



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

November 4, 2015

Dr. Cathy Washer
Superintendent
Lodi Unified School District
1305 East Vine Street
Lodi, California 95240-3148

(In reply, please refer to case no. 09-15-1117.)

Dear Superintendent Washer:

The U.S. Department of Education, Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint against the Lodi Unified School District. The Complainant alleged the District discriminated against her and the Student¹ on the basis of disability. The specific allegations OCR investigated were:

1. Whether the District failed to provide the Student with a free, appropriate public education (FAPE) by:
 - a. failing to implement his Individualized Education Plan (IEP);
 - b. failing to provide special education services the Student needed because the District does not provide those services at the Student's particular school of attendance; and
 - c. disciplining the Student without following adequate evaluation and placement procedures.
2. Whether conduct of the Student's classroom teacher and para-educator resulted in a disability-based hostile environment to which the District failed to appropriately respond; and
3. Whether the District retaliated against the Complainant after she advocated on the Student's behalf by denying her a right to participate in the Student's classroom.

OCR opened this complaint for investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 as amended and its implementing regulations over complaints alleging

¹ OCR informed the District of the identities of the Complainant and Student in our letter notifying it of the complaint. We are withholding them here to protect their privacy.

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

discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds and is subject to the requirements of Section 504, Title II, and their respective regulations.

To investigate this complaint, OCR conducted numerous interviews and reviewed extensive documentation and other information provided by the Complainant and the District. OCR also reviewed an audio recording of a September 2014 IEP meeting; references in this letter to comments made at the IEP meeting are based on that audio recording. After careful review of the information gathered in the investigation, OCR concluded that there was insufficient evidence to support a finding of noncompliance regarding issue 1(c). With respect to the remaining issues, OCR concluded that the District is in violation of Section 504 and Title II and their implementing regulations. The facts gathered, the applicable legal standards, and the reasons for our determinations are summarized below.

Background

- At the time of the events giving rise to this complaint, the Student was a XXXXXX grader at a District elementary school providing only gifted and talented education (GATE School). The Student is on the autism spectrum, and has had an IEP since entering the District. The Student was the only student with a disability in his class. The Student's IEP and Behavior Intervention Plan (BIP) note that the Student's disability related behaviors include: asking off-topic questions, requesting repetition of complex instructions and clarification of expectations, perseverating on class topics, and making noises. As a result, the IEP and BIP note that the Student needs monitoring to stay on task, regulate behavior, understand the impact of his behavior on others, and follow rules.
- The District's gifted and talented education (GATE) program options for elementary and middle school students include: 1) self-contained classrooms at certain elementary schools sites; 2) GATE clusters for students at all elementary schools; and 3) advanced placement classes at all middle schools. In addition, the GATE School serves students in grades 4-8, and is comprised only of self-contained GATE classrooms.
- Students are eligible for the GATE program if they meet certain academic and other assessment criteria. Students may attend the GATE School if, first, they are GATE-identified, and second, they are chosen through a lottery in which all identified students are entered. The Student was eligible to attend the GATE School through this method.
- For his XXXXX grade year, the Student was assigned to a self-contained GATE classroom at a neighborhood elementary school. Witnesses stated that the Student's behavior made the first two months of his XXXXX grade year very difficult for the Student, his teacher, and the class. However, as the year progressed, the Student's behavior became more manageable and he adjusted to his teacher and the routine of the classroom with implementation of his IEP and BIP.

- For his XXXXXX grade year, the Student attended the GATE School from July 25 – October 13, 2014 (approximately nine weeks), at which time his parents decided to move him to a self-contained GATE classroom at a different school site.
- According to the School's School Accountability Report Card, of 293 students enrolled in the GATE School for the 2013-14 school year, 2.0% were students with disabilities. Comparatively, 8.9% of students attending the Student's previous neighborhood school were students with disabilities, and 11.3% of students attending the Student's current neighborhood school were students with disabilities.

Legal Standards for Allegation 1(a-c)

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

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.

In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications in 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. While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.

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 104.35(a) of the 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. Section 104.35(c) of the regulations requires that 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.

Allegation 1(a): Whether the District failed to provide the Student with a FAPE by failing to implement his IEP.

- In April 2014, while the Student was in the XXXXX grade, his IEP team convened and developed an IEP and updated BIP for the next school year at the GATE School. The School's Autism Coach later also developed a document entitled "Strategies and Supports"; this was described as a guide or supplement to the BIP, and included additional instructions for supporting the Student.
- Since at least the XXXXX grade, the Student's IEP included a para-educator to work with him. At the start of the XXXXXX grade, the District hired a para-educator (Para-educator One) to work with the Student. Para-educator One was his para-educator from the start of the school year for approximately six weeks, when, at the Complainant's request, a para-educator who had worked with the Student the previous year (Para-educator Two) was reassigned to work with him. Para-educator Two worked with the Student for the

remaining three weeks he attended the School and continued to work with him at the school he attended afterward.

