



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

November 22, 2017

**SENT VIA EMAIL**

John Sutter  
Superintendent  
Loleta Union Elementary School District  
700 Loleta Drive  
Loleta, California 95551-0547

(In reply, please refer to case number 09-14-1111.)

Dear Superintendent Sutter:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint, which was filed against the Loleta Union Elementary School District (District). The Complainants<sup>1</sup> alleged that the former Principal of Loleta Elementary School (School), who was also the Superintendent of the District, and other staff members engaged in a pattern of verbal and physical harassment of Native American students, and the District failed to respond to complaints raised by the Complainants. The Complainants alleged the harassment of Native American students was part of a pattern of racial discrimination, which also included discrimination in discipline and a failure to provide special education services to Native American students at the School.

OCR investigated:

1. Whether the District subjected Native American elementary school students to a hostile environment at the School consisting of physical and verbal harassment based on race by the former Principal and other staff and failed to respond appropriately and effectively to notice of the harassment;
2. Whether the District subjected Native American students at the School to more frequent or more severe disciplinary actions than non-Native American students who engaged in similar or more serious misconduct;
3. Whether the District denied Native American students with disabilities at the School a free appropriate public education (FAPE) by: a) failing to evaluate students who need or are believed to need special education or related aids and services because of disability, b) failing to implement the provisions of the students' individualized education programs (IEPs) and Section 504 plans, c) failing

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<sup>1</sup> OCR previously informed the District of the identity of the Complainants. We are withholding that information from this letter to protect confidentiality.

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to evaluate students before significant changes in placement, including changes made for disciplinary reasons, d) failing to provide parents with procedural safeguards, and e) isolating students with disabilities from their peers without disabilities; and

4. Whether the District refused to make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability when it did not accommodate students with disabilities in its graduation ceremony and with respect to sports eligibility.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, at 34 C.F.R. part 100. Title VI prohibits discrimination on the bases of race, color, or national origin by recipients of Federal financial assistance. OCR also conducted this investigation under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.* Section 504 and its implementing regulation prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II and its implementing regulation prohibit discrimination on the basis of disability by public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Title VI, Section 504, Title II, and their implementing regulations.

#### Summary of Investigation and Findings

The District is located in Loleta, California, a rural community in Humboldt County. The District is made up of two public schools, the School, which serves students in grades k-8, and a charter school, which is not the subject of this complaint or investigation. The District Superintendent serves as the School Principal. The District is part of the Humboldt Del Norte Special Education Local Plan Area (SELPA) and is governed by a five member Board of Trustees (Board).

OCR's investigation spanned from the 2011-2012 through the 2014-2015 school years and the first semester of the 2015-2016 school year. The School's minimum enrollment was 83 students (in 2011-2012) and maximum enrollment was 128 students (in 2014-2015). Throughout the investigation period, the School reported that white students accounted for between 17 to 22 students and Native American students between 10 to 54 students. In the 2012-2013 school year, the District reported that the Native American student enrollment dropped from 25 to 10 students. As of the 2015-2016 school year, the Native American student enrollment was at 44 students.

To investigate this complaint, OCR reviewed data provided by the District for the 2011-2012 school year through the first semester of the 2015-2016 school year. In addition, for the 2011-2012 through 2013-2014 school years, OCR reviewed available student discipline files and handwritten referrals for discipline. OCR conducted three separate onsite visits to the District to interview witnesses and review student files in spring 2014. In addition to interviewing all of the 2013-2014 members of the Board, the former Principal, and eleven School staff members, OCR also interviewed Native American parents and students, members of the Tribal Councils from two nearby Native American Tribes, organizations serving students and families at the School, and other community members. In addition, OCR interviewed the District's Positive Behavior Interventions and Supports (PBIS) consultant and the Truancy Officer who conducted investigations for the School Board.

The District requested to enter into a Resolution Agreement Reached During Investigation (Agreement) pursuant to section 302 of OCR's Case Processing Manual (CPM), prior to the completion of OCR's

investigation.<sup>2</sup> As discussed in detail below, OCR determined that a section 302 resolution agreement was appropriate for several issues because OCR identified compliance concerns based on the facts gathered to date but had not completed its investigation and reached a compliance determination. However, with respect to issues 3.a), b), c), and d) related to the provision of a FAPE for Native American students with disabilities, OCR found that the District was out of compliance with Title II, Section 504 and their implementing regulations during the 2011-2012 through 2013-2014 school years.

In order to address the violations found and compliance concerns identified by OCR, the District has agreed to a series of actions described in the enclosed Agreement. The legal standards, factual findings, and reasons for OCR's determinations are summarized further below.

**Issue 1: Whether the District subjected Native American elementary school students to a hostile environment at the School consisting of physical and verbal harassment based on race by the former Principal and other staff and failed to respond appropriately and effectively to notice of the harassment.**

Legal Standard

The Title VI regulation at 34 C.F.R. § 100.3(a) states that no person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program receiving Federal financial assistance. School districts are responsible under Title VI and its implementing regulation at 34 C.F.R. § 100.3(a) and (b) for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee or agent of the school who is acting, or reasonably appears to be acting, in the context of carrying out its responsibilities for the district engages in harassment on the basis of race, color or national origin that is sufficiently severe, pervasive or persistent so as to deny or limit a student's ability to participate in or benefit from the program, the district is deemed to have constructive notice and is responsible for the discriminatory conduct, whether or not it has actual notice.

In analyzing claims of harassment under Title VI, OCR first considers the totality of the circumstances to determine whether a hostile environment has been created, i.e., whether the harassing conduct is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the district's program. These circumstances include the type of harassment, context, nature, scope, frequency and severity, age, race, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved. It also considers whether other incidents motivated by race, color or national origin have occurred at the school to this complainant or others.

The extent of a district's responsibilities when an employee harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aids, benefits, or services to students. Under Title VI and the regulations, if a student is harassed by an employee on the

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<sup>2</sup> The CPM is available on OCR's website at <http://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

basis of race, color or national origin, the district is responsible for determining what occurred and responding appropriately.

Once the district has notice of harassment, the responsibility to take reasonable, timely and effective action is the district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. The response must be tailored to stop the harassment from recurring, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The steps taken should be reasonable, timely, age-appropriate, tailored to the specific situation, and effective. Other actions may be necessary to repair the educational environment.

Title VI and the implementing regulations are intended to protect students from discrimination, not to regulate the content of speech. In cases of alleged racial harassment at a school, OCR must consider the protections of the First Amendment of the U.S. Constitution where issues of speech or expression by students or employees are concerned. The offensiveness of particular speech or expression, standing alone, does not violate Title VI.

### Facts

#### *Policies and Procedures*

The District's nondiscrimination related Board Policies (BP) 10410(a) and BP 5145.3(a), prohibit discrimination, including harassment, on several protected bases, including race, color, and national origin. BP 1312.1, "Complaints Concerning District Employees", states that the Superintendent or designee shall develop regulations which permit the public to submit complaints against district employees, and the Board may serve as an appeals body if the complaint is not resolved. The corresponding Administrative Regulation (AR) 1312.1 states that complaints related to the Superintendent shall be filed in writing with the Board, that the complainant may be required to attend a Board meeting to present evidence, and that the Board's decision is final but does not otherwise describe the District's investigative process or state that the Board's decision will be shared with complainants.

BP 1312.3(a) identifies the District's Uniform Complaint Procedure (UCP), which is described as the procedure to respond to complaints alleging unlawful discrimination, including harassment, based on several protected categories, including race and national origin. The UCP process is set out in AR 1312.3(c). Under the UCP, the Superintendent is designated as the District's compliance officer and is responsible for receiving and investigating complaints. No alternative designee is identified where, as in this case, the Superintendent is the subject of the complaint. The compliance officer is encouraged to hold an investigative meeting within five days of the complaint, and the complainant has an opportunity to present the complaint and evidence or information in support of the allegations. The UCP requires that the District's written response be issued to the complainant in writing within 30 days and include (1) findings of fact, (2) conclusions of law, (3) disposition of the complaint; (4) rationale for such disposition, (5) corrective actions, if any are warranted, and (6) notice of the complainant's right to appeal. The UCP includes an appeal to the California Department of Education.

#### *Background*

The Complainants alleged to OCR a pattern and practice of racial harassment of Native American students starting in the 2010-2011 school year by the former Principal and some staff members. In January 2011, during the 2010-2011 school year, an attorney submitted a complaint to the School Board (2011

complaint) that included allegations that the former Principal used physical punishment with Native American students and made derogatory statements to Native American students and others on the basis of race. The Board's Truancy Officer conducted an investigation and provided a report to the Board on March 10, 2011 with his findings (2011 report). The 2011 report stated that the Principal admitted to two incidents – that she threatened to pull a Native American student out from under a desk and that she pushed another Native American student who was blocking. The 2011 report found that frequent incidents of inappropriate touching or hitting of students may have been innocent or non-threatening but that the incidents created "negative responses". The report also stated that the Principal referred to one of the Tribes as "Table Top", which some witnesses asserted to OCR was denigrating because it is similar in name to a local strip club. The 2011 report did not make an ultimate finding as to whether the former Principal and other staff had harassed Native American students. The report issued recommendations including sensitivity training for the former Principal, that the Principal refrain from physical contact with students, such as hitting, touching, and kicking, that the School comply with contractual agreements with local Tribes regarding services for Native American students, and that the former Principal attend a workshop on passive restraint techniques. As a result of the 2011 report, the former Principal reported to OCR that she attended a Native American conference.

#### *Alleged Harassment*

In February 2013, a Tribal chairperson submitted a letter to the School Board (February 2013 complaint), which alleged concerns about the mistreatment of Native American students by the former Principal and school staff. Specifically, the February 2013 complaint alleged that the School XXXXXXXXX engaged in verbal harassment when she stated that Native American students were "wild Indians"; that the XXXXXXXX treated Native American students differently; and that the former Principal failed to respond to bullying incidents targeting Native American students. The February 2013 complaint cited a newspaper article in which Native American parents alleged that their children were treated unfairly at the School. The Board again requested that the District's Truancy Officer conduct an investigation. The Truancy Officer stated to OCR that he had no specific training in investigating discrimination complaints, and was not familiar with the Title VI legal standards; however, he had 50 years of experience as an educator, and had previously served as a XXXXXXXXXXXXXXXX XX X XXXXXXXXXXXXX XXXXXXXX. The Truancy Officer told OCR that he was given a copy of the District's BP 1312.1 "Complaints Concerning District Employees", but did not receive any further guidance from the District. The Truancy Officer stated he believed his role was to look into the allegations and propose a resolution if he uncovered any serious problems.

The Truancy Officer stated that his first investigative action was to contact two School staff members who work with Native American students. The Truancy Officer stated that the School staff members told him that Native American parents feared retaliation by the former Principal and would not provide him with the names of parents or students alleged to have experienced or witnessed discrimination or harassment. The Truancy Officer stated that he could not proceed with the investigation because the District did not provide him with student and parent names, and the District did not give him authority to require participation in his investigation. Neither the Truancy Officer nor the District made any other attempts to gather information from Native American students or parents. The Truancy Officer stated he may have "touched base" with the former Principal regarding the February 2013 complaint, but did not conduct an interview because he did not have testimony from parents and students. He did not conduct any interviews of any other witnesses.

The Truancy Officer provided a written report dated March 6, 2013 to the Board with general recommendations that he believed would improve the School environment. The report stated that he did not find evidence to substantiate the complaint due to his inability to obtain information from witnesses, and recommended that the District form a committee of Native American parents to provide feedback on the treatment of Native American students, and initiate a social emotional learning curriculum.

