR's review of the MSD 2012-2013 school calendar shows there were thirty-five Fridays during the school year, seventeen during the first semester and 18 during the second semester. The SLP informed OCR that she was on maternity leave from November 13, 2012, until February 4, 2013, but that during her absence the MSD arranged for an alternate speech therapist to provide services to the SLP's assigned students. OCR reviewed Student B's speech-therapy progress logs, the SLP's report on the Student's speech services, and other information regarding the speech services provided to Student B during the first and second semesters of the 2012-2013 school year. The alternate speech therapist indicated that she covered for the SLP on nine Fridays during the first and second semesters of the school year, two of which were during the official Christmas break. OCR's review of the alternate speech therapist's documentation for the 2012-2013 school year showed that two of Student B's sessions were missed during that timeframe, either because of the therapist's absence or performance of other duties. The alternate speech therapist indicated that she could not provide OCR with the exact dates of the

missed sessions because she no longer had the speech logs for that time period. OCR's review of the speech-therapy documentation from the second semester of the 2012-2013 school year revealed that four of Student B's speech-therapy services (March 1, 2013, March 15, 2013, April 5, 2013, and April 12, 2013) were missed because of testing or the SLP's absence or performance of other duties. In all, then, the evidence indicates that Student B missed six speech-therapy sessions during the 2012-2013 school year.

Because OCR's investigation revealed that the MSD failed to provide all of the speech-therapy services required by Student B's IEP, OCR examined the impact that the six missed sessions (which comprise approximately 17% of the total speech-therapy sessions Student B should have received during the school year) had on Student B. OCR's review of the Student's grades for the 2012-2013 school year showed that the Student passed all of her classes during the first semester, earning three C's, two B's, and one A, and that she passed all of her classes during the second semester, earning three C's, one B, and two A's. OCR also reviewed the Student's April 19, 2013, classroom assessments from her teachers, which indicated that the Student was participating in class and doing well academically. Notwithstanding this information, and because it is inherently difficult to quantify the harm resulting from any denial of disability-based accommodations (and accommodations related to speech therapy in particular), OCR has determined that MSD's failure to reschedule the six missed speech-therapy sessions in question, without more, is sufficiently serious that it constitutes a denial of FAPE.

Based upon the foregoing analysis, OCR has determined that a preponderance of the evidence supports a violation of Section 504 and Title II regarding this issue with respect to the failure to provide the necessary related aid and service of six speech-therapy sessions.

Issue #5

The complainant alleged that the MSD retaliated against her, Student A, and Student B during the 2012-2013 school year by failing to provide her with the Students' special education records when she requested them because she advocated for the Students' rights. She specifically alleged that she requested a copy of Student B's IEP on November 13, 2012, specific documents from Student B's special education file on March 8, 2013, and a copy of Student A's IEP on April 30, 2013, but did not receive the documents from the MSD in a timely manner. According to the complainant, the MSD's failure to provide her with the requested documentation adversely impacted her ability to assist the Students with their school work and to ensure that they received the services identified in their IEPs.

Legal Standards

The Title VI implementing regulations at 34 C.F.R. § 100.7(e) prohibit retaliation or intimidation by recipients and states, in pertinent part, that "no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title VI]." The Title IX implementing regulations at 34 C.F.R. § 106.71 and the Section 504 implementing regulations at 34 C.F.R. § 104.61, incorporate by reference the procedural provisions (including

the prohibition against retaliation) of Title VI. The Title II regulations, at 28 C.F.R. § 35.134, incorporate a prohibition against retaliation that is comparable to the Title VI prohibition.

In order for an allegation of retaliation to be sustained, OCR must determine whether:

(1) The complainant or other alleged injured party engaged in a protected activity;
(2) The recipient had notice of the protected activity;
(3) The recipient took an adverse action against the complainant or other alleged injured party contemporaneously with or subsequent to the protected activity; and
(4) There was a causal connection between the protected activity and the adverse action.

