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

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September 28, 2018

Mr. BJ Buchmann, Superintendent  
Deer Trail School District 26J  
350 Second Avenue  
Post Office Box 129  
Deer Trail, Colorado 80105

Mr. Don Anderson, Executive Director  
East Central Boards of Cooperative Educational Services  
Post Office Box 910  
820 Second Street  
Limon, Colorado 80828

*via email only to xxxx*

Re: **Deer Trial School District 26J**  
OCR Case Number 08-17-1061

**East Central Boards of Cooperative Educational Services**  
OCR Case Number 08-17-1270

Dear Mr. Buchmann and Mr. Anderson:

We have completed our investigation stemming from complaints against Deer Trial School District 26J ("District") and East Central Boards of Cooperative Educational Services ("BOCES") alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District, at Deer Trail High School ("School"), and BOCES discriminated against his sons ("Student 1" and "Student 2;" collectively, "Students") when, during the 2016-2017 school year (SY), they:

1. failed to implement Student 1's individualized education program (IEP); and
2. failed to implement Student 2's IEP.

Additionally, the Complainant alleged that the District:

3. treated Students 1 and 2 differently from their peers without disabilities when teachers physically removed the Students' hats and hoods from their heads;
4. treated Student 2 differently by asking him to attend Friday school to receive academic support;
5. failed to respond appropriately to peer harassment of Student 1; and
6. failed to respond appropriately to staff harassment of Student 1.

With respect to allegations one and two, our investigation established, by a preponderance of the evidence, that the District and BOCES (collectively, "Recipients") discriminated as alleged by failing to provide Student 1 with all of his XXX services and by failing to provide Student 2 with opportunities to practice the Armed Services Vocational Aptitude Battery. With respect to allegations three, four, five,

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and six, we found insufficient evidence to conclude that the District discriminated as alleged. The reasons for our conclusions are set forth in this letter.

Upon being advised of these findings, the Recipients voluntarily agreed to enter into a resolution agreement to resolve the matters. A signed copy of the agreement is attached.

During the course of our investigation, we also identified five additional areas of concern. In Section V of this letter, we provide the Recipients technical assistance regarding the concerns.

**I. LEGAL STANDARDS**

**a. Failure to Implement**

The Section 504 regulations, at 34 Code of Federal Regulations (C.F.R.) Section 104.33, require recipient school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. Sections 104.34-36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and 35.130(b)(1)(ii) and (iii), to require public school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

**b. Different Treatment**

Under the Section 504 regulations, at 34 C.F.R. Section 104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. Section 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. Section 104.4(b)(1) and 28 C.F.R. Section 35.130(b)(1), a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (a) deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service; (b) afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; or (c) provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, the Office for Civil Rights (OCR) looks at whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the different treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the recipient's actions were based on the individual's disability.

**c. Harassment**

The regulations implementing Section 504, at 34 C.F.R. Sections 104.4(a)-(b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. Section 35.130(a)-(b), create the same prohibition against disability-based discrimination by public entities. Recipients are responsible under Section 504, Title II, and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

**i. Student-on-Student Harassment**

Under Section 504, Title II, and their regulations, once a recipient has notice of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately. The recipient is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A recipient may violate Section 504, Title II, and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the recipient knew or reasonably should have known about the harassment; and (3) the recipient fails to take appropriate responsive action. These steps are the recipient's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

**ii. Employee-on-Student Harassment**

Recipients provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the recipient is responsible for the discriminatory conduct whether or not it has notice.

**iii. Recipient's Response to Harassment by Peer or Recipient Employee**

OCR evaluates the appropriateness of a recipient's responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the recipient must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The recipient must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

**II. EVIDENTIARY STANDARD**

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 as alleged.

### **III. INVESTIGATION**

Our investigation focused on obtaining the evidence necessary to determine whether the Recipients discriminated in violation of Section 504 and Title II. Specifically, our investigation consisted of:

- requesting and reviewing documentary evidence from the Complainant and Recipients;
- interviewing the Complainant and Student 1;
- interviewing the District’s special education teacher (“Teacher”);
- interviewing the School’s former principal (“Principal”);
- interviewing the BOCES’ special education director (“Director”), assistant special education director (“Assistant Director”), special education coordinator (“Coordinator”), audiologist (“Audiologist”), and school psychologist (“Psychologist”);
- requesting and reviewing narrative responses from the District; and
- providing the Complainant with an opportunity to rebut our insufficient evidence findings.