- Responsibility for implementing the Student’s IEP and BIP in XXXXXX grade rested primarily with his teacher (Teacher) and the para-educators. The IEP specifically provided that the para-educator facilitate implementation of the BIP.
- Both para-educators told OCR that they did not review the IEP or BIP while the Student attended the GATE School, but did see the Strategies and Supports document. Several other witnesses told OCR that para-educators are not allowed to view IEPs or BIPs.
- The following includes a description of the Student’s IEP services and BIP interventions in effect while he attended the GATE School, as well as evidence from IEP meetings and witnesses about how the services and interventions were and were not implemented:
 - Transition Warnings: The IEP required verbal and visual transition warnings to reduce anxiety. Witnesses told OCR that early in the school year, the Student did not receive warnings because Para-educator One did not know the Student needed them. Para-educator Two, on the other hand, said the Teacher would provide transition warnings, but not necessarily in a manner that would reduce anxiety. For example, the Teacher would tell the Student, “finish that worksheet because we are going to do art, and if you don’t finish it, you can’t do art.”
 - Preferential Seating: The IEP required preferential seating. August 2014 IEP meeting notes stated the Student had been sitting in a desk at the back of the room in part to limit the distractions to other students. In addition, Para-educator One told OCR that the Student’s desk was sometimes turned away from other students to give him more privacy, while Para-educator Two said the Student would sit away from others if he was off task. At the September 2014 IEP meeting, the Teacher said the Student sat apart from his group because parents complained about the Student distracting his peers. The Teacher told OCR that she would sometimes remove the Student, so he was seated about four feet away from others, but if his behavior improved, he could move back. However, because his behavior was frequently “out of control” this did not often happen.
 - Sensory Breaks: The IEP required “sensory breaks.” The Strategies and Supports document specified to provide the Student “with a concrete task or break card if he needs to step outside...to calm himself.” Witnesses told OCR the Student was to present a break card to the Teacher as needed, and that the breaks should last no more than five minutes, up to three times a day. The BIP specified that a time limit “should be set so he is not missing too much” class. At the September 2014 IEP meeting, the Teacher said that she had never seen the break cards before. Para-educator One told OCR she had never seen the break cards while working with the Student, even though the Teacher claimed that Para-educator One used

the cards after the September IEP meeting. According to Para-educator One, despite not having the cards, the Student took frequent breaks, typically lasting between five and 15 minutes. As a result of the breaks, she said, the Student sometimes missed the instructions for activities, making his transitions difficult and increasing his frustration. In an August 2014 email, the Teacher wrote that the Student was “in and out of the classroom due to behavior problems and he did no work at all. He is really far behind and never attends in class.” Para-educator One told OCR that after the first couple of weeks of school, the Teacher would sometimes respond to the Student’s undesirable conduct, including stimming behaviors, by instructing Para-educator One to “take him outside.”

- Ignore Self-Stimulatory (“Stimming”) Behaviors: The BIP stated that if the Student engaged in stimming behaviors, staff should “remind [him] continuously of expected behaviors, staff should not engage with [the Student].” The Strategies and Supports document read, “ignore behaviors that are not harmful or significantly disrupting...expect some stimming behaviors typical of autism...this may be humming, singing or talking to self, excessive erasures, etc.” As described by Para-educator One, the Student distracted other students with noises like humming and making “baby sounds.” She told OCR that he would “smile about it,” which suggested to her that he was doing it on purpose. The Teacher told OCR that she ignored stimming behaviors, but this statement is inconsistent with statements that the Student’s desk was moved away from his peers in part because his stimming behaviors were distracting, and that he was taken outside in response to such behaviors.
- Social Opportunities: The IEP required the para-educator to “facilitate social opportunities” for the Student a few times a week during recess. Para-educator One told OCR she sometimes prompted the Student to play with other students. However, she said, this was “just something she did” and was not part of her official duties. Para-educator Two told OCR that she was instructed to encourage the Student to engage with other students.
- Social Narrative: The BIP provided for the Student to have a written social narrative that reviewed classroom rules and expectations. If the Student was “attempting to gain access to clear rules and expectations,” he was to be given his social narrative. At the September 2014 IEP meeting, IEP team members acknowledged no social narratives had been developed. The Speech Therapist explained to OCR that, she could not complete the social narratives without the IEP team identifying positive replacement behaviors. Para-educator Two told OCR she received the narratives only after the Student left the GATE School to attend his current school.
- Rewards System: The BIP provided for the Student to self-monitor using a chart, to be sent home daily for the parents’ review. The chart outlined the Student’s

expected behaviors; if he exhibited them for a specified period, he was to give himself a favorable mark, eventually resulting in a reward. According to the Strategies and Supports document, the reward system was to be followed daily, and the Student should receive a mark for every five minutes he exhibited expected behavior. August 2014 IEP meeting notes showed the Student's behavior could be rewarded by a reduction in homework. The notes also stated that the Teacher "d[id] not see taking away [homework] as motivating....Reward chart is not working—no buy in. At [School] reward is intrinsic." According to Para-educator One, the Teacher said she did not like the reward system because it was not appropriate for a GATE program. The Teacher also shared this opinion with OCR and said the Student was consistently looking for opportunities to disengage, and regularly displayed work avoidance. The August 2014 IEP meeting notes reflected that the Teacher "shared that reinforcement system appears very distracting to" the Student. The Teacher also expressed that the system was distracting in an August 5th email to the Autism Coach. Witnesses told OCR that, because the system was distracting, it was not consistently used, and that Para-educator One often kept track of the Student's behavior instead of the Student. In the September 2014 meeting, the Autism Coach stated that she wanted to keep the reward system in place; she stated she did not think it had been "met yet" and that it could be "effective once implemented effectively, diligently and consistently." A September 15 email from the Autism Coach indicates that Para-educator Two would add "the reward chart...to [the Student's] planner... to be taken home that night." It is unclear whether the chart was provided to the parents prior to this date.

