



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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October 16, 2017

XXXXXX XXXXX, Esquire
XXXXXX XXXXX
XXXXXX XXXXXX, xxxxxx
XXXXXX, XXXXXX

Re: Banner County Public Schools
OCR Case Number: 07-17-1024

Mr. XXXXXX:

On October 31, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Banner County School District (District), Harrisburg, Nebraska, alleging discrimination on the basis on disability. This letter details OCR's investigation and findings.

OCR investigated whether the District discriminated against the Complainant's son (the Student) on the basis of disability (Diabetes) by:

1. allowing the Student to be bullied and harassed by other students and failing to promptly and equitably address and remedy the harassment which caused a hostile environment hazardous to his mental and physical health in violation of 34 Code of Federal Regulations (C.F.R.) § 104.4;
2. failing to provide the Student a free appropriate public education (FAPE) when it failed to implement his Section 504 plan in violation of 34 C.F.R. § 104.33;
3. failing to provide the Student a FAPE when it significantly changed his placement without determining whether the conduct for which he was expelled was due to his disability in violation of 34 C.F.R. § 104.35;
4. violating the Student's due process and procedural rights in violation of 34 C.F.R. § 104.36, when it failed to provide the Complainant with procedural safeguards; and
5. allowing school staff to wrongfully apply a restraint hold on the Student in violation of 34 C.F.R. § 104.33.

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

www.ed.gov/ocr

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 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA).
- 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 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, the names of employees, students, and other parties 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 and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is sufficient to support the conclusion.

In reaching a determination in this complaint, OCR reviewed information from the Complainant and the District. OCR carefully considered all of the evidence obtained during the investigation. Regarding allegations 1, 3 and 5, based on our investigation, OCR has concluded there is insufficient evidence to conclude the District discriminated against the Student on the basis of disability. OCR's determination is explained in this letter. Prior to the conclusion of the investigation, the District requested to resolve allegations 2 and 4 of this complaint.

Allegation 1

OCR investigated whether the District discriminated against the Student on the basis of his disability by failing to promptly and equitably address and remedy the harassment which caused a hostile environment hazardous to the Student's mental and physical health in violation of 34 C.F.R. § 104.4.

Legal Standard

The regulations implementing Section 504, at 34 C.F.R. Section 104.4(a) and (b), prohibit discrimination based on disability by recipients of FFA. The Title II regulations at 28 C.F.R. Section 35.130(a) and (b) similarly prohibit disability-based discrimination by public entities. School districts are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment.

In addition to the general prohibition against discrimination based on disability, harassment or the existence of a hostile environment based on disability is also a form of discrimination prohibited under Section 504 and Title II. The germane issue is whether the harassment rises to such a level that it denies or limits a student's ability to participate in or benefit from the school's program based on disability. A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. Schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.¹

In investigating a complaint of a hostile environment based on disability, OCR determines whether the incident or incidents alleged in the complaint, individually or collectively, created a hostile environment by interfering with or limiting the student's ability to participate in or benefit from a recipient's educational program and activities. In evaluating the seriousness of the conduct, OCR considers all factors or circumstances, including the degree to which the conduct affected the student's educational program; the type, frequency, and duration of the conduct; the identity and relationship between the alleged harasser and the subject of the harassment; the number of individuals involved; and the context in which the alleged incidents of harassment occurred.

To establish a violation of Section 504, or Title II under this hostile environment analysis, OCR must find the preponderance of the evidence shows: 1) the student has been subjected to harassing conduct (for example, physical, verbal, graphic, or written) based on disability; 2) the harassment is sufficiently severe, pervasive, or persistent to create a hostile environment (it interferes with or limits the ability of the student to participate in or receive the benefits, services, or opportunities provided by the District); 3) the District had actual or constructive notice of the harassment, and 4) the District failed to take prompt and effective actions to remedy the harassment (end the harassment, prevent it from recurring and, where appropriate, remedy the effects of the student).

