UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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April 22, 2021

Superintendent Steve Holmes
Sunnyside Unified School District
2238 East Ginter Road
Tucson, AZ 85706

via email only to: XXXX

Re: Sunnyside Unified School District
OCR Case No. 08-21-1028

Dear Superintendent Holmes:

This letter is to notify you of the disposition of the above-referenced complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR), received on October 26, 2020, alleging that the Sunnyside Unified School District (District) is discriminating against students with disabilities and retaliated against the Complainant, a former employee, for opposing disability discrimination.

Specifically, the Complainant alleges that the District is discriminating against students with disabilities by:

a. Categorically not providing academic support services to students classified solely as speech and language impaired (SLI);

b. Pre-determining outcomes, particularly with respect to the provision of "C" level services[1] and placement in self-contained settings, prior to Individualized Education Program (IEP) meetings and without the input of the IEP team;

c. Prohibiting psychologists who have knowledge about a child from making recommendations regarding services and placement of that child at IEP meetings and in multi-evaluation team (MET) reports; and

d. Overriding the decisions of IEP teams, particularly with respect to placement.

The Complainant additionally alleges that he was retaliated against for complaining about the District's discriminatory policies and practices by not being renewed into his psychologist

[1] The Arizona Department of Education LRE Code C refers to children who are inside the general education classroom less than forty percent of the day.

position nor re-hired into any other District position despite his qualifications and successful XXX tenure in the District.

OCR Jurisdiction

OCR is responsible for enforcing 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 in programs and activities that receive Federal financial assistance from the Department, and Title II of the Americans with Disabilities Act of 1990 (ADA) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The implementing regulations for Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. § 35.134, also prohibit retaliation. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

Summary of Investigation

OCR's investigation included three interviews of the Complainant totaling over six hours; review of over 5000 pages of documents pertinent to the complaint allegations, including but not limited to the District's non-discrimination, anti-retaliation, special education, and employment policies and procedures; special education training materials and presentations; communications to the "District psychologists" email list; spreadsheets and documents showing placements and changes in placement for the District's special education students; over seventy-five IEPs and/or Prior Written Notice (PWN) for students with a Mild Intellectual Disability (MIID), Speech Language Impaired (SLI), or Specific Learning Disability (SLD) classification; documents describing the District's inclusion initiative for MIID students; the Complainant's personnel file; correspondence between the XXX of Exceptional Education and the Complainant; correspondence between the Complainant and members of his school's special education team and his mentees; and the District's investigative file of the Complainant's May 2020 complaint.

OCR interviewed eleven former and current District employees, X – sentence redacted - X. Many of the interviews lasted between two to five hours. OCR also reviewed six witness statements from X – sentence redacted - X. Lastly, OCR conducted an extensive rebuttal interview of the Complainant. OCR additionally reviewed several letters and position statements from the District.

Evidentiary Standard

OCR applies a preponderance of the evidence standard to determine whether 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 or is insufficient to support the conclusion of non-compliance.

Factual Background

A. Description of the District

Sunnyside Unified School District serves approximately 15,000 students in grades preschool to high school and is comprised of four specialized high school academies, three traditional high schools, five middle schools, one early learning center, and twelve elementary schools. Approximately 1900 students in the District are identified as students with disabilities under the Individuals with Disabilities Education Act (IDEA). The student body of the District is eighty-nine percent Hispanic and seventy-nine percent of students come from low-income homes.

B. Changes to District's Special Education Policies and Procedures

1. Hiring of New XXX

The District hired a new XXX in August 2015. Her predecessor had been the District's XXX for seventeen years. X – sentence redacted – X.

When the new XXX was interviewed for the position, the Governing Board and Superintendent asked her to focus on improving outcomes for students with disabilities and for children not yet in special education who could benefit from early intervention services. They were concerned that the District's special education students were not being provided a comparable academic experience to the District's general education students and consequently were not participating in training and employment programs post-graduation at comparable rates. To meet these mandates, the XXX spent her first few years in the District learning the District's culture and reviewing its processes and practices.

The XXX summarized her analysis in a document called SWOT (Strengths, Weaknesses, Opportunities and Threats), which she presented to the Superintendent and Board. Among the list of District strengths, she noted "established mechanisms for data-driven changes to student [Least Restrictive Environment] LRE ([Change of Placement] COP process)." In the list of weaknesses, she included compliance with special education timelines and students with disabilities not making academic performance. Among the opportunities she noted was "Inclusive opportunities." In the list of threats, she included "overidentification of students with disabilities."

2. New Change of Placement (COP) Procedures

When the XXX joined the District, the Change of Placement (COP) procedures were generally as follows:

- Placements in district programs such as MIID, MOID MD, ED, and Autism would not take place until a change of placement was approved by the COP team;
- The COP team would evaluate student performance from all relevant data sources and either approve the COP or request additional information or interventions be provided;

- The COP team was made up of XXX, a district-wide psychologist, and psychologists, teachers and service providers from the attending and potential receiving school;
- After approval by the COP team, the sending school would inform parents of the rationale for the change in placement;
- The sending school would revise the student's IEP with input from the receiving school; and
- The IEP meeting was held before school or on the same day as the student started at the new school.

The XXX initially listed these COP procedures as a "Strength" because she thought it was a "good decision-making process" that was driven by data. However, once she looked closer at the process, she became concerned that COP teams were not sufficiently involving parents in change of placement discussions and decisions. In other words, conversations about placement were happening without parents' knowledge. She therefore asked the XXX to compile data regarding all COPs done in a two-year period to see if patterns emerged.

The XXX made a number of conclusions from the COP data that concerned her, including: a) students placed into special education were moving into self-contained settings within a short period of time with little movement back towards less restrictive environments; b) disability labels were driving placement into self-contained settings; and c) there was insufficient evidence of interventions tried at students' home schools before moving them to more restrictive placements. In addition, the State had found disproportionality with respect to the percentage of White male and African American students in self-contained settings for students with emotional disabilities (ED), and the District was under a corrective action plan to address disproportionality in ED classes.

As a result of these findings, the XXX brought together some psychologists to examine the COP process and started messaging during the 2018-19 school year that she would be changing the COP process. On August 13, 2019, the XXX sent an email to District psychologists in which she stated that "COP meetings no longer exist . . . . I do expect that we use the IEP process to address students' needs which include LRE." The XXX then shared her analysis of the COP data from the last two years. She wrote:

> I have documented all of the COP meetings and there are several obvious concerns as a result. A high percentage of students identified as eligible for special education went from A level to C level in less than a semester often only a month or two. A large percentage of students were placed in self contained based on label only. And finally of the students placed in self-contained rarely return to the Gen Ed. Hence I expect that you will work closely with your XXX. . . .

The XXX attached a flow chart to her email describing the new COP procedures. The flow chart included the following five steps:

- Student's team identifies placement concerns;
- School psychologist meets with XXX;
- Inclusion specialist observes and collects additional data;
- Observation by receiving program staff;
- IEP team convenes to review data for consideration of recommendation of change in LRE.

The XXX presented the data regarding self-contained placements and the new COP procedures at the monthly psychologist meeting on August 14, 2019. The XXX was unable to attend that meeting due to a family emergency. The XXX did not complete their presentation of the new procedures because of questions from the Complainant and other psychologists. They did not discuss the flow chart and assumed the XXX would finish the presentation of the new COP procedures at a subsequent meeting.

On September 5, 2019, a school psychologist wrote an email to the District psychologist listserv asking how to do a COP for two students. The XXX responded, "I will provide all of you with an updated COP procedure. After some edits and reviews the draft that you received has changed. In the meantime you must work with your XXX."