- Reduced Assignments: The IEP provided for "reduced class work and homework as needed." As noted above, work could also be reduced through the Student's reward system. The IEP specified that in reducing work, there should be "allowance given for the concept to be grasped as primary." The Strategies and Supports document read, "any work reduced for his reward system needs to be work that the teacher decides he already knows." The Teacher's understanding, as expressed to OCR, was that only the Student's homework was to be reduced—not his class work. Nonetheless, she said, the Student sometimes did not finish his tests and classwork, and she did not penalize him. When asked how she ensured the reductions reflected only work the Student had mastered, as required by the IEP, the Teacher said she would not assign math problems for homework that the class as a whole had not mastered, and that some non-math work, such as reading and related assignments, could not be reduced. She said she relied on the Student's parents to modify his homework, because they "knew him best." In the September IEP meeting, during a discussion about when the parents were reducing the Student's homework, however, the Teacher said that she was concerned with how they defined the Student's "mastery" of a concept.

- The BIP stated the circumstances that typically lead to the behaviors the BIP was intended to address, including: transitions from home, the teacher giving large class group instruction, the class transitioning when the Student has not finished his work, and not receiving immediate teacher feedback. Para-educator One told OCR she had no understanding that these circumstances would lead to the Student's behavior.
- At the September 2014 IEP meeting, the Autism Coach stated that she had observed the Student in the classroom and planned to collect data on him. Instead, however, she said she was often stepping in and giving instruction to Para-educator One about how to work with the Student, and modeling interactions with him.
- Around the start of the school year, Para-educator One began keeping a journal of the Student's behavior in class. Entries in the journal suggest Para-educator One did not know how to implement the Student's BIP. For example, she wrote, "Just how do I use positive reinforcement with this behavior?" Also, "after being given instructions on assignments, [he] will often ask me 'what am I supposed to do?'" and "I constantly have to repeat directions even after he has read them." The Student's IEP states that multi-part verbal instructions must be repeated for his comprehension, and that the Student requires clarification about expectations in activities to participate. Para-educator One also told OCR that, at the Teacher's instruction, she was recording the Student's conduct in the journal so frequently that it became difficult for her to fulfill her other duties to the Student.
- The IEP and BIP included several other provisions. OCR's investigation did not reveal concrete evidence that these provisions were not being followed.

The evidence established that many of the supports carefully designed by the Student's IEP team, based on what had been successful for him in the past, were not consistently implemented. OCR based its determination of non-compliance on the requirements in the Student's IEP and BIP but included relevant instructions from the Strategies and Supports document herein, where the instructions provided additional details with respect to implementation that are not inconsistent with these documents.

Transition Warnings

Specifically, the Student was provided transition warnings required by the IEP for only a brief period that began at some point after the school year started, when Para-educator One was eventually told to give them. The warnings given by the Teacher, as described by Para-educator Two, were not appropriate to ease the Student's anxiety regarding transitions.

Preferential Seating

The decision of the Teacher to remove the Student from his peers, at times in a way that isolated him from the class as a whole, was inconsistent with the requirement for preferential seating in the IEP. The requirement for preferential seating was to support the Student's learning but the evidence showed that the Student was isolated by as much as four to five feet and faced away

from peers and the rest of the class for the purpose of preventing his stimming and other behaviors from bothering the Teacher and other students, not for the purpose of helping the Student to access his education. As discussed further below, OCR found that this practice of isolating the Student contributed to the hostile environment in the classroom.

Sensory Breaks

Pursuant to the BIP, classroom breaks were intended to be brief and infrequent, for the purpose of refocusing the Student. In actuality, the Student was removed from the classroom frequently by the Teacher and para-educator, for periods of up to 15 minutes. On a number of occasions, the Teacher and para-educator removed the Student because of self-stimulatory behavior, which is a disability-related behavior that the educators should have accommodated. In this regard, the Strategies and Supports document generally instructed the Teacher and para-educators to ignore these behaviors. As recognized by the para-educator, the time out of the classroom increased rather than reduced the Student's frustration, as he missed instructions. Break cards specified in the Strategies and Supports document as accommodations to help the Student self-identify the need for breaks were never used.

Social Opportunities & Narrative

Both para-educators said they encouraged the Student to socialize with peers, but did not know this was specifically required by his IEP. Additionally, although required, the Student did not have a social narrative available throughout his time at the School.