Findings of Fact

The Complainant told OCR that when he filed his complaint with OCR on October 31, 2016, the Student was in the 6th grade and all students K-12 are in one building. The Complainant stated that on October 12, 2016, the Student reported that his teacher had Student A walk with the Student to the restroom.² While walking, Student A asked the Student why he had to walk the Student to the restroom. While in the restroom, the Student could hear that Student B was in the restroom as well. Students A and B turned off the bathroom lights to play "Bloody Mary". The Student shouted at them and the lights were turned back on. When the Student attempted to come out of the bathroom stall, Students A and B held the door shut. The Student kept running into the door to try to open it and finally he was able to get out. When the Student was washing his hands Student A asked the Student why his father had to walk with him when bringing him to school. The Student tried to tell the teacher about what happened in the restroom but she ignored his concern. The next day, the Complainant reported the incident to the principal and he said he

¹ See 34 C.F.R. §§ 104.7(b) and 104.8.

² The Student's 504 plan indicates the Student will have an escort (except for Students A and B) to the restroom in case his blood sugar level should go critically low.

would speak with the Student's teacher. Later that same day, the principal contacted the Complainant to report that he spoke with the Student's teacher and informed her that if she had no one to walk the Student to the restroom, she should call the principal and he would walk the Student to the restroom.

The Complainant alleged that on October 20, 2016, the Student informed him that other students were talking about the upcoming fall party. Student A asked the Student whether he could handle all the sugary candies at the upcoming fall party and Student C stated, "Oh man. Look at his face. He's getting mad." Student D then said he was going to bring the Student caramel candies. Student A replied that the Student could not have caramels either. Student D said he would bring some other type of candy. Student A then said the Student could not have any candy. The Student became upset because the teacher did not attempt to stop this open discussion about his disability and he was sent to the principal's office. The principal decided to keep the Student in his office, doing school work, until he calmed down and then took him back to his class. During music class on this same day, the Student was putting his drumsticks away when Student B shot the Student in the back with a rubber band. The Student turned around and looked at Student B, then picked up the rubber band and reported it to the music teacher who laughed and did nothing about the incident.

On October 24, 2016, the Student reported to the Complainant that Student C hit him in the head during lunch and his teacher witnessed this but did not do anything. Student A also repeatedly harassed the Student throughout the day in front of the teacher but she did not do anything.

The Complaint reported that on October 27, 2016, the Student was repeatedly teased by three other students. At lunch, the students teased the Student about the cinnamon rolls they were having, talking about how the rolls tasted so good. Later the same day, as the class was returning from lunch, Student D allegedly grabbed the Student's arm. The teacher told the Student it was not a big deal and the Student talked back to the teacher. The class returned to their room to work on math but the Student was upset and did not want to work. He threw the textbook on the floor. The teacher then said, "Let's go to [the principal's] office". When they started going to the principal's office, Student A blocked the Student from going so the Student decided to hit Student A. The teacher then grabbed the Student from around his arms and belly where he gets his shots with force and took him to the principal's office. The principal called the Complaint who requested the nurse check the Student's blood sugar level. The test showed the Student's blood sugar was above the target range so the principal could not discipline the Student, in accordance with his Section 504 plan. The principal asked the Student's parents if they could keep the Student home the following Monday but they declined because they felt this was a form of discipline. However, they later decided to keep the Student home on Monday because they were concerned school staff would try to discipline the Student in some other manner.

The Complainant told OCR that on December 7, 2016, students again teased the Student. When he stood up for himself the teacher asked him to leave. As the Student was leaving, he hit Student A with his lunch box. The teacher grabbed the Student and pushed him against the wall and began wrestling with him. The Student got lose from the teacher and he hit Students A and C. Next, the principal entered the classroom and held the Student in a restraint. The parents and the principal had a meeting after this incident and the principal reported that the Student was

suspended. The parents argued the Student's blood sugar should have been tested immediately after the incident to determine whether it was within its target range. The parents asserted that because the District failed to test the Student's blood sugar, he should not have been disciplined. They appealed the discipline to the superintendent but never received a response from her.

The Complainant reported he and his wife decided to home school the Student after the suspension because they were tired of the District allowing harassment of the Student to occur as well as the District's failure to provide FAPE to the Student. The Complainant told OCR the Student would not return to the District.

OCR interviewed the principal who described the Student as intelligent and capable of doing work above his grade level. The principal stated that socially and emotionally, the Student has difficulty with peers and his reactions are not proportionate to the situation. For example, if a classmate told the Student in the hallway that they were supposed to go to math class, the Student might scream and yell at the classmate.