The Board sent a response letter to the February 2013 complainant, dated May 6, 2013, which included the Truancy Officer's report and stated that in response to the investigation, the Board had "instructed the Superintendent to discuss the complaints with named personnel and take appropriate corrective action," but that any personnel actions taken would be confidential. The letter also stated that the District had recently adopted a PBIS program at the School to ensure students were treated fairly. The Board did not implement the Truancy Officer's other recommendations.

On December XX, 2013, the Complainants filed the instant complaint with OCR alleging the former Principal and other staff members engaged in a pattern of verbal and physical harassment of Native American students during the 2010-2011 school year through the time of the filing, and the District failed to respond to complaints raised by the Complainants and others. The complaint alleged that during the 2012-2013 school year, the former Principal subjected Native American students to instances of unwelcome physical harassment. In this regard, the complaint stated that the former Principal grabbed a Native American student by the arm when his mother came to pick him up leaving red marks on his shoulder. The former Principal in an interview with OCR recalled an incident in which a student grabbed her legs and she "grasped his arm hard". X XXXXXX XX X Native American girl described to OCR a different incident in which the former Principal pulled her XXXXXXXX into a room when the student tried to leave to go to the bathroom. The complaint also alleged that the former Principal frequently touched Native American students' hair even after being told that it was considered offensive by Native American students and families. One OCR witness told OCR that the former Principal had previously touched students' hair but stopped after being told it was offensive.

The complaint also alleged that during the 2012-2013 school year the former Principal and other staff members subjected Native American students to instances of verbal harassment. In this regard, the complaint alleged that the former Principal referred to Native American girls as a "pack of wolves". The complaint alleged that staff members made negative comments about the length of male Native American students' hair. One school staff member stated to OCR that she was aware of a teacher telling a Native American male student to cut his hair because the teacher believed it was too long. The complaint also included the allegation in the February 2013 complaint to the Board that two students heard the School XXXXXXXXX describe Native American students as a "bunch of wild Indians" and that when the former Principal was informed of the comment, she took no action because she did not find the comment offensive. In an interview with OCR, when asked about the alleged statement, one Board member stated to OCR that he did not have a problem with the statement because that is how the students were acting.

The complaint also alleged instances of physical harassment of Native American students in the 2013-2014 school year. In this regard, the complaint alleged that the former Principal hit Native American students over the head with her clip board or a notepad. XXX XXXXXX XXXXXXXXXXXX XX XXX XXXXXX XXXX XXX XXXXXXXXXXX XXX XXX XXX XXXX XXX XXXX XXXX X XXXXXXXXXXX XX XXXXXXXXXXX XXXX. X XXXXX XXXXXX XXX X XXXXXX told OCR that in February 2014, the former Principal pulled a Native American student with disabilities off the floor when the student had been destructive in the room and was

throwing a tantrum. XXXXXXXXXXX XX XXX XXXXXXXXXXX XXXXXX, XX XXX XXXXXXXXXXX XX XXX XXXXXXXXXXX XXXXXXXX XX XXX XXXXXXXXXXXXXXX XXXXX XXX XX XXX XXXXXXXXXXXXXXX XXXXXXXX. According to XXX XXXXX XXXXXXXX, he never witnessed the former Principal put her hands on a white student in a similar way.

The complaint also alleged that the former Principal subjected Native American students to instances of verbal harassment in the 2013-2014 school year. In this regard, a XXXXXX XXXXXXXX XXXXXX told OCR that the former Principal inaccurately stated that XXX XXX and another Native American student got in a fight due to “tribal rivalry” and that she said this “all the time”. Several staff and parent witnesses interviewed by OCR told OCR that the former Principal referred to one of the Tribes as “Table Top”. While one staff member believed this to be an unintentional error, two staff members believed that the former Principal used this term in a derogatory manner because it was a name similar to that of a local strip club.

In addition to instances of alleged physical and verbal harassment based on race, witnesses stated to OCR that the former Principal harassed Native American students in other ways by making it difficult to provide needed services to Native American students or by disciplining them more harshly than non-Native American students. In this regard, XXXXX XXXXX XXXXXXXX XXX XXXXXXXX XXXXXXXX to Native American students stated to OCR that despite the recommendation in the 2011 report, in the 2013-2014 school year, the former Principal continued to deny XXXXX program access to a separate classroom to provide services, even when the room was empty. Staff also reported that the former Principal delayed or failed to provide services to Native American students with disabilities and that this resulted in increased use of discipline with Native American students. Several witnesses interviewed by OCR identified harsh discipline as another form of different treatment by the former Principal.

Witnesses told OCR that the former Principal’s behavior towards Native American students impacted students’ access to the District’s programs and activities in several ways. According to a staff member and parent witnesses, a number of Native American families took their children out of the School and sent them to a neighboring school district because of the former Principal’s mistreatment. The staff member stated that it is much harder for parents to get to the neighboring school district, particularly for families who live on the reservation or do not have access to reliable transportation, because the drive is 15 miles compared to the 2 to 3 miles to the School. The staff member and parent witnesses also stated that the Principal’s conduct negatively affected academic performance, behavior, and self-esteem of Native American students at the School. Specifically, they asserted that Native American students did not feel welcome at the School, received poor grades, felt isolated from their non-Native American peers and teachers, and felt stereotyped as behavior problems.

In June 2014, the former Principal resigned. The District’s new Superintendent/Principal (Principal or current Principal) started at the beginning of the 2014-2015 school year. The Complainants told OCR that they were not aware of other incidents of harassment of Native American students or of written complaints filed by Native American parents with respect to District employees after the former Principal resigned. The District confirmed that it had not received any such complaints. The District reported to OCR that the current Principal has attended community Tribal Council meetings and invited the two nearby Native American Tribes to attend a conference with him to collaborate on improvements to the School. A Native American historian was also invited to discuss ways to provide a culturally responsive curriculum. However, the Complainants stated to OCR that Native American students at the school continue to experience the negative effects of the former Principal and other staff’s harassing behavior because no action was taken by the District to remedy the effects, such as offering counseling or academic support.

## Analysis

In assessing a claim of hostile environment on the basis of race, OCR first assesses whether based on the totality of circumstances the alleged conduct occurred and was severe, pervasive or persistent such that it limited or denied student's ability to participate in the District's programs or activities. OCR's investigation to date revealed a series of alleged unwelcome physical behaviors and derogatory statements made by the former Principal, and/or staff members to Native American students during the 2012-2013 and 2013-2014 school years, some of which were confirmed in interviews with staff members, parents, and a member of a local tribe, and with respect to two incidents complained of in the 2011 Complaint and one instance in the February 2013 Complaint, by the former Principal. In this regard, a XXXXX XXXXXXXX XXX XXXXXXXX reported to OCR that the former Principal pulled a Native American student off the floor in 2014 and in the 2012-2013 school year, she pulled a Native American child's arm leaving a mark. In her interview with OCR, the former Principal confirmed one incident of physically grabbing a child's arm. One of the XXXXX XXXXXXXX witnesses told OCR that he did not witness the former Principal engage in similar physical behavior when addressing white students. Witnesses also identified derogatory statements made by the former Principal towards Native American students such as referring to Native American students as a "pack of wolves", attributing students' conflicts or fights to "tribal rivalry", and referring to members of one of the Tribes with an incorrect name that is similar to a local strip club. There were also incidents described to OCR that involved alleged behavior of other staff members. One staff member stated that a Teacher told a Native American boy that his hair was too long, and that a XXXXXXXXXX referred to Native American students as a bunch of "wild Indians", which was allegedly ignored by the former Principal.

Parent witnesses and some staff members stated that the former Principal's and staff member conduct negatively affected the academic performance, behavior, and self-esteem of Native American students at the School. Due to the treatment of Native American students, some Native American parents removed their children from the School and sent them to elementary schools in neighboring communities, resulting in increased transportation costs and other difficulties. Additionally, parent and staff witnesses believed that denial of services and harsh discipline meted out for Native American students also constituted means of subjecting Native American students to harassment.

Prior to completing the investigation into whether the employees' alleged conduct created a hostile environment on the basis of race, the District expressed an interest in voluntarily resolving this allegation. OCR's investigation to date raised concerns that if the incidents as described occurred, they would be sufficiently severe and pervasive to create a hostile environment based on race for Native American students. In its assessment, OCR considered the former Principal/Superintendent's position as the highest District administrator, who was acting in the scope of her duties when she was alleged to have engaged in conduct targeted at young, elementary school age students. In addition, OCR considered that the conduct occurred in a small community in which the School is the only local school option.

OCR also identified compliance concerns with the District's response to the February 2013 complaint, which was the second formal complaint received by the Board about the former Principal and other staff in relation to treatment of Native American students. In specific, OCR had concerns with the Board's ability to recognize conduct that could constitute discrimination or discriminatory harassment and how to reasonably and effectively address complaints of such conduct. OCR found that in response to the February 2013 complaint, the District contracted with its Truancy Officer to investigate and propose resolutions. Although the Truancy Officer had significant experience as an educator and administrator, he did not have experience and had not otherwise received training in conducting discrimination

investigations, and was not familiar with Title VI legal standards. When the Truancy Officer was informed by some staff members that parents did not want to reveal their identities or the names of their children out of fear of retaliation, he stopped his investigation. He did not conduct interviews with key witnesses that he could access, including the former Principal or other School staff who may have witnessed the alleged conduct. The Truancy Officer's report included recommendations to improve the School climate. However, without identifying the nature or scope of discriminatory behavior, and the impact on Native American students, the District could not effectively determine and implement measures at the School to prevent further harassment and remedy its effects. OCR also determined that the District did not ensure implementation of the 2013 report recommendations.

Moreover, with respect to the former Principal, the Board instructed the Principal to discuss the February 2013 complaint with named personnel and take appropriate corrective action. While Title VI does not require creation of grievance procedures, if a district's grievance procedures encompass race, color, and national origin discrimination, it must apply such procedures consistently and in a manner that does not constitute Title VI discrimination. OCR notes that the District's UCP grievance procedure does not provide for a way to address a discrimination complaint in circumstances when the complaint is about the Principal. Where, as here, a principal is alleged to have engaged in discrimination, a response that only includes that such discrimination be resolved by the principal, who is also the subject of the complaint, would likely result in a process that is not reasonably effective.

For the 2014-2015 through the 2015-2016 school years, the evidence gathered does not show continued verbal or physical harassment by the current Principal or other staff members at the school. The Complainants identified ongoing effects of the harassing conduct but did not identify additional reports or complaints, and the District's record during this time period did not reflect any by parents, students or community members. To make a compliance determination, OCR would need to conduct further interviews with District staff, the former Principal, students, and parents. Prior to the completion of OCR's investigation, the District requested to enter into the enclosed Agreement to address the compliance concerns identified, and OCR determined it was appropriate to do so.

**Issue 2: Whether the District subjected Native American students at the School to more frequent or more severe disciplinary actions than non-Native American students who engaged in similar or more serious misconduct.**

#### Legal Standard

The Title VI regulations, at 34 C.F.R. §100.3(a) and (b), provide that a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. To determine whether a school district has discriminated against a student on the basis of race in the discipline process, OCR looks at whether there is evidence that the student was treated differently than students of other races under similar circumstances, and whether the treatment has resulted the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. To find a violation, the preponderance of the evidence must establish that the school district's actions were based on the student's race.