If any one of these elements cannot be established, then OCR finds insufficient evidence of a violation. If, however, all of the aforementioned elements are established, OCR inquires as to whether the recipient can identify a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR considers whether the reason given is merely a pretext for retaliation; in other words, whether the reason is not credible or believable.

Complainant's Protected Activity

OCR first considers whether the complainant engaged in a protected activity. A "protected activity" is one in which a person either opposes an act or policy that is unlawful under any of the laws that OCR enforces; files a complaint, testifies, assists or participates in an investigation, proceeding or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR. OCR's investigation revealed, and it is undisputed by the MSD, that the complainant advocated for the Students as persons with disabilities on August 17, 2012, at a separate programming conference to develop Student A's IEP, on September 18, 2012, at another separate programming conference for Student A, and on October 3, 2012, at a separate programming conference for Student B. OCR's review of documentation submitted by the MSD and the complainant and interviews with MSD faculty and staff also indicated that the complainant expressed her belief to MSD faculty and staff during a December 19, 2012, special education programming conference for Student B that the MSD was discriminating against Student B on the basis of race. OCR could not confirm, and the complainant could provide no additional information or witnesses to support her allegation, that she and the Students were also retaliated against as a result of the complainant's advocacy for the Students under Title IX.

OCR therefore determined that the complainant was involved in protected activities under Title VI, Section 504, and Title II because she exercised her right to resolve issues regarding the Students' IEPs and placement in addition to verbally complaining of alleged racial bias in the MSD's treatment of Student B.

Recipient's Notice

OCR next considers whether the MSD had notice of the complainant's protected activity. A recipient must have notice of any protected activity for OCR to conclude that it retaliated because of the protected activity. OCR determined that the MSD had knowledge of the complainant's protected activities prior to her November 13, 2012, March 8, 2013, and April 30,

2013, requests for special education documents from the MSD. Thus, the evidence shows that the first two elements of the complainant's *prima facie* case of retaliation have been met.

Adverse Action

The third step in OCR's analysis involves determining whether the complainant or the Students was/were subjected to an adverse action. To be an "adverse action," the recipient's action must significantly disadvantage the complainant or other alleged injured party as a student or employee, or his or her ability to gain the benefits of the program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claim(s). To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse.

OCR reviewed the complainant's requests to the MSD for copies of the Students' special education documents to determine if the alleged refusal to provide her with the documents significantly impacted the Students' ability to access the MSD's educational program. The complainant alleged that she requested a copy of Student B's IEP on November 13, 2012, and did not receive the complete document until April 9, 2013. OCR's investigation showed that the complainant and the MSD participated in a mediation conference on November 13, 2012, and as part of the mediation agreement the MSD was to provide the complainant with a copy of the mediation and revised IEP documents by November 16, 2013. According to Student B's inclusion math and English co-teacher 1, she was responsible for ensuring that the complainant received copies of Student B's mediation documents and IEP. The teacher informed OCR that she provided the complainant with a copy of the documents, including the draft IEP, after the mediation conference on November 13, 2012. The teacher also indicated that after the IEP was finalized on November 19, 2012, she and the complainant signed the document and she provided the complainant with a copy of it.

The complainant alleged that she went to the MSD's administrative offices on March 8, 2013, and requested Student B's entire special education file, which she did not receive. OCR's review of documentation from the MSD's Assistant Director of Special Services (Assistant Director) confirmed that the complainant arrived at the MSD's administrative offices on March 8, 2013; however, according to the Assistant Director, the complainant requested certain documents from Student B's March 5, 2013, programming conference and not the Student's entire special education file. The Assistant Director's statement indicates that the complainant informed the Assistant Director that the paperwork that she had received at the March 5, 2013, programming conference for Student B did not include a copy of an informed consent to Families, Inc., an informed consent to Arkansas Counseling Associates, a physician's statement, and a copy of the parental consent to release personally identifiable information (Medicaid Release). The Assistant Director stated that she provided the complainant with the requested documents on

March 8, 2013, and that the complainant signed a receipt, which the MSD provided to OCR, showing that she had received the documents.

