



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION VII  
KANSAS  
MISSOURI  
NEBRASKA  
OKLAHOMA  
SOUTH DAKOTA

September 30, 2016

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Re: Docket # 07121042

Dear XXXXXX XXXXXX:

On November 17, 2011, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against your client, the Webb City R-VII School District (District), Webb City, Missouri, alleging discrimination on the basis of disability, and retaliation for engaging in a protected activity. This letter is to inform you that OCR is administratively closing a portion of the complaint, and that the District has voluntarily submitted a Resolution Agreement to OCR to resolve the remaining complaint allegations.

Specifically, the Complainant alleged that the District discriminated against XXXXXX XXXXXX (Student) on the basis of disability by:

1. failing to identify, evaluate and make a placement decision for him based on his diagnosis of XXXXXX XXXXXX XXXXXX XXXXXX under Section 504 of the Rehabilitation Act of 1973;
2. failing to provide the Complainant notice of the District's procedural safeguards;
3. treating the Student differently than similarly situated, nondisabled students by not allowing him to participate in extra band classes because he had not completed class work, but allowing nondisabled students who also had not completed class work to participate in the extra band classes; and
4. failing to implement the Student's individualized education program (IEP) by not completing quarterly reviews of his progress as required by his IEP and by not using the Student's planner to communicate with her about his progress as required by his IEP.

Additionally, the Complainant alleged that the District retaliated against the Student because the Complainant asserted his rights as a student with a disability and advocated for him:

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

5. by using seating arrangements in class that isolated him from other students in class;
6. by not allowing him to participate in the end-of-the quarter function; and
7. by not allowing him to participate in extra band classes.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA). The regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI) at 34 C.F.R. § 100.7(e) prohibits retaliation. The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates the Title VI prohibition on retaliation. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. The regulation implementing Title II at 28 C.F.R. § 35.134 also prohibits retaliation.

As a recipient of FFA from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

To protect individuals' privacy, OCR did not use the names of employees, students, and other parties in this letter.

During the course of its investigation, OCR reviewed documentation provided by the Complainant and by the District, including the District's Section 504 procedures, the Student's transcript, teacher's notes regarding the Student, and some of the Student's special education, health information, and discipline records. In addition, OCR interviewed the Complainant. The District did not provide all of the documentation requested by OCR, and OCR was not provided an opportunity to interview District personnel as requested. The Complainant has provided OCR with audio recordings of several of the Student's IEP team meetings as well as voluminous email exchanges between herself and District staff regarding the Student.

The District expressed an interest in resolving Allegations 1, 2, and 4 prior to the conclusion of OCR's investigation of this complaint. OCR determined it was appropriate to resolve the allegations with an agreement pursuant to the process outlined in Section 302 of the *OCR Case Processing Manual (CPM)*.<sup>1</sup> The District submitted a signed Agreement (copy enclosed) to OCR on September 27, 2016 that, when fully implemented, will address Allegations 1, 2, and 4 of this complaint. As explained in more detail below, OCR has determined that Allegations 3, 5, 6, and 7 of this complaint are moot, and is closing the allegations in accordance with *CPM* Section 110(o).

### **Allegations 1, 2, and 4 – Failure to Provide Free Appropriate Public Education**

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<sup>1</sup> The *CPM* is available on OCR's website at <http://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

In Allegations 1, 2, and 4 of her complaint, the Complainant alleged that the District discriminated against the Student, who has XXXXX XXXXX XXXXX, on the basis of disability by: failing to identify, evaluate and make a placement decision for him under Section 504; failing to provide the Complainant notice of the District’s procedural safeguards; and failing to implement the Student’s IEP (by not completing quarterly reviews of his progress as required by his IEP and by not using the Student’s planner to communicate with the Complainant about the Student’s progress as required by his IEP). The Student has not attended the District since September 2015, and is currently enrolled as a high school senior in another school district.

### **Legal Standard**

The Section 504 regulation at 34 C.F.R. § 104.3(j) defines a person with a disability as any 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(l)(2) defines a qualified person with disabilities for elementary and secondary educational services as a disabled person of an age during which nondisabled persons are provided such services. The Title II regulation at 28 C.F.R. § 35.104 contains similar definitions.