The principal stated the Complainant would call him whenever anything he perceived as harassment of the Student occurred and the principal investigated each incident reported to him but he did not generally keep notes or a log of each incident. The principal reported he investigated the October 12, 2016 incident in the restroom. The principal stated he spoke with Student A and Student B who said they were just trying to be funny. The principal determined the students never said anything to suggest their actions were because the Student had a disability. Additionally, the Student only informed him that the students held the stall door shut. The principal stated that neither Student A or B were asked to escort the Student to the restroom but rather the incident occurred during transition time and these students happened to be in the bathroom at the same time. The principal stated these two students have behaved similarly toward other students, not only the Student. The principal stated that after the investigation, Students A and B were disciplined.

The principal stated he investigated another reported incident in October 2016. The principal determined that while the Student's class was returning from computer lab, the Student attempted to run past Student D who put his arm out to keep the Student from passing him. In response, the Student grabbed Student D's arm and spun him around. When the students were back in the classroom, the Student was unhappy and did not want to do any work. After he threw a book on the floor, the teacher asked him to go to the office. On the way out of the classroom, the Student tried to punch Student A and then tried to choke him. The principal stated the hall camera video showed that the Student did grab Student D's arm and spun him around after Student D stuck his arm out. Disciplinary action was taken against the Student and Student D.

The principal also described the December 7, 2016 incident. The principal stated that as the students were reentering the classroom after lunch, the Student hit Student A with his metal lunch box but Student A did not retaliate but went to his chair and sat down. The Student then attacked and started choking Student A. The teacher intervened and tried to restrain the Student from further harming Student A. The Student was taken to the office and the principal asked the Student to explain what happened to cause him to become so upset. The Student reported that

the students in the lunch room were acting like they were shooting him with a bow and arrows. The principal stated he did not learn about the severity of the Student's attack on Student A until later that same day. The guidance counselor told him about the physical altercation and then the principal contacted the teacher and asked her to talk to him about the incident. She informed him about the Student hitting Student A with a lunch box, choking, and punching him so she had to restrain the Student. Then the guidance counselor came in and helped her with the other students. The principal took statements from all the students in the classroom to find out what happened. Their accounts of the incident were consistent. They said the Student hit Student A with a lunch box. None of the students indicated the Student was teased prior to the incident.

The principal contacted the Complainant on December 7, 2016, and requested to meet and discuss the Student's actions. The principal met with the Complainant and his wife and the Student on December 12, 2016. During the meeting, the Student described the incident. The Student only talked about students pretending to shoot him with a bow and arrows. The principal told the Complainant and his wife that because of the violent nature of the Student's action upon Student A and the teacher, the Student was suspended for four days. The Student did not return to school after the four days of his suspension from December 13 – 16, 2016. The Student did not return to the District thereafter.

The principal told OCR the Student often came to his office upset but he would not speak to the principal, he would only speak on the phone with the Complainant. The Student never mentioned he was upset because other students were harassing him because of his disability. The Student came to the office frequently, about two to three times a week. The Student provided a number of reasons for wanting to go to the office. The Student never said he was teased because he had diabetes.

The principal told OCR that the Complainant said the Student was teased because of his disability on one occasion. The principal investigated by interviewing students and the teacher and determined that students had been talking among themselves about the upcoming Halloween party but no comments were directed toward the Student. The principal told OCR he concluded that there was no evidence that the Student was harassed based on his disability.

OCR interviewed the guidance counselor who stated he was not aware of any disability harassment of the Student. The guidance counselor introduced an emotional learning curriculum to teach the 6th grade students social skills and anti-bullying measures but the Student did not participate in this program. The Complainant informed the guidance counselor that he did not like the program and did not want the Student to participate in it. The Complainant also said he did not want the Student to receive any counseling services of any kind but he did allow the guidance counselor to interact with the Student in his role as the music teacher.