#### Facts

### *Discipline Policies and Procedures*

The District provided OCR with several discipline-related policies and procedures including BP 5144, "Discipline"; BP 5144.1 and AR 5144.1, "Suspension and Expulsion/Due Process"; and AR 5144.2 "Suspension and Expulsion/Due Process (Students with Disabilities). BP 5144.1 and AR 5144.1 & 2 were in effect as of July 2013 and were consistent with the California law in providing that students cannot be suspended for tardiness, truancy, or absence, and, for five offenses, including possession of a gun and selling drugs, providing that suspension and referral to expulsion are mandatory. Consistent with California law, the policies and procedures state that students can be suspended for up to five days for specific enumerated offenses and cannot be suspended for more than 20 cumulative days in a school year, unless they are involuntarily transferred, and the District is required to exhaust other means of correction, which may include restorative justice, positive behavior supports, and social emotional learning, before issuing a suspension, except in limited circumstances where the student's presence causes a danger or a student commits another major enumerated offense.<sup>3</sup> The policies and procedures include due process protections consistent with constitutional requirements, such as written notice and opportunity to be heard for suspensions and a hearing/appeal process for expulsions.

The District provided OCR with two different versions of its School Student Discipline Code (Version 1 and Version 2, Discipline Code), which it stated were used during the 2011-2012 through 2013-2014 school years. Both versions of the Discipline Code have four categories of disruptive behaviors – "Disruptive Behavior A, B, C and D." Under each category, there are examples of the prohibited behavior. For example, under "Disruptive Behavior A", conduct such as cheating, excessive tardies, and disruption of class are listed. At the other end of the spectrum, the "Disruptive Behavior D" category lists severe offenses, such as possessing controlled substances and causing serious physical injury.

The list of behaviors is followed by a list of disciplinary consequence(s), which is different in Versions 1 and 2. Version 1 lists a detailed "Sequence of Events" related to the intervention or consequence for the student's first, second, third and fourth offense. For example, under "Disruptive Behavior A", the first referral results in a conference; no suspension is issued until the third referral. Version 2 does not include progressive discipline; it only contains citations to the California Education Code section for student suspension. The Referral Form used by the District during the 2011-2012 through 2013-2014 school years included a space for the referring staff person to identify the disruptive behavior and whether it was a category A, B, C or D.

The Board President told OCR that he began exploring PBIS during the 2013-2014 school year in response to complaints from parents, community members and advocates about excessive discipline of Native American students at the School. The Board President worked with a consultant to develop a PBIS Handbook, which provides information on school rules, how to teach behavior expectations and a system for discouraging undesired behaviors. The PBIS Handbook states that the District's goal is to maximize instructional time and that staff should keep students in the classroom and engaged in learning as much as possible. The PBIS Handbook has a Level 1, Level 2 and Level 3 Problem Behaviors Chart. Each chart provides a definition of the behaviors at each level, and the procedure a teacher should follow to correct the behavior and a menu of corrective options. For example, the "Level 1 Problem Behaviors" chart includes being unprepared for class, not following directions and disregarding classroom norms, and includes corrective actions, such as reteaching expected behavior, proximity

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<sup>3</sup> The policies do not reflect the change in California law as of January 1, 2015, that students in grades K-3 cannot be suspended for willful defiance/disruption and no student can be expelled for this offense.

management, and completing and submitting a Behavior Tracking Form when interventions are ineffective. Under the Problem Behavior Chart, suspension, law enforcement contact and expulsion are only listed as corrective actions for the most serious Level 3 offenses.

### *Recordkeeping*

During the 2011-2012 through 2013-2014 school years, the District used an electronic student information system.<sup>4</sup> As discussed further below, OCR found that during this time period the recordkeeping system was in disarray, and the former Principal often sent students home or had them sit in the office for portions of the day or all day without documentation or records.

During the 2011-2012 through 2013-2014 school years, students who were removed from class for behavior issues were supposed to be sent to the former Principal's office with a Disciplinary Action Referral Form (Referral Form). The Referral Form provides space to record the student name, date of referral, name of the staff member who made the referral, category of discipline offense, referral number, description of disruptive behavior, and the action taken, such as phone call to parents, parent/teacher conference, detention, or suspension. The Referral form also has a space to write comments.

School staff stated that the Referral Form was a triplicate copy, and that one copy stayed with the teacher, and the other two were supposed to go to the front office, one for the school record and the other for the student's parent/guardian. However, in practice, the front office and other school staff told OCR that there was no effort made by the former Principal to ensure Referral Forms accompanied students who were sent to the office, and they frequently did not accompany students. When Referral Forms were filled out, front office staff entered the information into the electronic system, and hard copies of the Referral Forms were kept in an accordion file in the former Principal's office. Native American parents/guardians interviewed by OCR stated that they usually did not receive copies of Referral Forms.

The School also provided OCR with a "Notice of Suspension and Right to Post-Suspension Conference" Form (Suspension Form). The Suspension Form records the date and time of the student's suspension, whether it was in school or out of school, a list of seven categories from the California Education Code with instructions to circle the applicable basis for suspension, and the dates of the suspension. It includes a space for "conference date" and states that parent/guardians should inform the School, if they are unable to make the conference. The Suspension Form is also a triplicate copy for the office, teacher, and parent/guardian. As with the Referral Forms, Native American parents/guardians interviewed by OCR stated they usually did not receive copies of Suspension Forms. OCR also did not find copies of Suspension Forms in any student file reviews. The former Principal told OCR that she gave filled out suspension forms to the office secretaries and assumed they were entered in to the electronic system but had never checked to see if her assumption was accurate.

During the 2013-2014 school year, the School began implementing PBIS but records under this system were not properly kept during the School year, in part because the former Principal did not want to use

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<sup>4</sup> The District stated that the electronic system that it used interfaces with the California Department of Education data collection system (CALPADS). Prior to the 2011-2012 school year, School staff told OCR there was no centralized system of recording student discipline.

a recordkeeping system that corresponds with PBIS interventions. She eventually purchased the system at the end of the 2013-2014 school year.

Under the School’s PBIS recording keeping system, Behavior Tracking Forms are used to document student behavior, teacher interventions, and referrals to administrative intervention. However, utilization of Behavior Tracking Forms varied during the 2013-2014 school year, with some staff continuing to use Referral Forms. The former Principal told OCR that once the School began using Behavior Tracking Forms, Referral Forms were still used for student suspensions. School staff told OCR that they were not sure if the front office was keeping hard copies of the Behavior Tracking Forms.

During the 2014-2015 school year, the District began using the PBIS-related electronic record system as its recordkeeping system for student discipline. Behavior interventions are recorded on Behavior Tracking Forms and entered into the electronic system, including student referrals, in-school suspensions, and out-of-school suspensions.

*Discipline Data*

OCR examined the District’s discipline data in the following categories for the 2011-2012 through 2013-2014 school years: disciplinary referrals, in-school suspensions; out-of-school suspensions; involuntary transfers; expulsions; and referrals to law enforcement. OCR reviewed copies of the referral forms maintained by the School for the 2011-2012, 2012-2013, 2013-2014, and 2014-2015 school years and the beginning of the 2015-2016 school year. During the three onsite conducted by OCR between February and April of 2014, OCR reviewed all of the discipline files for white and Native American students and every paper referral document or other disciplinary document kept by the District for the same groups of students. OCR did a hand count of every referral slip and consequence because the numbers provided by the District about discipline and consequences did not match with the documents provided and reviewed onsite.

The District reported to OCR the following regarding its enrollment:

School Year	Native American	White	Latino	Multiple Race	African American	Asian	Not listed	Total
2011-12	25 (30%)	22 (27%)	26 (32%)	4 (5%)	1 (1%)	1 (1%)	3 (4%)	82
2012-13	10 (8%)	21 (18%)	32 (27%)	0 (0%)	0 (0%)	0 (0%)	56 (47%)	119
2013-14	23 (18%)	22 (20%)	33 (29%)	4 (4%)	0 (0%)	0 (0%)	30 (27%)	112
2014-15	54 (42%)	17 (13%)	48 (36%)	8 (6%)	0 (0%)	0 (0%)	1 (1%)	128
2015-16	44 (39%)	17 (15%)	44 (39%)	7 (6%)	0 (0%)	0 (0%)	1 (1%)	113

*Disciplinary Referrals*

OCR found that the difference in the proportion of disciplinary referrals received by Native American and white students was statistically significant for the 2011-2012, 2012-2013, and 2013-2014 school years.

School Year	Native American	White	Latino	Total
2011-12	73	0	0	73
2012-13	71	1	0	72
2013-14	36	7	5	48

Two staff members told OCR that they frequently encountered Native American students who had been sent out of class to stand in the hallway, or to sit in the front office, with no referral forms. This information when reviewed with statements from staff that Referral Forms were not consistently issued raises significant concerns that the data provided undercounts the extent of the disparity for Native American students and that, as such, the District failed to have a system in place to ensure accurate data for the purposes of ensuring nondiscrimination in discipline.

For the 2014–2015 and 2015-2016 school years, the District’s discipline referrals are recorded on Behavior Tracking Forms. As discussed, under the District’s PBIS system, Level One behaviors are addressed through classroom interventions and do not result in a Behavior Tracking Form. Level Two behaviors generate a Behavior Tracking Form only when the teacher requests administrative involvement and Behavior Tracking Forms are required for Level Three behaviors. The District provided OCR with copies of several hundred Behavior Tracking Forms completed during the 2014-2015 school year and beginning of the 2015-2016 school year, many involving offenses labeled as major.

#### *In-School Suspensions*

The District provided OCR with a list of all students who received in-school suspensions and the number of suspensions<sup>5</sup> during the 2011-2012 through 2014-2015 school years and with a report of in-school suspensions for the 2014-2015 through the first semester of the 2015-2016 school years. OCR found that the difference in the proportion of in-school suspensions issued to Native American students and white students for the 2014-2015 and for the beginning of the 2015-2016 school years was statistically significant.

During the investigation, the District reported the following to OCR with respect to in-school suspensions:

Number of In-School Suspensions by Race				
School Year	Native American	White	Latino	Total
2011-12	1	0	0	1
2012-13	6	4	1	11
2013-14	0	0	0	0

<sup>5</sup> OCR’s student file review revealed that the District did not consistently record student in-school suspensions based on the grounds for suspension in the California Education Code, or by the category of offense listed in the District’s discipline policies and procedures. Instead, the list of in-school suspensions that the District provided to OCR described the behavior that led to each suspension, for example: “Had phone hidden and was using it at recess”, and “Pulled chair out from another student”. OCR categorized the conduct described into two offenses: fighting/physical aggression and defiance/disruption.

Number of In-School Suspensions by Race				
School Year	Native American	White	Latino	Total
2014-15	11	0	1	12
First Semester 2015-16	8	1	1	10

However, as with disciplinary referrals, other evidence reviewed by OCR indicated that the District's data during the 2011-2012 through 2013-2014 school years did not accurately reflect the number of in-school suspensions for Native American students. For example, according to the District's data, one Native American student received an in-school suspension during the 2011-2012 school year. However, the data reported by the District 2011-2012 to the Department through the Civil Rights Data Collection (CRDC) shows that 24 students received in-school suspensions: 12 (50%) Native American students, 8 (33%) white students, and 4 (16.7%) Latino students.

In addition, in-school suspensions of Native American and non-Native American students recorded in Disciplinary Referral Forms and Behavior Tracking Forms are not reflected in the data summary provided by the District. For example, a September 2012 Disciplinary Referral Form for a Native American XXX grade student reflects an in-school suspension for defiance, however, this student does not appear on the District's list of 2011-2012 in school suspensions. Similarly, the District reported zero in-school suspensions to OCR during the 2013-2014 school year, but a March 2014 Behavior Tracking Forms shows that at least two students – one white and one Latino – received in-school suspensions.

