

September 24, 2015

Phyllis Washington, Principal  
Allen Village Charter School  
XXXXXX XXXXXX XXXXXX XXXXXX  
XXXXXXXX XXXXXX, XXXXXX XXXXXX

Re: Docket # 07121120

Dear Principal XXXXXX:

On February 21, 2012, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint alleging discrimination on the basis of disability by the Allen Village Charter School (School), Kansas City, Missouri. This letter is to confirm that the School has voluntarily submitted a Resolution Agreement to OCR to resolve part of this complaint. For the remainder of the complaint, OCR found insufficient evidence to establish the School engaged in discrimination against the Complainant's son. OCR's determination is explained in greater detail below.

The Complainant specifically alleged:

1. The School denied her son, a student with a disability (XXXXXX, XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX), a free appropriate public education by failing to evaluate him and provide him with special education or Section 504 services in a timely manner; and
2. The School treated her son differently than similarly situated students without a disability by assigning him a long-term suspension for his role in a disciplinary incident on XXXXXX XXXXXX, XXXXXX, and assigning lesser or no punishment to all other students involved.

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.
- 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.

As a recipient of Federal financial assistance and a public entity, the School 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>.

In the remainder of this letter, the Complainant's son is referred to as "the Student." To protect individuals' privacy, the names of employees, witnesses and other parties also were not used in the letter.

OCR applies a preponderance-of-the-evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of or against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination in your complaint, OCR considered information the Complainant and the School submitted, including information you provided in your complaint. OCR interviewed the Complainant on March 29, 2012 and August 14, 2013. OCR obtained copies of documents and written information from the School on September 20, 2012. On December 19, 2012, OCR interviewed XXXXX XXXXX XXXXX and XXXXX XXXXX XXXXX (XXXXX). On June 15, 2015, OCR interviewed the School XXXXX and XXXXX. OCR attempted to contact the Complainant but our attempts to reach her were unsuccessful.<sup>1</sup> The legal and factual bases for OCR's determination are set forth below.

### **Allegation 1**

The School denied the Student, a student with a disability (ADHD, Bipolar disorder with mood disorder), a free appropriate public education by failing to evaluate him and provide him with special education or Section 504 services in a timely manner.

### **Legal Standard**

The regulation implementing Section 504 at 34 C.F.R. § 104.4(b)(1)(i) prohibits a recipient of FFA from the Department from denying a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service of the recipient's program. The regulation implementing Title II at 28 C.F.R. § 35.130(b)(1)(i) prohibits a public entity from denying a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service of its program.

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<sup>1</sup> OCR attempted to contact the Complainant by telephone and by email on June 15, 2015 and by letter dated June 16, 2015,

The Section 504 regulation, at 34 C.F.R. § 104.33(a) and (b), requires a recipient to provide a free and appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of individuals with disabilities as adequately as the needs of individuals without disabilities are met, and which have been developed in accordance with process requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards.

The Section 504 regulation at 34 C.F.R. § 104.35 provides that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with requirements of paragraph (b) of that section 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 the initial placement of the person in regular or special education. 34 C.F.R. § 104.35(c) requires a recipient, in interpreting evaluation data and in making placement decisions, to (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with 34 C.F.R. § 104.34, which pertains to educational setting. The Section 504 regulation at 34 C.F.R. § 104.33(b)(2) provides that implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the standard established in this section.

Additionally, the Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient 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 parents or guardians to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

Concerning Title II, under 28 C.F.R. § 35.103, the Title II regulation does not set a lesser standard than those under Section 504. Accordingly, OCR interprets the Title II regulation to require public entities to provide a FAPE to students 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.

### Findings of Fact

- The School is a charter school serving students who reside within the boundaries of the Kansas City #33 School District (District), Kansas City, Missouri. At the time the Student attended the School, the School served students from kindergarten through eighth grade. In 2013, the School expanded the grades it serves to the ninth through twelfth grades.
- The Student enrolled in the XXXXX grade at the School at the beginning of the 2011-12 school year. He was previously expelled from his neighborhood school for committing an offense categorized as a XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.
- In an interview with OCR, the administrator stated that she met with the Complainant and the Student at the time of the Student’s enrollment. She explained that because the Student had been expelled from his previous school when he was found to have committed an offense that was a XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX, in accordance with School policy, he was required to sign a behavior contract wherein the Student committed to appropriate behavior at the School.
- The School did not consider the Student a student with a disability at the time of his enrollment. According to School staff, the Complainant did not indicate verbally or in writing that the Student had a disability. A review of the Student’s enrollment forms shows that when the Student enrolled in the School, the Complainant did not indicate on his enrollment forms that he had an Individualized Education Program (IEP), XXXXX XXXXX XXXXX, or XXXXX/XXXXX. The Complainant left the “answer” portion blank on the section of the enrollment form that asked whether the Student was XXXXX XXXXX XXXXX. .
- During the 2011-12 school year, the Student’s teacher provided a daily behavior report to the Complainant and School staff documenting the Student’s behavior, which is School policy for students with a behavior contract.
- The Complainant told OCR that a XXXXX XXXXX diagnosed the Student with XXXXX and XXXXX XXXXX XXXXX XXXXX XXXXX and that the XXXXX submitted a report to the School with the Student’s diagnoses. According to the Complainant, despite receiving the report, the School did not evaluate the Student to determine if he was eligible for special education and related services, which the Complainant felt was discriminatory. The Complainant cannot recall the date the XXXXX submitted her report to the School.

