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1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

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May 5, 2015

Superintendent Don Levinski
Central Consolidated School District
PO Box 1199
Shiprock, New Mexico 87420

Re: Central Consolidated School District
OCR Case Number: 08-12-1013

Dear Superintendent Levinski:

In a letter dated December 27, 2011, we notified you that we were opening for investigation the above-referenced complaint filed against Central Consolidated School District (the District). We completed our investigation and are notifying you of our decision. The Complainant alleged the District discriminated by: 1) denying students with disabilities a free appropriate public education, including failing to implement their individualized education programs; 2) treating students with disabilities differently by excluding them from or limiting their access to certain classes; and 3) disciplining students with disabilities differently or more harshly than their non-disabled peers. In addition, the Complainant alleged that: 4) the District was aware of these discrimination allegations and failed to provide a prompt and equitable response. Finally, the Complainant alleged that: 5) by the actions of some staff, the District has intimidated certain other District staff, causing them not to report all instances when students with disabilities have been denied a free appropriate public education.

We investigated these allegations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a public entity that receives Federal financial assistance from Department and is subject to the requirements of these laws and regulations.

In the investigation, we carefully considered information provided by the Complainant, documents submitted by the District, and the District's response to the complaint. We also interviewed the Complainant and numerous District witnesses with information relevant to the allegations. Our investigation found, by a preponderance of the evidence, that the District violated Section 504 and Title II with respect to allegations 1, 2, and 4 above, and insufficient evidence to support allegations 3 and 5. We thank the District for entering into a Resolution Agreement designed to remedy these violations. A signed copy of this Agreement is enclosed with this letter. This letter explains our findings.

Background

This complaint contained allegations that students with disabilities were discriminated against at XXXXX High School (the School) in a variety of ways. Because the Complainant identified so many different individuals allegedly discriminated against, we treated the allegations as systemic allegations. Nonetheless, although we investigated the allegations systemically, we also investigated the individual instances of alleged discrimination identified by the Complainant.

The Complainant was a special education case manager at the School, and there is no doubt that she was a passionate and committed advocate for her assigned students. There was also no doubt, however, that the Complainant had numerous and significant conflicts with other teachers at the School. Many of these conflicts related to the services her students were receiving, and the Complainant frequently criticized others and raised concerns with the School administration when she believed teachers were not providing services or treating her students properly. Many of the teachers, on the other hand, believed the Complainant was too aggressive and combative in raising her concerns and that she allowed her students to get away with misbehavior with no accountability. It seems likely that some of these communication issues and interpersonal conflicts contributed to some of the problems revealed in our investigation.

The Complainant alleged that the District discriminated during the 2010-2011 and the 2011-2012 school years. Just prior to the beginning of the 2011-2012 school year, however, there was substantial change in the administration at the School. Notably, at the initiation of our investigation, the School had a new principal along with multiple new assistant principals, none of whom had been at the District during the period of the alleged discrimination. Although this change cannot justify any discrimination that may have occurred, to some extent, it may explain some of the mistakes that were made during the new administration's transition and some of the communication breakdowns that contributed to the District's violations.¹

Analysis

I. Alleged Failure to Implement Students' IEPs

The Section 504 regulation at 34 C.F.R. § 104.33(b) states that the provision of a free appropriate public education (FAPE) includes the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. OCR interprets the Title II implementing regulation at 28 C.F.R. § 35.130 to require public education entities to

¹ Although we were able to interview most individuals with information relevant to the Complainant's allegations, we were unable to speak with the former principal and assistant principal from the School. The inability to interview the former principal is particularly frustrating because he is still an administrator who is employed by the District, and thus subject to the direction of his superiors within the District. The District is accountable for this individual's lack of cooperation. Had we determined the former principal's cooperation to be essential to completing our investigation, his failure to cooperate could have been found by OCR to be a denial of access by the District, placing the District in jeopardy of administrative and civil enforcement action by the Department, the U.S. Department of Justice, or both. See 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.6(b) and (c). To the extent that the information available through the former principal would stand to support other evidence proffered by the District or to rebut the evidence proffered by the Complainant, we have weighed the evidence in a manner granting the benefit of the doubt to the Complainant.

provide a FAPE to the same extent as is required under the Section 504 regulation. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this regulatory requirement. Further, one of the ways in which a district can deny a student a FAPE is by failing to properly implement the student's IEP or Section 504 plan.