### **IV. EVIDENCE AND ANALYSIS**

#### **a. Background**

During the 2016-2017 SY, Student 1 was in XXX grade and Student 2 was in XXX grade at the School. Both students had an IEP. Student 1 was not enrolled in the District from XXX to XXX; the Complainant voluntarily withdrew him from the District during that time period.

The District is on a four-day week schedule; there is no school on Fridays. During the 2016-2017 SY, the District had one school building and one special education teacher.

#### **b. Failure to Implement Student 1’s IEP**

##### **i. Evidence**

X – SECTION REDACTED – X

##### **ii. Analysis**

The Complainant’s primary allegation (both to the Recipients and OCR) related to implementation of Student 1’s IEP was that the Teacher was not qualified to teach special education math. However, evidence shows that the Teacher possesses a bachelor’s license in teaching and a master’s in curriculum and instruction; has passed his required Praxis exams; and had a current license, from the Colorado Department of Education, to teach as a “special education generalist” for students ages five to 21. Therefore, we did not find a preponderance of evidence to support this allegation.

The Complainant also alleged that the Recipients failed to implement Student 1’s IEP by denying him audiology-related accommodations. However, evidence shows that the Recipients made the accommodations available, but Student 1 consistently refused to use XXX XXX XXX. Therefore, we did not find a preponderance of evidence to support this allegation.

Additionally, the Complainant alleged that the Recipients failed implement Student 1’s IEP by not providing him with adequate credit recovery opportunities. X – THREE SENTENCES REDACTED – X. Student 1’s IEP did not specify the type or frequency of credit recovery assignments that were to be provided to Student 1, and we were unable to establish a consistent understanding among Student 1’s IEP team members about what his credit recovery opportunities were intended to look like. Therefore, we did not find a preponderance of evidence to support this allegation.

In the course of our investigation, we found that the Recipients failed to implement Student 1’s IEP when they did not provide him with all of the specified XXX services in January 2017. X – EIGHT SENTENCES REDACTED – X.

**c. Failure to Implement Student 2’s IEP**

**i. Evidence**

X – SECTION REDACTED – X

**ii. Analysis**

The Complainant’s primary allegation (both to the Recipients and OCR) related to implementation of Student 2’s IEP was that the Teacher was not qualified to teach special education math. For reasons explained in Section IV(b)(ii) of this letter, we did not find a preponderance of evidence to support this allegation.

The Complainant also reported to OCR that the Recipients failed to provide opportunities for Student 2 to practice the Armed Services Vocational Aptitude Battery (ASVAB) test. The “Post-Secondary Transition Plan” section of Student 2’s IEP read, “The Sped teacher will provide opportunities for [Student 2] to practice the ASVAB periodically.” During an interview with OCR, the Teacher indicated he did not specifically offer Student 2 opportunities to practice the ASVAB; instead, the Teacher periodically asked Student 2 if he wanted to work on anything. The onus was on the Teacher to provide the practice opportunities; the onus was not on Student 2 to request practice opportunities. Therefore, we find, by a preponderance of the evidence, that the Recipients failed to implement part of Student 2’s IEP by failing to periodically provide opportunities for him to practice the ASVAB test.

**d. Different Treatment of Students 1 and 2 (removing their hats and hoods)**

**i. Evidence**

The District’s 2016-2017 Board Policy on “Student Dress and Good Grooming” (JICA) read, in relevant part, “No hats, caps, or sunglasses.” The School’s 2016-2017 “Student Handbook and Discipline Code Books” read, in relevant part, “Hats, caps, or sunglasses are left up to the discretion of the classroom teacher. They are not allowed in the hallway.” According to the Teacher and Principal, the XXX consistently does not allow any students to wear hats or hoodies in the XXX.

Students 1 and 2 have a history of getting in trouble for wearing hats and hoodies XXX. On or about XXX, Student 2 was given a one-week lunch detention for wearing a hat XXX as a repeat offender. Then, on or about XXX, Student 2 was given a three-day out-of-school suspension (OSS) for refusing to remove his hat and hood XXX. Records from Student 2’s XXX IEP team meeting note, “[Student 2] has an issue with

[XXX] – she does not let him wear his hat – he will need to take his hat off if asked to.” Records from Student 2’s XXX manifestation determination meeting note, “[Student 2] was arguing with a staff member. He would not take his hat off after repeated warnings to remove his hat from the teacher. He was being directly defiant.” X – THREE SENTENCES REDACTED – X.