On September 17, 2019, the Complainant sent an email to XXX asking her to resend the new COP procedures if they have been sent and, if not, to please tell him what "paperwork" he needed to complete for a student that the team believed needed a change in placement. The XXX responded that the XXX was planning to give out the flow chart at the next meeting, but that there is no longer any "paperwork" to fill out for a COP.

On October 2, 2019, the XXX sent an email to the school psychologist listserv regarding the COP procedures stating:

> I know some of you have been feeling a bit frustrated that I have not completely clarified the COP process. . .I have refined the flow chart I initially shared with you and have brought together a small team of your colleagues to vet the process with me . . . [M]ost of what will happen will be via the MET/IEP process. However, as I have shared, you do not move to a level C without including your program specialist (not the day before the meeting but over time and in person to discuss students who may need more restrictive placements to level c) . . . Also for any first time meetings that are being planned to consider a change in LRE to more restrictive-Level C, I need to be in attendance (after the initial meeting then your program specialist must always be in attendance). We want to have a premeeting with you and your school team that would include leadership to walk through this process. . . .

On October 30, 2019, the XXX gave a Power Point presentation during a psychologist professional development meeting regarding legal issues related to LRE, including the difference between preparation and pre-determination and the need to avoid "shoehorning." Her presentation included a slide on the following "Placement: Don'ts":

- Don't predetermine placements
- Don't determine placement prior to completing a student's IEP
- Don't exclude parents from placement decisions
- Don't place students on the basis of their disability categories.

The XXX also included a slide regarding what she learned from her analysis of COP data, including:

- If a student is labeled (esp. MIID) the majority go straight to self-contained;
- Students placed in ED/SC or MOID stay secluded for the majority of their school experience;
- Most students go from level A to C (most often within less than 6 months from initial eligibility.

The flow chart disseminated to psychologists in August 2019 was never implemented because some people were treating it as a "check list," and the XXX "didn't want teams to feel like they had to jump through hoops." No alternative document was created during the 2019-20 school year to describe the new COP process. The District's plan was to update the psychologist handbook to include the new COP process, but that did not occur before OCR began its investigation. The 2020-21 psychologist handbook included the old COP process that required a COP team and a COP form, which have not been used since the start of the 2019-20 school year.

During OCR's investigation, the District provided OCR with new written COP procedures, which have replaced the former procedures in the 2020-21 psychologist handbook. The new procedures state:

> The student's team must always consider the full continuum of placements. To support you in this, always include and invite your program specialist to an IEP where the team will be considering a move in placement. Provide them with the team's documentation of placement history successes and concerns prior to scheduling the IEP.

The new procedures also include information about preparation versus predetermination, questions for the team to ask themselves, a reminder that placement decisions "must be individualized and made consistent with a child's IEP," and procedures for changing a placement should the team agree a change is warranted. The new procedures additionally remind psychologists that placement issues should not be considered until the goals and services section of the IEP has been completed.

3. Inclusion Initiative for Students with Mild Intellectual Disabilities (MIID)

When a new Superintendent joined the District in 2015, he and the XXX started evaluating the services the District was providing to students with disabilities and looking for ways to become more inclusive in the District's general education program. They were particularly concerned that the District was not keeping pace with other districts in Arizona and nationwide with respect to creating an inclusive environment for students with mild intellectual disabilities (MIID). They shared their vision for more inclusive opportunities for MIID students with the XXX when she came on board.

In 2018, the Parallel Learner's program at Sunnyside High School began pairing students in self-contained MIID classrooms with student mentors in the general education setting. The self-contained students made great academic and social progress. In addition, during the 2018-19 academic year, as part of a Transition from School to Work program, the District created a Practical Assessment Exploration System (PAES) lab, which took students with MIID out of their self-contained classrooms (where many had been since elementary school) and onto the broader campus. The PAES students thrived in the lab. The XXX discovered that many of these students were cognitively able to read but were not reading.

As a result, the XXX began reviewing data on student skills levels in the MIID self-contained classrooms and discovered that students were not making expected progress. She and her staff discovered that IEPs for students with MIID had been written as a "place" rather than individualized services for each student and that students' labels were driving placement decisions. For example, nearly all students with MIID who were placed in a self-contained setting had IEPs that provided between 1450-1800 minutes of specialized instruction in the self-contained classroom although many did not need that many minutes. The XXX concluded that this group of students had been "left behind" because their education relied largely on a self-contained model. She wanted to ensure that students with MIID had the opportunity to be educated with their non-disabled peers and had service minutes in their IEPs that truly reflected what they needed to make progress in the general education curriculum and their IEP goals.

Based on her review of IEPs and the success of MIID students in the Parallel Learner's program and PAES lab, the XXX began researching and planning how to educate students with MIID eligibility in the general education setting, which became known as the District's "inclusion initiative". The District collaborated with many District specialists and community experts, including professors from the University of Arizona and an Inclusion specialist from another school district, and created a team of in-district and out-of-district parents with experience regarding inclusive practices. The District also created a transition team to work on programming, communication, data collection, and implementation of the inclusion model.

The XXX began presenting the inclusion model for students with MIID to the Board at public meetings in February 2018. The District's plan was to discontinue all MIID self-contained classes for the 2020-21 school year and move all the students in those classes to their home

schools. The District did not consider retaining some self-contained MIID classes but reducing the number of those classes.

In December 2019, the Board approved the decision to eliminate all nine self-contained MIID classes, cut all the MIID teacher positions, re-hired eight of the twelve former MIID teachers as inclusion support teachers, and cut twenty MIID paraprofessional positions. At the time, there were approximately 150-160 students in the District's MIID self-contained classrooms.

In the first part of January 2020, the District held meetings with the MIID teachers and all special education staff to discuss the transition to an inclusion model. In addition to formal training, the XXX held monthly meetings with personnel at each of their assigned sites.

On January 12, 2020, the District sent parents of MIID students a letter informing them that the District was moving to an inclusive educational experience in the 2020-21 school year for students with MIID and inviting them to attend parent meetings. The District held three parent engagement sessions regarding the inclusion initiative at the end of January. Parents were given an opportunity to ask questions about the inclusion initiative and were told they could call the XXX or XXX with any questions or concerns. On January 31, 2020, the XXX and one of the XXX recorded a video that was posted on the District's website describing the inclusion initiative as a "major shift in how we educate our students." The XXX and Superintendent received no calls from parents, and the XXX received a few questions or concerns from parents.

In February 2020, the transition team met to review assessment data in reading, writing, and math. They also reviewed student profiles for all the MIID students who would be moving to their home schools. The profiles contained information about the student's strengths, difficulties, communication skills, independent skills, and academic skills, which was provided by their teachers using a standard template.

The purpose of these discussions was to get a better sense of how the students were performing so that the District could identify the scope of curricular supports needed in general education for the students to be successful. The discussions were for "programmatic design" purposes; they were not part of the IEP process and did not include the students' parents. The District was looking at trends rather than individual students' needs. The data that was collected was not akin to multi-disciplinary evaluation data. The only students who were re-evaluated prior to the move out of a self-contained setting were those that were due for a triennial evaluation, and those evaluations were not the reason for the move.

On February 26, 2020, the XXX presented the District's plans for the transition to an inclusive model for students with MIID to the psychologists at their monthly meeting. From March to May 2020, training was provided to special education staff, inclusion teachers, and instructional aides on how to support students in an inclusive setting and how to draft and implement IEPs for students who would be receiving special education services in a general education setting. Two additional parent meetings were held in March 2020.