The guidance counselor stated that on December 7, 2016, he was in the music room when he heard shouting. Specifically, he heard an urgent voice telling the Student to stop. He stepped into the hallway and realized the voice was coming from the 6th grade classroom. He went to the 6th grade classroom and saw the students standing along the northwest side of the room, watching what was occurring. The teacher was between the Student and the rest of the students. She was telling the Student to calm down and stop, over and over again. The guidance counselor

saw the Student flailing his arms, swinging, and saying “No, no, I won’t” The guidance counselor stated he stepped towards them to see if he could help and the Student punched him with his fist in the ear and on the shoulder. The Student did not appear to be moving toward the other students but he was screaming at them. The guidance counselor stated he asked the students to go out into the hallway, which they did. The teacher was holding the Student, but not from behind. She was in front of him and her arms were straight out against the sides of his body, similar to a bear hug, and maintaining that contact. The Student’s arms were above her and free. He observed the Student hit the teacher repeatedly on her shoulders, mid-section, and upper back. She was telling the Student to stop and he was saying he wouldn’t but he was actually calming down. The counselor observed the teacher was not in grave danger so he took the rest of the students from the hallway to the gym. By this time, the teacher was no longer holding the Student but she remained in close proximity to him.

The guidance counselor interviewed the other students to determine whether they needed to process what had just occurred. The students appeared to be baffled as to the reason the Student was upset. The students reported to him that the Student just came into the classroom and hit Student A on the head with his lunch box. They said the Student had been eating lunch with Student E and seemed to be in a happy mood.

The guidance counselor stated he was no longer in the room when the principal arrived about five minutes after the Student had calmed down but observed him from the gym. He saw the Student walk to the office with the principal and the principal was not holding on to the Student or restraining the Student. The guidance counselor said the sequence of events alleged by the Complainant was not what he witnessed.

OCR interviewed the Student’s 6th grade teacher (Student’s teacher) who stated the Student is very creative and a hard worker. Socially and emotionally, he was immature for his age and irritated his classmates.

The Student’s teacher stated she never observed the Student being harassed because of his disability. As to the alleged teasing about candy, she thought the students were curious about his disability and wondering why he could not stay for the Halloween party. Student B talked about how diabetes runs in his family and how he could get diabetes someday too. Student D stated he would bring apples instead of candy, in an attempt to be friendly to the Student, not to harass him. She said she never heard anyone tease the Student because he could not eat candy and the Student did not tell her the students were harassing him because he could not eat sweets. On one occasion diabetes was mentioned in a book the class was reading and soon afterwards the Student’s parents called to say they did not want the Student to be reading that book.

On another occasion, the Student informed her that some students in the bathroom were asking about the Complainant’s job and the Student did not like it. The Student’s teacher asked the students what happened and they admitted asking about the Complainant’s job but said they just wanted to know more about the railroad.

The Student’s teacher stated there was an incident in October 2016 when the class was returning from computer lab. The Student reportedly tried to pass Student D but Student D stuck out his

arm and then the Student flung Student D several feet into the gym. The Student's teacher stated she did not witness the incident but it was reported to her by other students. She told the Student to keep his hands off his classmate. The Student then became angry because she did not punish Student D and she explained to the Student that based on the information provided to her by the other students she was not going to punish Student D.

The Student's teacher stated she has had to physically restrain the Student on two occasions. On one occasion in October 2016, Student A was standing at his desk when the Student went over to Student A and first tried to punch Student A but he missed so he put both hands around his neck and tried to choke him. She stated she hooked her arms under the Student's armpits and performed a short restraint so Student A could get loose from the Student. Once she let go of the Student, he ran out of the room and she followed the Student as he ran toward the office.

The Student's teacher told OCR that on December 7, 2016, the class was returning from lunch. Student A was standing by his desk when the Student went over to him and started kicking and punching Student A. Student C went over to try to stop the Student and the Student pinned him against the cabinet and started kicking Student C. Then he went back to trying to choke Student A. The Student's teacher pulled the Student off of Student A by hooking her arms under his armpits but the Student pivoted around and continued to try to harm the students and he pulled posters off the wall. The guidance counselor came in at that time and helped navigate the Student away from the doorway. Once the students were out of the room, the Student calmed down. She released him and she asked him to explain why he was upset. The Student told her that during lunch, the students were laughing about how it would be funny if he were shot with an arrow. The students later told the teacher that the Student was only sitting with one person during lunch, a female student, and no one said there was any conversation from anyone about shooting the Student with arrows. The Student's teacher stated she did not actually see the Student hit Student A with the lunch box. The 4th grade teacher across the hall said she saw it. She was the one who called the office.