The complainant also alleged that on April 30, 2013, she contacted Marion High School (MHS) and requested a copy of the April 29, 2013, IEP that had been developed for Student A. The complainant confirmed to OCR that she had attended the April 29, 2013, programming conference. According to the complainant, she contacted MHS and requested a copy of the IEP and was informed that Student A's special education supervisor was not at the school that day but that he would be informed that the complainant wanted a copy of the IEP. The complainant indicated to OCR that she felt this was another example of the MSD's failure to provide her with copies of the Students' special education documents. Documentation from the MSD and the complainant revealed that the complainant's request for the IEP had been relayed to Student A's special education supervisor and that the complainant received a copy of the IEP on May 2, 2013.

OCR also considered the timeframes of the complainant's protected activities to determine if the MSD's alleged failure to provide the complainant with the Students' special education documents acted as a deterrent or precluded the complainant from pursuing her discrimination claims. Documentation provided by the MSD and the complainant showed that the complainant participated in five programming conferences and one mediation conference for Student A and five programming conferences and two mediation conferences for Student B during the 2012-2013 school year. The complainant participated in three programming conferences and one mediation conference prior to her November 13, 2012, request for Student B's special education paperwork; four programming conferences prior to her March 8, 2013, request for documents; and, a programing conference and a mediation conference for each Student prior to her April 30, 2013, request for documents. Additionally, the complainant filed this discrimination complaint with OCR on May 9, 2013.

OCR's review of the evidence showed that although there was a two- to three-day delay in the MSD's provision of the Students' special education paperwork to the complainant, there was no evidence that the delay significantly disadvantaged the Students' ability to gain the benefits of the MSD's program or that the alleged adverse action caused lasting and tangible harm to the Students. OCR considered the facts that the complainant attended and participated in each of the programming conferences and mediation sessions for which she alleges she did not receive the paperwork and that she received the paperwork within a reasonably short timeframe after each request. The evidence also showed that the MSD's alleged failure to provide the complainant with the requested special education paperwork did not act as a deterrent to the complainant's protected activities because the complainant continued to advocate for the Students after each of the MSD's alleged denials of the paperwork she requested. Based on all of the information reviewed, OCR determined that the MSD's actions in response to the complainant's requests for documents were not adverse to the complainant or to the Students. As previously stated, if any one of the elements of a *prima facie* case of retaliation cannot be established, it is unnecessary for OCR to continue with the retaliation analysis and OCR must find insufficient evidence of a violation.

In light of the information reviewed, OCR determined that based upon a preponderance of the evidence, the MSD did not retaliate against the complainant or the Students as alleged. Therefore, OCR has determined that there is insufficient evidence to support the complainant's allegation that the MSD is in violation of Title VI, Section 504, or Title II, and their respective implementing regulations, as to Issue #5.

The MSD submitted a voluntary Resolution Agreement (Agreement) on April 24, 2014, to address OCR's compliance concern related to Issue #3. OCR has determined that this Agreement, upon full implementation, will satisfactorily resolve the compliance concern. OCR will monitor the implementation of the Agreement. Please be advised that if the MSD fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts. A copy of the Agreement is enclosed herein.

There are no further complaint allegations appropriate for resolution; therefore, OCR is closing the above-referenced complaint as of the date of this letter. The complainant has been notified of this action. This letter is not intended, nor should it be construed, to cover any issues that are not specifically discussed herein.

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

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

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

This concludes OCR's consideration of this complaint. If you have any questions, you may contact Ms. Stewart or me at (214) 661-9600.

Sincerely,

Taylor D. August,
Director
Office for Civil Rights
Dallas Office