Rewards System

Because the Teacher found the reward system distracting and did not agree with reducing the Student's homework, she did not implement it. The Teacher appropriately raised her concerns about the system with the IEP team; however, absent modification of the system by the team, it was the Teacher's obligation to continue to implement it. The evidence also suggested that neither the Teacher nor Para-educator One reliably provided the parents communication about the reward system, as required by the BIP.

Reduced Assignments

The IEP and supporting documents made clear that the Student's homework and classwork was to be reduced by the Teacher, based on her determination of what concepts the Student had mastered. Instead, the Student was to complete what classwork he could, with no advance reduction to make the assignment more manageable, and the Teacher deferred to the Student's parents to reduce homework although they were not in a position to know what concepts the Student had mastered. Additionally, if the Teacher believed some assignments could not be reduced, she should have raised this with the IEP team so that the team could decide the best way to address the concern.

In sum, OCR found that the GATE School and, thereby, the District failed to implement Student's IEP and BIP in material respects thereby denying him FAPE. OCR also found that the District did not comply with Section 104.33(b) of Section 504's implementing regulations because the Teacher and para-educators were not trained to provide the services, supports, accommodations

and modifications required by the Student. In addition, the District did not provide the para-educators with copies of the IEP or BIP. And, as a result, they lacked knowledge about the contents of those documents and their responsibilities under them and did not implement many of the requirements.

Allegation 1(b): Whether the District failed to provide the Student with a FAPE by failing to provide special education services the Student needed because the District does not provide those services at the Student's particular school of attendance.

- The IEP in place when the Student was in XXXXX grade required 150 minutes of Specialized Academic Instruction (SAI) provided weekly in the regular classroom by a resource specialist. Two part-time resource specialists assigned to the Student's XXXXX grade school site provided these services to the Student. The Student's XXXXX grade teacher told OCR the resource specialists worked with her daily to support the Student, and their services helped to ensure that she could address the Student's needs and help him progress in his education.
- As mentioned above, in April 2014, the Student's IEP team convened and developed an IEP and updated BIP in anticipation of his attendance at the GATE School. The BIP attached to the Student's XXXXX grade IEP, and to the IEP developed in anticipation of his attendance at the GATE School, stated that a resource specialist was responsible, or partly responsible for establishing, monitoring and reporting on several provisions of the plan. These documents also stated that a school psychologist was partly responsible for one provision of his BIP.
- Several members of the Student's IEP team told OCR that the GATE School does not have onsite resource support, and therefore, students receive resource support only through consultation, in which resource specialists at other school sites advise School educators via phone and email. They stated the District restricted resource services available because the GATE School is a "school of choice." Witnesses said they made this clear to the Complainant at the April 2014 IEP meeting, so she could consider this in deciding whether to place the Student at the GATE School.
- As a result of the District's practice of not providing direct resource support at the GATE School, the April 2014 IEP developed in anticipation of the Student's enrollment at the School required 30 minutes of SAI provided monthly on a consult basis.
- During a September XX, 2014 IEP (September IEP) meeting that occurred approximately seven weeks after the Student was already attending at the GATE School, the IEP team removed references to the resource specialist in the BIP because the GATE School did not have one onsite. The resulting draft BIP replaced previous delegations of responsibility to a resource specialist with: "No RSP Teacher on site at current placement" or "RSP Team from home school."

- Witnesses reported that two resource specialists consulted with the Teacher at the School via phone calls and through email, and that one of them would also attend his IEP meetings. The resource specialists told OCR that they did not provide any direct services to the Student, and did not observe the Student’s classroom or otherwise visit the School.
- Also during the September IEP meeting, the Teacher referenced difficulties resulting from not having resource support for the Student in her classroom. The Teacher told OCR as well that not having onsite resource support for the Student was a hindrance to the Student’s success, and that she did not think the Student could be successful at the School without more support for him, for her, and for the Student’s para-educator. Para-educator Two told OCR that it was difficult not having someone onsite to answer questions and provide guidance, as she had had in the Student’s third grade classroom.
- The IEP developed on December XX, 2014, for the Student upon his return to a neighborhood school, after leaving the GATE School, required 60 minutes of SAI in math provided weekly in the RSP classroom. The BIP developed after the Student left the School again delegated responsibilities to the resource specialist.

OCR found that the District does not provide certain special education services, such as RSP, directly to students who attend the School. While this practice is not memorialized in a written policy, it is commonly understood by staff members, who clearly communicated it to the Student’s parents and acknowledged it to OCR. According to 34 C.F.R. § 104.33, 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. In this case, the District did not base its decision to eliminate direct resource support from the Student’s IEP based on his individual needs. Instead, the evidence showed that the only reason the IEP team changed the services was because of the District’s practice to not provide these services at the GATE School. The District cannot refuse to provide students with disabilities with a FAPE or limit the regular or special education and related aids and services students are entitled to receive without an individualized determination based on the needs of the student with the disability. Witnesses’ explanation for not providing certain services at the School—that it is a “school of choice”—is insufficient to overcome the District’s Section 504 and Title II obligations.