The Section 504 regulation at 34 C.F.R. § 104.33 requires recipients of FFA, including school districts, to provide a free appropriate public education to each qualified person with a disability within its jurisdiction, regardless of the nature or severity of the person’s disability. A free appropriate public education (FAPE) is defined as is regular or special education and related aids and services that: (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements pertaining to educational setting, evaluation and placement, and procedural safeguards at 34 C.F.R. §§ 104.34, 104.35, and 104.36. Implementing an IEP developed pursuant to the Individuals with Disabilities Education Act (IDEA) is one means of providing a FAPE.

The regulation implementing Section 504 at 34 C.F.R. §§ 104.32, 104.35, and 104.36 contains specific requirements concerning the identification, evaluation, and placement of students who need or are believed to need regular or special education and related aids and services, as well as specific requirements regarding procedural safeguards. The Section 504 regulation at 34 C.F.R. § 104.32 requires school districts to annually identify and locate qualified persons with disabilities within their jurisdiction who are not receiving a public education and notify them of the school district’s obligations under Section 504.

The Section 504 regulation at 34 C.F.R. § 104.35 requires school districts to evaluate 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 or any subsequent significant change in placement. This regulation also states when interpreting evaluation data and making placement decisions, school districts must draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, and ensure that placement decisions are

made by a group of persons knowledgeable about the person with disabilities, the meaning of the evaluation data, and the placement options.

The Section 504 regulation at 34 C.F.R. § 104.36 requires school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parent or guardian to examine relevant records, an impartial hearing with opportunity for participation and representation by counsel, and a review procedure.

The Title II regulation does not set a lesser standard than the standard established under the Section 504 regulation. Accordingly, OCR interprets the Title II regulation to require public entities to provide a FAPE to persons with disabilities to the same extent as is required under the Section 504 regulation. Under the Title II regulation at 28 C.F.R. § 35.171(a)(3), OCR uses its Section 504 procedures to investigate Title II complaints.

## **Preliminary Findings**

### Allegation 1

According to the Complainant, the District has been aware of the Student's XXXXX XXXXX XXXXX diagnosis since he was in approximately 4 years of age, when he was enrolled in the District's Head Start program, but failed to evaluate him and determine his eligibility and make a placement under Section 504. The District asserted in its position statement in response to this complaint that it had evaluated the Student and determined he was eligible for special education and related services pursuant to the IDEA on XXXXX X, XXXX, but did not identify the disability for which the Student received special education. The District also asserted that since 2003, it had provided the Student with "all necessary and appropriate accommodations" to receive a FAPE. It did not address whether District personnel knew the Student had XXXXX XXXXX XXXXX, and claimed that the Complainant had never asked the District to evaluate the Student to determine if his XXXXX XXXXX XXXXX was a disabling condition under Section 504.

### *2010-11 School Year (XXXXX Grade)*

During the 2010-11 school year, the Student attended XXXXX grade in the District. According to his XXXXX X, XXXX IEP, the Student was evaluated/reevaluated under the IDEA in XXXXX XXXX. (OCR has not been provided a copy of the evaluation, so it is unclear whether it addressed the Student's XXXXX XXXXX XXXXX as a potentially disabling condition.) The "Present Level of Performance" section of the Student's XXXXX XXXX IEP noted that the Student lacked organization skills, was easily distracted, and required many prompts to remain on task. The District noted that the Student was able to do more, but distractions interfered with his work. The Student's math and science teachers reported that it was difficult keeping the Student on task, which led to him not completing class work, and that once he fell behind, it was difficult for him to catch up. The District determined that the Student was eligible for special education services because he had XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. His

IEP contained only one annual goal: to perform curriculum requirements for language arts. According to the IEP, the Student was to receive 250 minutes of special education services weekly, along with the following modifications/accommodations: 1) extended time for written responses as needed in all areas; 2) extended time for tests as needed in all areas; 3) alternative setting for tests as needed in all areas; and 4) extended time for assignments as needed in all areas. The XXXXX XXXX IEP did not mention or address the Student's XXXXX XXXXX XXXXX.