- The Complainant told OCR that on or around January 19, 2012, the Student was disciplined for his role in an incident at the School. The Complainant stated that other boys displayed the same behavior as the Student, yet the Student was the only one who received a long-term suspension. The Complainant believes the Student was singled out for discipline because he was a student with a disability. The Complainant appealed the Student’s suspension but it was upheld by School officials following a hearing.
- In an interview with OCR, the XXXXX XXXXX XXXXX stated she was familiar with the Complainant and the Student. She stated the School did not have a receptionist for most of the 2011-12 school year so she assisted by sitting at the front desk, answering phone calls, and receiving visitors. She stated that the Complainant called the front desk daily and in all of her interactions and conversations with the Complainant, the Complainant never indicated she believed the Student was a student with a disability and never requested that the School evaluate the Student for special education or related services. However, the XXXXX XXXXX XXXXX acknowledged receiving information that the Student had a XXXXX XXXXX and his XXXXX recommended an IEP on or around November 30, 2011.
- As stated above, according to the XXXXX XXXXX XXXXX, on or around November 30, 2011, the School received a facsimile from the Student’s XXXXX XXXXX XXXXX (a XXXXX associated with the Student’s XXXXX) stating that the Student was diagnosed with XXXXX XXXXX with XXXXX features, XXXXX, and “possible XXXXX XXXXX.” The XXXXX XXXXX XXXXX stated in the note, “In order for [the Student] to be successful in school an IEP is recommended due to XXXXX XXXXX diagnosed.”
- The XXXXX XXXXX XXXXX considered the report from the XXXXX XXXXX XXXXX to be a request for a special education evaluation. On November 30, 2011, the XXXXX XXXXX XXXXX notified the Complainant that the School received the XXXXX XXXXX XXXXX report and informed the Complainant that the School considered receipt of this report a request for evaluation under IDEA for special education and related services. The XXXXX XXXXX XXXXX initiated a review of existing data regarding the Student.
- On January 12, 2012, the multi-disciplinary team charged with reviewing existing data for the Student determined that additional data was necessary in order to make an eligibility determination.
- As stated above, on January 19, 2012, the Student received a long-term suspension. The School issued a *Notice of Suspension* for the Student with the following description of the Student’s infraction:

*Several of the 6<sup>th</sup> grade boys have reported that [the Student] has continuously called them names and bullied them in inappropriate ways during the school day, even after being asked to stop by the students. Bullying and harassment is not permitted our school in accordance to the Missouri Safe Schools Act. Therefore [your son] is being suspended pending a hearing.*

- In an interview with OCR, the XXXXX discussed in greater detail the facts surrounding the Student's disciplinary incident. She explained that the Student was suspended for several behaviors, not just one incident. First, the Student used a water bottle to demonstrate a sexual act to another student. In addition, the school received complaints that the Student was bullying other kids in his classroom "frequently and severely." He was observed pulling down the pants of several classmates, touching others and himself inappropriately, and calling other children names.
- Students reported the Student's bullying incidents to School staff. School staff investigated the alleged incidents and interviewed all the students in the Student's class. The School's investigation revealed that the Student's name came up frequently as someone bullying other students.
- According to School staff, there were four other students who were also engaged in bullying behavior around the same time as the Student. School staff investigating the Student's behavior determined that while the other four students engaged in bullying behavior but the Student's was "the worst" and the fact that it was sexual in nature was very concerning to school staff.
- A hearing took place on January 27, 2012, to discuss the Student's discipline.
- At the Student's disciplinary hearing, the Complainant stated that the Student was a student with a disability. The hearing officer contacted the special services director and instructed her to complete the evaluation for the Student under IDEA.
- The multi-disciplinary team met to review the results of the evaluation of the Student. The team reviewed the Student's vision and hearing screenings and results of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and Woodcock Johnson Texts of Achievement administered to assess his intellectual and cognitive ability. The team also reviewed the results of informal speech language and motor screenings as well as the report from his XXXXX regarding social, emotional and behavioral areas. Finally, the team considered information the Complainant provided in making its determination. The team concluded that the Student was not eligible for special education and related services. An evaluation report was completed on February 7, 2012.