**ii. Analysis**

We did not find a preponderance of evidence to support this allegation because we did not find any evidence that the XXX act of making Student 1 or Student 2 remove their hats and hoods was based on either student having a disability, rather than the XXX broadly applicable rule about hats and hoodies not being worn XXX.

**e. Different Treatment of Student 2 (asking him to attend school on Fridays)**

**i. Evidence**

The District has a “Friday School” program that makes tutoring available for all students from 9:00 a.m. to 11:00 a.m. on Fridays. During an interview with OCR, the Principal indicated that nine or ten students may participate on any given Friday and that approximately 200 total students attend over the course of a full school year. Student 2’s math teacher told Student 2 that he should attend Friday School in order to receive extra help in math.

**ii. Analysis**

The Complainant alleged that a math teacher engaged in discriminatory different treatment of Student 2 when he encouraged Student 2 to attend Friday School. We did not find a preponderance of evidence to support this allegation because we did not find any evidence that the math teacher’s actions were based on Student 2 having a disability, rather than the facts that the Student 2 was struggling in math and that all students are invited to participate in Friday School.

**f. Peer Harassment of Student 1**

**i. Evidence**

X – TWO SENTENCES REDACTED – X. When given an opportunity to rebut information provided by the District, the Complainant told OCR that the District was lying and that Student 1 was harassed constantly. The Complainant told OCR that the recording he provided of a manifestation determination meeting to OCR demonstrated that Student 1 was harassed. OCR listened to this recording carefully and determined that it does not demonstrate that Student 1 was harassed because he has a disability.

The Recipients acknowledged that the Complainant had reported peer harassment of Student 1 to staff. However, Recipients’ staff reported to OCR that the Complainant provided few details and never indicated that the harassment was related to Student 1 having a disability.

**ii. Analysis**

We did not find a preponderance of evidence to support this allegation because we did not find any evidence that the alleged peer harassment was based on Student 1 having a disability.

Notably, the bullying of a student with a disability *on any basis* can result in a denial of FAPE that must be remedied under Section 504. However, we did not find a preponderance of evidence that any peer harassment had caused Student 1 to not receive a FAPE.

**g. Employee Harassment of Student 1 (removing hats and hoods)**

**i. Evidence**

Please see Section IV(d)(i) of this letter.

**ii. Analysis**

We did not find a preponderance of evidence to support this allegation because we did not find any evidence that the XXX act of making either Student 1 or Student 2 remove their hats and hoodies amounted to harassment or was based on either student having a disability, rather than the XXX rule about hats and hoodies not being worn XXX.

**V. ADDITIONAL CONCERNS**

During the course of our investigation, we identified five additional areas of concern:

- a. whether the District took appropriate and continuing steps to publish notification that it does not discriminate on the basis of disability and identify the employee designated to coordinate its efforts to comply with Section 504 and Title II;
- b. whether the District adopted grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination;
- c. whether the Recipients appropriately evaluated the Students prior to taking action with respect to the Students' initial placement and before any subsequent significant change in placement and, relatedly, whether the Recipients understand the requirements and purposes of manifestation determination meetings;
- d. whether the Recipients educate students in the least restrictive environment, consistent with their Section 504 plans or IEPs; and
- e. whether the Recipients understand that harassment of a student with a disability may result in a denial of FAPE, even if the harassment is not disability-based.

Although we did not fully investigate these issues because they were not directly at issue in these specific cases, and therefore are not finding violations with respect to these issues, we have included below information discovered during the course of our investigation and technical assistance.

**a. Notice of Nondiscrimination and Section 504 Coordinator**

**i. Legal Standard**

The Section 504 regulations, at 34 C.F.R. Sections 104.8(a)-(b), require a recipient employing 15 or more persons to take appropriate and continuing steps to notify program participants, beneficiaries, applicants, employees, and unions or professional organizations that it does not discriminate on the

basis of disability. The notification must also identify the responsible employee designated under 34 C.F.R. Section 104.7(a) to coordinate its efforts to comply with the regulations. The Title II regulations, at 28 C.F.R. Section 35.106, similarly require a public entity to inform applicants, participants, beneficiaries, and other interested persons about the protections against disability discrimination assured by Title II and the regulations. Under 28 C.F.R. Section 35.107(a), public entities employing 50 or more persons must also notify all interested individuals of the name, address, and telephone number of the designated Title II compliance coordinator.