Witness testimony also contradicted the District's report of its in-school suspensions of Native American students. Multiple school-site witnesses stated that during the 2011-2012 through 2013-2014 school years, Native American students were frequently sent out of class to a room referred to as "the hole." Witnesses stated that "the hole" is a small room adjacent to the Principal's office, where students were sent for behavior problems for portions of or the whole school day. The School's front office staff told OCR that students often arrived without any work to do. There was no teacher, counselor or other staff member in the room. The front office staff stated that if multiple students were in the room at the same time, they may have asked older students to read to younger students. The front office staff also stated that students frequently misbehaved while in the room, and that there was no effort on the part of the former Principal to intervene, supervise student behavior, or ensure students placed in the room have classwork. A staff member told OCR that he rarely saw white students in the room and routinely saw Native American students sitting in the room with no work to do. During the 2011-2012 through the 2013-2014 school years, neither the length of time spent in terms of minutes or hours nor the number of days of time spent in this room was recorded as an in-school suspension in District records.

#### *Out-of-School Suspensions*

The District provided OCR with a list of all students who received out of school suspensions during school years from 2011-2012 through the 2013-2014 school years and with a report for the 2014 – 2015 through first semester of the 2015-2016 school year. The difference in the proportion of out-of-school suspensions issued to Native American students and white students was statistically significant for each of the years reviewed by OCR except for the 2012-2013 school year.

Number of Out-of-School Suspensions by Race
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School Year	Native American	White	Latino	Total
2011-12	14	2	0	16
2012-13	13	15	0	28
2013-14	33	4	0	37
2014-15	67	2	9	78
First Semester 2015-16	7	1	3	11

OCR categorized the conduct described into four offenses for the 2011-2012 through 2013-2014 school years: fighting/physical aggression; defiance/disruption; sexual harassment; and dangerous object/weapon.<sup>6</sup> Based on these offense categories:

Number of Out-of-School Suspensions by Race and Offense for 2011-2012			
	Native American	White	Latino
Fighting/Physical Aggression	8	1	0
Defiance/Disruption	6	1	0
Sexual Harassment	0	0	0
Dangerous Objects /Weapons	0	0	0
Total	14	2	0

Number of Out-of-School Suspensions by Race and Offense for 2012-2013			
	Native American	White	Latino
Fighting/Physical Aggression	10	5	0
Defiance/Disruption	1	10	0
Sexual Harassment	0	0	0
Dangerous Objects/Weapons	2	0	0
Total	13	15	0

Number of Out-of-School Suspensions by Race and Offense for 2013-2014			
	Native American	White	Latino
Fighting/Physical Aggression	16	1	0
Defiance/Disruption	16	3	0
Sexual Harassment	1	0	0
Dangerous Objects/Weapons	0	0	0
Total	33	4	0

As with disciplinary referrals and in-school suspensions, additional evidence gathered by OCR indicated that Native American students receive more frequent out-of-school suspensions than the District reported. The numbers in the charts reflect fewer suspensions than those OCR identified through an onsite review of discipline referrals that were not recorded by the District in data provided to OCR. For

<sup>6</sup> The District did not consistently record student out-of-school suspensions based on the grounds for suspension in the California Education Code, or by the category of offense listed in the District's discipline policies and procedures (described below). Instead, the District's list of out-of-school suspensions described the behavior that led to each suspension, for example, "Arguing with teacher. Did not select better option"; and "Vulgar, sexual language with girls", and "Sent out of class 3 times already."

example, the District's list for the 2011-2012 school year has two one-day suspensions for Student 1, a Native American XXX grader, both occurring in September 2011. However, Student 1's attendance records state that he also received a five-day suspension in October 2011, and this was not recorded.

The 2012-2013 school year does not include any out-of-school suspensions for Student 2, a Native American XXX grader, but the student's Referral Forms show he was suspended at least eight times during that period, including several multiple day suspensions, and a suspension on November XX, 2012, which states the student will be "gone until after Thanksgiving." The District's 2012-2013 list is also missing out-of-school suspensions for Student 3, a Native American XXX grader whose Referral Forms indicate that he was suspended five times, including multiple day suspensions, during the 2012-2013 school year. Similarly, the out-of-school suspension list provided by the District stated that during the 2013-2014 school year, Student 4, a XXX grade Native American student had been suspended six times. However, the student's attendance records for the 2013-2014 year indicate that he was suspended 17 times.

In addition, the information provided by the District and reviewed by OCR shows that more Native American students received multiple suspensions, and multiple day suspensions, than white students. For example, during the 2011-2012 school year, Student 1 and Student 5, XXX grade Native American students were each suspended two times; Student 6, a XXX grade Native American student was suspended two times – and one of those suspensions was for two days; and Student 7, an XXX grade Native American was suspended on three separate occasions. During the 2013-2014 school year, Student 8, a XXX grade student was suspended 7 times, including a two-day suspension, and Student 9, a XXX grade Native American student was suspended four times. No white students were suspended multiple times during these school years, or suspended for multiple days at a time.

Native American parents interviewed by OCR stated that they frequently received calls from the School regarding alleged misbehavior and were told to pick up their children. Without exception, the parents told OCR that they did not receive written notice that their children had been suspended, but were simply told to take them home for the remainder of the school day or longer. Other evidence reviewed by OCR supported the testimony of Native American parents. OCR reviewed dozens of referral forms, which stated that students were sent home for the remainder of the school day, or for longer periods of time. For example, a May 2012 Behavior Tracking Form for Student 2 states that the student had been suspended two previous times, and that his behavior had not improved. The Principal wrote "[Student 2] will be put on independent study until we can get his behavior under control." Attendance records indicate that Student 2, who was already on suspension for five days was kept home for 14 additional days, until the end of the school year.

OCR also reviewed evidence indicating that Native American students were suspended for minor infractions when white students were not. For example, in its onsite document review, OCR identified a white student who had been referred by a teacher after drawing a picture of a gun, which the teacher found threatening, and OCR did not find any evidence that the white student was suspended, although Native American students were suspended for minor infractions, such as not sitting in their seat. Witnesses who worked in the School also told OCR that Native American students were frequently sent out of class and standing in the hallway, in the office, and referred to law enforcement, and they rarely saw white students treated in the same way.

#### *Expulsions and Involuntary Transfers*

The District informed OCR that it had not formally expelled or involuntarily transferred any students during the 2011-2012 through 2013-2014 school years. The District did not report any student expulsions in the CRDC or to the California Department of Education. However, OCR met with the parent of Student 1, a Native American XXX grader who stated that following a disciplinary incident, the former Principal verbally told her that XXX XXX was expelled and could not return to the School. The parent stated she did not receive any written notice regarding expulsion proceedings. XXX XXXXXXXXXXXX XXXXXXXX XXXXX XXXX XXXXXXXX XXX XXXXXXX XXXXXXXXXXXX XX XXXXXXXXXXXXXXXXXXXX XXXXXXXX; XXXXXXXX, XXXXXXXX XXX XXXXXXX XXXXXXX XXXX XXX XXX XXXXXXXXXXXX XXX XXXXXXX XXXX XXXXX XXX XXXXXXX XXXXXXXXXXXX XXXX XXX XXXX XXXX XXX XXXX XXXX XXX XXXXXXX XXX XXX XX XXXXXXX XXXXXXX XXX XXXX X XXXXXXX XXXXXXXXXXXX XX XXX XXXXXXXXXXXXXXXXXXXX XXXXXXX XXXXXXXX.

The District formally expelled a student during the 2014-2015 school year, Student 2, a XXX grade Native American student. The District assigned the student to Community School during his expulsion. The student was subsequently found eligible for special education, and the Board suspended the expulsion. As described further in allegation three, the complainant asserted that the student should have had a special education evaluation before the 2014-2015 school year.

Several Native American students who received suspensions subsequently transferred out of the School. During the 2011-2012 school year, Student 2 was suspended at least nine days and placed on independent study for the last two weeks of the year. In the 2012-2013 school year, Student 2 was suspended for at least 16 days. Student 5, Student 10, and Student 11, all Native-American students transferred out of the school during the 2012-2013 school year after receiving suspensions. OCR did not receive any information from School witnesses or documents about white students involuntarily transferred or expelled. The District did not produce any documentation of involuntary transfers of students during the 2014-2015 school year or the first semester of the 2015-2016 school year.

*Referrals to Law Enforcement*

The District provided OCR with a chart of student referrals to law enforcement. The District did not provide any supporting documentation for OCR to review to verify the information provided in the chart. Similar to other data provided by the District, there is evidence that the District was not properly documenting referrals to law enforcement and that the data reported underrepresents the number of Native American students referred. In this regard, only two disciplinary referrals reviewed by OCR for the 2011-2012 school year through the first semester of the 2015-2016 school years identify a law enforcement referral, but those referrals do not correspond with the dates on the District's submitted list for when law enforcement was called.

Nevertheless, the data provided by the District shows Native American students were overrepresented in referrals to law enforcement. During the 2011-2012 and 2012-2013 school years, the District recorded three referrals to law enforcement each year; Native American students accounted for 100% of the students referred to law enforcement. During the 2013-2014 school year, Native American students accounted for 67% (2 of 3) of students referred to law enforcement. The District produced no documentation of referrals to law enforcement for the 2014-2015 school year or the beginning of the 2015-2016 school year.

OCR categorized the conduct described into three offenses: fighting/physical aggression; defiance/disruption; and threats.<sup>7</sup> Based on these offense categories, in 2011-2012, all three referrals for Native American students were for defiance/disruption, in 2012-2013, two referrals to Native American students were for defiance/disruption, one was for threats, and in 2013-2014, three referrals to Native American students were for defiance/disruption.

As with school suspensions, the District's CRDC data on referrals to law enforcement does not match the data reported to OCR for the same period. The District's CRDC 2011-2102 data states that six students without disabilities were referred to law enforcement that school year (two Native American students and four white students), and that four students with disabilities were referred to law enforcement (two Native American and two white). Given the discrepancy, OCR did not find that the data reported by the District for the CRDC was reliable.

In addition, other information gathered by OCR suggests that the number of law enforcement referrals is higher than those reported to OCR and the CRDC. Two School staff members stated that the Humboldt County Sheriff's Office (Sherriff) was frequently called to the School to address minor behavior issues with Native American students, such as kicking a ball over a fence or climbing a tree. They reported seeing the Sheriff at the School on an almost weekly basis. The staff members stated that they had not observed the former Principal contact the Sheriff to intervene in behavior issues with a white student. The Native American students and parents interviewed by OCR also reported that the former Principal frequently called the Sheriff on Native American students.

Apart from the Referral Forms, the District has no system of documenting when law enforcement officers were called to the campus. Similarly, the District has no system of documenting or tracking the nature, length of time, or frequency of law enforcement contact with students.

#### *File Review*

For the 2011-2012, 2012-2013<sup>8</sup> and 2013-2014 school years, OCR reviewed 191 referral forms: 76 Discipline Action forms were missing the referral number or offense category (A, B, C, or D) and 83 Behavior Tracking Forms had the offense category (minor or major, with additional subcategories) identified, but interventions were missing on 13 forms, and there was no space to document the number of prior referrals the student had received. Based on the records reviewed, OCR identified several examples that raised concerns that similarly situated students were treated differently:

- On September XX, 2013, a white student received a disciplinary referral for "refusing directions of adults several times." The School categorized the white student's conduct as a Disruptive Behavior

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<sup>7</sup> The District did not record referrals to law enforcement based on any discipline categories in the California Education Code, or by the category of offenses listed in the District's discipline policies and procedures (described below). Instead, the District's list of law enforcement referrals described the behavior that led School staff to contact law enforcement, for example, "Student ran away from school and...climbed over the fence of a neighbor's yard"; and "Student pushed desks and threw items around room."

