



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 6, 2017

VIA ELECTRONIC EMAIL

Dr. Jeffrey Barrstad
Superintendent
Conejo Valley Unified School District
1400 E. Janss Road
Thousand Oaks, California 91362

(In reply, please refer to case no. 09-17-1446.)

Dear Superintendent Barrstad:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Conejo Valley Unified School District (District). The Complainant alleged discrimination against the Student on the basis of disability.¹ Specifically, OCR investigated whether the District:

- 1) denied the Student a free, appropriate public education (FAPE) by failing to evaluate the Student in all areas of suspected disability in a timely manner, and by disciplining the student without following adequate evaluation and placement procedures; and,
- 2) subjected the Student to harassment by other students based on disability, and failed to respond appropriately and effectively to notice of the harassment.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR interviewed the Complainant, and reviewed documents and other information provided by the Complainant and the District. After a careful review of the information gathered in its investigation, OCR concluded that with respect to the first allegation, the District violated Section 504, Title II, and their implementing regulations. Prior to the completion of OCR's investigation of the second allegation, the District informed OCR of its interest in resolving the matter pursuant to a Section 302 Agreement Reached During

¹ OCR notified the District of the identities of the Complainant and the Student when the investigation began. We are withholding their names from this letter to protect their privacy.

Investigation, and OCR determined that a Section 302 resolution was appropriate. Accordingly, with respect to allegation two, OCR did not complete its investigation or reach a conclusion regarding the District's compliance with Section 504 and Title II. However, without admitting to any violation of federal law, the District has entered into the attached resolution agreement to resolve the noncompliance OCR found with respect to allegation one, and the concerns OCR found with regard to allegation two. The findings of fact, legal standards, and the reasons for OCR's determinations are summarized below.

Factual Findings:

Background

During the 2016-2017 school year, the Student was in XXXXXX grade, and attended a middle school in the District (School). Prior to middle school, the Student attended an elementary school in the District. The Student was previously diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and also suffers from other social/emotional and social skills disorders.

According to the Complainant, the District had not assessed the Student to determine his eligibility under the Individuals with Disabilities Education Act (IDEA) or Section 504, despite having reason to suspect that the Student may have a disability impeding his education. The Complainant asserted that as far back as kindergarten, the Student's Parents have raised concerns with the District about his academic, social, and/or emotional challenges.

According to the District, it did not have reason to suspect that the Student had a disability, and therefore had no obligation to evaluate the Student for IDEA or Section 504 eligibility, in-part because the Student earned high scores in academics and standardized testing, and was eligible for the GATE program. The District also asserted that prior to January 2017, the only indicia that the Student had any problems at school were teachers' notes on elementary school report cards and a 2014 case conference summary. The District claimed that these teacher observations were not current and were insufficient to trigger the District's obligation to evaluate the Student.

First and Second Grades

From 20XX through 20XX, the Student attended schools in the District XX XXXXXX XXX XXXXXXX XXXXX. OCR examined various District records regarding the Student from this time period, including report cards and notes from teachers. Starting in 20XX, the Student's first grade teacher noted that while the Student was meeting academic benchmarks, he had some behavioral challenges to work on, including that it was difficult to get him started on his work, he frequently lost things and was disorganized, he was not focused, he was distracted, missed directions, and needed redirection. A few months later, in March 20XX, the same teacher again reported that the Student continued to exhibit some of the same issues, including an inability to focus, having difficulty getting started on tasks and concentrating; needing repeated directions; and being distracted. The teacher also moved the Student to different areas of the room so that he would be less distracted and could get his work done. In June 20XX, the same teacher noted that while the Student continued to meet benchmarks in Language Arts and Math, the Student's

focus and ability to stay on task had not improved since the last report card. The teacher also wrote that the Student sat “completely apart from other kids, otherwise he gets no work done,” and that this was “going to really impede his learning when he gets to second grade, as the curriculum gets much harder and focus is extremely important.” The teacher also wrote, “I’m hoping that his focus improves as he gets older; this is definitely something that needs to be watched carefully.”