The District intended to hold IEP meetings for all the students transitioning out of self-contained MIID classes in the Spring of 2020. However, after schools shut down in March 2020 because of the COVID pandemic, the only IEP meetings that took place that Spring were for students who were due for an annual meeting. The District also intended to do a summer "bridge" program for students who had been in MIID self-contained classes to become familiar with their new schools, but that program did not happen because of COVID.

The District operated under the presumption that all MIID students currently in self-contained classrooms would have their IEPs implemented in the general education setting and that their IEPs ultimately would be addended to identify the location of their services as a general education setting. The presumption was not individualized until the IEP teams met the following school year.

For most students, special education services were provided at their home school. However, the District decided that students who were nearing promotion from elementary school to middle school or middle school to high school should not return to their home schools unless their parents wanted that move because they would have to move again the following year. It was also determined that some students with greater needs should stay at XXX School, which had a XXX that could provide additional support to these students in her new role as XXX.

On or around June 5, 2020, all parents of students formerly in a self-contained MIID class received a form PWN stating that "[t]he district is moving to more inclusive practices to provide general education and specialized instruction for your child in their home school . . . Therefore, we are proposing your son/daughter attend ____ school starting Fall 2020 school year. . . .Other options which were considered was to have your student remain at Esperanza self-contained classroom. . . We will use current IEPs and evaluations to determine individual student needs to support the proposed action . . ."

In the Fall of 2020, the District addended many of the IEPs for students formerly in MIID self-contained classes (some without IEP meetings). Other students' IEPs were not revised until an annual meeting was held later in the 2020-21 school year.

Some parents were told that the purpose of the addenda was so that their student's IEP would reflect his/her new classroom and services. In addition, some of the addenda described the program change as follows:

- "service minutes changed to reflect services in general education setting;"
- "increased minutes in general education because of transition into full inclusion;"
- "changing the LRE setting to reflect the minutes he is receiving now that [student] is attending his home school;"
- "Team proposed increase of minutes in general education classroom because of transition into full inclusion;"

- "[Student's] minutes of specially designed instruction were greatly reduced because she is now participating in full inclusion in a generalized education classroom."

As a result of these addenda and IEP meetings, at least thirty-six MIID students' level of services was reduced from a C to an A or B level services. Other students' level of services remained the same, and the Level C services were provided in the student's home school or other school in either a push-in or push-out model.

The District received no due process complaints from parents related to the inclusion initiative. However, several teachers, psychologists, and parents expressed concerns about how their students' needs would be met in general education. Psychologists encouraged parents to call the XXX to discuss their concerns, but many were reluctant to articulate their views.

At XXX School, the XXX and XXX created a list of students for whom there were concerns about inclusion. One of those students remained in a self-contained setting. When his IEP team met for his annual IEP meeting in XXX, the team determined that he still needed a self-contained classroom for XXX and placed him in an XXX self-contained classroom. None of the other 150-160 students formerly in a self-contained MIID classroom remained in a self-contained setting.

Some psychologists had concerns about the abruptness of the move for students. They felt that if the District had moved students gradually, as originally planned, it could have seen if there were students who could not handle the general education environment.

C. Complainant's Employment with the District

1. Tenure

The Complainant was hired by the District as a school psychologist on XXX. X – sentence redacted – X.

X – two paragraphs redacted – X.

2. Complainant's Opposition to Some of the District's Special Education Policies and Procedures

a. SLD and SLI Students

A XXX told OCR that, towards the end of the 2017-18 school year, there were several instances in which he recommended academic support services (i.e., specialized instruction) for a District student with a Specific Leaning Disability (SLD), but the IEP team would not provide the student with services in areas for which he/she did not meet SLD eligibility criteria. The XXX thought the team's actions were inappropriate and that the student should be given services in any area for which there was documented need supported by data. He discussed the issue with

the Complainant, who agreed that the practice constituted an illegal pre-determination of services. The Complainant started asking his colleagues if they had heard about this issue and some had heard from teachers that it was happening at elementary schools. The Complainant confirmed that it was not happening at his school.

Around the same time, the Complainant heard from speech and language providers (SLPs) and special education teachers that they were instructed they could *not* provide academic support services to students classified solely as Speech and Language Impaired (SLI). Other psychologists heard the same rumor. The Complainant thinks this information was shared during a training by another psychologist but is not sure.

The Complainant was concerned about the SLI issue. He was repeatedly told by the XXX that a student's label does not determine services; services must be provided to students based on their needs as determined by an evaluation. The Complainant talked to some colleagues both inside and outside of the District to confirm his analysis and told teachers at his school not to follow the guidance because it is illegal.

In the Summer of 2018, XXX asked XXX whether students classified as SLI only could have academic goals in areas other than speech, such as reading and writing. On August 2, 2018, the XXX responded that the District only provides services for those areas of disability that the student has been found eligible through comprehensive evaluation. As an example, he stated that a student who has been determined to need speech and/or language goals could not have goals in other academic areas, such as reading fluency, reading comprehension, math calculation, or written expression.

The XXX forwarded the XXX's email to the Complainant and asked his opinion. She wrote, "I don't like it . . . I have a student that was recently tested by a psych that I know did a good job . . . did not qualify SLD – low/flat scores and the team felt he needed the extra help." The Complainant responded, "I HATE this. I have heard that people are being told to do this, but this is the first real confirmation. I have been reading the IDEA legislation and state regulations, and it seems to me that this is illegal. I will try to talk to [the XXX] about this." The XXX additionally shared the email with the XXX.

The following day, on August 3, 2018, the Complainant discussed the SLI issue with the XXX in a car. He told her, as he did the XXX, that he was concerned this practice violates IDEA. He stated that services must be provided to meet students' needs and enable them to make progress on their goals and in the curriculum. He further stated that if sufficient support for providing the services is lacking, then psychologists need to do a better job of describing students' needs in their evaluation reports. He offered to provide training to psychologists on how to address the implications of a student's disability in the MET report.

The XXX said she would look into the issue further. The Complainant does not recall whether he also discussed the SLD issue with the XXX that day but understands the two issues to be related. Later that day, the Complainant sent an email to the XXX following up on their discussion about SLI students. He wrote:

> Special education services are going to be driven by need not by label, but that the PLEP (Present Level of Educational Performance) and the evaluation report have to clearly document why there is an academic need . . . We have to clearly spell out how the student's disability whatever it is, but especially SLI impacts areas such as reading, writing, and math, if the team wants to provide services in those areas.

The XXX responded, "I value your input," and stated that she was planning to reach out to the new Arizona Department of Education program specialist for clarification on the issue and would then provide guidance to staff on this issue. The Complainant followed up with additional research and discussed this issue with the XXX a few more times.

On October 31, 2018, the XXX addressed the SLI and SLD issues at the monthly psychologist meeting and provided the following written guidance:

> If students qualifies for any disability category (including SLI) and they have other needs (i.e. Behavior, academic) then we do have an obligation to address those needs. If the SLP sees an area of concern then they should make a TAT referral and collaborate with the classroom teachers on interventions and strategies . . . For speech only students, the SLP will be the case manager for students who may have other needs but do not meet the eligibility criteria for other disabilities.

The XXX never took the Complainant up on his offer to provide training on the "implications" section of MET reports. As XXX, the Complainant informally told psychologists that they need to do a better job of discussing the implications of a student's disability in the MET report so that the IEP team could write an appropriate IEP that addresses all of the student's needs.