The Student's teacher described the Student as very strong and approximately five feet tall with a medium build. Student A is one of the smallest students in her class and a frequent target of the Student. Student C and D were a little bigger than the Student but not much.

The Student's teacher stated she is aware the District policy calls for training with regard to restraint but stated she has not received this training. She just reacted on instinct. The Student did not say anything about her physically hurting him but the Student gave her whiplash. He was actually pushing her so hard she was sliding across the floor. She stated the two occasions when she restrained the Student, it was necessary to prevent injury to another student. In both instances, the Student was choking Student A.

In her interview with OCR, the nurse stated she knew the Student through the Section 504 process, her role as lunch room monitor and as substitute teacher. She explained the Student was diagnosed with diabetes in June 2015 and she was responsible for administering insulin and checking the Student's blood sugar level at least twice a day. She stated when the Student was initially diagnosed as a type I diabetic, she wanted to ensure the Student received the food and care he needed so she volunteered to serve as lunch room monitor. She also ensured the Student

was the first person in line to receive lunch but sometimes he used this to justify his expectation that he should be first in line for everything e.g. going to recess, library or returning to class. The nurse described the Student as socially immature and said he struggled to get along with his classmates.

The nurse was aware of a personality conflict between the Student and a couple of other students and was informed they were to keep these students and the Student apart. The nurse noted the personality conflicts between these students began before the Student was diagnosed with diabetes. The nurse stated she did not observe any escalation in behavior difficulties after the Student was diagnosed with diabetes and the Student never reported to her that he was being harassed based on his disability.

The District provided a copy of the Student's grades for the first semester of the 2016-17 school year. The Student earned the following grades prior to his withdraw from the District: Art-E; Music-A+; Library-I; Band-A+; Math-C; Reading-C; English-C-; Spelling B+; Social Studies-C; and Science/Health-B-.³

Legal Analysis and Conclusion

OCR investigated whether the District created or allowed a hostile environment based on disability by failing to promptly and equitably address and remedy harassment which caused a hostile environment. To establish a violation of Section 504 or Title II under the hostile environment analysis, OCR must find: 1) the Student has been subjected to harassing conduct based on disability; 2) the harassment is sufficiently severe, pervasive, or persistent to create a hostile environment (it interferes with or limits the ability of the Student to participate in or receive the benefits, services, or opportunities provided by the District); 3) the District had actual or constructive notice of the harassment, and 4) the District failed to take prompt and effective actions to remedy the harassment (end the harassment, prevent it from recurring and, where appropriate, remedy the effects on the Student).

Based on the facts obtained during its investigation, OCR concluded there is insufficient evidence to support the Complainant's allegation of a hostile environment based on disability. The Complainant reported that two students held the bathroom stall door shut on the Student, questioned why someone had to escort the Student to the restroom, asked the Student about the Complainant's job working for the railroad, allowed the students to discuss the topic of diabetes in class, teased the Student about not being able to eat candy during the upcoming fall party, or eat cinnamon rolls during lunch, failed to discipline a Student alleged to have shot the Student in the back with a rubber band, allowed students to taunt the Student by shooting him with a pretend bow and arrow, and allowed another student to stick out his arm to prevent the Student from passing him in line. The investigative facts indicate the principal investigated each incident reported to him by the Complainant. In each incident, the investigative facts obtained by the principal did not match the version of facts provided by the Complainant, except for the bathroom stall incident. In this incident, the principal confirmed the Students held the bathroom stall shut while the Student was in the stall but the facts he obtained did not suggest the boys' actions were because of the Student's disability. The principal stated there have been numerous

³ A grade of E signifies "Excellent" and a grade of I signifies "Incomplete".

incidents of boys doing this to other boys, not just the Student, and even climbing urinals to turn off the water. This type of incident also occurred in the high school. The principal's investigations into each incident reported to him by the Complainant did not yield evidence of harassment of the Student based on disability.

The facts provided to OCR from the Student's teacher, the guidance counselor and the nurse further failed to demonstrate that the Student was harassed based on disability. Therefore, based on a preponderance of the evidence, OCR found there was insufficient evidence to support the Complainant's allegation that Student was harassed because of his disability. OCR considers allegation 1 closed as of the date of this letter.