Individual Allegations

In support of her allegations, the Complainant identified numerous students whose IEPs she believed were not implemented properly. For all but one of these individual allegations identified by the Complainant, we found insufficient evidence to support her allegations. Specifically:

- Student 1: Student 1's IEP, dated April 20, 2011, states that he will receive support from a full-time one-on-one educational assistant. The Complainant alleged that although Student 1 received that support initially, his aide was later reassigned to a different student and no replacement one-on-one aide was ever assigned to Student 1. In response, the District stated that Student 1 ceased receiving support from a full-time one-on-one aide after requests from Student 1 and his parent, and this change is reflected in a subsequent IEP. The District stated that Student 1 and the parent refused the one-on-one aide because he did not want an aide following him around and with him all day. OCR attempted to contact Student 1's parent to confirm the District's statement but were unable to reach them. Without information from the parent, and because the District stated that Student 1 and the parent refused services in the IEP allegedly not provided, we find insufficient evidence that Student 1 was denied a FAPE as alleged.
- Student 2: The Complainant alleged that Student 2 was denied a FAPE when he was given a test that included rote memory questions even though his disability limits his rote memory skills. Student 2's IEP, however, does not state that he should not be tested with memory questions. Thus, whether he was given a test that included memorization is not relevant to our FAPE analysis because even if he was, that would not have violated Student 2's IEP. As a result, there is insufficient evidence that Student 2 was denied a FAPE as alleged.
- Student 3: The Complainant alleged that Student 3 was not accommodated on his XXX final in May 2011 because he did not request the accommodations listed in his IEP and did poorly on the final. She adds that after Student 3's parent was informed he did not receive accommodations, the parent met with administrators, and Student 3 was allowed to take the test again with accommodations. Student 3's educational assistant, however, denied that the student was not accommodated on the initial XXX final test and claimed that she read the test aloud to him as required in his IEP. Thus, although it is unclear whether Student 3 was denied accommodations on the test initially, Student 3 was permitted to retake the test with appropriate accommodations. Thus, there is insufficient evidence that Student 3 was denied a FAPE as alleged.
- Students 4 and 5: The Complainant alleged that Students 4 and 5 were denied a FAPE when a XXXX teacher refused to accommodate the students on an exam. The Students' IEPs state that Students 4 and 5 are supposed to have the opportunity – but are not

required – to receive accommodations on exams, such as taking tests in a small group environment with test items read aloud to them. The XXXX teacher stated that Students 4 and 5 often declined to receive the accommodations provided in their IEPs. Because providing the students’ testing accommodations was at the option of the students, we find insufficient evidence that Students 4 and 5 were denied a FAPE as alleged.

Our investigation did reveal, however, that the District failed to fully implement an IEP for one of the students individually identified by the Complainant. Specifically:

- Student 6: The Complainant alleged that the School’s own documentation states that Student 6 was denied a FAPE. Consistent with the allegation, the School’s documentation of its decision following a manifestation determination hearing for Student 6 states: “We do not believe that his conduct was a direct result of a failure to implement his IEP, but we do believe that there are contributing factors that added to his stress levels (*lack of accommodations and modifications* – [Student 6] is feeling overloaded by schoolwork, not being given extra time or thorough explanations of his work)” (emphasis added). Further, when asked about the comments in this document, Student 6’s case manager confirmed that he was not receiving all of the services prescribed in his IEP. Specifically, the special education teacher stated that Student 6’s IEP states that he should receive multisensory instructional models, and his teachers were not providing that to him. For these reasons, we conclude that there is a preponderance of evidence indicating that Student 6 was denied a FAPE in violation of the regulations implementing Section 504 and Title II.²

Systemic Allegations

Although we find insufficient evidence to support most of the individual instances of discrimination alleged by the Complainant, there is sufficient evidence to support a finding that the School failed to provide students with disabilities a FAPE on a systemic basis because it did not fully implement students’ IEPs. The most notable examples of evidence supporting our finding of systemic violations include:

- One special education case manager stated that some teachers have a general misunderstanding of FAPE and refuse to do what the law requires. As an example, the special education teacher stated that some teachers simply refuse to differentiate for their students or use different instructional models even though many students’ IEPs require differentiation or different instructional models. She added that one time when she was delivering a list of accommodations to a teacher for one of her students, the teacher identified to her the accommodations that she was not going to provide to the student.
- Another special education teacher confirmed the view that some teachers simply lack knowledge of the laws required to serve students with disabilities and that some teachers

² By the time OCR completed its investigation and negotiated a resolution agreement with the District, Student 6 had already graduated from the School. Ordinarily, after a finding that a student was denied a FAPE in violation of the regulations implementing Section 504 and Title II, we would require a district to provide compensatory services to the student. Here, however, because Student 6 has already graduated, we are not requiring the District to provide him compensatory services, and we are administratively closing the allegations related to Student 6 pursuant to section 110(o) of OCR’s *Case Processing Manual*, which allows OCR to close allegations that are moot.

generally fail to accommodate their students, both in differentiating instruction and on tests, as required in some IEPs.

- Many students with disabilities have a provision in their IEPs that states that teachers should notify those students' case managers if they are failing, but case managers stated that they are rarely notified even though many of their students are failing, and OCR confirmed that many of these students did in fact have failing grades.
- An administrator at the School candidly told us that he does not feel comfortable enough to say that IEPs are being followed. He attributed this, in part, to a lack of strong communication at the School, some teachers being unaware of what accommodations are required, some case managers failing to keep up with their students, some significant interpersonal conflicts between general and special education teachers, and an unwillingness by some teachers to put in the effort necessary to provide prescribed services.