In his May 26, 2020 letter to XXX, the Complainant raised the issue of services for students classified as SLI-only as an example of one of the issues for which he has concern regarding the XXX's interpretation of special education law. He provided a technical assistance manual from the Arizona Department of Education stating that evaluations must be sufficiently comprehensive to identify all of students' special education and related service needs, whether or not they are commonly linked to the disability category in which the student has been classified. The Complainant stated he does not know the extent to which IEP teams at other schools are denying academic services to students classified solely as SLI, but he knows they are no longer doing it at his school. The Complainant did not specifically address the SLD issue in his May 2020 letter.

b. Change of Placements

i. General Opposition

The Complainant's first recollection of discussion of the District's new COP procedures was at the August 14, 2019 psychologists meeting, in which the XXX presented data on COPs and the new COP procedures. The Complainant asked a lot of questions about the new COP process, as did other psychologists, and expressed frustration regarding the lack of clarity about the new process.

The Complainant was struggling to understand how the new requirement to meet with program specialists to discuss change of placements *before* an IEP team meeting was consistent with the directive that change of placements should be determined by the "IEP team process." He understood the purpose of the meetings with program specialists to be so that they could review change of placement recommendations and did not believe they had the credentials to make placement decisions.

The Complainant claims he asked, "Am I correct you have the final say in a change of placement?" and stated "if you have veto power, this is not an IEP process" at either the August 14th meeting or a subsequent monthly psychologist meeting that Fall during which the new COP procedures were discussed. He additionally claims he repeated the "veto power" comment in one-on-one conversations with the XXX.

The District denies that the Complainant said the program specialists or the Director had "veto power" over change of placement decisions. No District witness recalls the Complainant using those words before May 2020 to describe the COP process, but one XXX said, "he didn't say it to me but he may have said it to others," and "I would assume he said that." The XXX recalls the Complainant saying at the August 14th meeting, "how dare you tell us what to do." The other XXX recalls the Complainant saying at the August 14th meeting that the XXX "didn't know what [they] were doing," but does not remember much more about what was said because she got so nervous she "shut down."

On or around August 26, 2019, the Complainant and XXX spoke on the phone about the new COP procedures. He was trying to understand the new COP procedures and what steps he needed to follow to initiate a COP. According to XXX, the Complainant screamed at her saying "you are denying placement," "how dare you tell me what to do," and "you don't have experience." The XXX understood the Complainant to be upset because he thought she had the power to say "no" to the COP, which she denies she had.

The XXX sent a follow-up email to the Complainant stating, "We are in the process of implementing new procedures and I know that with change comes many uncertainties. . . I understand that you do not like the new process, but that is the process for now." When OCR asked XXX to explain more generally the Complainant's objections to the COP process, she stated: "he thought I was telling him one way or another" what to do regarding a change of placement, and "he objected to having to ask me." She additionally stated, "he didn't complain about change of placement minus the fact that he thought we were vetoing him, but we weren't." She also said, "I didn't hear him complain about the changes [the XXX] was making, just his perception of my role" in the change of placement process.

One psychologist said that she had conversations with the Complainant in which he expressed concerns about the COP process and the lack of clarity around the process. He also expressed frustration, which she shared, that teams that had spent two to three months amassing data were being told by the XXX to gather more data, which was delaying the provision of additional support to meet students' needs.

The Complainant more explicitly laid out his beliefs about the COP process in writing in his May 26th letter to the XXX. He wrote:

> This letter is to inform you of several concerns I have about [the XXX's] interpretation of special education law. . . [The XXX] stated that she and the XXX were going to review every [change of placement] decision . . . before a student could be placed in a self-contained program. When I asked her for guidelines or a rubric to help us know what the process would look like, she repeated that we needed to follow the IEP process. I commented to her and the group that if she had veto power over the placement that it was not an IEP process (because the IEP team was not making the decision). I asked for guidance and procedures because I believed all of us were following the 'IEP process' for every student who received special education services, and we needed to know what she wanted us to improve. She has never given [us] procedures or specific guidelines on what to improve. . .

The Complainant also wrote in his May 26th letter that the XXX and XXX have stated several times throughout the 2019-20 school year that it is inappropriate to go from eligibility into a "C" level of service or self-contained placement, which is a "predetermined policy" not based "on the needs of the student and without consulting people who know [the student] – the IEP team . . . This could be a legal problem if a parent found out that a level of service had been predetermined and did not agree with those services." He connected these statements to the new COP policy as follows:

> I suspect [the XXX] introduced [the COP] policy to be intentionally vague so she could prevent placing students into self-contained settings . . . I suspect that she is doing this so she could implement the policy of avoiding placing students in special education with C level services.

ii. The Complainant's Opposition to the New COP Procedures in the Context of Discussions of Specific Students

a. Student A

On August 27, 2019, the Complainant wrote to XXX and asked about the placement of a student with MIID whose IEP called for a self-contained placement and who was previously in a self-

contained classroom in another district. He asked if he could transfer the student from his school to a school with a self-contained program, stating that her parents mistakenly registered her at his school.

XXX requested to review documents regarding the student and then responded that the IEP team would need to meet to determine whether her needs could be met at the current school or whether a self-contained MIID program was needed. The Complainant responded, "I am respectfully declining to do this for the following reasons . . . [W]e have a current IEP stating that she needs a MIID classroom; we have a MET saying that she qualifies as MIID . . . and we have her teachers and parents who have requested the placement since the first week of school. I do not see why we legally need to provide further documentation for you. . . " XXX later responded with a carbon copy to the XXX approving the transfer. A few days later, the student's guardian decided to leave the student at her current school because she was happy there, recognizing that she would not get the same level of support she would in a self-contained program.

On November 25, 2019, the Complainant renewed discussions about the placement of this student because a teacher had come to him "expressing concerns that [the current placement was] really inappropriate for her academically and socially." The Complainant wrote, "Given what you have said about mainstreaming all MIID students next year, is there any chance that we could move her to a MIID program this year?" The District ultimately did not pursue the COP because the family objected.

b. Student B

On or around September 18, 2019, the Complainant emailed XXX to ask about the new COP procedures because the team believed Student B needed a COP to a self-contained ED program. The XXX provided the Complainant with a list of specific questions, including what are the student's strengths, what accommodations have been provided in the current placement, what adjustments have been made to the student's IEP this year, and what does the other program offer.

Approximately one week later, the Complainant informed XXX that he had written responses to all her questions and lots of supporting data and was receiving pressure from the teachers and administration to move forward with the IEP team meeting to discuss the COP.
XXX responded, "I will come observe [the student] and go through what you guys have done . . . I understand you are receiving pressure. I want to follow up and see what's been implemented and the data supporting any changes the team suggests." She later scheduled a meeting with the Complainant and XXX to "discuss concerns and data."

On September 30, 2019, XXX wrote to the Complainant, "Let's go ahead and call an IEP meeting to discuss . . . We must go into [the IEP meeting] with intentions of how best to provide support and what looks like with regard to a continuum of services *at your school*." The Complainant responded with a carbon copy to XXX and others:

> So when I read this, I hear you saying that we should anticipate that you will refuse permission for us to make the change for [the student]. . . I would also like to see in writing your rationale for that decision and what you are basing it on. . . If you are going to deny placement, I would like you to make recommendations and provide support for us implementing them.

Two days later, the Complainant wrote to XXX with a copy to XXX, "As I said on Monday, it seemed that you are planning on denying the change." The XXX responded, "Change of placements must come through the XXX and I," and scheduled a meeting with the Complainant for that afternoon.