In XXXXX XXXX, the Complainant requested a reevaluation of the Student due to concerns about XXXXX in his XXXXX (XXXXX). On XXXXX XX, XXXX, the Student's IEP team completed a Review of Existing Data for the Student. The Review of Existing Data did not mention that the Student had XXXXX XXXXX XXXXX or indicate whether the District evaluated the Student to determine if his XXXXX XXXXX XXXXX was a disabling condition under Section 504 or the IDEA. The Review of Existing Data contained a description of the Student's current academic performance, indicating the Student was passing all classes but struggled to complete assignments, fell behind easily, may not have put forth the effort needed, required many prompts to stay on task and to fill out his planner, and struggled with organizational skills. Pursuant to the Review of Existing Data, the Student's IEP team determined further assessment of the Student was needed in the area of XXXXX. Once that assessment was completed, the Student's XXXXX XXXX IEP was amended to include XXXXX XXXXX.

According to the Student's transcript, his quarterly grades for the 2010-11 school year included one A, nine Bs, seven Cs, and three Ds. The District did not provide any discipline records for the Student from the 2010-11 school year and did not indicate whether any such records existed.

#### *2011-12 School Year (XXXXX Grade)*

The Student attended XXXXX grade in the District during the 2011-12 school year. The Present Level of Performance section of the Student's IEP dated XXXXX 11, XXXX, stated that the Complainant reported the Student was diagnosed with XXXXX XXXXX XXXXX by a physician when he was younger, and that he was not taking any medication for the condition at the time of the IEP meeting. That was the only mention of XXXXX XXXXX XXXXX in the Student's XXXXX XXXX IEP.

The Present Level of Performance section of the Student's XXXXX XXXX IEP also included observations by the Student's teachers about his behavior and performance in each of his classes. In the area of language arts, the IEP noted that the Student did not make an effort to complete work unless prompted often and that the teacher isolated the Student at his own table because he was bothering others. In the area of math, the IEP stated that the teacher could not allow the Student to sit near others because he was easily distracted and became disruptive to others, and that the Student needed prompts to stay on task, even in one-an-one situations. For science, the IEP said the Student needed constant reminders to do his work, and that as soon as the teacher walked away, he "went back to doing nothing." For his Resource Intervention class, the IEP indicated that the Student was frequently off task and unprepared, rarely had his work with him, did not work independently, only completed work when some was sitting next to him, was easily

distracted, and could be disruptive to others. In the area of Communication Arts, the IEP indicated that the Student was doing better since the teacher moved him away from other students (previously he would move another student's seat or put his hands and feet on another student), but did not always bring his work to class and often looked around during silent reading time. For social studies, the IEP stated that the Student's behavior ranged from good to bad, but typically he was off task and distracted others from their work, and he rarely participated in class discussions. In addition, under the Present Level of Performance in the XXXXX XXXX IEP, the District noted that due to the Student's lack of organization and self-motivation, the IEP team developed a plan to encourage better organization and facilitate completion of more in-class work.

According to the XXXXX XXXX IEP, the Student continued to qualify for special education services due to XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The IEP contained two annual goals: organizing and completing work in mainstreamed classes on time, and performing curriculum requirements for language arts. Under the IEP, the Student was to receive 80 minutes of special education instruction every other day in the area of study skills. The Student's modifications and accommodations remained the same as in his XXXXX X, XXXX IEP.

According to the Student's transcript, his quarterly grades for the first semester of the 2011-12 school year included one B, five Cs, one D, and three Fs. The District did not provide OCR the Student's grades for the second semester of the 2011-12 school year.

The District provided OCR a copy of the Student's discipline records for the 2011-12 school year. According to the District's records, the Student had 11 disciplinary incidents including five Minor Incident Reports<sup>2</sup> for throwing paper and a pencil, hitting another student with flip flops, being unprepared for class, belching and farting in class, and not completing work in class. Additionally, the Student received several lunch detentions for horseplay, inappropriate comments, refusing to work, and "slamming" a chair. He received one bus suspension for throwing objects and wrestling with others on the bus.