## **ii. Relevant Information from Investigation**

During the course of our investigation, we reviewed the District's Section 504 Parent/Student Handbook ("Section 504 Handbook"), Policy AC, Policy AC-E-1, the 2017-2018 Student Handbook ("Student Handbook"), 2017-2018 Support/Classified Staff Handbook, and 2017-2018 Staff Handbook.

Although the Section 504 Handbook contains information indicating that the Rehabilitation Act of 1973 ("Act") is a nondiscrimination statute and states that the Act's purpose is to prohibit discrimination, the Section 504 Handbook does not specify that the District is subject to the Act or that discrimination on the basis of disability is otherwise prohibited. Furthermore, while the Section 504 Handbook informs parents and students that they may contact the Section 504 Coordinator for information, it does not clearly identify the Section 504 Coordinator. Instead, several inches below the statement about the Act, the Section 504 Handbook includes the former Dean of Students' name and telephone number, without any indication that she has been designated as the District's Section 504 Coordinator.

District Policy AC contains a nondiscrimination statement sufficient to meet the requirements set forth by the regulations implementing Section 504. OCR was able to confirm that the nondiscrimination notice is published annually in the District's Student Handbook. The only place the District's Section 504 Coordinator may have been identified was in the Section 504 Handbook. Further, the District's notice of nondiscrimination is not posted on the District's home webpage, nor is it available for access through the "search" function on the District's webpage.

Policy AC-E-1 reads, "The following person(s) have been identified as the designated employee(s) to coordinate [Section 504] compliance activities for the district:", but does not include a person's name or title following the colon. Instead, the text immediately following reads, "As referenced in exhibit ACE-E, specific complaints of alleged discrimination under Section 504 or the ADA (handicap/disability) should be referred to: Superintendent of Schools." This information is inconsistent with the Section 504 Handbook, which instructs parents and students to contact the Section 504 Coordinator, who seems to be identified as the Dean of Students.

## **iii. Recommendations**

We recommend that the District review the above identified policies and procedures, as well as any other related policies and procedures, to ensure that the District's notice of nondiscrimination is appropriately disseminated and the District's Section 504 Coordinator is consistently identified by name or title, office address, phone number, and e-mail address.

### **b. Grievance Procedures**

#### **i. Legal Standard**

The Section 504 regulations, at 34 C.F.R. Section 104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. Section 35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

At least in the Title IX context, OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

#### **ii. Relevant Information from Investigation**

We found relevant information regarding grievance procedures in the District's Section 504 Handbook, Policy AC-R, Policy AC-E-1, and Policy ACE-E.

The Section 504 Handbook informs parents and students that the District has a grievance procedure for disability complaints. However, the Section 504 Handbook does not explain what is required in a Notice of Appeal, how long the District has to respond to a written appeal, when a hearing may be scheduled, or how to contact the District's 504 Coordinator, the person to whom the appeal must be submitted. It is also unclear whether an individual may file a complaint directly with the Section 504 Coordinator or whether the complainant *must* attempt to resolve the concern through the teacher and/or principal, first.

While District Policy AC-R states that any aggrieved individual may submit a written complaint to the compliance officer, it does not identify the compliance officer. Further, Policy AC-R indicates that the District shall respond to a complaint of discrimination and/or harassment reported "when discrimination and/or harassment is discovered." The District must respond to a complaint before harassment is discovered; otherwise, the District will never discover harassment. Under Section 504, Title II, and their regulations, once a recipient has notice of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately.

#### **iii. Recommendations**

We recommend that the District review the above identified policies and procedures, as well as other related policies and procedures, to ensure that the District's grievance procedures are consistent and provide: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the

parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

We also recommend that the District revise Policy AC-R, and other policies and procedures, as necessary, so that they appropriately state that the District will respond to discrimination and/or harassment once it has notice of the possible discrimination.