One hour later, the XXX sent an email to all District psychologists acknowledging the frustration among psychologists about the lack of clear guidance on the new COP process and reiterating that she needs to be at meetings where a change in LRE to a more restrictive placement is being discussed.. She wrote:

> This is not a meeting to predetermine placement but a way of reviewing all of the data to understand the students needs and to ensure everyone understands what is expected to be discussed at the meeting . . .

Thirty minutes later, the XXX responded to the email thread regarding the COP for Student B as follows: "[The XXX] is correct in what she has shared with you about what needs to be done in considering a more restrictive placement . . . A change to a more restrictive environment is a team decision it's not one person saying yes or no nor is it a group of people coming together making a decision outside of the IEP process. Having the psychologist and the XXX work as a team to discuss students who have not been successful is critical especially when considering other placements available."

A few days later, XXX wrote to the Complainant to schedule a time when she, XXX, XXX, and the Complainant could meet to discuss the student. The Complainant responded, "I would also like to set up a time to meet and discuss the situation with his . . . guardian, teachers and case manager – the iep team."

Ultimately, the IEP team met on October 22, 2019, and approved the change of placement for the student to a self-contained ED program. XXX opposed the change during the IEP meeting, believing C level services in a less restrictive program was more appropriate, but was overridden by the other members of the IEP team.

c. Student C

On March 4, 2020, the Complainant wrote to XXX, XXX, and others regarding a student with significant mental health issues. He asked whether it would be possible to place her in an ED class based on safety concerns X – phrase redacted - X. The MET meeting for the student was scheduled for two days from then.

XXX responded, "It is highly unlikely and likely an inappropriate placement to transition a student who has maintained this year for the last quarter to a new school. Due to the current dynamics of that particular classroom it would also be highly unlikely that it would be a good fit . . In this situation it is very likely we will have to be creative in how we build support around her and the . . . team to keep her in class [at her current school]."

XXX responded around 7:30 AM the morning of the MET meeting, March 6, 2020, as follows:

> I've shared with you and all the psychologists that it's inappropriate to go from eligibility straight to self contained. With that eligibility you want to determine what special Ed services can be provided to her in the home school . . . Working in the least restrictive environment and that's her home school. . . I'm going to ask that you provide the met eligibility and that [XXX] will facilitate this meeting. I do not want it to become a power struggle between you and [XXX] because of personal difference. The expectation is that you focus on the students need and to serve her in the LRE with the new eligibility.

The Complainant responded thirty minutes later, "How dare you substitute the judgment of people who have worked with this student since the start of this school with someone who has never met the child and does not know what is going on with her? Your concern appears to be about what you perceive as appropriate procedure as opposed to what the iep team believes is actually appropriate for this child."

A few minutes later, when the Complainant saw XXX, he began yelling at her saying that she didn't have the credentials to tell him how to run a MET meeting. He stated it was his meeting, she didn't know the student, and she had no business being there.

Later during the MET meeting, the Complainant presented his evaluation results and his opinion that the student qualifies for special education services. He then discussed the availability of a self-contained placement for the student. XXX interjected and directed the Complainant to speak only about eligibility and not placement because it was a MET meeting. The student's mom was overwhelmed and ultimately decided to decline eligibility.

After the meeting, XXX talked to the Complainant about his conduct before and during the meeting. The Complainant stated XXX was incorrect about what could be discussed at a MET meeting and was wrong that students newly identified could not go directly to a self-contained placement.

Legal Analysis

A. Systemic Special Education Allegations

1. Legal Standards

FAPE

The Section 504 regulations, at 34 C.F.R. §104.33(a), require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions regardless of the nature or severity of their disabilities.

An appropriate education is defined in 34 CFR §104.33(b)(1) 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 non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections.

Pursuant to 34 CFR §104.33(b)(2), implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

Educational Setting

Section 104.34(a) of the 504 regulations requires public school districts to educate students with disabilities with students who are not disabled to the maximum extent appropriate to the needs of the student with disabilities. A school district shall place a student with disabilities in the regular educational environment unless it is demonstrated that the education of the person with disabilities in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

The Appendix to Subpart D states, "it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §104.34."

It is illegal to base individual placement decisions on presumptions and stereotypes regarding persons with disabilities or on classes of such persons. August 2010, "Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973."

Evaluation and Placement

Section 104.35(a) of the 504 regulations requires school districts 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.

The Appendix to Subpart D provides, "Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant

change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. 'Any action' includes denials of placement."

OCR considers transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement. "Protecting Students with disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities," at 29.

The Appendix to Subpart D states reevaluations in accordance with the IDEA will constitute compliance.

Under Section 104.35(c), in interpreting evaluation data and in making placement decisions, school districts shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

The Appendix to Subpart D states that "[t]he placement of the child must, however, be consistent with the requirements of §100.34 and be suited to his or her educational needs."

Procedural Safeguards

Pursuant to §104.36, public school districts must establish and implement a system of procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities that includes notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with participation by the parent and representation by counsel, and a review procedure.

The Appendix to Subpart D states, "[t]he EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model" and that that procedural safeguards are "established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children."

2. Legal Analysis of Systemic Special Education Allegations

a. Allegation 1: Academic Support Services for SLI and SLD Students

The Complainant alleges that the District is categorically not providing academic support services to students classified solely as speech and language impaired (SLI) or to students with Specific Learning Disabilities (SLD). He initially mentioned only SLI students but broadened the claim to include SLD students during OCR's investigation. The Complainant claims that these

practices started in 2018, and he has heard from former colleagues that the SLI practice is continuing today. He is not sure whether the SLD issue persists.

The District denies the allegation that it is categorically not providing academic support services where those services are needed. The District claims it is unaware of any SLI or SLD students who were denied such services and that no District level staff have provided guidance on these issues.

The categorical denial of academic support services to students with certain disability labels or classifications would violate the requirements in Section §§104.33(a) and 104.33(b) of the 504 regulations to provide students with disabilities a free appropriate public education because decisions regarding services must be based on students' individualized needs and not based on presumptions or stereotypes. However, as discussed below, there is insufficient evidence for OCR to find that the District is categorically denying academic support services to SLI or SLD students. On the contrary, the preponderance of the evidence is that the District is making individualized decisions about academic support services for SLI and SLD students through the evaluation and IEP processes in compliance with Section 504, the ADA, and their regulations.

i. SLI Students

All witnesses, including XXX, stated that students classified as SLI only can receive academic support services if needed. In addition, several witnesses confirmed that there has never been a District directive or policy not to recommend support services for SLI only students. Nor has XXX ever stated that staff could not recommend academic support services for a student with an SLI only classification.

The District provided IEPs from the 2018-19, 2019-20, and 2020-21 school years demonstrating that students with an SLI only classification *are* receiving specialized instruction in areas other than speech. OCR reviewed the IEPs of seven SLI only students who received reading, writing, or math services in addition to speech services during the 2018-19 school year, the IEPs of seventeen other SLI only students who received reading, writing, or math support in addition to speech services in 2019-20, and the IEPs of five additional SLI only students who are currently receiving reading, writing, or math support in addition to speech in the 2020-21 school year. In addition, several witnesses named students with an SLI only classification that they know are getting academic support services.

The XXX who trained SLPs and resource teachers in the Spring of 2019 denied telling them that SLI only students could not receive academic support services. On the contrary, she claims she stated that SLI only students *could* receive services other than speech if the data supported including those services in the IEP.