In addition to the records described above, OCR reviewed the Student's 2011-12 Health Information form completed by Complainant and found the Complainant did not identify XXXXX XXXXX XXXXX as a health issue for the Student on the form. OCR also reviewed the District's health record for the Student which noted that in Head Start, the Student had medical diagnoses of XXXXX and XXXXX XXXXX XXXXX. In 2005, the Student's health record noted "XXXXX XXXXX XXXXX XXXXX" and showed the Student was taking XXXXX. In 2007, the Student's health record indicated the Student was no longer taking medication for XXXXX XXXXX XXXXX, using XXXXX XXXXX XXXXX XXXXX instead.

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<sup>2</sup> The Minor Incident Reports do not show any disciplinary action taken by the District in response to the student's behavior.

*2012-13 School Year (XXXXX Grade)*

According to the Student's XXXXX XX, XXXX IEP, under Present Level of Performance, three of the Student's teachers noted that the Student continued to need frequent prompts and reminders to stay focused. The Student's IEP team determined the Student continued to have XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX and agreed the Student should receive 80 minutes of special education services every other day to work on study skills. The Student's XXXXX XX, XXXX IEP also provided several modifications/accommodations for the Student including extended time for assignments and testing; alternative test settings; modified test formats; note-taking assistance; and preferential seating.

The Student's XXXXX XX, XXXX IEP originally contained no reference to the Student's XXXXX XXXXX XXXXX. However, pursuant to the Complainant's request, the District amended the Student's IEP on XXXXX XX, XXXX to indicate the Complainant had provided the District with documentation that the Student had a medical diagnosis of XXXXX XXXXX XXXXX.

Although requested, the District did not provide OCR with the Student's grades quarterly or by semester for the 2012-13 school year.

The District provided OCR a copy of the Student's discipline records for the 2012-13 school year. According to these records, the Student had only one disciplinary incident during the 2012-13 school year. On XXXXX XX, XXXX, the Student swung around the end of a stairwell, almost hitting a teacher. The District assigned the Student three days of lunch detention as a consequence.

*2013-14 School Year (XXXXX Grade)*

According to the Student's XXXXX XX, XXXX IEP, under Present Level of Performance, the Student's teachers made the following observations about the Student's classroom performance and behavior:

- Study Skills—The Student lacked motivation and required continual prompting.
- Physical Science—The Student worked hard to get caught up, but may have been overwhelmed with the amount of work to do.
- Health—The Student was a bit chatty with friends, but nothing out of the norm.
- Communication Arts II—The Student participated in class and enjoyed group work, but left make-up work behind in class on occasion.
- Math—The Student needed one-on-one instruction in solving equations.

The District noted in the Present Level of Performance that the Student scored Below Basic in math, communication arts, and science on the MAP in XXXXX grade with accommodations of extra time on the Terra Nova survey and small group testing. At the time the Student's IEP team met in XXXXX XXXX, the Student was failing band, physical science, study skills, physical education, health and integrated math. He had a C- in geography and a B- in communication arts.

The Student's original XXXXX XX, XXXX IEP included no reference to the Student's XXXXX XXXXX XXXXX in any context. In response to the Complainant's request to include the Student's XXXXX XXXXX XXXXX in his IEP, the District amended the Present Level of Performance on the Student's IEP on XXXXX XX, XXXX to state

*On XX/XX/XXXX our district received documentation from XXXXX XXXXX XXXXX stating [the Student] has a medical diagnosis of XXXXX XXXXX XXXXX. His current IEP has accommodations and modifications to support his needs with this medical issue. He receives extended time for assignments and tests. He also receives alternate settings for tests, note taking assistance, preferential seating and some modification of testing format. These accommodations are also being used to support his XXXXX XXXXX XXXXX XXXXX XXXXX.*

According to the Student's XXXXX XX, XXXX IEP the Student continued to be eligible for special education based on XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. His IEP contained one annual goal—to improve skills in copying and writing information. The Student was to receive 80 minutes of special education instruction every other day in the area of study skills. The Student's 2013-14 IEP included the same modifications/accommodations as his 2012-13 IEP.

In XXXXX, XXXX, the District conducted its triennial reevaluation of the Student including a Review of Existing Data. Based on the Review of Existing Data, the District concluded no additional assessment data was needed and that the Student continued to qualify for special education services for XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The District's Review of Existing Data included, among other data, the following information:

- health and motor screenings from XXXXX XXXX (with a notation that the Student had a diagnosis of XXXXX XXXXX XXXXX, but did not take medication for the condition);
- XXXX grade MAP scores of below basic in math, science, and communication arts;
- Teacher observations that the Student had trouble remaining on task to complete assignments, rushed through work, and required preferential seating in most classes;
- one teacher's observation that the Student struggled with organization and two teachers' observations that he required constant redirection to remain focused on some days.