<sup>8</sup> Of the 148 Discipline Action Referral forms for the 2011-2012 and 2012-2013 school years, none of the referral forms provided by the District were for white students. However, the suspension chart provided by the District lists seven white students in the 2012-2013 school year and two white students in the 2011-2012 school year as having received suspensions, even though the District failed to provide referrals forms for white students.

B, it was her first referral of the 2013-2014 school year, and the consequence given was not participating in a field trip the following day. In comparison, on October XX, 2013, a Native American student received his first disciplinary referral for being “defiant. Said no multiple times. Sent out of class 3x with no effect.” The Native American student’s conduct was also categorized as a Disruptive Behavior B. This student was sent home for the rest of the day.

- On September XX, 2013 a Native American student received a disciplinary referral for slapping another student on the way to the bus. The Native American student’s conduct was categorized as a Disruptive Behavior B and it was her first referral of the 2013-2014 school year. The consequence was a one day out-of-school suspension.
- On October XX, 2011, a Native American student received a disciplinary referral for hitting another student. The Native American student’s conduct was categorized as a Disruptive Behavior B and it was her first referral of the 2011-2012 school year. The consequence was a one-day out of school suspension.
- On October XX, 2012, a Native American student received a disciplinary referral for pinching and biting another student. The Native American student’s conduct was categorized as a Disruptive Behavior B and it was her first referral of the 2012-2013 school year. The consequence was a two day out-of-school suspension.
- In comparison, on March XX, 2014, a white student received a referral for fighting/physical aggression for punching another student. This incident was identified as a Major Problem Behavior and was also the student’s first offense. The School held a conference between the students, the form notes the offending student’s “apology was accepted,” and that he received a time out/lunch detention.
- On March XX, 2014, another white student received two behavior referrals for slapping other students. The student’s conduct was categorized as a Major Problem Behavior and, based on the records provided by the District, was her fifth and sixth referral. The consequence for the first slapping incident was a conference with the student, and the consequence for the second slapping incident was a time out/lunch detention.

#### *Training, Complaints, Research-Based Alternatives, and Student Supports*

The former Principal told OCR that School staff had not received training on implementing discipline policies and procedures during the 2011-2012 or 2012-2013 school years, but she provided training on classroom management through class observations. However, School staff told OCR that when the former Principal did class observations, she would not provide any substantive feedback, and would interrupt their classes with comments or announcements in a manner that was disruptive. Witnesses, including School staff, stated that the former Principal exercised her disciplinary authority inconsistently and in a manner that exacerbated student misbehavior. Witnesses stated that the former Principal often kept students in the front office, or suspended them from school. School staff also expressed frustration regarding the negative impact of disciplinary incidents on the learning environment for all students. Few staff interviewed by OCR expressed a belief that the School’s disciplinary practices were effective in reducing student misbehavior, and several staff members told OCR that the former Principal’s approach to student discipline contributed to a chaotic and disruptive environment at the School. During the 2011-

2012 through 2013-14 school years, the District did not have any safeguards/systems to monitor the exercise of discretion in referrals and imposition of sanctions to ensure they were nondiscriminatory.<sup>9</sup> Staff members reported to OCR that they had not received any training on the School's discipline policies and could not describe which policy, if any, that they were following when imposing discipline on a student.

With respect to discipline complaints, front office staff stated that they had advised parents to write down any concerns for the former Principal. When parents complained, front office staff told OCR that the former Principal did not conduct an investigation, and no decisions were issued or practices changed.

Prior to the 2013-2014 school year, the District did not have a formal process for providing academic support or counseling services for students who received in-school or out-of-school suspensions. As described above, students who were sent out of class to the front office were not consistently provided with classwork and/or did not receive any academic instruction. The District did not provide any evidence that students who received out of school suspensions for multiple days received any additional academic support. School staff and other witnesses stated that a significant number of students in the District experience chronic trauma, including parents/guardians with substance abuse problems, abuse, and homelessness. A School staff member stated that the former Principal often relied on the Tribes to respond to the mental health and behavior issues that occurred while students were at School. The District did not have a School Psychologist or on site counselors at the School but some counseling was available through the Humboldt County Office of Education (County Office of Education). In addition, several teachers told OCR that the Student Study Team (SST) process at the School did not function properly, and that as a result, students who were struggling academically, including students who were repeatedly receiving disciplinary consequences, did not receive needed support.

A nonprofit organization that presented PBIS to the Board and secured the initial grant funding to pay for the District's PBIS consultant, stated that in the fall of 2013, they proposed that the former Principal create a parent advisory committee to ensure that PBIS would be implemented in a culturally responsive manner, but the former Principal rejected the idea.

Under the current Principal, the District provided PBIS professional development sessions to School staff during the 2014-2015 and 2015-2016 school years, and trauma-informed training during the 2015-2016 school year. The Behavior Tracking Forms provided by the District indicate that hundreds of Level Two and Level Three behaviors occurred during the 2014-2015 school year. OCR reviewed the Board minutes for the 2014-2015 school year and the beginning of the 2015-2016 school year, and found that the Principal provided general monthly updates on PBIS implementation, but that most presentations did not include a discussion of the number or type of disciplinary referrals, or disaggregate discipline referrals by race.

### Analysis

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<sup>9</sup> For the 2013-2014 school year, the District's PBIS Handbook states that through the SWIS system, the School can generate reports of problem behaviors to enable staff to make data based individual and school-wide interventions. However, at the time of OCR's onsite and staff interviews in the 2013-14 school year, the School had not fully implemented PBIS, and had not purchased the data system necessary to generate the data described above.

To determine whether a school district has discriminated against a student on the basis of race in the discipline process, OCR considers both direct and circumstantial evidence of racially discriminatory intent. The information gathered by OCR raises Title VI compliance concerns with regard to the District's discipline of Native Americans during the 2011-2012 through 2014-2015 school years and the first semester of the 2015-2016 school year.

OCR found that the data provided by the District for the 2011-2012 through 2013-2014 school years generally undercounted the issuance of discipline to Native American students, as the District's data system was in disarray and the former Principal and staff regularly failed to fill out discipline referral and suspension forms, even while sending Native American students home, having them stand in the hall way or placing them in a small room near the front office without supervision. In addition, the District did not accurately track the use of law enforcement for discipline purposes. The District provided OCR with two versions of discipline policies, which differed from each other, in that one listed escalating consequences while the other listed the California education code sections that pertained to suspendable offenses. OCR asked staff at the School what they were following to determine how to provide discipline and consequences, and staff stated that they had not received any training on the discipline policies and could not describe which policy, if any, that they were following.

Based on the available data, OCR found that at every level, Native American students were more likely to receive discipline than white students. Native American students received 73 out of 73 disciplinary referrals during the 2011-2012 school year, 71 out of 72 disciplinary referrals during the 2012-2013 school year, and 36 out of 48 disciplinary referrals during the 2013-2014 school year. In contrast, white students received zero referrals during the 2011-2012 school year, one disciplinary referral during the 2012-2013 school year, and seven referrals during the 2013-2014 school year. Similarly, Native American students received 14 out of 16 out-of-school suspensions during 2011-2012 school year, and 33 out of 37 out-of-school suspensions during the 2013-2014 school year. During the 2012-2013 school year, other evidence gathered by OCR shows that the District did not record or report out-of-school suspensions accurately, as with other the disciplinary consequences described above. Further, the evidence established that although the District stated that it did not expel any students, OCR found that at least one Native American student was expelled without due process.

OCR also found that Native American students were overrepresented with respect in-school suspensions, as compared to white students, for the 2012-2013 school year. With respect to the 2011-2012 and 2013-2014 school years, the evidence established that the information provided to OCR by the District on in-school suspensions was incomplete. School witnesses provided consistent testimony that the frequently encountered Native American students in the front office who had been sent out of class for disciplinary reasons. In addition, front office staff confirmed that Native American students were often sent to the front office for a period or the remainder of their school day. The evidence established that the District failed to consistently record the students sent to the front office as in-school suspensions. Based on the racial disparities established in discipline referrals and out-of-school suspensions, and witness testimony, OCR has significant concerns that Native Americans were also subjected to disproportionate in-school suspensions during the other years during this period.

Concerns remained during the 2014-2015 school year, even with the changes made by the current Principal, as Native American students received 11 out of 12 in-school suspensions during the 2014-2015 school year, and 67 out of 78 out-of-school suspensions during the same period. In contrast, white students received only one in-school suspension and two out-of-school suspensions during the same

period. These differences in the treatment of Native American and white students were statistically significant.

In its review of discipline referral forms and files (and despite the District's record keeping failures) for the 2011-2012 school year through the 2013-2014 school years, OCR identified a concern that some Native American students who were similarly situated to white students may have received more severe treatment. OCR identified several incidents where Native American students' disciplinary consequence of an out-of-school suspension for first time incidents of physical aggression or fighting was more severe than the white students' consequences of a conference and time out/lunch detention. With respect to two first-time incidents of refusing to follow directions in class, the Native American student's disciplinary consequence of an out-of-school suspension was also more severe than the white student's consequence, inability to participate in a field trip. In addition, in the March XX, 2014 incidents, where a white student received two behavior referrals for slapping other students, the white student received a lesser consequence than the Native American student for similar conduct, even though the white student had multiple prior disciplinary referrals. Witnesses who worked in the School also told OCR that during the 2011-2012 through 2013-2014 school years, Native American elementary school students were frequently sent out of class and standing in the hallway, in the office, and referred to law enforcement and they rarely saw white students treated in the same way.

OCR also found that the District did not have a policy to define when it would be appropriate to engage law enforcement in student discipline issues. Based on the data received from the District, OCR found that even though the District recorded only a few referrals, Native American students were still overrepresented with respect to law enforcement referrals. As with in-school suspensions, School witnesses provided consistent testimony that the former Principal called law enforcement more often than was reported to OCR by the District. In addition, while conducting a comparator analysis between similarly situated students was difficult due to the failure to keep proper records, School witnesses stated that they never observed the former Principal contact the Sheriff to intervene in behavior issues with white students, even though the records reviewed by OCR show that white students experienced similar behavior problems. Native American students and parents interviewed by OCR also reported that the former Principal frequently called the Sheriff on Native American students.

The District did not provide a legitimate, nondiscriminatory reason for the disparities in discipline. Rather, staff consistently told OCR that the former Principal was inconsistent with respect to how she meted out discipline in ways that were ineffective at reducing problem behaviors, harmful to the climate at the school and created "chaos", and both the former Principal and staff identified that they had not received any training for at least two year on the Board discipline policies in effect at the time, up until the District began training staff on PBIS. In addition, staff could not identify a consistent process that they were following with respect to discipline of students. Although the School's disciplinary policies and procedures reflected state law requirements for due process, including written notice and the opportunity to respond, OCR found that these policies were not followed in practice. For example, Native American parents told OCR that they rarely received suspension notices when their children received in-school or out-of-school suspensions. As described above, one Native American parent was simply told by the Principal that her child could not return to the School.

Furthermore, the evidence showed that the District did not have a system for providing students at-risk or who have been exposed to trauma with supports and services; the District did not have a school psychologist or counseling on-site and staff testified that the school's Student Study Team did not function properly. In addition, as discussed below, OCR found that the school failed to provide

appropriate special education services to students in need. OCR also found that the derogatory remarks made by the Principal against Native American students provide some evidence of pretext with respect to implementation of discipline.