Collectively, these facts indicate systemic issues regarding how the School implemented IEPs for its students with disabilities, including a refusal by certain teachers to provide certain accommodations and significant communication problems between special education and general education teachers, which limits the School's ability to properly implement students' IEPs. Thus, we find that a preponderance of the evidence supports a finding that the District failed to fully implement students' IEPs on a systemic basis at the School.³

Although finding a violation here as described, we note that the District appears to recognize some of these issues and has taken some proactive steps to prevent further issues. For example, the District provided multiple trainings at the School during the 2011-2012 school year related to special education and providing a FAPE to students with disabilities. We commend the District for being proactive in an effort to remedy some of these issues. Nonetheless, given our finding that the District has failed to provide a FAPE to many of its students with disabilities and that many of these problems persist,⁴ more remedial action is needed. When fully implemented, the attached Resolution Agreement is intended to address these issues.

II. Alleged Different Treatment

The Section 504 and Title II regulations provide that individuals with disabilities may not, 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 Federal financial

³ The District argued that one of the problems it encountered in providing students a FAPE was that it was trying to implement a system of greater inclusion for students with disabilities, but the Complainant refused to cooperate with that plan. For example, the District states that although they wanted students mainstreamed as much as possible, the Complainant frequently pulled her students out of their classes so she could work with them on her own and even wrote into some of their IEPs that they could leave their classes to visit with her when they needed to, which led to abuse by the students. We need not resolve this factual dispute because even if the Complainant caused her students to be denied a FAPE (and we are taking no position on whether she did), the District would still be responsible because the Complainant was an employee of the District.

⁴ As will be discussed later in this letter, the District's failure to fully implement students' IEPs on a systemic basis also affected the treatment of students with disabilities by limiting or excluding their access to classes.

assistance. Further, these regulations prohibit different treatment on the basis of disability unless such action is necessary to provide individual students with disabilities with aids, benefits, or services that are as effective as those provided to others. In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged injured party or parties, whether it followed its policies and procedures for taking such action, and whether similarly situated non-disabled individuals were treated differently. If the alleged injured parties were treated differently, we determine whether the recipient had a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Similarly, in evaluating an allegation of different treatment on a systemic basis, we determine what action the recipient took against members of the alleged injured class, whether it followed its policies and procedures for taking such action and whether similarly situated non-disabled individuals were treated differently. If the alleged injured class members were treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Alleged Different Treatment in Scheduling

Individual Allegations

a. Student 7

The Complainant alleged that the School's XX teacher made Student 7 feel so uncomfortable in her class that she eventually withdrew. Further, the Complainant said that the XX teacher said that Student 7 could not keep up in her class and should be in XX instead, but Student 7 had already successfully completed XX. In response, the XX teacher denied that she treats students with disabilities any differently or that she discriminated against Student 7. She did not remember much about Student 7, but she believed that the issues with Student 7 were related to attendance because she missed so many classes. In addition, a District administrator recalled looking into this issue, and he confirmed that Student 7 had attendance problems and that he did not believe the XX teacher discriminated against Student 7. Given the conflicting reports and lack of additional evidence to support the Complainant's allegations, we find insufficient evidence that Student 7 was discriminated against as alleged.

b. Student 8

The Complainant alleged that, based on Student 8's disability, the XX teacher made Student 8, a student with a disability, feel extremely uncomfortable in her class causing Student 8 to withdraw from her class. Numerous witnesses, along with contemporaneous notes from a witness, confirmed that Student 8 felt uncomfortable with the XX teacher. Further, because of these difficulties, an educational assistant was assigned to accompany Student 8 to her XX class, and the educational assistant also felt uncomfortable with the XX teacher's behavior towards Student 8 and confirmed that Student 8 was made to feel uncomfortable in that class. The educational assistant, however, also stated that she believed these issues were caused by personal

and cultural differences⁵ rather than based on Student 8's disability.⁶ For these reasons, we find that there is insufficient evidence to find that Student 8 was discriminated on the basis of disability as alleged.

c. Students 9, 10, and 11

The Complainant alleged that the XX teacher discriminated against Students 9, 10, and 11, all students with disabilities, by treating them more harshly than other students, requesting that they be transferred out of her class, and in essence, forcing them out of her class. Our investigation revealed that the XX teacher repeatedly removed these students from class based on their behavior, and ultimately, they were transferred out of her class.⁷ The District argued that the XX teacher's actions were justified by the students' behavior. Much of the evidence supports this view, as multiple witness interviews indicated that these students had significant behavioral issues, were affiliated with gangs and made gang whistles in class, "fed off of" each other, and were disruptive to the classroom environment.

The XX teacher denied that she discriminates against students with disabilities, and she has had numerous students with disabilities who attended her classes without issue. With respect to Students 9, 10, and 11, the XX teacher stated that when these three students were together, they were disruptive and made it impossible for other students to learn, that other students in class approached her and told her that they were scared of these three students, and that they were removed from her class because of their atrocious behavior and not because of their disabilities. Because these students were disruptive to the learning environment for the other students in the class, the XX teacher requested that their schedules be changed so that they are not all in the same class together. Other School staff reported – and discipline records corroborated – that these students had similar behaviors in other classes too, including habitual tardiness, classroom disruptions, disrespect, gang activity, and ditching.