Nevertheless, there is evidence that this was an area of confusion in the District during the 2018-19 school year. Several witnesses stated that they heard rumors about misinformation on this issue. However, it is questionable how many students were impacted by the incorrect information being shared. Several of the witnesses stated they never declined to recommend

academic support services for an SLI only student based on this rumor. The Complainant similarly stated that psychologists were telling SLPs not to follow this policy. He likewise told teachers at his school not to follow the policy and is therefore not aware of any students impacted by this policy.

In any event, there is uncontroverted evidence that XXX addressed the issue in the Fall of 2019, clarifying that students *can* receive academic support services in any area for which there is documented need. Furthermore, all but one witness stated that they are not aware of this issue currently happening anywhere in the District. XXX stated that she hears this belief from SLPs about once a year and as recently as the week before the interview, and that whenever she hears it, she corrects the SLPs. And, the Complainant admits that he has no evidence that SLI students in the District are currently being denied academic support services.

The preponderance of the evidence is that the District's psychologists understand the law in this area, have been trained on this issue, and are correcting any misinformation when it arises. Thus, there is insufficient evidence for OCR to find that the District is pre-determining services for SLI students or denying them FAPE by categorically refusing to provide academic support services in violation of Section 504, the ADA, and their regulations.

ii. SLD Students

All witnesses agree that students with a Specific Learning Disability classification can receive academic support services in areas other than the ones for which they were classified as SLD. For example, they can receive math services even if their SLD classification is based on reading. In addition, several witnesses, including XXX who raised this issue, stated that they are unaware of any policy in the District that would preclude SLD students from receiving services in another area of need, nor were they ever told by any administrators that they could not recommend such services.

However, as with the SLI rumors, there is some evidence of misinformation regarding this issue. XXX stated that she has heard confusion regarding this issue, which psychologists cleared up. Another XXX stated that prior to XXX, she recalls him stating that students who qualified in one area of SLD could not receive services in another area. However, the school psychologists recognized that this statement was incorrect and did not follow his advice.

The only specific evidence provided to OCR about this issue occurring is from XXX School. The Complainant is unaware of it happening at any other school in the District. The District provided many IEPs for SLD students at XXX during the 2018-19, 2019-20, and 2020-21 school years. OCR's review of those IEPs revealed at least nine students who received services in an academic area other than the one for which they were classified as having a specific learning disability and another six students that got speech or other non-academic related services with only an SLD classification. In addition, several witnesses provided names of students who are receiving academic services in an area other than the one for which they were classified as SLD.

The IEPs for the only XXX student identified by name by XXX reveal that in May 2018, the student was provided special education services in reading and written expression but not math despite the recommendation from XXX who evaluated him that he needed math services. However, during the following two school years, the student received math problem solving services in addition to reading and writing support despite being classified as SLD only in reading and writing. Thus, to the extent there were any issues at XXX in the 2017-18 school year with respect to the provision of academic support services to SLD students, it appears from the IEPs provided to OCR that they have been addressed. Moreover, none of the witnesses were aware of this issue occurring this school year.

There is also no evidence that the SLD issues at XXX were brought to the attention of XXX. The XXX stated he never discussed this issue with XXX. The Complainant cannot recall whether he raised the issue with XXX in the car when he discussed the SLI issues. The XXX denies that the Complainant raised the SLD issue in the car and the issue is not included in the email summary of their conversation the Complainant sent the next day. In any event, the clarification XXX provided in writing in October 2018 was broad enough to cover SLD students, as it reminded staff that special education services can be provided in any area of documented need.

The preponderance of the evidence is that the psychologists understand the law in this area, have received general training on this issue, and are correcting any misinformation when it arises. Thus, there is insufficient evidence for OCR to find that the District is pre-determining services for SLD students or denying them FAPE by categorically refusing to provide academic support services in violation of Section 504, the ADA, and their regulations.

b. Allegation 2: Pre-determining Outcomes

In addition to the SLI/SLD issue discussed above, the Complainant alleges that the District is pre-determining IEP team outcomes through the following three policies or practices:

i. New COP procedures which enable the programs specialists and the Director to make placement decisions without the input of the IEP team;

ii. A categorical policy that students cannot go from eligibility to C level services or self-contained placements or skip a level of services on the continuum; and

iii. The District's inclusion initiative pursuant to which all students with a mild intellectual disability (MIID) who were in self-contained MIID classrooms in the 2019-20 school year were moved into general education at the start of the 2020-21 school year.

Prior to the completion of OCR's investigation of these three allegations of pre-determination, the District agreed to voluntary resolve allegations 2.i and 2.iii. Thus, OCR will discuss the evidence regarding these allegations, but will not make findings with respect to either. For the reasons set forth below, OCR finds insufficient evidence of a violation with respect to allegation 2.ii.

i. Change of Placement (COP) Procedures

The Complainant alleges that the District's new COP procedures pre-determine outcomes because the requirement that psychologists consult with program specialists prior to discussing a COP at an IEP meeting effectively gives the program specialists and the Director "veto power" over COP decisions and takes the process away from the IEP team, thereby denying the student's parents and other team members meaningful input into the placement decision.

The District claims that placement decisions are made through the IEP process and denies that the required consultation between psychologists and program specialists "pre-determine" placement, claiming that they instead constitute lawful preparation for IEP meetings.

It is undisputed that psychologists are required to consult with program specialists when considering any change of placement, particularly a change to a more restrictive placement. However, the witnesses gave varying explanations of the content and purpose of these pre-IEP conversations likely because it was never clearly explained by the District.

XXX was not able to attend the meeting in which the new COP procedures were first presented to psychologists because of a family emergency and left it to XXX to present. XXX did not finish their presentation because they were interrupted and derailed by questions from the Complainant. A flow chart describing the new procedures was disseminated but never implemented. And, the new policy was not reduced to writing until OCR began its investigation.

In addition, the psychologists were given two seemingly contradictory messages about the new procedures. On the one hand, they were told that placement must be determined through the IEP process. On the other hand, they were told that an IEP team could *not* consider a change of placement until it was first discussed with the program specialist (and, in some circumstances, with the Director). This new requirement was presented in the context of concerns about labels driving placement, pre-determined service minutes, and overly abrupt movement through the continuum to C level services and self-contained settings.

According to XXX, the purpose of the requirement for consultation with program specialists is to make sure psychologists have done their due diligence, understand the full continuum of placements, and have considered providing C level services in general education in order to prevent inappropriate placements. One psychologist similarly said that the purpose is to brainstorm ways to serve kids in general education and to look at special education as more of a spectrum of services than a particular placement. Another psychologist stated that the purpose of the requirement is for the program specialists to determine if the proposed COP is appropriate.

Two witnesses stated that the conversations with program specialists are to make sure the District has sufficient documentation and data to consider a more restrictive setting. Others said the purpose is for the program specialists to provide psychologists with information about available resources in the District and placement options. And, almost every witness stated that

the meetings are to explore whether there are additional supports or interventions that could be tried in the current setting before considering a more restrictive placement.

There is also conflicting evidence about the authority of the program specialists to approve or disapprove of proposed changes of placement. XXX stated that she never told psychologists that they needed "approval" from program specialists and no decision regarding placement was supposed to be made during these conversations. However, she also said that she never instructed program specialists *not* to offer an opinion or recommendation regarding the proposed change.

XXX stated that they don't say "yes" or "no" to a placement bur rather focus on the strengths of the student, interventions that have been tried, and the data. XXX said that they don't believe the program specialists have the authority to make decisions on placement but see them more as someone to consult in the process.