Under Present Level of Performance in the Student's XXXXX X, XXXX IEP, the District noted that overall the Student's task completion and on-task behaviors had increased since the introduction of the chrome books, but that the Student struggled with organizational strategies. The Student benefited from preferential seating and continual prompting to remain on task for completion. One teacher noted that the Student responded well to preferential seating. Others indicated he continued to struggle with organization and initiating tasks. Yet, other teachers said the Student's attitude had improved, and that he was completing and turning in work. One teacher said he worked hard some days and other days needed constant reinforcement to complete tasks.

The Student's XXXXX X, XXXX IEP contained one goal--to improve skills in copying and writing information. The Student was to receive 80 minutes of special education services every



other day for study skills; 80 minutes of class-within-a-class instruction in communication arts every other day in the regular education classroom; and 80 minutes of class-within-a-class instruction in math every other day in the regular education classroom. The Student's XXXXX X, XXXX IEP included modifications/accommodations allowing extended time for assignments and testing; alternative test settings; and notetaking assistance. The Student's XXXX X, XXXX IEP contained no mention of the Student's XXXXX XXXXX XXXXX in any context.

According to the Student's transcript, his semester grades for the 2013-14 school year included two As, 2 Bs, five Cs, five Ds, and one F. According to the District, the Student had no discipline records for the 2013-14 school year.

*2014-15 School Year (XXXXX Grade)*

In the Student's XXXXX XX, XXXX IEP under Present Level of Performance, the District noted that the Student had a medical diagnosis of XXXXX XXXXX XXXXX which may have contributed to poor organizational skills. The District indicated the Student occasionally had difficulty following through with completing assignments and turning in work, but this was better since moving to one-on-one instruction with chrome books. Teachers provided the following observations for the Present Level of Performance:

- Life Science—The Student struggled to complete assigned work and was missing assignments that were to be completed in class. He tended to rush through quizzes and tests resulting in low scores.
- Art—The Student was very attentive to catching up on work missed due to absences.
- American Government—The Student had difficulty staying on task and rushed through assignments, but could do work if he slowed down and paid attention to details.
- Geometry—The Student rushed through work, did not use class time wisely, and at the time was failing this class.

According to the Student's XXXXX XX, XXXX IEP, the Student continued to be eligible for special education services based on XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The IEP contained one annual goal--to improve writing skill based on purpose, including an introduction, supporting details, and a conclusion on three out of five occasions. The Student was to receive 80 minutes of special education services daily in the area of study skills with an emphasis on writing skills and career education, and 80 minutes class-within-a-class instruction daily on proper writing conventions in the regular classroom. The Student's XXXXX XX, XXXX IEP provided the same modifications/accommodations as his XXXXX X, XXXX IEP.

According to the Student's transcript, his semester grades for the 2014-15 school year included one A, one B, six D's, and two F's.

The District provided OCR a copy of the Student's discipline records for the 2014-15 school year. According to the District's records, the Student had ten disciplinary incidents during 2014-15. The Student received detention in seven of the ten disciplinary incidents which included behaviors such as refusing to comply with teacher requests, skipping class, throwing something

out of the bus window, and having tobacco on the bus. In addition to the detentions, the Student received three out-of-school suspensions--one for disrespecting a teacher, one for being disruptive on the bus, and one for drugs.

### Allegation 2

In an interview with OCR staff, the Complainant stated the District had not provided her notice of procedural safeguards, including its due process procedures.