**c. Evaluation and Placement**

**i. Legal Standard**

Section 104.35(a) of the Section 504 regulations requires recipients to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under Section 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (*i.e.*, decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. Recipients, including school districts, must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Section 104.36 requires recipients to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation, or placement of the student. Taken together, Sections 104.35(a) and 104.36 of the Section 504 regulations prohibit a recipient from taking disciplinary action that results in a significant change in the placement of a student with a disability without reevaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and 35.130(b)(1)(ii) and (iii), to require recipients to act consistent with the Section 504 regulations in disciplining students with disabilities.

A significant change in placement occurs when a student with a disability is excluded from his or her program for more than ten: (a) consecutive school days; or (b) cumulative school days in a single school year under circumstances that show a pattern of exclusion. Before such a change occurs, recipients must determine whether the conduct in question was: (a) caused by, or had a direct and substantial relationship to, the child's disability; or (b) the direct result of the recipient's failure to implement the student's Section 504 plan or IEP. If the answer to either question is "yes," then the recipient generally may not subject the student to a significant change in placement.

**ii. Relevant Information from Investigation**

The "Notice of Parent and [S]tudent Rights Under Section 504" section of the District's Section 504 Handbook reads, in part, "Parents are required to produce validation of a child's handicapping condition when the condition is beyond the parameters of assessments/evaluation that can be legally performed by a public school personnel (*i.e.* medical evaluation(s), psychological, etc.)." However, if a recipient determines a medical assessment is necessary to conduct an evaluation and determine eligibility,

Section 504 requires the recipient to ensure that the student is assessed at no cost to the parents and that, if necessary, staff assist the parent in making arrangements for the evaluation.

Additionally, the “Parent Permission for Initial Evaluation” form in the Section 504 Handbook asks parents to verify that they have received a copy of “Section 504 Parent and Student Rights” that inform them of their rights throughout the 504 Referral Process, including a parent’s right to receive “This an[d] all other written notices in the language I understand: English or, if needed, a translator of such orally, in sign language, or Braille as appropriate . . . .”

In this case, the Recipients: obtained information regarding numerous medical diagnoses of Student 1; conducted an initial evaluation of Student 2 to determine whether a full XXX evaluation was necessary; and held manifestation determination meetings for Students 1 and 2. After reviewing documentation provided by the District and listening to a recording of a manifestation determination meeting for Student 1, held on XXX, we learned that: (a) after the Complainant informed the Recipients that Student 1 had received a new medical diagnosis during the XXX, the Recipients did not conduct a re-evaluation; (b) the group convened for Student 2’s XXX manifestation determination meeting determined that Student 2 “does not have a Behavior Plan because [he] has a Specific Learning Disability and does not need nor require a behavior plan;” and (c) multiple members of the group convened for Student 1’s XXX manifestation determination meeting expressed confusion regarding what type of information they could consider or discuss during the meeting and what standard to apply when deciding whether Student 1’s behavior was a manifestation of his disability.

Therefore, we are concerned that the individuals involved in making evaluation and placement decisions for Students 1 and 2 during the 2016-2017 SY did not fully understand: the requirements or purposes of manifestation determinations; that all relevant information must be considered when making a placement decision, not solely a student’s most recent diagnosis; and that students with specific learning disabilities may need a functional behavioral assessment (FBA) and behavioral intervention plan (BIP).

### **iii. Recommendations**

We recommend that the District revise its Section 504 Handbook to reflect that the District will provide written translation when necessary to ensure that parents are provided with meaningful access to participate in their child’s education.<sup>1</sup> Additionally, we recommend that the District revise its Section 504 Handbook to clarify that: (a) parents are not required to produce validation of their child’s disability; (b) necessary evaluations will be completed at no cost to a student or parent; and (c) District personnel will assist parents, upon request, with arranging evaluations (for Section 504 or IDEA purposes) not conducted by District personnel.

Further, we recommend that the Recipients retain a qualified individual to provide Section 504 training to District and BOCES employees who are responsible for identifying, evaluating, placing, or serving students with disabilities. We recommend that the training cover, at a minimum, the Recipients’ obligation to: identify, evaluate, and place students with disabilities consistent with the requirements of Section 504 and Title II; make placement decisions based on students’ individual needs; apply the proper

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<sup>1</sup> See “English Learner Students and Limited English Proficient Parents,” *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

legal framework for manifestation determinations; fully implement students' Section 504 plans and IEPs, including transition plans and services; and provide FAPE.