However, XXX, in addition to the Complainant, said she thought they needed permission or approval from the program specialists before moving a student into a more restrictive environment, and she saw the process as a way to end inappropriate placement of students in overly restrictive self-contained placements. Thus, it was the perception of at least two psychologists in the District that they needed the program specialists' permission to discuss a COP to a more restrictive setting at an IEP team meeting.

The email correspondence and witness testimony regarding specific students paints a vastly different picture than the more general witness statements about approval for COPs. In the email correspondence regarding the students discussed above as well as others, the Complainant clearly sought the approval of XXX for a COP, as he thought he had to do, and XXX expressed her opinion about the proposed change, often disagreeing with the Complainant. With respect to Student C, both XXX and XXX expressed their opinions that the student should be served in her home school rather than a self-contained setting, although they later claimed that it was inappropriate to be discussing placement before eligibility. In addition, one witness recounted a time when XXX "agreed" that a student needed a self-contained placement for middle school.

There is also evidence that some COP discussions resulted in IEP teams never considering the COP being contemplated by members of the team. XXX had approximately five proposed COPs last year that never resulted in IEP team discussions of a COP because the strategies she proposed worked. For example, there was a student with MIID for whom the resource teacher, teacher, and psychologist were recommending a self-contained setting. XXX suggested that the psychologist brainstorm strategies to keep the student in general education, particularly given the impending inclusion initiative for MIID students. As a result, the student was retained in general education, and the IEP team (including the student's parent) never discussed the possibility of a COP for her.

XXX also had several conversations about COPs that were never discussed at IEP meetings. In fact, she attended only one IEP meeting last year in which a COP was discussed and that was for Student B. She said there were at least four to five times last year when COP discussions with psychologists other than the Complainant resulted in more supports and services being put into

place, thereby obviating the need for discussion by the IEP team of a COP. OCR finds it difficult to see how these conversations constitute "preparation" for an IEP meeting that were never scheduled or held.

The focus on collecting more data also sometimes delayed or precluded the need for IEP team discussion of a COP. XXX, in addition to the Complainant, stated that they often had to engage in a several month process of amassing more data in situations where they thought they had sufficient data to support a COP, which was frustrating and delayed the provision of needed services to the student. In other words, an instruction from XXX to provide more supports in the current placement or amass more data was understood by some psychologists to be a denial of the COP.

Thus, while the recent written policy of the District makes clear that changes of placement should be determined by the IEP team, conflicting information and practices in the District raise concerns about whether parents and other IEP team members are being meaningfully included in discussions about COPs or whether those discussions -- and some placement decisions -- are occurring outside of the IEP team process. Although the intent of the new COP policy was to avoid pre-determination, OCR is concerned that by replacing the former COP committee with consultation with program specialists, the District has unintentionally made the program specialists a "gatekeeper" of sorts for changes of placement. While the District denies that its new COP procedures are pre-determinative, it has agreed to voluntarily resolve this issue to ensure that its messaging on COPs is clear. As a result, OCR need not determine whether the new COP policy violates Section 504, the ADA, and their regulations.

ii. Prohibition on Certain Changes of Placement

The Complainant alleges that the District implemented certain categorical rules regarding COPs during the 2019-20 school year, which pre-determine placement and undermine the individualized nature of the IEP team process. In particular, he claims there is a District policy prohibiting the provision of C level services or placement in a self-contained setting without first providing services in general education. He claims this policy was presented verbally in meetings at the beginning of the 2019-20 school year and referred to in an email from XXX on March 6, 2020, in which she wrote, "I've shared with you and all the psychologists that it's inappropriate to go from eligibility straight to self contained."

The Complainant also claims that XXX strongly discouraged a move from A level services to C level services, stating that students need to move through each level of the continuum. Lastly, he claims that the District is planning to eliminate self-contained classes for ED students, like it did for students with MIID.

All the District witnesses denied there is any prohibition against a student going directly into C level services or a self-contained placement if the IEP team believes those services are appropriate for the student. Yet, XXX and XXX had no good explanation for the statement in XXX's March 6th email. XXX stated that she "misspoke" in that email and "what she needed to say was that the meeting needed to be around eligibility" and that placement would be discussed

at the IEP meeting. XXX said XXX was talking about eligibility in that email, which does not make sense.

When OCR asked XXX if she ever told psychologists that students cannot go from eligibility into a self-contained setting, she gave the following non-responsive answer: "We have identified examples where students went straight to self-contained or C level services." She also stated, "I strongly encouraged we have good data for newly identified students" and emphasized that moves to more restrictive settings should not be based on the student's label but rather data and what the IEP team thinks the student needs. One XXX explained there was an emphasis on trying more strategies and interventions in general education before moving to a self-contained setting.

All but one of the District witnesses denied there are any limitations on moving students from A to C level services, but several admitted XXX expressed concerns about moving too quickly from A to C level of services. One psychologist said, "we were told to go consecutively through levels of service and not to skip." Another psychologist explained the message from leadership was that a move from A to C could beg the question of whether the District is truly engaging in inclusive practices and providing interventions in general education.

XXX acknowledged there were rumors among the psychologists that the District was eliminating all self-contained classes, including those for ED students, but stated the rumors are not true. However, the District is looking at each of its special education programs and is concerned that ED students are spending too much of their educational experience in self-contained classes.

Despite these somewhat cryptic explanations of what XXX actually said to psychologists about COPs to more restrictive placements, the District has provided at least eight examples of students who went from eligibility to C level services or a self-contained setting last school year. The District also has provided spreadsheets showing at least thirty students that went from A to C level services in 2019 and at least four that went from A to C level services in 2020.Thus, it appears that IEP teams were making decisions based on student need regardless of what psychologists may or may not have been told by XXX.

Since the preponderance of the evidence is that there is no District policy or practice categorically prohibiting certain changes of placement, there is insufficient evidence to find the District has violated Section 504, the ADA, and their regulations with respect to allegation 2.ii.

iii. Inclusion Initiative for Students with MIID

The factual evidence regarding the District's inclusion initiative for MIID students is largely undisputed. The District planned for many years to move all the students in its self-contained classes for MIID students into general education, which was approximately 150-160 students in the 2019-20 school year. The Board approved the plan and the elimination of all the MIID teaching positions in January 2020, before there were any discussions of individual students' needs. The District ultimately looked at some data and information regarding all the

students in the MIID program, but the purpose of that review was programmatic and not to make individual placement decisions.

The District claims that it intended to hold IEP meetings for all the students with MIID in the Spring of 2020, but couldn't because of the COVID pandemic. However, none of the thousands of documents produced by the District regarding the inclusion initiative referenced that plan. In any event, the District concedes that it did not re-evaluate the students with MIID or hold IEP meetings for them prior to moving them to the general education setting unless they were due for a triennial evaluation or annual IEP meeting. It also admits there was no other mechanism for having individualized discussions of the appropriateness of moving students out of self-contained settings.

During the 2020-21 school year, IEP addenda or new IEPs were developed for almost all the MIID students, but many of those addenda and new IEPs appear to have rubber stamped the pre-determined move, as they include language about needing to adjust the students' service minutes and location to reflect the inclusion initiative.

While OCR applauds the District for its efforts to ensure compliance with the LRE requirement in Section 504's regulations, it has concerns about the way in which this initiative was implemented – namely, that the least restrictive environment for these students was changed based on their disability classification without a re-evaluation, which is required when there is a "significant change of placement," without an IEP team determination that the change met the student's individualized needs, and without parent involvement or significant consideration of team members' individualized concerns.