In the District’s February 20, 2012 institutional response to allegation 2, the District asserted that the District had provided the Complainant a copy of the District’s procedural safeguards a number of times. In support of its assertion, the District provided OCR a copy of its Notice of Action<sup>3</sup> form which contains the following *Procedural Safeguards Statement*:

*Parents of a child with a disability have protection under the procedural safeguards of Part B of the Individuals with Disabilities Education Act (IDEA). A copy of The Procedural Safeguards Statement for Parents and Children may be obtained from Special Education Office, Webb City R-7 School at 673-6000.*

*If you need assistance in understanding the provisions of the procedural safeguards, you may contact XXXXX XXXXX, Special Education Director or the Special Education Compliance section at the Department of Elementary and Secondary Education at (573) 751-0699 or via email at [secompliance@dese.mo.gov](mailto:secompliance@dese.mo.gov).*

As discussed in more detail below, the District provided OCR a portion of its 504 Procedures Manual (504 Manual); the District did not provide OCR a copy of any of the forms it used to document its 504 evaluation process, including a Notice of Action.

In its March 19, 2015 supplemental request for information and records, OCR asked the District to provide OCR documentation of each instance when the District provided the Complainant a copy of its procedural safeguards during the 2012-13, 2013-14, and 2014-15 school years. In its November 16, 2015 response to OCR, the District provided OCR a document entitled “Procedural Safeguards Log” (Log). The Log consists of three columns headed respectively, Student Name, Date, and Given/Offered, and appears to be completed by one or more case managers. The Log has eight entries, six of which pertain to the Student. The two columns detailing the Date and Given/Offered information show the following information for the Student:

<u>Date</u>	<u>Given/Offered</u>
8/14/2013	mailed
9/27/2013	offered-refused
2/13/2014	offered-refused
8/13/2014	mailed

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<sup>3</sup> The form provided to OCR is designated as a form used by the District pursuant to the Individuals with Disabilities Education Act (IDEA). The District has not indicated this form is also used by the District in its Section 504 evaluation process.

8/18/2015	mailed
11/5/2015	offered-refused

Allegation 4

The Complainant stated she had not received any information from the District regarding the Student’s quarterly progress on his IEP goals from XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX October 2009 through the filing of this OCR complaint on November 17, 2011. Additionally, the Complainant told OCR that the Student’s teachers do not write anything in the Student’s planner even though according to the Student’s IEP they are required to use the planner to communicate.

Regarding quarterly progress reports, the Student’s XXXXX X, XXXX IEP contained one annual goal: the Student will perform curriculum requirements for language arts. According to the IEP, the Student’s progress toward the goal was to be measured by work samples, scoring guides and workbook mastery tests. The XXXXX X, XXXX IEP identified four reporting periods for progress toward the Student’s annual goal ending respectively on XXXXX X, XXXXX XX, XXXXX XX, and XXXXX XX, XXXX. The IEP included the questions “Making progress toward the goal?” and “Was goal addressed during this reporting period?” with check boxes for the District to indicate yes or no for each reporting period. In the XXXXX X, XXXX IEP the District provided to OCR in February 2012, well after the required quarterly reporting dates, all of these check boxes were blank.

The Student’s XXXXX XX, XXXX IEP contained two annual goals: (1) organizing and completing work in mainstreamed classes on time and (2) performing curriculum requirements for language arts. Neither goal included objectives or benchmarks. The Student’s progress toward these goals was to be measured through weekly missing assignment reports, work samples and curriculum based tests. The XXXXX XX, XXXX IEP identified four reporting periods for progress toward the Student’s annual goal and included the same check-box format as the Student’s previous IEP for indicating progress. In the XXXXX XX, XXXX IEP the District provided to OCR in February 2012, all of these check boxes were blank; however, only the first reporting period had passed at the time the District submitted its data response to OCR. In addition, as supporting documentation of the Student’s quarterly progress, the District provided OCR the Student’s Missouri Assessment Program (MAP) scores in which the Student scored below basic in both mathematics and communication arts, and a copy of one of the Student’s Weekly Progress Reports from the 2011-12 school year, showing the Student had four missing assignments and was failing three classes.

OCR asked the District to provide OCR a copy of the Student’s quarterly progress reports for the 2012-13, 2013-14, and 2015-16 school years. In the District’s November 16, 2015 response to OCR, the District provided OCR one page from the Student’s IEP for each year, but did not provide any of the supporting documentation of any of the Student’s quarterly progress reviews for these three school years. As in previous years, each IEP identified four progress reporting periods for the year, asking the questions “Making progress toward the goal?” and “Was goal addressed during this reporting period?” with check boxes for the District to indicate yes or no for each reporting period. Although there was some variation from year to year, the Student’s

IEPs from the 2012-13, 2013-14, and 2015-16 school years did not consistently reflect that the District reviewed the Student's quarterly progress toward his IEP goals during those three years.