⁵ The Complainant did not allege, and we did not investigate, whether the teacher's actions constituted national origin discrimination under Title VI of the Civil Rights Act of 1964 and its implementing regulation. In addition, Student 8's national origin is the same as the vast majority of her classmates in the District, and the evidence does not give us reason to infer that this teacher had similar issues with other students.

⁶ For example, the educational assistant stated that, out of respect and deference to adults, Student 8 does not respond immediately to adults when they ask her a question. The educational assistant believes that when Student 8 took her time in responding to the XX teacher's questions, the XX teacher would get angry and felt like the student was ignoring her.

⁷ The three students were removed from the XX class to the in school suspension ("ISS") classroom. Their removal, however, was not a form of discipline; instead, it was a temporary administrative assignment for the students while they awaited a schedule change because their relationships with the XX teacher were no longer workable. Their schedules were changed in a reasonable amount of time under the circumstances, and while the students waited for their schedule changes, they attended the ISS classroom during the period they would ordinarily have attended the XX class. Two of the students' IEPs indicate that placement in ISS is not an effective form of discipline for the students, and if the students' temporary assignment to the ISS classroom had been disciplinary, we would likely find that placement in violation of the students' IEPs. Here, however, because we are persuaded that the students' assignment to the ISS classroom was for administrative purposes pending the necessary schedule changes, we need not address whether the School's action denied the students a FAPE by violating their IEPs.

In contrast, there is some evidence that, although there were behavioral issues with these students, the XX teacher was unnecessarily harsh in her dealings with them. For example, in one instance when the students arrived late to class, the XX teacher removed them from class even though they had a legitimate late pass; the special education teacher who accompanied the students informed us that she believed that the XX teacher's actions were not justified under those circumstances. That special education teacher also stated some students with disabilities have told her that they do not feel comfortable asking the XX teacher for help because she does not explain things to them. On the other hand, this special education teacher acknowledged to us that the XX teacher has other students with disabilities in her classes who have not had any issues, and she has not seen the XX teacher treat students with disabilities differently than students who do not have disabilities.

An Assistant Principal had a candid and valuable opinion regarding these competing considerations and what happened between these three students and the XX teacher. While acknowledging that these students had significant behavioral problems, he also believed that the XX teacher was unnecessarily difficult toward them, possibly in an effort to get them out of her class. He counseled her about her behavior toward them and directed that she should not be constantly singling them out like she was. He believed these students did not feel comfortable in the class, and so they developed a practice of dragging in late – while they had tardiness problems in all their classes, it was worse in the XX class – which contributed to a further deterioration of the relationship. He acknowledged that it was a difficult situation because the behavior of these students was clearly defiant and unacceptable, but the XX teacher did not help the situation. As a result, the students' case managers and administrators changed these students' schedules because, he stated, it was the best thing for everyone involved. Notably, when asked whether he thought these issues were disability related, he stated:

[She] focused in on them because of their behavior to get rid of them. It was almost too much of a coincidence. She knew they were students with disabilities. But yet, she was constantly complaining about their discipline issues. I can't honestly say they were treated the same as every other kid in the class. I'd tend to say they probably weren't. But it's hard to say whether it was because of their disability or behavior.

Based on this evidence, it is clear that the XX teacher treated Students 9, 10, and 11 differently than other students and pushed for their removal from her class. It is unclear, however, whether the XX teacher's actions were based on the students' disabilities or on their behaviors while together in class and the corresponding impact on her classroom. In considering all of the evidence, we do not find that a preponderance of the evidence shows the XX teacher's actions were based on the students' disabilities.⁸ As a result, we find insufficient evidence to find that Students 9, 10, and 11 were discriminated against as alleged.

Systemic Allegations

⁸ This is not the same as concluding that the XX teacher does not treat students with disabilities differently based on their disabilities. Rather, the weight of the evidence indicates that, with respect to Students 9, 10, and 11, it is more likely that the XX teacher's actions were based on their misbehavior with respect to the incidents alleged.

Although we found insufficient evidence to support the Complainant's allegations of different treatment against individual students who were identified to us by the Complainant, we must still consider the systemic allegations. Generally, the Complainant alleged that the School discriminated by excluding students with disabilities from or limiting their access to certain classes, and this was based, in part, on her belief that the individuals described previously were discriminated against. To support her allegations, the Complainant alleged that she received requests from the XX and XX teachers that students with disabilities not be placed in their classes.

With respect to the XX class, the Complainant's position is based in large part on an email from the XX teacher sent to the Complainant, other case managers, and a guidance counselor, which stated: "X is a higher level inquiry based class which requires independent work. Please, check with me first before registering students who may need additional help and/or are credit recovery." The XX teacher denies that she discriminates against students with disabilities or that she ever requested that students with disabilities not be placed in her class. Instead, she says the email was intended to communicate that her XX class is a difficult course that requires a lot of hard work, and so case managers should be aware of that when scheduling their students.