The District’s failure to provide special education services to qualified students at the GATE School without consideration of their individual needs violates Section 504 and Title II.

Allegation 1(c): Whether the District failed to provide the Student with a FAPE by disciplining the Student without following adequate evaluation and placement procedures.

- The Teacher told OCR that students who had completed all of their homework were rewarded with 10 minutes of “preferred activity time” (PAT) on Fridays.

- On September X, 2014, the Student’s father emailed the Teacher, asking her to clarify why the Student had missed out on PAT. The Teacher responded that students “are rewarded for completing all of their classwork and homework [The Student] and 5 other students did not receive PAT time as they had missing work. [The Student] has completed 3 of 8 [reading] assignments and has completed very little classwork. These are not optional assignments, nor is PAT time an educational requirement for which [he] is being restricted. [It is] important to recognize the personal responsibility exhibited by students who complete their work . . . I hope [the Student] will be motivated to complete his work in the future.”
- The Teacher told OCR that the Student usually participated in PAT; however, in a couple of instances, he was too far behind.

Where disciplinary action results in exclusion of a student with disabilities from school for more than ten days, the school must take certain steps to ensure the discipline is not, in essence, punishing the student for having a disability. As noted above, the Student’s IEP was not properly implemented, including provisions about reduced classwork and homework. There was confusion and inconsistency about whether and how work was to be reduced, and how the Student would be credited for work he did or did not complete. This may have unfairly resulted in the Student missing out on the benefit of PAT that other students received as a reward for their work. If so, this was understandably upsetting to the Student and his parents. Denial of PAT, if improper, was a component of the District’s denial of FAPE. It did not, however, constitute a school removal such that the District had to follow evaluation and placement procedures under Section 504 and Title II.

Therefore, because a denial of PAT is not a denial of instruction time but rather is the denial of non-instructional activity time, OCR determined that the District did not violate Section 504 and Title II’s adequate evaluation and placement procedures regulations.

During the course of the investigation, and as mentioned above, OCR learned that the Student was removed from the classroom frequently due to the sensory breaks given to the Student not in accordance with his IEP or BIP. In this regard, an August 2014 email, the Teacher wrote that the Student was “in and out of the classroom due to behavior problems and he did no work at all. He is really far behind and never attends in class.” Because the District has entered into a resolution agreement to address the issue in accordance with the District’s denial of FAPE, OCR did not reach a finding. However, OCR noted that where removals from class add up to more than 10 days, the District is required to provide procedural protections.

Allegation 2: Whether conduct of the Student’s classroom teacher and first para-educator resulted in a disability-based hostile environment to which the District failed to appropriately respond.

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by

public entities. School districts are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

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

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In determining whether a hostile environment based on disability has been created, OCR evaluates whether the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors.

- The Student's Strategies and Supports document read, "ALWAYS BE POSITIVE with your facial expressions, tone, and with rewards/consequences. [The Student] does not do well with name on board, taking away, etc."
- At the September IEP meeting, the Complainant stated that all of the Teacher's feedback on the Student's work was negative, which discouraged him. The Teacher did not refute that her feedback was negative; rather, she responded that all students prefer positive feedback.
- Para-educator One told OCR that she believed the Student did not belong at the GATE School, and that the Teacher had also expressed this opinion to her. She said that, though the relationship between the Student and the Teacher was fine at the start of the school year, the Teacher eventually became very frustrated with the Student. Para-educator One said the Teacher would "vent" her frustrations with the Student, as well as his

parents, to her. However, she said, she did not think the Teacher's feelings came through in her interactions with the Student. Witnesses who visited the Student's classroom, such as the Principal, also told OCR they did not witness the Teacher behaving negatively toward the Student.

- As noted above, Para-educator One said the Teacher would sometimes respond to the Student's conduct by instructing Para-educator One to take the Student outside. Para-educator One said the Teacher would also gesture to her to record conduct of the Student that displeased her in a journal. Para-educator One demonstrated to OCR that the Teacher would do this by making an exaggerated writing gesture in the air. The Teacher gave these instructions and made these gestures in front of the Student and his classmates.
- Para-educator One said she and the Teacher became so frustrated with the Student's reluctance to do work, and the amount of time it took him, that they sometimes adopted the attitude that he could just sit in class, not doing any work.
- In the journal maintained by Para-educator One, she repeatedly used words like "obnoxious," "whining," "annoying," and "rude" to describe the Student. Often this language was used to describe behaviors that were disability-related, such as stimming behaviors; for example, the journal refers in multiple places to the Student making noises, including an indication that the Student "chooses" to make noises.
- The Complainant told OCR the Student was aware that Para-educator One was writing negative things about him in the journal. She thought he could read what Para-educator One was writing. The Student told the Complainant that Para-educator One was "tormenting" him.
- Para-educator One told OCR that she did not think he could read the journal while she was writing in it, because of how she was seated. However, she said, the Student knew she was writing about him because of the Teacher's visible gestures to write down his behavior. Further, Para-educator One said, she sometimes read the contents of the journal aloud to the Student, including the "bad" entries, because she felt he was entitled to know what she was writing. As noted above, Para-educator One told OCR that she was recording the Student's conduct in the journal every few minutes.
- Para-educator One said the Teacher instructed her to maintain the journal. According to the Teacher, she instructed to Para-educator One to keep the log so she could identify patterns in the Student's understanding. She noted that the Resource Specialist had instructed her in an email reviewed by OCR to "keep a log of observations and correspondence between home and school, especially homework modifications by parent." The Resource Specialist told OCR that she suggested this to help the Teacher keep track of assignment modification for the purpose of figuring out how to grade the

Student. The journal, however, did not include information about homework modifications, or the Student's understanding of content.