Regarding the District's use of the Student's planner to communicate with the Complainant, neither the Student's XXXXX X, XXXX IEP nor his XXXXX XX, XXXX IEP contained a requirement that the Student's teachers use the planner to communicate with the Complainant. Further, none of the Student's IEPs in effect for the 2012-13, 2013-14 and 2014-15 school years contained a requirement that the Student's teachers use the planner to communicate with the Complainant.

## **Conclusion**

As noted at the beginning of this letter, prior to the conclusion of the investigation, the District expressed an interest in resolving Allegations 1, 2, and 4 of this complaint in accordance with the process outlined in *CPM* Section 302. The Agreement the District submitted to OCR on December 17, 2015 will, when fully implemented, address these allegations. The Agreement requires the District to: 1) revise its Section 504 Manual; 2) provide training regarding Section 504, including the revisions to the 504 Manual required by the Agreement, to all administrators, faculty, school nurses, and school counselors/social workers; 3) if the Student reenrolls in the District, notify the Complainant and the Student of its intent to conduct an evaluation of the Student to determine his eligibility to receive services as a student with a disability under the IDEA or Section 504; and 4) if the Student reenrolls in the District and consents to the evaluation, make eligibility and placement determinations for the Student in accordance with the procedural requirements of the IDEA/Section 504.

## **Allegation 3 – Different Treatment Based on Disability**

In Allegation 3 of her complaint, the Complainant alleged that the District discriminated against the Student on the basis of disability by treating him differently than similarly situated, nondisabled students. More specifically, she alleged that the District discriminated by not allowing him to participate in extra band classes because he had not completed class work while allowing nondisabled students who also had not completed class work to participate in the extra band classes. According to the Complainant, extra band classes were originally established as a privilege students earned by completing all assigned classwork, but because the band was so small, all band members other than the Student were allowed to attend the extra band classes.

## **Legal Standard**

The regulation implementing Section 504 at 34 C.F.R. § 104.4 states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives FFA. The Section 504 regulation at 34 C.F.R. § 104.4(a) prohibits recipients of FFA from discriminating against qualified individuals with a disability on the basis of disability. The regulation implementing Title II at 28 C.F.R. § 35.130(a) states that a qualified individual with a disability may not be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity. The Title II regulation at 28 C.F.R. § 35.130(b)(1)(i)

similarly states that a public entity, in providing any aid, benefit or service, may not deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service on the basis of the individual's disability.

To determine whether the District discriminated against a student on the basis of disability, OCR applies a different treatment analysis. First, OCR examines whether a *prima facie* case of discrimination exists. To establish a *prima facie* case of discrimination, the preponderance of the evidence must establish: 1) the District identified or regarded the Student as an individual with a disability, 2) a District official or representative treated him differently than one or more similarly situated students without a disability in a way that interfered with or limited his ability to participate in or benefit from the District's educational program, and 3) the different treatment occurred in the course of the District official's or representative's authorized or assigned duties and responsibilities. If OCR finds a *prima facie* case of discrimination exists, it will determine whether the District can articulate a legitimate, nondiscriminatory reason for treating the Student differently. If OCR determines that the District articulated a legitimate, nondiscriminatory reason for treating the Student differently than similarly situated students without a disability, OCR will find that the District did not discriminate against the Student on the basis of disability unless OCR determines that the reason the District provided for the different treatment is merely a pretext, or a cover-up, for unlawful discrimination.

Pursuant to *CPM* Section 110(o), OCR may close complaint allegations that are moot when the allegations are not systemic allegations; the allegations do not involve relief beyond that solely for the injured party; or there is no need for the recipient to change its policies, procedures or practices in order to prevent possible future discrimination. Generally, under the *CPM*, a student's graduation or withdrawal from a school district is not sufficient to close an allegation based on mootness. However, dismissal or closure would be appropriate in situations where the allegation relates only to the particular student and the appropriate and available remedy requires the student's presence in the school district.