Allegation 3

OCR investigated whether the District failed to provide the Student a FAPE when it significantly changed the Student's placement by expelling him for a fight that occurred on December 7, 2017, without determining whether the conduct for which he was expelled was due to his disability.

Legal Standard

The Section 504 regulation requires a recipient of FFA that operates a public elementary or secondary education program to provide a FAPE to each qualified student with a disability in its jurisdiction. Section 504 requires that school districts evaluate a student with a disability before making an initial placement of the student in a regular or special education program and any subsequent, significant change in the student's placement. The proposed exclusion of a student with a disability that is permanent (expulsion), for an indefinite period, or for more than 10 consecutive school days, constitutes a "significant change of placement" under Section 504. A series of suspension that are each of 10 days or fewer in duration that creates a pattern of exclusions may also constitute a "significant change in placement." The determination of whether a series of suspensions creates a pattern is made on a case-by-case basis. In no case, however, may serial, short exclusion be used to avoid the requirements of reevaluation before suspensions of more than 10 days. Before implementing a suspension or expulsion that constitutes a change of placement, a school district must conduct a reevaluation of the student to determine if the misconduct in question is caused by the student's disability or if the student's current educational placement is appropriate.

Findings of Fact

OCR incorporates the **Findings of Fact** set out in **Allegation 1** above.

The Complainant clarified his complaint in his interview with OCR. He explained the Student engaged in a fight on December 7, 2016, and the principal met with them on December 12, 2016. During this meeting the principal informed the Complainant and his wife that because of the violent nature of the Student's actions, he was expelled from the District. The Complainant argued because the staff at the school failed to test the Student's blood glucose level immediately after the incident to determine whether his glucose level was within the target range, as required

by the Student's Section 504 plan, the District did not know whether the Student's behavior was a result of his disability. The Complainant argued the District was violating the law by changing the Student's placement without first conducting a manifestation determination.

The principal told OCR that the Student had a total of 5 days of suspension. The dates of suspension were as follows: October 31, December 13, 14, 15 and 16, 2016. The last day of the semester was December 16, 2016. The Student was suspended, not expelled, for two separate incidents when the Student began choking Student A. The Complainant and his wife kept the Student home following the incident on December 7, 2016, but this was their choice. The principal did not take disciplinary action until December 13, 2016.

Legal Conclusion and Analysis

OCR investigated whether the District significantly changed the Student's placement without an evaluation. As stated above, a proposed exclusion of a student with a disability that is permanent e.g. expulsion for an indefinite period, or for more than 10 consecutive school days, constitutes a significant change in placement, requiring a determination (or manifestation determination) that the Student's behavior was the result of his disability. A series of suspensions that are each of 10 days or fewer in duration that creates a pattern of exclusions may also constitute a significant change in placement. Based on the facts obtained during its investigation, OCR concludes there is insufficient evidence to support a conclusion that the District significantly changed the Student's placement. The preponderance of the evidence showed the first suspension occurred on October 31, 2016, when the Student attempted to choke another student and the Student was given a one-day suspension. The second suspension lasted from December 13 to 16, 2016, after the Student attempted to choke another student on December 7, 2016 and hit his teacher and the counselor. The two incidents were not close in time and totaled five days. OCR found no evidence to suggest the District engaged in a pattern of exclusion meant to avoid the 10 consecutive day requirement. The evidence revealed the Student's parents decided to keep the Student home from school after the December 7, 2016 incident, but this was their choice. The principal did not discipline the Student until he met with his parents and the Student, five days after the incident. The Complainant did not provide any evidence to demonstrate the exclusion lasted for more than 10 consecutive days or establish a pattern of exclusion which amounted to more than 10 days. The Complainant also failed to provide any evidence to suggest the principal "expelled" the Student, as opposed to giving him a four-day suspension.

Based on a preponderance of the evidence OCR found there was insufficient evidence to establish the District significantly changed the Student's placement without conducting an evaluation. Based on a preponderance of the evidence, OCR found there was insufficient evidence to support the Complainant's allegation that the District expelled the Student without first conducting a manifestation determination. OCR considers allegation 3 closed as of the date of this letter.

Allegation 5

OCR investigated whether the District discriminated against the Student based on his disability by allowing school staff to wrongfully apply a restraint hold on the Student.