With respect to the XX class, the Complainant claims her belief was based on comments made by the XX teacher. The XX teacher, however, denies making any such comments to anyone and notes that she has numerous students with disabilities in her classes.

There is no additional evidence regarding the alleged requests by these teachers beyond the Complainant's allegations. In addition, we found that both of these teachers serve multiple students with disabilities. Without further corroboration of the Complainant's allegations about the XX and XX teachers' comments to her, there is insufficient evidence that the XX and XX teachers discriminated by requesting that students with disabilities not be placed in their classes as alleged.

Nonetheless, for the reasons that follow, we find that students with disabilities as a class were discriminated against as a result of practices not directly addressed by the Complainant's allegation. More specifically, the Complainant and other special education case managers at the School stated that when they schedule their students, they avoid placing them with certain teachers. The case managers' action is not dissimilar from other counselors' efforts to enroll each student, regardless of disability status, in the classroom that will be best for the student and provide the environment most conducive to their education. The case managers' actions are distinguished, however, by their explanation to us that they do this because of their belief that certain teachers will fail to implement the students' IEPs or will bully them because of their disabilities. On its face, this constitutes different treatment because the access of students with disabilities to certain classes was limited in a manner that was not applicable to students without disabilities.

Because we find that students with disabilities were treated differently in how they were scheduled, we next consider whether the recipient has a legitimate, non-discriminatory reason for

the different treatment and, if so, whether the stated reason is a pretext for discrimination.⁹ The District's justification for this different treatment is that the case managers believed certain teachers would not implement students' IEPs or would not accommodate students with certain disabilities, and they were trying to do what was best for the students. For example, it would not be an ideal situation to place a student with behavioral disabilities with a teacher who would not implement the behavioral modifications in that student's IEP.

Although the case managers' approach may be well-intentioned, and the basis for their approach accurate as we determined in our investigation, the District's justification is not legitimate. The problem with the District's justification is that it avoids the real problem; rather than having all teachers properly provide students with disabilities a FAPE, it allows certain teachers to avoid their responsibilities under Section 504 and Title II. The appropriate response for the School is not avoiding teachers believed to be discriminating but rather, to appropriately ensure that all teachers are fulfilling their responsibilities under Section 504 and Title II. Thus, although the case managers' actions were reasonable under the circumstances based on their perceptions of what was best for their students, the School has a greater obligation to ensure that all students with disabilities receive an appropriate education commensurate with their IEPs, which would eliminate the need for the identified different treatment in scheduling students with disabilities. Accordingly, we find that the District's justification is not legitimate and that the School's different treatment in scheduling students with disabilities violates Section 504 and Title II.

*Alleged Different Treatment in Discipline*¹⁰

The Complainant alleged that the District discriminated by disciplining students with disabilities differently or more harshly than their non-disabled peers. More specifically, the Complainant alleged that the District frequently used a 45-day placement in the District's Interim Alternative Educational Setting (IAES) as a form of discipline for students with disabilities, whereas students without disabilities received suspensions that were far shorter in length than 45 days. We find insufficient evidence that the District discriminated as alleged.

The District utilized IAES as a placement for some students with disabilities after they had committed an offense involving drugs, weapons, or serious bodily injury of another (the "big three offenses"). The District's policy appears to be consistent with the IDEA, which expressly allows the use of IAES for up to 45 days, without regard to whether the behavior is determined to be a manifestation of the child's disability, if a student commits a big three offense. *See* 34

⁹ Different treatment based on an individual's disability is legitimate when such action is necessary to provide a benefit that is as effective as that provided to others, such as by providing a FAPE in accordance with legitimate procedures. *See* 34 C.F.R. §§ 104.4(b)(i)(iv) and 104.33-36. The different treatment at issue here, however, is not related to providing a FAPE or the result of decisions made by a group of knowledgeable persons, based on information from a variety of sources, taking into consideration the appropriate academic setting and procedural safeguards, including parents' right to notice and due process. Thus, 34 C.F.R. §§ 104.4(b)(i)(iv) and 104.33-36 cannot be used to justify the different treatment at issue here.

¹⁰ The Complainant identified a number of different individuals allegedly discriminated against in discipline. It is unnecessary to analyze the alleged discrimination against each individual separately, however, because the alleged discrimination was largely the same against each individual. Thus, the systemic analysis also addresses the individual discrimination alleged by the Complainant.

C.F.R. § 300.530(g).¹¹ Because the District was using IAES as a placement for students with disabilities who committed a big three offense, the District has a legitimate justification for its use of IAES.¹²

Finally, we consider whether the District's legitimate justification is nonetheless a pretext for discrimination. The District informed us that students with disabilities were not immediately placed in IAES for a big three offense, which could be permissible under the IDEA. Instead, the District explained that students were typically only placed in IAES after their total number of days of suspension would exceed ten days in a school year.¹³ Thus, they were treated the same as students without disabilities until the total number of days of suspension exceeded ten days. At that point, a student without disabilities would typically be expelled, whereas a student with disabilities would continue to receive educational services in IAES.¹⁴

For these reasons, we find insufficient evidence that the District discriminated by disciplining students with disabilities differently or more harshly than their non-disabled peers as alleged.