**d. Least Restrictive Environment**

**i. Legal Standard**

The Section 504 regulations, at 34 C.F.R. Section 104.34(a), require that a student with a disability be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability – *i.e.*, in the least restrictive environment (LRE). School districts must place students with disabilities in the regular educational environment unless it can be demonstrated that education in the regular setting with the use of supplementary aids and services cannot be achieved satisfactorily.

**ii. Relevant Information from Investigation**

We reviewed all IEPs in place for Students 1 and 2 during the 2016-2017 SY and interviewed the individuals responsible for writing and implementing their IEPs. During the records review and interviews, we learned that the Recipients rely on software to generate a student's LRE description in the IEP based on the special education service minutes entered in the service delivery section. The software seemingly bases the calculation on the assumption that the students attend school for a full school day. This reliance results in IEPs with incorrect LRE descriptions that are inconsistent with the IEP teams' intended placement decisions. For example, in this case, Student 1's IEP indicated that he would be educated in a general education setting at least 80 percent of the time. However, because he was on a shortened school day, his actual percentage of time in general education was much lower than 80 percent.

**iii. Recommendations**

We recommend that the Recipients adjust its IEP software, if possible, to be able to account for shortened school days, or alternatively, manually update the LRE description to account for shortened school days. Additionally, we recommend that the Recipients institute a practice whereby staff double check the IEPs of students on a shortened school day to ensure that the LRE description is consistent with the service delivery plan and IEP team's intent.

**e. Harassment or Bullying of Students with Disabilities**

**i. Legal Standard**

At the elementary and secondary school level, bullying or harassment of a student with a disability *on any basis* can result in a denial of FAPE that must be remedied under Section 504.<sup>2</sup> Under Section 504, recipients have an ongoing obligation to ensure that a qualified student with a disability who is the target of bullying continues to receive FAPE—an obligation that exists regardless of whether the bullying is based on disability. Accordingly, under Section 504, as part of a recipient's appropriate response to bullying on any basis, the recipient should convene the IEP team or the Section 504 team to determine

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<sup>2</sup> See "Responding to Bullying of Students with Disabilities," available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

### **ii. Relevant Information from Investigation**

Students 1 and 2 experienced interpersonal conflict with classmates, which the Complainant labeled bullying. Neither documentation provided by the parties nor information obtained during interviews indicate that the conflict occurred because Students 1 and 2 have disabilities. Rather, the Complainant and Student 1 shared that they believed the conflict was primarily the result of XXX XXX XXX.

Documentation provided by the parties, as well as the recording of Student 1's XXX manifestation determination meeting, tend to show that the Recipients did not acknowledge their obligation to respond to bullying or harassment incidents that occurred outside of school, even if they impacted the school environment, including possibly Student 1's access to a FAPE. While the Complainant did not allege that Student 1 was denied a FAPE as a result of the bullying, the Recipients did not proactively convene or consider convening Student 1's IEP team to determine whether, as a result of the alleged bullying, Student 1's needs had changed such that he was no longer receiving a FAPE.

### **iii. Recommendations**

We encourage the Recipients to include this issue in future training regarding harassment and bullying of students with disabilities. OCR's October 2014 Dear Colleague Letter, "Responding to Bullying of Students with Disabilities," is attached, with the most relevant sections highlighted.

## **VI. CONCLUSION**

Case numbers 08-17-1061 and 08-17-1270 are now in the monitoring phase. OCR will monitor implementation of this Agreement through periodic reports from the Recipients demonstrating that the terms of the Agreement have been fulfilled. We will provide the Recipients with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The monitoring phase will be completed when OCR determines that the Recipients have fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the Recipients, copied to the Complainant, stating that OCR case numbers 08-17-1061 and 08-17-1270 are closed. If the Recipients fail to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues above and should not be interpreted as a determination of the Recipients' compliance or noncompliance with Section 504 or Title II, or any other federal law in any other respect.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not

formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. Please be advised that the Recipients may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint investigation. If this happens, the individual 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, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for your attention to this matter and the Recipients' cooperation. If you have any questions, please contact Allison Morris, the attorney assigned to the case, at XXX or XXX.

Sincerely,

/s/

Angela Martinez-Gonzalez  
Supervisory General Attorney

Attachments: Resolution Agreement  
"Responding to Bullying of Students with Disabilities" Dear Colleague Letter

cc (via email): John Price, President, District School Board  
Elizabeth Friel, Attorney for the District, Caplan & Earnest  
Katy Anthes, Colorado Commissioner of Education