Based on the evidence in file review showing some Native American students who were similarly situated to white students with respect to conduct may have been treated differently in imposition of discipline, the witness testimony of difference in treatment, and the disparities in discipline data, as well as the District's admission that it was not consistently implementing its policies and the comments evidencing bias from the former Principal, OCR identified compliance concerns for the 2011-2012 through the 2013-2014 school years under Title VI and its implementing regulations with respect to the administration of discipline. OCR also identified significant concerns about the failure to keep proper records during this period of time from which the District could accurately assess whether it was ensuring nondiscriminatory administration in discipline. For the 2014-2015 school year and the first semester of the 2015-2016 school, OCR also found evidence in its review of different treatment with respect to disparities in imposition of in-school and out-of-school suspensions. Prior to OCR completing its investigation, the District expressed an interest in entering into a voluntary agreement, and OCR determined that it was appropriate to do so.

**Issue 3: Whether the District denied Native American students with disabilities at the School a FAPE by: a) failing to evaluate students who need or are believed to need special education or related aids and services because of disability, b) failing to implement the provisions of the students' IEPs and Section 504 plans, c) failing to evaluate students before significant changes in placement, including changes made for disciplinary reasons, d) failing to provide parents with procedural safeguards, and e) isolating students with disabilities from their non-disabled peers.**

#### Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a 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 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. 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. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure. The Section 504 regulations, at 34 C.F.R. §104.8(a) and (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. §104.7(a) to coordinate its efforts to comply with the regulations. The Title II regulations, at 28 C.F.R. §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. §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.

Section 104.35(a) 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. Under §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. 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.

The exclusion of a disabled student from his or her program for more than ten consecutive days, or for a total of ten or more cumulative days under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

Under 34 C.F.R. §104.34(a), a student with a disability must be educated with non-disabled students to the maximum extent appropriate to the needs of the disabled student. School districts must place disabled students 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.

Under both the Section 504 regulations, at 34 C.F.R. §104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. §35.130(b)(1)(i), (ii) and (iii), school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

### Facts

For the 2011-2012 through 2013-2014 school years, the data from the District shows that 78.7% of the students with disabilities at the School are Native American. The remaining 21.3% of students with disabilities consist of students who are white (6.6%), Latino (9.85%), or half white and half Latino (4.9%). The District provided OCR with copies of the 2012 Local Plan for Special Education and the Notice of Procedural Safeguards. During the 2014-2015 school year, OCR found that the District's website did not directly provide parents with any information regarding special education. OCR reviewed the Student Handbook on the District's website for the 2015-2016 school years. It had one paragraph on special education, which stated, in its entirety:

The district provides two Special Education programs: [1] The Resource Specialist Program is a state and federally funded program that was developed for students with exceptional needs. If you feel your student may have a learning problem or disability, you may request he/she be considered for testing. Referrals may be made through the classroom teacher. [2] A Speech Pathologist/Therapist is available to work with students needing help with speech-related problems. Referrals are made through the classroom teacher and yearly assessments are conducted for new students.

On January 14, 2016, the District adopted new special education policies and administrative regulations BP and AR 6159, et seq., which set forth the legal requirements that the District is required to follow with respect to, among other things, identification and evaluation of individuals for disabilities and special education services, creation and implementation of IEPs, provision of procedural safeguards, and use of behavioral interventions and supports. The District also provided a copy of a Section 504 Notice of Parent and Student Rights (Section 504 Notice). The Section 504 Notice was in effect from the 2013-2014 school year through the 2015-2016 school year; it had a space for the District's Section 504 Coordinator, title and phone number, but no information was filled in.

a. Evaluation of Students in All Areas of Suspected Disability

During spring 2014, OCR conducted interviews with the staff, former Principal, and the Board and reviewed Native American student files to assess whether the School properly evaluates students to determine whether they have a disability and are in need of special education and related services. A staff member informed OCR in spring 2014 that the School refused to evaluate students, unless the student was two years behind their grade level, and provided the names of five students for whom evaluations had been requested but who were denied evaluations by the School for this reason. A teacher witness (Teacher 1) confirmed that she had requested an evaluation of one of the five students during the 2012-2013 school year, but that the District failed to conduct the evaluation. She informed OCR that she had filled out forms for evaluations for other students but that the evaluations never occurred. Another teacher witness (Teacher 2) informed OCR that the School fails to evaluate students for a disability in a timely manner. Teacher 2 stated that there was a "bottle neck" of students at the School who needed to be evaluated for IEPs, including one Native American student who had waited nearly an entire school year for an evaluation. Teacher 2 stated that the School had used its limited number of psychological service hours, and, as such, it was a "waste of time to assess [students]", since the Principal had not given the "green light" to do evaluations that were on the School's list. Another teacher witness, Teacher 3, told OCR that the School had an evaluation backlog for speech services for students with disabilities. At the time, she was aware of three Native American students (Students 16, 17, and 18) who needed a speech assessment but had not been evaluated.

OCR reviewed the files of all Native American students enrolled at the School during the 2013-2014 school year. OCR identified a number of Native American students who had information in their files which evidenced that they may have a disability, but who had not been evaluated by the District. In addition, OCR found a number of Native American students who had been identified as students with disabilities by their previous school districts, but who were not receiving special education or related services after transferring to the District. In specific:

- Student 19, a XXXXXXXXXXXXX student's file included a letter from a speech pathologist, which stated that he had XXXX XXX XXXXXXXXXXX XXXXXX. The letter recommended the student receive speech therapy and behavior intervention. The District did not conduct an evaluation for this student, and

he did not have an IEP during the 2013-2014 school year. (However, he is listed as having one during the 2015-16 school year.)

- Student 20, a XXXXXXXXXXXX student's file showed she has "XXXXXXXX XXXX XXXXXXXX" and that her "XXXXX XXX XXXX XXXX XXXXXXXX." There is no indication that the District evaluated whether this student would qualify for accommodations or special education or related services under Section 504.
- Student 4, a XXX grade student's file included notes from his teacher stating that his "behavior is keeping him from learning" and disciplinary records show the student had been suspended six times between September 2013 and March 2014. The District did not conduct a behavior assessment or evaluation. A staff member stated that she recommended that the student be tested and evaluated but the School did not evaluate the student and told her to take the student to his own doctor to have him assessed.
- Student 22, a XXX grade student's file showed that she transferred to the School during the 2012-2013 school year with an IEP from her previous school district. She had been identified as having a speech and language impairment and received weekly speech therapy in her previous school district. There was no record of the student continuing to receive speech therapy at the School. Further, the student's 2013-2014 report card included a comment from her teacher that she was "very concerned about [Student 22's] lack of progress in all areas...." Her file showed that she received disciplinary consequences for missing homework every week between August XX, 2013 and November XX, 2013. The student's teacher confirmed that the student did not have an IEP at the School during the 2012-2013 school year, and District records showed that the student did not have an IEP during 2013-2014 school year.
- Student 23, a XXX Grade student's file included information showing that he had a 2010 IEP for speech or language in place from another school district and was receiving speech therapy services for 80 minutes per month outside of the classroom and also received speech services during the 2009 – 2010 school year about twice a week. There were no records in the student's file showing that he had an IEP in place when he started attending the School and no record that he received speech therapy services from the School.
- Student 24, a XXX grade student's file included a parent request for her "special education file" and showed failing grades, but there were no records that she received special education services or that information was provided to her parent.
- Student 25, a XXX grade student's file showed that he consistently scored far below basic and below basic during the XXX, XXX and XXX grade and had a grade point average of XXXX. The student's files contained no record of SST meetings, evaluations or other interventions. The student's teacher, Teacher X, confirmed that there were no SST meetings for this student.
- Student 26, an XXX grade student's file showed that he had an IEP, dated March X, 2010, at his previous school district, where he had been identified with X XXXXXXXX XXXXXXXX XXXXXXXXXX. His file contained no IEP from the School or information regarding IEP implementation. Teacher X told OCR that Student 26 did not have an IEP, and she was not aware of him having one in the past.

- Student 4, who was in XXX grade in the 2013-2014 school year was evaluated for a disability by the School on March XX, 2014. After his evaluation, during the following school year, the student had at least 68 behavioral incidents during the 2014-2015 school year, of which 39 were identified as “major.” The School did not reevaluate the student; its initial evaluation of the student did not include a Functional Behavioral Analysis, and the School Psychologist did not conduct evaluations to determine the cause of the student’s processing speed, communication, or socio-emotional functioning difficulties, which had been identified in school records.

During the 2011-2012 through 2013-2014 school years, the School did not develop and implement any behavioral support or intervention plans for any students in the School in spite of the number of students with disabilities receiving significant school removals. Teacher 4 informed OCR that she was not aware of any behavior support or interventions plans developed for students during the 2011-2012 through 2013-2014 school years. A teacher who works with students with disabilities told OCR that there were Native American students in need of additional behavior supports and intervention plans. For example, the teacher stated that Student 3, who received multiple disciplinary referrals and suspensions, had no behavior plan and “there is no good answer for why he doesn’t have one.”

OCR reviewed supplemental documentation and information for the 2014-2015 through 2015-2016 school years for Native American students enrolled at the School:

- Student 38, who was in XXX grade during the 2014-2015 school year, was not evaluated. The student’s file showed that she received 43 behavioral incidents during the school year of which 38 were listed as “major”, and her teachers noted that she had problems focusing and repeated behavioral issues ranging from XXXXXXXX XX XXXXXXXX XXXX XX XXXXX XX XXXXX.
- Student 13, who was in XXX grade during the 2014-2015 school year, was not evaluated. The student’s report cards show that she had struggled academically for four years. Student 13’s teachers during the 2014-2015, 2013-2014, 2012-2013, and 2011-2012 school years noted respectively that Student 13’s English Language Arts work is “far below grade level, missing work,” that she “rarely attends school and has missed a great deal of instruction...I’m very worried”, that she “struggles in all academic areas,” and is “below grade level in language arts and most topics in math.” There is no record that the School made any attempt to determine the cause of Student 13’s academic and attendance difficulties or whether she should be evaluated for a disability.
- Student 19, who was in XXX grade during the 2014-2015 school year, was not evaluated timely or in all areas of suspected disability. The student was diagnosed with XXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXX XXXXXXXX XX X XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX. The file shows that the student’s mother made repeated requests that the School evaluate Student 19 for a disability in 2014, including a written request to the current Principal on November XX, 2014, in which she asked for an IEP or 504 plan for the student since he had been diagnosed with XXXX and no accommodations had been made by the School. The School provided Student 19 with an IEP in February 2015. The IEP provided for speech and language consultation and did not address his XXXX and academic struggles.
- Student 2, who was in the XXX grade during the 2014-2015 school year, was not appropriately or timely evaluated. His student file showed that he was struggling academically and behaviorally for at least XXXX years. For example, records starting in XXX grade noted academic struggles, including

that he was far below basic in English and Science, and during the 2014-2015 school year, School staff documented 112 behavioral incidents for the student. On May XX, 2015, Student 2's mother made a written request for evaluation to the current Principal. On May XX, 2015, the School developed an assessment plan without the participation of the student's mother and did not offer assessment in all areas of suspected need, such as behavior, social/emotional functioning, attention, speech and language, and adaptive functioning. After the student's mother filed a due process complaint alleging that the School did not properly evaluate the student even though she requested that he be evaluated multiple times, the School evaluated the student for a disability in September and October 2015. On October XX, 2015, the School found the student eligible for special education services.