III. Alleged Failure to Respond to These Allegations

The regulations implementing Section 504 at 34 C.F.R. § 104.7(b) and Title II at 28 C.F.R. § 35.107(b) require a covered entity, such as the District, to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints alleging any action prohibited by their respective provisions. Additionally, the District is responsible, whenever it has notice of possible discrimination based on disability, to respond in a prompt and equitable manner.

When investigating allegations of a failure to respond to a disability-based complaint, OCR first examines whether the District knew or should have known that disability discrimination may have occurred. Once OCR determines that the District is on notice of possible disability-based discrimination, it then examines whether the District responded in a prompt and equitable fashion. In evaluating whether a response is prompt and equitable, we consider whether: (1) the District provided an adequate, reliable, and impartial investigation of the complaint allegations, including the opportunity to present witnesses and other evidence; (2) there were reasonably

¹¹ Although OCR does not enforce the IDEA, compliance with the IDEA is relevant to OCR's evaluation of the legitimacy of the District's justification.

¹² There was one student who was placed in IAES for an infraction other than a big three offense. Specifically, Student 9 was placed in IAES for insubordination. He was placed there because he had been involved in two fights earlier that school year and had numerous other disciplinary issues, and the District concluded that IAES would be the best placement for him. That decision could have resulted in greater scrutiny by OCR as part of this investigation. The District, however, quickly realized that Student 9 should not be in IAES based on insubordination and removed him from IAES after only one day in that placement.

¹³ There was one instance we identified in which a student was placed in IAES following his first offense of the school year and not after accumulating a total of ten days of suspension. In the incident at issue, however, the student committed two of the big three offenses. In addition, the District believed IAES was the best placement for him due to safety concerns related to off-campus incidents involving the same student.

¹⁴ Some of the District's witnesses interviewed believed that IAES was simply a form of punishment for students with disabilities. More witnesses, however, believed that IAES was a legitimate educational placement where students continued to receive educational services.

prompt timeframes for the major stages of the complaint process; (3) parties were notified of the outcome of the complaint; and (4) the district took steps to prevent further discrimination and correct its effects, if applicable.

The Complainant alleged that she complained to the District about many different types of discrimination and that it failed to provide a prompt and equitable response. Her allegation is complicated for a couple reasons. First, although she did not go through the District's formal grievance process, there is no doubt that the Complainant complained to School administrators multiple times – sometimes several times a week – about a variety of issues. Not all of her complaints, however, were allegations of disability discrimination. Instead, the issues she raised covered a variety of topics, including personality conflicts between teachers, other personnel matters, and disability discrimination. In light of the District's obligation to respond to allegations of potential disability discrimination and the frequency with which the Complainant raised issues, the District was in a difficult position trying to determine what issues required a response. Second, as a special education case manager, part of the Complainant's job responsibilities included advocating for her students to her colleagues and administrators and ensuring that her students are receiving a FAPE; a school district need not assume that every time a case manager raises an issue as part of their job responsibilities (for example, pointing out the need to fully implement a student's IEP) that it creates an affirmative obligation to provide a prompt and equitable response to an allegation of discrimination, aligned with 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b). Thus, even for those issues raised by the Complainant related to services for students with disabilities, it may be difficult for the District to differentiate when she raised a complaint alleging disability discrimination that requires a prompt and equitable response and when she was performing her job responsibilities as a special education case manager. In short, although the District is obligated to provide a prompt and equitable response when it is on notice of potential disability discrimination, we do not find that such an obligation was triggered in every instance when the Complainant, a special education case manager, raised a concern.

Nonetheless, there is clear evidence that the District was on notice of explicit allegations of potential disability discrimination in a few specific instances, and in those instances, we find that the District failed to provide a prompt and equitable response. For example, in an email from the Complainant to School administrators on August 18, 2011, the Complainant stated:

Please be aware that both [the XX teacher] and [the XX teacher] have both openly voiced to me in the past two days (including a written email from [the XX teacher]) that students with disabilities should not be enrolled in their classes (or that case managers should check with them before enrolling) because their courses are “higher level,” require a lot of “independent work,” and the students “can't keep up.” Students receiving services in special education have every right to be enrolled in any class for which they have completed the district-mandated pre-requisite work. Teachers are required by law, under IDEA through the Office for Civil Rights, to provide the federally-mandated and individually-designed accommodations and modifications to instructions for these students to ensure their success and progress in any class. The comments and feedback I have received from these teachers indicate either a misunderstanding of their responsibilities to serve these students as individuals and to provide specialized instruction as necessary or a lack of willingness to execute these responsibilities. I hope you will take the time to address

these issues. [Two staff at the School] have both expressed similar concerns that [the XX Teacher] doesn't want to work with students in special education. You may consider seeking their input for more information. Please let me know if you need any other information.