- According to the Principal, maintenance of the journal was required by the Student's IEP. The Student's IEP at no time actually mentioned a journal or log, however.
- The Teacher said she reviewed the journal daily and, although she talked to Para-educator One about the tone of her entries, she wasn't really concerned because the journal was to be shared only between the two of them.
- The Principal told OCR that, after the Complainant made her aware of the journal's contents, she counseled Para-educator One about them. Para-educator One, however, told OCR that no one spoke to her about appropriateness of the journal's contents.
- The August IEP meeting notes stated that the Student's parents felt that Para-educator One had developed a negative attitude toward the Student, that Para-educator One and the Student "were clashing," and that the Student did not think Para-educator One liked him. The notes stated, "parents can contact Coordinator of Special Education if they want to address the personnel question."
- The Teacher said Para-educator One worked hard with the Student and that she did not think she had a negative attitude toward the Student. However, she said, Para-educator One was open about how she was feeling, whether it was happy or frustrated. According to Para-educator Two, the Teacher told her that Para-educator One yelled at the Student.
- The Complainant told OCR that Para-educator One frightened the Student by telling him there was a black widow spider under his bench at lunchtime. Para-educator One said that she once killed a very large spider that crawled out from under the Student's bench. She said the Student was frightened and, afterward, always asked her to check under his bench to ensure there were no spiders.
- On August 14th, the Complainant emailed the Principal, after a behaviorist had observed the Student in the classroom, that Para-educator One told the Student "'the lady across the room is writing stuff down about you'. She also told [him] that his test tomorrow is going to be 'really hard.' Being told these type[s] of things only cause[s] him] to be more anxious. Can you please ask [her] not to tell him things like this." The Principal responded that she had sent a message to the Teacher regarding the comments.
- As noted above, the Student was separated from his peers, with his desk removed from the group by four to five feet and, sometimes, seated with his back to the group.
- Para-educator One was reassigned around the first week in September, approximately six weeks into the semester. The Principal said this was because of some of the "red flags" raised about her, and the possibility the Student would do better with someone else.

- The Student’s therapist told OCR the Student was excited about attending the School prior to the start of the school year. She said shortly after school started, however, he began to regress emotionally, and became anxious, frustrated, and angry. She said the focus of the Student’s feelings was the Teacher; while the Student did not articulate exactly what was happening in the classroom, he did tell the therapist that the Teacher ignored him. Another of the Student’s doctors told OCR the Student became more anxious, rigid, and less willing to participate in therapy while he attended the School.
- The Complainant said that while the Student attended the School, he began referring to himself as stupid, his confidence plummeted, and he acted out at home. Since leaving the School, she said, he continues to feel insecure about whether his teachers like him, and upset by mention of the School.

In determining whether a hostile environment based on disability was created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student’s ability to participate in or benefit from the school’s program. OCR examines all the circumstances, including: the type of conduct; the frequency and severity of the conduct; the age and relationship of the parties; the setting and context in which the conduct occurred; whether other incidents have occurred at the school; and other relevant factors.

The Student is a young child—a XX-year-old at the time he attended the School. He was the only student with an IEP in the class. While he was in the classroom, the Teacher and Para-educator One were typically the only adults. They exercised power and authority over him, while he was in a relative position of vulnerability. His vulnerability was exacerbated by his disability—which caused the Student to feel anxious in a new environment, made it difficult for him to socialize, and identified him as different to his peers—and the new environment of the GATE School.

It is in this context that Para-educator One kept the journal of the Student’s behavior. Maintenance of such a log is not inherently problematic; in fact, if it included the information it purported to include, such as the Student’s grasp of substantive concepts and assignment modification, it would be useful. In actuality, however, Para-educator One regularly wrote negative comments about the Student directly connected to his disability. Her entries reflect not only negative feelings toward the Student, but a misunderstanding of the Student’s disability and impatience with how it manifested in his behavior. That the Student knew at least some of what Para-educator One wrote is clear; he told his parents that Para-educator One was “tormenting” him with the writing. Even if he was not able to read the journal himself (which is unclear), Para-educator One acknowledged reading parts of it to him aloud. The Student’s Strategies and Supports document specifically states that he does not respond well to negative reinforcement. The journal consisted of pages of negative statements about the Student, and, as the Student well knew, Para-educator One wrote it in every few minutes.