- Student 15, who was XX during the 2015-2016 school year, and had attended the School from the XXX through XXX grades, was not evaluated. The student's file shows that a majority of her standardized test scores since XXX grade have been consistently "below basic" and "far below basic" level and her grade point averages were below a XXX in XXX grade. The student's grade point averages at regular marking periods in XXX grade were XXXX, XXXX, and XXXX. Numerous school Behavior Tracking Forms during the 2014-2015 school year show that the student avoided work, failed to complete work, complained that work is too difficult, and struggled with adult direction. In addition, the student's file notes that she also had challenges with focusing attention, maintaining appropriate behavior, and reading.

On October 28, 2015, February 23, 2016 and May 12, 2016, the County Office of Education Director provided the current Principal with "Special Education 101" training.

*b. Implementation of Students' IEPs and Development of 504 Plans*

*IEP Implementation*

According to the District, during the 2013-2014 school year, there were 12 students at the School with IEPs: XXXX XXXXXX XXXXXXXX XXXXXXXX, XXXX XXXXXX XXXXXXXXXXXXXXXX XXXXXXXX, XXX XXXXXX XXXXXXXX, XXX XXXXXXXXXXXX XXXXXXXX, XXX XXX XXXXX XXXXXXXX. OCR reviewed the files of each of the students, except one, for evidence of IEP implementation.<sup>10</sup> Where OCR was able to make contact with the student's parent/guardian, OCR also interviewed the parent/guardian regarding IEP implementation and their involvement in the IEP progress. In addition, OCR conducted interviews with the staff and former Principal to address whether the School properly implemented student IEPs during the 2011-2012 through 2013-2014 school years.<sup>11</sup> OCR's investigation revealed the following:

- there was little evidence of implementations of student IEPs in the records reviewed by OCR;

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<sup>10</sup> OCR did not review the file for Student 27 because this student file was not available when OCR went onsite to the District to conduct the file review and Student 27 is not on the District's list of students with IEPs for the 2014-2015 and 2015-2016 school year.

<sup>11</sup> OCR also notes that there was evidence that the District also failed to properly evaluate students and implement IEPs in the 2010-2011 school year. According to a staff member, during this year, the former Principal failed to provide Student 6 and Student 36 with the correct hours of Special Education services required by the students' IEPs. The staff member also stated that in September 2010, a teacher told her that she recommended speech services for disabled Student 37 but this recommendation was removed from the IEP minutes. According to the staff member, the former Principal did not want to provide these services to the student because there were other students waiting for speech services.

- parent complaints about lack of IEP implementation and services provided to students with disabilities were common;
- for the first half of the 2013-2014 school year, the School did not have a speech pathologist and therefore, none of the students whose IEPs required speech services received speech services; according to the Principal, the School provided make-up speech services for these students by giving these students 30 minute sessions twice a week instead of once a week, but OCR was not provided with any evidence – documentary or otherwise – to confirm that this occurred;
- a teacher reported to OCR that she was concerned that teachers were not properly implementing accommodations and modifications noted in the IEPs; and
- a staff member also stated to OCR that IEPs were not being implemented and that students were not receiving the required services.

OCR found that the School frequently did not provide Native American students with services that were required by students' IEPs. For example, Student 1, a XXX grader, had an IEP in place during the 2013-2014 school year that required weekly speech services. According to the student's parent, the School informed her that Student 1 needed speech therapy, but never provided these services to the student. The parents of Student 5 told OCR the student had an IEP in place for speech services and improving reading comprehension starting in February 2013.<sup>12</sup> Student 5's mother stated that the student received speech services twice a month while at the School instead of the twice a week service required under his IEP. XXXXXXXX XXX XXXXXXXX XXXXXXXX XXXX XXX XXXXXX XXX XXXXXXXX XX X XXX XXXXXXXX, XXXXX XXX XXXXXXXX XXX XXXXXXXX XXXXXXXX XXXXXXXX XXXXX X XXXX, XXX XXX XXX XXXX XXXXXXXXXXXXX XXXXXXXXXXXXX.

For the 2012-2013 school year, witnesses told OCR that Student 35, a XXX grade student who had an IEP, did not receive adequate services from the School. A staff member told OCR that Student 35 was getting kicked out of her class regularly because she was low on her reading skills. The staff member stated he questioned whether the teacher was following the student's IEP, including modifying Student 35's classwork, and raised the issue with the former Principal. According to the staff member, the former Principal responded that Student 35 had the same number of problems as the non-disabled students, since all of the students in the class tested low in reading. Student 35's mother stated she attended an IEP meeting and complained that Student 35 was lacking reading skills because she was getting kicked out of class during reading time. After this complaint, the teacher did not send Student 35 home during reading, and Student 35's skills started to improve due to class participation.

According to the District, during the beginning of the 2015-2016 school year, there were 15 students at the School with IEPs: XX XXXXXXXX XXXXXXXX XXXXXXXX, X XXXXX XXXXXXXX, XXX X XXXXXXXX XXXXXXXX. The IEPs reviewed by OCR during this period did not include information about service implementation. The Complainants asserted to OCR that the District continued to not implement IEPs and Section 504 plans for Native American students with disabilities during the 2014-2015 and 2015-2016 school years.

#### *Section 504 Plan Development*

OCR found that no students at the School had a Section 504 plan in place and the School did not refer any students for Section 504 evaluations during the 2011-2012 through 2013-2014 school years. Staff

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<sup>12</sup> OCR notes that this student was not included on the list of students with IEPs provided by the School.

interviewed by OCR, including the former Principal and several teachers, consistently stated that they did not know of any students who had a Section 504 plan or who had been evaluated for one. The former Principal stated that no students were identified by the School for a Section 504 plan during 2011-2012 through 2013-2014 school years. One teacher who is in charge of students with disabilities stated that she had not developed any Section 504 plans since she started working at the School in XXXXXX 2012. A staff member stated that during the course of his work, no one from the School ever brought up a Section 504 plan and he had never heard of such plan. No Board Members had heard of providing special education or related services under Section 504 or were familiar with Section 504 Plans. The majority of classroom teachers interviewed in spring 2014 stated that they had never received any formal training regarding Section 504 or special education policies and procedures.

The District reported to OCR that the School's XXX Teacher attended a September XX, 2015 training provided by the County Office of Education related to Section 504 plans. During the 2014-2015 through the first semester of the 2015-2016 school years, the School developed one Section 504 plan for a XXXXX XXXXXXXX with a disability, Student 43. The School developed no Section 504 plans for Native American students during this time period.

c. Evaluation Before Significant Changes in Placement

OCR did not find any evidence in the student files reviewed that showed that the School conducted a manifestation determination evaluation for any student other than Student 3 before suspending a student for more than 10 days. A teacher witness confirmed that she had conducted only the one manifestation determination meeting for Student 3, since she started working for the School in XXXXXX 2012. Based on the discipline data and student files reviewed by OCR, at least eight other students with disabilities or suspected disabilities -- Student 1, Student 2, Student 6, Student 19, Student 24, Student 26, Student 35, and Student 39 -- had been removed from class for disciplinary reasons on numerous occasions but had not been evaluated during the 2012-2013 and 2013-2014 school years.

The parent of Student 35 also told OCR that the student's teacher sent her to the office on a daily basis for a three-month period when she XXX XXX XXXX XX XXXX XX XXXXX. Student 35's parent stated that Student 35 was placed in the "hole", where students would do class work unsupervised with no adult in the room; she was required to stay in the room until she finished her work or until the parent got her and took her home. The parent stated that Student 35 was also sent home approximately 12 times during the 2013-2014 school year.<sup>13</sup> Witnesses described students with disabilities who were regularly sent to the "hole"; OCR did not find any evidence that the School tracked the number of days that such students were sent to the "hole" to ensure that students with disabilities were not being subjected to a significant change in placement.

The District stated to OCR that no manifestation determination meetings were conducted during the 2014-2015 school year through the first semester of the 2015-2016 school year. District discipline documents show that during the 2014-2015 school year, the School suspended Student 2 on eleven separate occasions. As described above, the student was found eligible for special education in October, 2015, after his mother filed a due process complaint. Even though the School was on notice that the student may have a disability (see prior section), the School proceeded with suspending the student

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<sup>13</sup> X---paragraph redacted---X.

more than 10 times without attempting to evaluate the student for a disability or conducting a manifestation determination hearing.

During the 2014-2015 school year, the School suspended three other Native American students with disabilities or who are suspected of having a disability multiple times. Student 1, a Native American student with a disability, was suspended at least 7 times during the 2014-2015 school year. Student 24, who have not been evaluated for a disability by the School, even though the School had notice that they may have disabilities, had been suspended 10 times, during the 2014-2015 school year. As of the beginning of the 2015-2016 school year, the School had already suspended Student 31 and Student 3, both Native American students with disabilities, multiple times. Student 24, a Native American student who the School failed to evaluate despite having information that he may have a disability, had already received one in school and one out of school suspension.

*d. Procedural Safeguards*

District records during the 2011-2012 through 2013-2014 school years did not reflect that parents of Native American students with disabilities were always provided with the required notice so that they could participate in student IEP meetings and with respect to changes made to the IEPs. Additionally, a staff member provided OCR with several examples of students who had an IEP but the School failed to provide the student's parent with notice of the IEP meeting or changes made. For example, the School tried to send a student with an IEP and behavioral plan to a community school and when the staff member asked why the student's behavioral plan was not being implemented, the Principal responded by saying it did not matter because the Principal and two teachers had created a new IEP without notifying the parent. During the 2013-2014 through 2015-2016 school years, the District's Section 504 Notice did not include the name, title or contact information for the Section 504 Coordinator.

*e. Isolation of Students with Disabilities*

The Complainants alleged that Native American students with disabilities were isolated more than other students by being placed in the "hole," without proper instruction or supervision by teachers and without consideration of the student's disability status. As discussed previously, staff, student and parents interviews confirmed that Native American students, including students with disabilities were frequently sent to the front office, and sat in a room the Complainants described as the "hole." OCR could not complete its investigation with regard to the issue of whether Native American students with disabilities were sent to the "hole" with greater frequency than non-disabled students during the 2010-2011 through 2013-2014 school years, because of the District's failure to complete and maintain proper records regarding students referred out of class.

Analysis

*a. Evaluation of Students Suspected of having a Disability*

OCR's investigation revealed that for the 2010-2011 through 2013-2014 school years, the District failed to conduct timely evaluations of Native American students who needed or were believed to need special education and related aids and services because of disability. Staff confirmed a "backlog" in evaluating students, provided multiple examples of students for whom a request had been made but no evaluation had been conducted, and stated that the District waited at least one year, or longer in some cases, to

evaluate a student for a disability, even where a referral or request had been made by a teacher or parent. One witness stated that the District would not evaluate a student for a disability until the student was two years behind their grade level, regardless of individual circumstances, need, or request. A witness told OCR it was “a waste of time” to assess students for a disability because she was only allowed to provide an allotted amount of services and the former Principal had not given her the “green light” to perform evaluations of students who were on the list to be evaluated.

OCR’s review of Native American student files during the 2011-2012 through the first semester of 2015-2016 school years confirmed that the District routinely failed to evaluate Native American students for a disability even when there was information in their student files that indicated that they had a disability or that they were identified as having a disability by prior school districts. OCR found evidence of at least 14 Native American students who were not timely evaluated, evaluated in all areas of suspected disability, or provided with an IEP by the School despite students records that showed that they may have an identified disability (from either doctor’s records or as evidenced by IEPs from prior schools) or should be evaluated to determine if they had a disability (based on teacher’s reports regarding student needs, excessive removals, requests for evaluation, and other data).