In this case, Allegations 3 raises an issue of discrimination against the Student with regard to his participation in extra band classes, which involve the alleged denial of access to or participation in XXXXX XXXXX school events. The Student, if he returns to the District during the 2016-17 school year, would be a XXXXX in high school. The District would be unable to give the Student, as a XXXXX, an opportunity to participate in the missed activities that would provide an educational experience comparable to participating in those activities as a XXXXX XXXXX student. Further, Allegations 3 is an individual allegation and potential relief would be applicable solely to the Student. Addressing any potential violation(s) of Section 504 with regard to this allegation would not require the District to change its policies, procedures or practices in order to prevent possible future discrimination, and to the extent appropriate remedies could be available for these allegations are available, any such remedies would require the Student's presence in school. According to the District and the Complainant, the Student has not attended the District since XXXXX XXXX, and is currently enrolled in another school district. Consequently, based on the individual nature of Allegation 3 and the Student's transfer to another school district, OCR determined that the allegation is moot, and is closing the allegation effective the date of this letter.

### **Allegations 5 through 7 – Retaliation**

In Allegations 5 through 7 of the complaint, the Complainant alleged that the District retaliated against the Student, because the Complainant asserted his rights as a student with a disability and advocated for him, by: using seating arrangements in class that isolated him from other students in class; not allowing the Student to participate in the end-of-the quarter function; and not allowing the Student to participate in extra band classes.

### **Legal Standard**

The Section 504 regulation incorporates the Title VI retaliation prohibition at 34 C.F.R. § 100.7(e), which states that “[n]o recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege... or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.” Title II contains statutory language explicitly prohibiting retaliation: “No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.”

Retaliation is a form of intentional discrimination. OCR evaluates a retaliation allegation by reviewing the evidence to determine if there is a sufficient factual basis to believe a *prima facie* case of retaliation exists. In order to establish a *prima facie* case of retaliation, OCR must find that: 1) the complainant engaged in a protected activity; 2) the recipient took a materially adverse action against the complainant; and 3) a causal connection exists between the protected activity and the materially adverse action. If a *prima facie* case has been established, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its materially adverse action. If a non-retaliatory reason for the materially adverse action exists, OCR must determine whether the recipient’s reason is genuine or is a pretext for retaliation.

Pursuant to *CPM* Section 110(o), OCR may close complaint allegations that are moot when the allegations are not systemic allegations; the allegations do not involve relief beyond that solely for the injured party; or there is no need for the recipient to change its policies, procedures or practices in order to prevent possible future discrimination. Generally, under the *CPM*, a student’s graduation or withdrawal from a school district is not sufficient to close an allegation based on mootness. However, dismissal or closure would be appropriate in situations where the allegation relates only to the particular student and the appropriate and available remedy requires the student’s presence in the school district.

In this case, Allegations 5, 6, and 7 raise issues of discrimination and retaliation solely against the Student with regard to his classroom seating assignments, his participation in an end-of-quarter event, and his participation in extra band classes, which involve the alleged denial of access to or participation in XXXXX XXXXX school events. As noted above, the Student, if he returns to the District during the 2016-17 school year, would be a XXXXX in high school. The District would be unable to give the Student, as a XXXXX, an opportunity to participate in the

missed activities that would provide an educational experience comparable to participating in those activities as a XXXXX XXXXX student. Further, Allegations 5, 6, and 7 are individual allegations and potential relief in each instance would be applicable solely to the Student. Addressing any potential violation(s) of Section 504 with regard to these allegations would not require the District to change its policies, procedures, or practices in order to prevent possible future discrimination. To the extent appropriate remedies could be available for these allegations are available, any such remedies would require the Student's presence in school. Based on the individual nature of these allegations and the Student's transfer to another school district, OCR has determined Allegations 5, 6, and 7 are moot, and is closing the allegations effective the date of this letter.

### **Summary**

OCR considers this complaint resolved effective the date of this letter and will monitor the District's implementation of the Agreement the District submitted to resolve Allegations 1, 2, and 4. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume its investigation.

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 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 Complainants 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.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by e-mail at XXXX.XXXX@ed.gov.

Sincerely,

Kelli Douglas  
Supervisory Attorney

Enclosure

cc: XXXXX XXXXX XXXXX  
Commissioner of Education