Here, the School's administration was clearly put on notice of potential disability discrimination,¹⁵ and therefore, they were required to provide a prompt and equitable response to those allegations. In response to the Complainant's email, the Principal responded by email stating: "We will work with Guidance as to the class schedules, and with these teachers as to their concerns. It is agreed that teachers do not choose their students or who they will or will not serve. We will address that. I would ask the teachers you are mentioning this to put their request in writing, if they are adamant that they will not serve these students." The District did not provide us convincing evidence that the School worked with Guidance or addressed the issue as indicated in the email.¹⁶ An Assistant Principal did, however, follow up on the allegations by speaking with the XX teacher. He did not speak to others about the allegations and was unable to make a conclusion about whether the XX teacher was discriminating as alleged, but he did confirm that there were students with disabilities in both the XX and XX teachers' classes. Unfortunately, none of the administrators at the School recalls whether they investigated the allegation that the XX teacher discriminated as alleged beyond confirming that she had students with disabilities in her classes.

In defending their actions, School administrators stated that they viewed the allegations as a personnel matter, and so they followed their typical protocol of having the parties attempt to resolve the issue at the lowest possible levels if possible. They stated that that is their typical process for resolving conflicts between teachers; that they should attempt to work it out themselves before involving administrators. Unfortunately, while this response might be appropriate in some circumstances, it was not adequate here because the allegations were not merely a personnel matter; they were clear allegations of potential disability discrimination. We find the District's response of asking the Complainant to ask the alleged discriminator to put in writing that they are discriminating is inconsistent with providing a reliable investigation. Because the District was on notice of potential disability discrimination and failed to conduct an adequate, reliable, and impartial investigation of the complaint allegations, we find that the District failed to provide a prompt and equitable response to the Complainant's disability discrimination allegation as alleged.

Similarly, another special education case manager at the School emailed a District administrator, stating:

¹⁵ The Complainant's email mischaracterized the XX teacher's email, which was described earlier. Nonetheless, the issue here is not whether the XX teacher discriminated, but rather, whether the District provided a prompt and equitable response. The School administrators who received the Complainant's email did not know the Complainant had mischaracterized the XX teacher's email. Thus, whether the alleged discrimination actually occurred is largely irrelevant to our analysis.

The Complainant's email further mischaracterizes the relationship between the IDEA and OCR. Nevertheless, her reference to OCR in the context of alleged failures to implement students' services mandated under the IDEA clearly identifies potential disability discrimination proscribed under Section 504 and Title II.

¹⁶ The District acknowledges that it is aware of the alleged discrimination by the XX teacher regarding Students 9, 10, and 11, discussed earlier, and the evidence indicates that the District properly investigated and responded to these allegations. The Complainant's email about the XX teacher, however, was sent before any issues arose with Students 9, 10, and 11 and raised a distinct discrimination allegation.

I am currently having some difficulty working with one of the regular education teachers here at XXHS. She is insistent on removing a student on my caseload from her XX class on the basis that she “can’t handle it” and “will fail.” . . . I do not believe [the student] is being accommodated, and I have heard from [two other special education teachers], that they have been concerned about the same issue with this teacher, involving other students receiving Special Education Services.

Again, this is sufficient to put the District on clear notice of potential disability discrimination requiring a prompt and equitable response. In response to this email, the District administrator stated: “I would be happy to stop by and visit with the teacher regarding their need for further training. The student should not suffer in this situation. Sometimes, the only viable option is to avoid placing students in that teacher’s class.” The District’s response here was inadequate because, although the School held an IEP meeting for the Student, the District did not provide an adequate, reliable, and impartial investigation to determine whether any discrimination occurred despite clear allegations of potential disability discrimination. To the contrary, the District administrator’s response was to suggest the same illegitimate response of unilaterally modifying the disabled student’s education program, by scheduling students with disabilities for different classes so as to avoid the teacher. As a result, we find that the District failed to provide a prompt and equitable response to the case manager’s email alleging disability discrimination.

Finally, the manifestation determination hearing involving Student 6, discussed earlier, provides another example in which the District was on notice of potential disability discrimination and failed to respond. The document summarizing that meeting indicated an awareness that Student 6 may have been denied a FAPE, but it does not appear the District engaged in any effort to determine whether he was denied a FAPE and entitled to compensatory services. There was no meeting to discuss the lack of accommodations or follow up to ensure he was receiving them. Again, this is another example of the District’s being on notice of potential disability discrimination and failing to provide a prompt and equitable response.

IV. Alleged Intimidation:

Under the implementing regulations, recipients are prohibited from intimidating any individual for the purpose of interfering with any right or privilege protected by Section 504 and Title II. A finding of intimidation must be predicated on the inference of a causal connection between the recipient’s interest in preventing or stopping an activity protected by Section 504 or Title II and some adverse action taken by the recipient. In order for an action to be considered adverse under this analysis, it generally must cause lasting and tangible harm or have a deterrent effect; merely unpleasant or transient incidents usually are not considered adverse.