It is hard to believe that if IEP meetings had been held in the Spring of 2020, the IEP teams would have determined that education in the general education environment with the use of supplementary aids and services could be achieved satisfactorily for *all* 150-160 students, particularly where the students' IEP teams had just decided a few months earlier that the students required a self-contained setting and no new evaluation data was available. In fact, one of the few IEP teams that did meet in the Spring of 2020, found that inclusion was not appropriate for a MIID student and placed him in a self-contained classroom for XXX students.

The District claims that its movement of students with MIID from self-contained classrooms to general education does not constitute a "change of placement" but rather a change in location of services because many of the students continued to receive C level services in general education, and that it therefore had the authority to make the change without re-evaluating the students or convening IEP teams. Nevertheless, it agrees that holding IEP team meetings before the move would have been preferable. OCR does not need to determine whether the move constituted a "significant change of placement" or whether it required a team meeting under the 504 regulations because the District has agreed to a voluntary resolution of this issue.

c. Allegation 3: **Prohibiting Psychologists from Making Recommendations about Services and/or Placement at IEP meetings, MET meetings, and in MET reports.**

The Complainant additionally alleges that District psychologists are precluded from making recommendations about services or placement at MET meetings and that this policy violates special education law because it hinders parent participation in the decision-making process. OCR initially understood the Complainant's allegation to cover IEP meetings and MET reports as well, but through the investigation learned that the Complainant's allegation is limited to MET meetings. Thus, OCR did not investigate whether such a policy exists with respect to IEP meetings or MET reports.

The Complainant's allegation is based exclusively on comments from XXX during and after the March 6, 2020 MET meeting for Student C, as well as in his 2020 performance evaluation; he was never told before then that he could not discuss services or placement at a MET meeting. During the March 6th meeting, XXX interrupted the Complainant's discussion of a self-contained placement and stated that the team was only discussing eligibility and would discuss placement when the IEP was developed *if* the student was found eligible. The Complainant insisted that the availability of services and placement options was helpful information for the parent to have when considering whether to accept eligibility and special education services. There is conflicting evidence about how the Complainant presented a self-contained setting at the March 6th meeting – as a possible placement the IEP team could consider for the student or as a placement that the MET team had determined the student needs.

XXX subsequently added the following comment to the Complainant's otherwise positive 2020 performance review: "I am concerned about how you conducted a recent MET 2 meeting. I only point this out because I have only attended one MET and I would expect that you know the procedure for the MET 2 meeting is to determine eligibility not LRE/placement."
The Complainant responded that nothing in special education law precludes discussion of services that might be provided in an IEP at the MET meeting and that the information is often helpful for parents to make informed decisions and for development of the IEP. XXX then wrote a lengthy response stating that such discussions during a MET meeting are inappropriate because they are predetermining placement.

The Complainant raised the issue again in his May 26, 2000 complaint about XXX to the Board and administration, explaining "Whenever I conduct a MET 2 meeting, I discuss the options that are available to a student if the student qualifies for special education so the parent(s) can make an informed decision about the need for services. . . Once we finish a discussion about evaluation results, parents almost always ask what we can do to help their child . . . Parents are frequently very appreciative of this discussion."

All the evidence reveals that this issue is specific to the facts of the contentious March 6th MET meeting, which occurred *after* the Complainant's non-renewal of employment. There is no

evidence that the District has a clear policy or practice regarding what can and cannot be said by a psychologist at a MET meeting or in a MET report. Several psychologists stated there is no clear prohibition against discussing placement at a MET meeting. While XXX warned psychologists against discussing prospective services or placement in a MET report because the whole IEP team was not present for the discussion, XXX has not provided District-wide guidance on this issue. Moreover, XXX infrequently attends MET meetings or reviews MET reports. Her attendance at the March 6th meeting was because of a disagreement that occurred beforehand; it was the first and only time she attended one of the Complainant's MET meetings.

All witnesses agreed that the purpose of a MET meeting is to determine eligibility rather than services or placement, which are determined by the IEP team at a subsequent IEP meeting. However, several psychologists stated that they sometimes discuss the types of services available at the student's home school or elsewhere if the student is deemed eligible. While it is not typical to discuss placement at a MET meeting, two psychologists admitted there may be some instances when information about possible placement options could be helpful to share. Another psychologist stated that if this question comes up during a MET meeting, she responds that those issues are part of the IEP process.

While MET teams should not be determining services or placement, the preponderance of the evidence is that MET teams in the District have discretion to share information they believe is relevant to the eligibility determination. Accordingly, there is insufficient evidence to find that the District has a clear policy or practice of precluding psychologists from sharing information they deem could be helpful to the parent in making decisions about whether to accept special education services. OCR therefore finds no violation of Section 504, the ADA, or their regulations with respect to allegation three.

d. Allegation 4: Overriding the Decisions of IEP teams

OCR initially understood the Complainant to be separately alleging that the District had a process for reviewing and overriding IEP team decisions, particularly with respect to placement, and opened a separate allegation on this issue. However, during the investigation, OCR learned that the Complainant is *not* alleging that there is substantive review of IEP team decisions after IEP team meetings. By "overriding" IEP teams, he meant that the District is pre-determining IEP team decisions through its COP procedures. Thus, this issue is the same as allegation two, and OCR stopped investigating it separately once it gained the above clarification.

In any event, OCR's initial investigation found that there is no District process for substantive review of IEPs or IEP team decisions; the District's review is limited to ensuring compliance with procedural requirements. In addition, many of the witnesses stated they are not aware of any time when an IEP team decision was reversed or changed after the IEP team meeting. Thus, there is insufficient evidence for OCR to find a violation of Section 504, the ADA, or their regulations with respect to allegation four.

Conclusion

During OCR's investigation, the District agreed to voluntarily address OCR's concerns regarding pre-determination with respect to the District's new COP policy and procedures and its inclusion initiative for students with MIID. Thus, pursuant to Section 302 of OCR's Case Processing Manual (CPM), OCR has not made a legal determination with respect to these pre-determination allegations.

The District signed a Voluntary Agreement on April 22, 2021, which, when fully implemented, will resolve these two allegations. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

OCR finds insufficient evidence that the District violated Section 504 or the ADA and their implementing regulations with respect to the Complainant's other systemic special education allegations and is therefore dismissing those allegations under Section 303(a) of the CPM.

Lastly, the parties have resolved the Complainant's retaliation allegation through OCR's Facilitated Resolution Between the Parties (FRBP) process. Pursuant to OCR's CPM, OCR will not monitor the agreement between the Complainant and the District but, if a breach occurs, the Complainant has the right to file another complaint. If a new complaint is filed, OCR will not address the alleged breach of the agreement. Instead, OCR will determine whether to investigate the original allegation. When making this determination, OCR will consider whether the alleged breach is material, its relation to any alleged discrimination and any other factors as appropriate. To be considered timely, the new complaint must be filed either within 180 calendar days of the date of the alleged discrimination or within 60 calendar days of the date the complainant obtains information that a breach occurred, whichever date is later.

This concludes OCR's investigation of the complaint. This letter 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. 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.

OCR routinely advises recipients of Federal funds that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Please note the Complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

The Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the Recipient. The Recipient has the option to submit to OCR a response to the appeal. The Recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Recipient.

Under the Freedom of Information Act (FOIA), 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.

We thank the District, its staff, and counsel for their diligence and cooperation in this matter. If you have any questions, please contact X – phrase redacted - X.

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

cc: Kathy Hoffman, Superintendent of Public Instruction (by email only)

Enclosure – Voluntary Resolution Agreement