The Teacher was aware of Para-educator One’s language, and the attitude and misunderstandings it apparently reflected, and did not intervene. On the contrary, the

evidence showed that she also engaged in negative behavior toward the Student. Specifically, when she was displeased with him, she gestured elaborately for Para-educator One to record his behavior in the journal, or told her to take him out of the classroom; these actions were visible not only to the Student, but his peers. When the Student avoided work, the Teacher and Para-educator One at times took the position that the Student could sit and do nothing. Despite the Strategies and Supports document, and even after being told the Student did not respond well to negative feedback, the Teacher was resistant to cease writing negative comments on his homework.

In addition, the Teacher and Para-educator One separated the Student from his peers when he engaged in what they deemed “distracting” behavior. Segregating him from his peers, and positioning him so his back was to them, had the likely effect of isolating him and highlighting that he was different to both him and his peers. As the Student’s therapist and the Complainant explained, after the Student began attending the GATE School, he regressed emotionally; became anxious, frustrated, and angry; referred to himself as stupid; and his confidence plummeted. OCR acknowledges that the Student’s behavior was, as described by many, challenging in the classroom. However, implementation of such extreme and potentially emotionally damaging measures should not have been undertaken without input and agreement from the IEP team.

Taking into account the relationship that exists between teachers/para-educators and students, the frequency of the negative conduct toward the Student, the Student’s confinement to the class where it was occurring, and the Student’s age and disability, the conduct of the Teacher and Para-educator One created a hostile environment for the Student in his classroom based on disability.

A school district is responsible for the harassing conduct of employees acting in the scope of their employment, regardless of whether it had notice. In this case, however, the District did have notice of the conduct. The Complainant expressed concerns numerous times about the environment for the Student in the classroom, and the attitudes of the Teacher and Para-educator One toward the Student. This happened at IEP meetings, in conversations, and in emails with several individuals including the Principal and the District’s Director of Student Services. The Complainant notified the Principal about the contents of the journal. Yet the District did not investigate the concerns or provide a response to the Complainant, other than to tell the Complainant to contact personnel. While it moved Para-educator One to a different position, the District told OCR that the reason for the move was because of other “red flags” but not specifically related to concerns raised by the Complainant.

Based on this evidence, the District is in violation of Section 504 and Title II for subjecting the Student to a hostile environment based on disability, and for failing to take appropriate steps to investigate and remediate the hostile environment once it received notice of it.

Allegation 3: Whether the District retaliated against the Complainant after she advocated on the Student’s behalf by denying her a right to participate in the Student’s classroom.

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to a material adverse action by the school district, under circumstances that suggest a connection between the protected activity and the material adverse action. Retaliation by a district employee is imputed to a school district whether or not it has notice of the employee's actions. If a preliminary connection is found, OCR asks whether the school district can provide a non-retaliatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the material adverse action was in fact retaliation.

- Early in the school year, the Teacher invited class parents to volunteer in the classroom. The Complainant told OCR that she regularly volunteered on Wednesdays at that time.
- On August XX, 2014—a Monday—the Teacher emailed the class parents requesting volunteers to help with a class project that Friday, August XXnd. A few hours after the Teacher sent the email, the Student's IEP team met. As noted previously, the Complainant raised concerns at the meeting.
- On Wednesday, August XXth, the Complainant arrived at the Student's classroom to volunteer. She said the Teacher put her hand in front of the Complainant's face, stated she was not welcome in the classroom, and drew a line with her hand over the classroom entryway to indicate the Complainant could not cross the line into the room.
- The same day, the Teacher emailed the Principal and some members of the IEP team and told them that the Complainant had come to her classroom unexpectedly to volunteer, and she had told the Complainant she hadn't prepared anything for her to do. She wrote, "I **do not** want [the Complainant] in the classroom unless another credentialed teacher is there. Honestly, with [the para-educator] already in the room, I don't want or need another adult around right now. I want to handle this well, so I thought I would email her and let her know I will contact her if I have anything for her to do. That sounds a little lame, but I'm not sure what else to say" (emphasis in original). OCR did not see any responses to this email.
- On August XXnd, the day that parents were scheduled to help with the project about which the Teacher had emailed earlier in the week, the Teacher emailed the Complainant that parents would no longer be allowed to volunteer in class. She wrote,

“it would be best for the class if we don’t add more adults to the room. We have had a number of different adults visit and students have been distracted It may work to have volunteers . . . later.” The Complainant told OCR she saw parents volunteering in the classroom that day.