- Also on February 7, 2012, the School issued a *Notice of Action* which indicated that the Student did not meet the criteria necessary for him to qualify as a student with a disability under the IDEA and provided the Complainant with a statement of procedural safeguards. The Complainant told School officials that if the Student was long-term suspended from the School, it would be tantamount to the School “throwing [the Student] out into the streets.” The School recognized the Complainant’s concern and offered to pay for tuition and transportation costs for the Student to attend a private placement at a local educational facility (private placement). The School recommended that a Section 504 evaluation be conducted when the Student moved to the private placement. School staff could not recall whether a manifestation determination was conducted for the Student and OCR obtained no documentation supporting that a manifestation determination review occurred.
- On March 29, 2012, the Student enrolled in the private placement. The School submitted invoices to OCR indicating its payment for the Student’s transportation and tuition. While at the private placement, the Student was determined eligible for a Section 504 plan. Measurable academic and behavior goals were established for him and reports from the private placement show the Student achieved between 94% and 100% completion rates on his goals.
- OCR reviewed the records of the other four students who the Complainant identified as receiving less severe discipline than the Student. Students 1, 2 and 3 were suspended for the remainder of the academic year and allowed to return to the school the following year after signing a behavior contract. Student 4 received a long-term suspension. At the time of the discipline, student 4 had not been identified as a student with a disability and was not suspected of having a disability. Student 4 enrolled at the same private placement as the Student. At the beginning of the 2012-13 academic year, student 4’s parents requested a special education evaluation for the student. As a result of this evaluation, student 4 was ultimately determined to be a student with a disability and in November 2012, an IEP was put in place for him.
- The Student no longer attends either the School or the private placement. OCR has attempted to reach the Complainant to discuss the Student’s current status as a student and where he is attending school but the Complainant has not responded to those attempts. The School has no record of where the Student is attending school.

### **Legal Analysis and Conclusion**

To make a determination regarding the first allegation of the complaint, OCR examined whether School staff knew or suspected the Student was an individual with a disability who needed special education or related services; whether the School failed to evaluate him

within a reasonable amount of time from when the School knew or suspected he needed such services; and whether the School's failure to evaluate and provide him with special education and related services denied him a FAPE. As stated in the Section 504 regulation at 34 C.F.R. § 104.33(b)(2), a school district may satisfy its obligation to provide an appropriate education to a student with a disability by implementing an IEP developed for the student in accordance with the IDEA. Further, to be protected under Section 504, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of having such impairment; or (3) be regarded as having such impairment.

The School asserted that the Complainant did not indicate that the Student had an IEP, a XXXXX XXXXX XXXXX or XXXXX/XXXXX upon his enrollment for the 2011-12 school year. The parties agree, however, that the School received information from the Student's XXXXX XXXXX XXXXX on or around November 30, 2011, indicating the Student may have a disability and recommending that the School initiate the development of an IEP for him. The evidence shows the School initiated a review of existing data to determine whether an evaluation of the Student was warranted. On January 12, 2012, the team concluded that additional data was necessary to determine whether to complete an evaluation. During the course of the evaluation process, on January 19, 2012, the Student received a long-term suspension. The multidisciplinary team completed the evaluation while his suspension was pending and found that the Student was not eligible for special education and related services as a student with a disability on February 7, 2012, but recommending the Student be evaluated under Section 504.

In analyzing the allegation that the School denied the Student a FAPE, OCR considered whether the School failed to conduct a special education evaluation of the Student in a timely manner during the 2011-12 school year after receiving documentation from a XXXXX XXXXX that he was a student with a disability and needed an IEP, which the School considered a request for an evaluation. OCR referred to the Missouri State Plan for Special Education, Part B to determine whether the School conducted a timely evaluation of the Student to determine his eligibility for services as a student with a disability under Section 504<sup>2</sup>. This plan states that special education evaluations generally must be conducted, and an eligibility determination made for a student made within 60 calendar days of receiving parental consent for evaluation. The plan provides that delays beyond the 60 days may be permitted for just cause.

The preponderance of the evidence established that during the 2011-12 school year, the School completed the Student's special education evaluation of and made an eligibility determination within 69 days of receiving the XXXXX XXXXX XXXXX report indicating

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<sup>2</sup> OCR does not have jurisdiction over school districts' compliance with the IDEA and is not making any findings whether the District's evaluation of the Student complied with the procedural and other requirements in the IDEA.

he may be a student with a disability and may need an IEP. OCR recognizes that the School's determination was outside the required 60 days. However, OCR concluded that this delay was not significant enough to establish a denial of FAPE that violated Section 504.