The Complainant alleged the following adverse actions were taken to intimidate her: 1) after she and other special education case managers complained to School administrators about the failure of some teachers to accommodate some students with disabilities, certain teachers at the School intentionally denied a FAPE to some students in an effort to prevent the case managers from complaining further; and 2) in response to her previous protected activities and in an effort to prevent future complaints to administrators, certain teachers at the School ceased cooperating with the Complainant, which further hindered her ability to ensure that her students received a FAPE.

With respect to the first adverse action alleged by the Complainant, we find that there is sufficient evidence, as described earlier, that some students with disabilities were not provided a FAPE, an action that would cause lasting and tangible harm. Further, there is sufficient evidence that the case managers had previously complained to School administrators about discrimination against students with disabilities by certain teachers, and it is reasonable to assume those teachers believed there might be future similar complaints from the case managers. It is also reasonable to assume that those teachers would have preferred that the case managers not continue to complain about their compliance with Section 504 and Title II. That is, the teachers had an interest in seeing the case managers cease their complaints. Nonetheless, for the reasons that follow, we find insufficient evidence to infer a causal connection between the adverse action and the teachers' interest in preventing future complaints.

First, other case managers stated that they did not feel intimidated by the teachers, nor did they believe that their students were denied a FAPE in an effort to prevent them from complaining. With respect to intimidation of the Complainant, we were unable to establish any meaningful increase over time in the extent to which students were denied a FAPE that would correlate with the Complainant's protected activities or her expected protected activities. Further, none of the other case managers and administrators we interviewed believed that the teachers took action against the Complainant's students to intimidate her. In light of the lack of evidence to support the Complainant's belief and the lack of similar views from other case managers, we find insufficient evidence of a causal connection between any denial of FAPE and the teachers' interest in preventing future complaints.

With respect to the second adverse action alleged by the Complainant, witness interviews established sufficient evidence of a lack of cooperation and a tense relationship between some teachers and the Complainant; the Complainant acknowledged this, and an Assistant Principal described the tension between her and other staff members as palpable.¹⁷ And as with our analysis of the first adverse action alleged, based on the Complainant's previous complaints to administrators, it is reasonable to assume that certain teachers believed the Complainant would engage in future protected activities and that they had an interest in preventing such future complaints. There is, however, insufficient evidence of a causal connection between the lack of cooperation and tense relationship between some teachers and the Complainant and the teachers' interest in preventing future complaints. Instead, the evidence indicates more persuasively that the difficulties between the Complainant and other teachers were the result of personality conflicts and personnel issues, rather than an intent to stop the Complainant from complaining further to administrators. In addition, other case managers who complained to administrators about discrimination against students with disabilities did not report experiencing the same lack of cooperation and tension that the Complainant experienced, diminishing the likelihood that the cause of these problems was the complaints to administrators. Thus, we find insufficient evidence of a causal connection between any lack of cooperation and tension between the teachers and the Complainant and the teachers' interest in preventing future complaints.

¹⁷ While the witnesses noted that the Complainant had numerous personal conflicts with other teachers and put part of the blame for those conflicts on the Complainant, the witnesses also said the other teachers certainly deserved part of the blame.

In short, although there is evidence of adverse actions, even if we assume that teachers would have preferred that the Complainant and other case managers not complain about their failure to provide students with disabilities a FAPE, there is insufficient evidence of a causal connection between the protected activity the recipient sought to prevent and the adverse actions alleged. Thus, we find insufficient evidence to support the Complainant's intimidation allegations.

Conclusion

As noted, the District entered into a Resolution Agreement to address our findings that the District: 1) denied students with disabilities a FAPE, in violation of 34 C.F.R. Section 104.33, and 28 C.F.R. Section 35.130; 2) discriminated against students with disabilities in scheduling, in violation of 34 C.F.R. Section 104.4(b)(ii), and 28 C.F.R. Section 35.130(b)(ii); and 3) failed to provide a prompt and equitable response to disability discrimination allegations, in violation of 34 C.F.R. Section 104.7(b), and 28 C.F.R. Section 35.107(b). We are pleased that the District voluntarily elected to take steps necessary to comply with Section 504 and Title II. We also find that there is insufficient evidence to conclude that the District discriminated against students with disabilities in discipline or intimidated certain staff members as alleged.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. We will monitor the District's implementation of the Resolution Agreement, and the case will remain open until we determine that the District has satisfied all commitments in the Resolution Agreement. The Complainant has the right to file a private suit in federal court regardless of whether OCR finds a violation.

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

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

This 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.

I personally regret our protracted delay in completing this investigation. Thank you for the courtesy and cooperation your staff extended to OCR during the investigation of this case. If you have any questions regarding this complaint, please call Mr. XXXX XXXX, the attorney assigned to this case, at (303) 844-XXXX. I can be reached at (303) 844-4506.

Sincerely,

/s/

Thomas E. Ciapusci
Supervisory Team Leader

Enclosure: Resolution Agreement

cc: Hanna Skandera, Secretary of Education, Public Education Department (w/out enclosure)
Olivia Kien, Director of Academic Support