- The Teacher and Principal told OCR that the adults referred to in the Teacher’s email were individuals who came to observe or work with the Student. This was also clear from comments at the September 2014 IEP meeting.
- In Student’s prior school, the Complainant had regularly volunteered, and she felt that this had provided significant support for the Student. The Complainant’s participation in class also helped her to better understand when the Student was exhibiting disruptive behavior so that she could review expected behaviors with the Student and reinforce those expectations at home as stated in his BIP.
- Later that month, the Student’s father volunteered to drive for a field trip. The Complainant said the Teacher did not assign any other students to ride in his car, so the Student rode alone with his father. She said no other students rode alone. The Teacher said this happened because there were more volunteers than needed, and that two other students also rode alone with their parents. The Principal, on the other hand, said this happened because the Student’s father volunteered to drive at the last minute, when students had already been assigned to cars; she said the Student chose not to ride in a different car with other students. In addition, in an August XXnd email, the Teacher asked parent volunteers to confirm they had submitted their proof of insurance and drivers’ licenses to the school office in anticipation of the upcoming trip, suggesting that parents could not volunteer at the last minute.
- In the September 2014 IEP meeting, the Complainant stated that she had a copy of Para-educator One’s journal. She told OCR that Para-educator One had accidentally sent the journal home in the Student’s backpack and that, after reading its contents, the Complainant copied it and then sent it back to school. The Teacher, however, told OCR she thought the Complainant had taken the journal from the classroom without permission.
- In response to the Complainant’s statement at the IEP meeting, the Teacher stated, “That is why I couldn’t allow you into my classroom, because things have been twisted beyond belief....I am floored that you did this and this is why I asked you not to come in my classroom and why I sent an email saying I don’t have any parents in my classroom.”
- The Teacher told OCR that “things...twisted” was a reference to the Complainant misstating information the Teacher provided during private conversations to suggest at the August IEP meeting that the Teacher was not implementing the IEP.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to a material adverse action by the school, under circumstances that suggest a connection between the protected activity and the material adverse action. Actions the Complainant took because of her concerns regarding implementation of the Student's IEP and treatment of the Student by the Teacher and Para-educator One were protected activity. This includes the Complainant sharing her interpretation of information provided by the Teacher with the IEP team.

OCR next asked whether the District took material adverse action against the Complainant because of her protected activity. A causal connection can be found based on the proximity in time between the protected activity and the adverse action. The Complainant had been volunteering in the Teacher's classroom on a regular basis on Wednesdays. Two days after the Complainant advocated for her son at the August XX IEP meeting, the Teacher put her hand in the Complainant's face, prohibited her from entering the room and told her she could not volunteer; the Teacher then issued a rule that no parents could enter the room and told school administration that this was, in part, because of the presence of the Student's para-educator. OCR finds that the time period between the Complainant's protected advocacy and the Teacher's action is sufficiently close to establish a causal connection.

By prohibiting the Complainant from volunteering, the Teacher deprived her and the Student of myriad benefits that flow from a parent's involvement in the classroom, as well as limited the Complainant's ability to review expected and unexpected behaviors with the Student at home, as mentioned in his BIP, because she was not receiving relevant information from the Teacher or Para-educator One. The Teacher's extension of the prohibition to other parents did not mitigate its negative effect; rather, it potentially stigmatized the Complainant and Student, to the extent other parents similarly deprived of this benefit suspected they were the cause. In the same month, the Teacher made a decision not to assign any other students to ride in Student's car when the Student and his father went on a school field trip. The decision not to have any other students ride with the Student and his father for the field trip, together with the Teacher's refusal to allow the Complainant to volunteer in class, constitutes material adverse action.

Accordingly, OCR next asks whether the District offered a legitimate, non-retaliatory reason for the adverse action, and whether the reason offered was the real reason or rather pretext for what was in fact a retaliatory motive. The Teacher and Principal told OCR the Teacher prohibited volunteers because the adults coming into the classroom to observe or assist the Student were disruptive to the class, and parent volunteers would exacerbate the disruption. OCR need not determine whether this reason is non-retaliatory, because the evidence established that this was not the real reason. As discussed, the close proximity in time between the August IEP meeting and the Teacher's decision is circumstantial evidence that the two actions were linked; specifically, the Teacher requested volunteers the morning of the IEP meeting, denied the Complainant access to the classroom two days later, and emailed her decision to prohibit all volunteers in the same week. Significantly, the Teacher's own statements in the September IEP meeting, and her subsequent explanation of those statements

to OCR, clearly show her decision was because of the Complainant's advocacy on behalf of the Student.

Regarding the Teacher's failure to assign other students to the father's car for the field trip, the Teacher's proffered reason—that she had more drivers than needed—is a legitimate, non-retaliatory reason. Again, however, a preponderance of the evidence showed the reason offered was pretext. Specifically, the Teacher and Principal offered conflicting explanations for the decision. Further, on the disputed point of whether the Student was the only student who rode without a peer, OCR found the Complainant more credible, as the Teacher was not truthful with OCR on other points.

Based on this information, OCR concluded the District retaliated against the Complainant in violation of Section 504 and Title II.

Conclusion

On October 26, 2015, the District, without admitting to any violation of law, agreed to implement corrective actions and signed an agreement that, when fully implemented, will resolve the issues in the complaint. A copy of the signed agreement is attached. OCR will monitor the District's implementation of the Resolution Agreement until the District is in compliance with Section 504 and Title II, and their implementing regulations.

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 this complaint as of the date of this letter, and notifying the Complainant simultaneously.

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

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

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

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact OCR Attorneys Alvaro Soria, at (415) 486-5580, or Suzanne Taylor, at (415) 486-5561.

Sincerely,

/s/

Anamaria Loya
Team Leader

Enclosure