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 subjected to discrimination under any program or activity that receives FFA. The regulation implementing Section 504 at §104.33(a) requires recipients of FFA that operate a public elementary or secondary education program, to provide a FAPE to each qualified individual with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the individual’s disability. The regulation implementing Section 504 at 34 C.F.R. § 104.33(b)(1) defines an “appropriate education” as regular or special education and related aids and services that: (i) are designed to meet individual educational needs of individuals with a disability as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards).

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. OCR interprets the Title II regulation to require school districts to provide a FAPE to qualified individuals with a disability to the same extent required by the Section 504 regulation. Under 28 C.F.R. § 35.171(3)(i), OCR processes Title II complaints according to its procedures for enforcing Section 504.

Section 504 and Title II do not address or specifically prohibit the use of restraint in schools. However the use of restraint must not be implemented in a discriminatory manner on the basis of disability.

Findings of Fact

OCR incorporates the **Findings of Fact** set out in **Allegation 1** above.

OCR reviewed the District’s policy on restraint, which states:

Except in the case of an emergency, only school personnel who have received systematic training in the use of restraint and seclusion in accordance with the district’s policy will implement physical restraint or seclusion with a student. In an emergency, a district employee may use physical restraint or seclusion as necessary to maintain order or to prevent a student from causing physical harm to self, other students, and school staff or property. School personnel will continuously monitor a student’s status during any physical restraint or seclusion.

I. PHYSICAL RESTRAINT

Physical restraint means the use of physical force to restrict the free movement of all or a part of a student's body.

Physical restraint will be considered to be a reasonable use of force when used in the following circumstances:

- A. as reasonably needed to obtain possession of weapons or other dangerous objects on the person or within the control of a student;*
- B. as reasonably as needed to maintain order or to prevent or break up a fight;*
- C. as reasonably needed for self-defense;*
- D. as reasonably needed to ensure the safety of any student, employee, volunteer, or other person present;*
- E. as reasonably needed to teach a skill, to calm or comfort a student, or to prevent self-injurious behavior;*
- F. as reasonably needed to escort a student safely from one area to another;*
- G. if used as provided for in an IEP, Section 504, or behavior intervention plan;*
or
- H. as reasonably needed to prevent imminent destruction to school or another person's property.*

Legal Analysis and Conclusion

OCR investigated whether the District applied restraint to the Student in a discriminatory manner based on his disability. Based on the facts obtained during its investigation, OCR concluded there is insufficient evidence to support the Complainant's allegation of unlawful restraint based on disability.

The District's policy allows for the use of restraint by an untrained staff member in an emergency situation when physical restraint is necessary to prevent a student from harming another student. Here, the facts showed the teacher applied restraint to prevent the Student from choking Student A by placing herself between the Student and Student A and holding her arms straight out under the Student's armpits, not wrapping her arms around the Student's stomach as alleged by the Complainant. The restraint was limited to only the amount of time necessary to prevent the Student from continuing to choke Student A. The teacher and the principal informed OCR that the Student did not state that he was hurt during the restraint.

The preponderance of the facts does not demonstrate that the Student was treated differently based on his disability than another similarly situated student. To the contrary, the Student was engaged in violence towards another, smaller student and the Student's teacher restrained him for the purpose of preventing further injury to Student A.

In conclusion, based on a preponderance of the investigative facts, OCR found insufficient evidence to support the conclusion that the Student was wrongfully restrained based on his disability. OCR considers allegation 5 closed as of the date of this letter.

Allegations 2 and 4

Prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy enclosed) on October 12, 2017, that, when fully implemented, will address allegations 2 and 4 of this complaint. The Agreement provides the District will review and revise its policies and procedures to ensure the District meets the requirements of 34 C.F.R. §§ 104.31 through 104.36 regarding the identification, evaluation, educational placement of students and procedural safeguards. The Agreement also requires the District to provide training to administrators and staff regarding the District's obligations under Section 504 and Title II. Please consult the Agreement for further details.

OCR considers allegations 1, 3, and 5 of this complaint closed as of the date of this letter. OCR considers allegations 2 and 4 of this complaint resolved as of the date of this letter and will monitor the District's implementation of the Agreement. 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 the 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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

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, (816) 268-0551 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXX@ed.gov.

Sincerely,

Karl Menninger
Supervisory Attorney

Enclosure