Accordingly, OCR found that, during the 2010-2011 through 2013-2014 school years, the District violated the Title II and Section 504 and their implementing regulations to provide a timely evaluation of students or provide special education and related aids and services to students who need or are believed to need special education and related aids and services because of disability. For the 2014-2015 school year through the first semester of the 2015-2016 school year, OCR had ongoing compliance concerns based on the student files reviewed which showed at least five students who may have a disability but who were not evaluated by the District. The District expressed an interest in resolving this allegation prior to the completion of OCR’s investigation for these years, and OCR agreed it was appropriate to do so.

*b. Implementation of Student’s IEPs and Development and Implementation of Section 504 Plans*

In its file review and through interviews with staff and parents/guardians, OCR found little evidence of implementation of student IEPs during the 2011-2013 through 2013-2014 school years. Parents commonly complained about the lack of IEP implementation and services provided to disabled students. For the first half of the 2013-2014 school year, the School did not have a speech pathologist and students with IEPs were not receiving required speech services during this period. A staff member witness confirmed that students with IEPs were not receiving the required services, and a teacher witness was concerned that teachers were not properly implementing accommodations and modifications noted in the IEPs. Prior to 2015, OCR did not find any evidence that the School developed and implemented any behavior intervention plans for students. No students at the School had a Section 504 plan in place or were referred for Section 504 evaluations prior to 2015; District staff routinely stated that they were not familiar with and/or had not received training about Section 504 and its requirements.

The Complainants asserted to OCR that the School has continued to fail to implement the IEPs of Native American students with disabilities. A review of the 2015-2016 IEPs did not show whether they were being implemented. OCR obtained evidence that one parent, however, was not involved in the development of an assessment plan for their child.

Accordingly, OCR found that, during the 2011-2012 through 2013-2014 school years, the District failed to implement the IEPs of Native American students at the School, thereby failing to provide them with required special education services, and failed to evaluate any students for Section 504 services, regardless of individual need or suspected disability, in violation of Title II, Section 504 and their implementing regulations. For the 2014-2015 through 2015-2016 school years, the District expressed an interest in resolving the allegation prior to the completion of its investigation, and OCR found it was appropriate to do so. To complete the investigation, OCR would need to conduct further interviews of staff and parents and review additional documentation, such as service logs.

c. Evaluations Before Significant Change in Placement

OCR found that during the 2011-2012 through 2013-2014, the School did not conduct any evaluations or manifestation determination meetings before suspending or disciplining students with disabilities or suspected disabilities for more than 10 cumulative days, except for one instance in April 2013. Based on the discipline data reviewed by OCR, at least eight students with disabilities or suspected disabilities had been disciplined numerous times during the 2012-2013 and 2013-2014 school years but had not been evaluated. The parent of one of the eight students informed OCR of additional days not documented by the School when Student 35 was removed from class for XXXXX XXXXXXXXXX XX XXXX and was placed in a room called the "hole" by students, staff, and parents, where students were unsupervised, and when she was sent home during the 2013-2014 school year. Other witnesses confirmed that students with disabilities were regularly sent to the "hole" but these removals were not documented by the School. Accordingly, OCR found the District violated Title II and Section 504 and their implementing regulations during the 2011-2012 through 2013-2014 school years by failing to evaluate students and conduct manifestation determination meetings before subjecting them to a significant change in placement.

During the 2014-2015 school year through the first semester of the 2015-2016 school year, OCR found that Student 2 was suspended more than 11 times but the District did not conduct any manifestation determinations or an evaluation prior to disciplining him until October XX, 2015, even though the District had reason to suspect the student had a disability for many years based on his behavior and low academic performance. Discipline data suggests that at least three other students with disabilities may have been subjected to a significant change in placement, but the District told OCR that no manifestation determination meetings or related evaluations occurred during the 2014-2015 and the first semester of the 2015-2016 school years. This raised ongoing concerns regarding the District's compliance with the requirement to evaluate a student prior to any significant change in placement. Prior to completing its investigation and reaching a compliance determination for 2014-2015 and 2015-2016 school years, the District expressed an interest in entering into a voluntary resolution, and OCR agreed it was appropriate to do so. In order to complete its investigation, OCR would need to conduct additional interviews and review additional documentation.

d. and e. Procedural Safeguards and Isolation of Students with Disabilities

OCR's investigation revealed that District records did not reflect that parents of Native American students with disabilities were always provided with the required notice so that they could participate in student IEP meetings and with respect to changes made to the IEPs. Given the District's poor record-keeping, OCR found credible the testimony of the staff member witness who asserted that the School did not regularly send letters to parents notifying them of students' IEP meetings and, at the former Principal's direction, held some meetings and made revisions to IEPs without parents being present. Accordingly, OCR found that the School violated Section 504 and Title II and their implementing

regulations during the 2011-2012 through 2013-2014 school years by failing to provide parents of disabled students with proper notice regarding IEP meetings and changes made to IEPs.

Under the applicable regulations described above, a student with a disability must be educated with non-disabled students to the maximum extent appropriate to the needs of the student with a disability. OCR's investigation found that Native American students, including students with disabilities were sent to a small room referred to as the "hole" without proper instruction, supervision, or consideration of the student's disability status. However, OCR was not able to complete its investigation regarding whether Native American students with disabilities were sent to the "hole" with greater frequency than students without disabilities during the 2010-2011 through 2013-2014 school years due to the District's failure to maintain proper records.

Prior to OCR completing its investigation regarding both issues for the 2014-2015 school year and the beginning of the 2015-2016 school year, the District expressed an interest in entering into a voluntary resolution agreement, and OCR agreed it was appropriate to do so. In order to complete its investigation, OCR would need to conduct an additional on-site visit to interview staff, students, and parents and obtain additional documentation.

**Issue 4: Whether the District refused to make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability when it did not accommodate students with disabilities in its graduation ceremony and with respect to sports eligibility.**

#### Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.37(a), require school districts to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity to participate. In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications to policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Whether or not a particular modification or service would fundamentally alter the program or constitute an undue burden is determined on a case-by-case basis.

The Section 504 regulations, at 34 C.F.R. §104.34(b), state that in providing or arranging nonacademic and extracurricular services and activities school districts must ensure that students with disabilities participate with nondisabled students to the maximum extent appropriate to the needs of the students with disabilities. Implementation of an IEP developed in accordance with the IDEA is one means of meeting these requirements.

#### Facts

OCR examined whether during the 2012-2013 through 2015-2016 school years, the School did not accommodate students with disabilities in its graduation policy. The District's graduation policy states that a student cannot participate in the graduation ceremony if the student receives an "F" in a course; there is no provision for modifications of this policy based on disability. According to Teacher 4, four students were not allowed to participate in the graduation ceremony during the 2012-2013 school year because of failing grades. OCR did not receive any reports or information that any student with a

disability was denied modifications to the District's graduation policy or otherwise denied the ability to participate in the graduation ceremony during the 2013-2014 through 2015-2016 school years.

With respect to sports eligibility, the Complainants identified one instance in September 2015, where the current Principal suspended Student 2 from the School's XXXXXXXXXX team for a week based on the number of disciplinary referrals he had received, and made his future participation contingent on not receiving additional referrals. At the time the student was suspended, he had a special education evaluation pending. The Complainants stated the current Principal did not consider whether Student 2's behavior might be a manifestation of his disability, and did not consider whether the sports eligibility policy applied to the student may need to be modified to avoid discriminating against the student on the basis of disability.

The District provided Student 2's parent, with a one-page document which lists behavior and academic requirements for sports eligibility. The document does not cite to any board policy, but states that after two major referrals in a two week period, a student is not allowed to play in games or tournaments for five days. A student is not eligible to attend games for five days, if a student receives "any Fs in the teacher's grade book", and is ineligible for two weeks if he/she has less than a "C" average in the previous trimester.

OCR also reviewed the sports eligibility requirements posted on the District's website.<sup>14</sup> The District's BP 5123.400(a), "Extra-Curricular and Co-Curricular Activities" (Extracurricular Eligibility Policy) states that the Board requires students in grades 4 through 8 to earn a minimum 2.0 or "C" grade point average on a 4.0 scale" to participate in extra/co-curricular activities. Students with any "F" grades must maintain minimum progress towards graduation in order to meet eligibility requirements, and the Superintendent or designee may revoke a student's eligibility, when a student's poor citizenship is "serious enough to warrant loss of this privilege." Neither the Extracurricular Eligibility Policy nor the one-page document addresses how accommodations for students with disabilities will be provided.

### Analysis

OCR's investigation to date showed that the District had a graduation policy, which states that a student cannot participate in the graduation ceremony if the student received an "F" in a course and that some students were not permitted to participate in the ceremony in the 2012-2013 school year. In September 2015, the current Principal suspended Student 2 from the School's XXXXXXXXXX team for a week based on the number of disciplinary referrals the student had received, and made his future participation contingent on not receiving additional referrals. The evidence gathered to date raised a compliance concern because even though Student 2 had an evaluation for special education pending, OCR did not receive any evidence that the School considered whether Student 2's behavior might be a manifestation of his disability or otherwise assessed whether an accommodation might be needed to school policy based on the Student 2's disability. Neither the Extracurricular Eligibility Policy nor the one-page document provided to Student 2 about the sports eligibility requirements address how accommodations or modifications for students with disabilities will be provided. Prior to OCR completing its investigation and making a compliance determination as to whether the District had considered any modifications to its graduation and sports eligibility policies on a case by case basis to prevent discrimination against students with

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<sup>14</sup> [http://www.loletaschool.com/board\\_policy\\_on\\_eligibility.pdf](http://www.loletaschool.com/board_policy_on_eligibility.pdf)

disabilities, the District expressed an interest in entering into a voluntary resolution agreement, and OCR agreed it was appropriate to do so.

### Conclusion

The District has entered into the enclosed Agreement with OCR, which is intended to address the compliance concerns and noncompliance findings identified herein. Pursuant to the Agreement, to address the Title VI allegations, the District will, among other things: establish a Stakeholder Equity Committee; annually administer a climate survey; develop age appropriate and culturally relevant training for students to promote a positive and nondiscriminatory school environment; review and revise its discipline policies; revise its discipline data system to ensure data is analyzed and reported at the site level and to the community; assess student support services and provide appropriate early interventions for at-risk students; provide staff training; hold informational sessions for parents/guardians and community organizations about the changes to its discipline system and how to file discipline related complaints; establish a procedure for an independent consultant to address complaints of harassment made against any Principal/Superintendent; and receive training regarding the District's obligation to respond to complaints of racial harassment.

To address the Section 504 and Title II allegations, the District will, among other things: develop a record keeping system for students who are referred for evaluation and/or have a IEP or Section 504 Plan; establish a system for ensuring evaluations are conducted in a timely and appropriate manner; assess the need for compensatory services for students who did not receive a timely evaluation or services; issue written guidance and conduct staff training; and revise its policies and procedures.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainants concurrently. When fully implemented, the Agreement is intended to address all of the compliance concerns and violations identified in this investigation. OCR will monitor the implementation of Agreement until the District is in compliance with the statutes and regulations, which were at issue in the case. OCR notes that the District has already begun implementing some provisions of the Agreement.

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

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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

OCR would like to thank the District for its cooperation in resolving this case. OCR will continue to work with the District to complete the steps outlined in the agreement. If you have any questions, please contact me at (415) 486-5747.

Sincerely,

/s/

Laura Faer  
Regional Director

Enclosure