Nonetheless, a compliance concern was raised during the course of OCR's investigation regarding whether the School conducted a manifestation determination review of the Student who was suspected of having a disability at the time of his long-term discipline. Because the Student is no longer attending school and OCR's attempts to contact the Complainant have been unsuccessful, OCR is unable to identify individual relief available to the Complainant and the Student for any potential compliance concern. Insofar as the compliance concern raised by the individual circumstances of the Student in this complaint related to conducting a manifestation determination review raises general, class-wide concerns of the School's procedure for long-term suspending students with discipline, the School entered into resolution agreement (Agreement) with OCR on September 23, 2015 (copy enclosed). The Agreement requires the School to conduct revisions to its policies and procedures, review long-term suspensions for the last year of students who have disabilities, or who are suspected of having disabilities, in order to ensure the School's compliance with student placement under Section 504 and Title II and remedy any potential concerns that students with disabilities were subjected to discipline without a manifestation determination review and conduct staff training regarding the requirement to conduct a manifestation determination review.

### **Allegation 2**

In the Complainant's second allegation, the Complainant alleged the School treated the Student differently than similarly situated students without a disability by assigning the Student a long-term suspension for his role in a disciplinary incident on January 19, 2012, and assigning lesser or no punishments to all other students involved.

### **Legal Standard**

The Section 504 regulation at 34 C.F.R. § 104.4(a) provides that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from FFA. The Section 504 regulation at 34 C.F.R. § 104.4(b)(1)(ii) prohibits affording a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others. The Title II regulation at 28 C.F.R. § 35.130(a) and (b)(1)(ii) contains similar standards.

In investigating discrimination complaints that allege different treatment based on disability, OCR generally looks at whether there is evidence of difference in treatment (that is, less favorable treatment) of a student with a disability as compared to a similarly situated student

who is non-disabled in the recipient's program or activity. In doing so, OCR considers direct evidence of different treatment as well as other facts that may provide evidence of bias against persons with disabilities. If OCR finds evidence of different treatment, an initial, or *prima facie*, case of discrimination is established. We then determine whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, we determine whether the reason given by the recipient is a pretext or excuse for hiding unlawful discrimination.

### **Findings of Fact**

OCR considered the same findings of fact listed above under allegation 1 with regard to the Complainant's allegation of different treatment.

### **Legal Analysis and Conclusion**

In analyzing the Complainant's allegation that the Student was subjected to different treatment based on his disability when he was disciplined more severely than non-disabled students for the same conduct, OCR examined the conduct of all the students involved in the incident and the discipline each of them received. The Student was one of five students who received discipline for behavior on or around January 19, 2012. Three of the students received short-term suspensions and were permitted to return to the School after signing a behavior contract. The Student and another student, student 4, received long-term suspensions. Student 4 was not a student with a disability. Student 4, like the Student, was privately placed by the School. Although the Student received a harsher punishment than three other students without disabilities, one student without a disability received the same punishment as the Student. Because the Student's discipline was more severe than more than one similarly situated students without a disability, a *prima facie* case of different treatment is established.

OCR next examined whether the School provided a legitimate, non-discriminatory reason for the different treatment. The evidence established that the Student engaged in significant behaviors involving bullying and sexually inappropriate conduct. The Student's behavior was described by the administrator as "by far the worst" compared to the five other students who were disciplined. The School has a legitimate interest in ensuring appropriate behavior by students and disciplining those students who do not conform to expected behavioral conduct. The evidence does not support a conclusion that the School's legitimate, non-discriminatory reason was a pretext for discrimination. Furthermore, the School arranged and paid for a private placement for the Student during his suspension so that he was able to continue to receive educational services during his suspension. That action is not consistent with an intent to discriminate against the Student based upon his disability by denying him an equal opportunity to receive the benefits of educational services. Based on its investigation, OCR has determined there is sufficient evidence to prove that the School

discriminated against the Student by subjecting him to different treatment when it disciplined him as alleged in the allegation. Therefore, OCR is closing allegation 2 as of the date of this letter.

OCR considers this complaint resolved effective the date of this letter and will monitor the School's implementation of the Agreement. When OCR concludes the School has fully implemented the terms of the Agreement, OCR will close the complaint. If the School 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.

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

Sincerely,

/s/ Joshua Douglass

Joshua Douglass  
Chief Attorney

Enclosure

cc: Dr. Margaret Vandeven, Commissioner of Education  
Missouri Department of Elementary and Secondary Education