The Student’s *second grade* report cards reflected similar areas of concern: that the Student needed close supervision to work well; his lack of focus caused him to not perform to the best of his abilities; he needed to follow rules and instructions; he needed to use time effectively; he needed to improve his organizational and listening skills; and that he was smart, but his inability to listen and attendance often caused him to fall behind.

Fifth, Sixth, and Seventh Grades

According to the Complainant, in *fifth grade*, the Student was formally diagnosed with ADHD by his doctor. The Complainant told OCR that the Student fell behind academically that year, and although the Student had experienced bullying by his peers in prior years, the bullying escalated. For example, one bully allegedly told the Student on several occasions XX XXXX XXXXXXXX. According to the Complainant, the Parents met with the principal who did a threat assessment. The Complainant provided OCR with emails from the Student’s mother to the school’s principal (in March and June 20XX) indicating that the Student was being bullied and harassed by multiple students. Specifically, in the March 20XX email, the Student’s mother described an incident of bullying, and stated that the “[D]istrict and school policy is no bullying[,] but this is too much and seems way to[o] tolerant. [The Student] is an incredibly bright boy who is not working to his abilities due to the anxiety he feels on your campus.”

The Complainant also provided OCR with an email between the Student’s mother and the Student’s teacher in April 20XX, during his fifth grade year, in which the teacher wrote that the Student was “still having major issues at school” including not completing his class and homework, roaming around the room, not following class rules, and “not working independently and must be constantly monitored to keep him on task.” The teacher asked to meet with the Student’s mother to come up with a plan for the rest of the school year.

The District’s documentation also indicated that during the Student’s *sixth grade* year, the School identified the following areas of concerns for the Student: disorganized; missing work; slow to transition; and turning in work late. The case conference summary also described different ways in which the School attempted to resolve these issues, including his teachers having him come in every day at lunch; giving him 50% credit on assignments he turned in late; providing him with daily guidance in organizing his binder; following his binder checklist; and checking his locker for missing work. During the Student’s *seventh grade*, the Student’s mother sent the Student’s math teacher an email on August XX, 20XX, indicating that the Student “can lose focus.”

STAR & CAASPP Testing & GATE

The District also provided OCR with documentation showing the Student’s results from his STAR and CAASPP testing from second grade through seventh grade: the Student scored “proficient” or “advanced” in all but one STAR testing subject, and “standard” or “above standard” in CAASPP testing. He was also eligible for GATE placement based on his advanced test results.

2016-2017 School Year

According to the Complainant, during the Student’s XXXXXXXX grade year, the School administration and counselors contacted the Parents multiple times about various concerns, including regarding the Student’s drawings, incomplete assignments, and failing to participate in homework correction. The Complainant told OCR that the Student’s teachers reported the Student’s inconsistent work habits, and that the Student required encouragement to participate more, was frequently late with work, too talkative, and socially disruptive.

The Complainant also asserted to OCR that throughout the 2016-2017 school year, other students teased the Student in class and passing periods, calling him stupid and telling him XXXX XX XXXXXX XX XXXXXX XXXXXXXX (described further below). According to the Complainant, at back-to-school night, the Parents pulled several of the Student’s teachers aside to express their concerns about the Student’s performance and the harassment he was experiencing. The Complainant explained to OCR that the Student’s teachers told his Parents that they noticed the Student had unique needs and that they would help him.

Although the Complainant told OCR the Student was having trouble throughout the 2016-2017 school year, the District asserted that it wasn’t until January 2017 that the Student exhibited behavioral issues. Specifically, the Student wrote in an English paper that he XXXXXXX XX XXX XXXXXXX XXXXXXXX, and drew pictures of XXXXXXXX X XXXXXXX XXXXXXXXX X XXXX XXX X XXXXX. As a result, on January XX, 2017, the District conducted a threat assessment (Threat Assessment) on the Student. The resulting completed Risk/Threat Assessment Form (Form) for the Student stated the Student XXX XXX XXXXXXXXX XX XXXXXXXX XXXXXXXX XX XXXXXXX; that the drawing was a joke; and that he had seen a YouTube video XX X XXXXXXXX XXXXX XXXXXXX. The Form also indicated that the Student was XXXXXXXXXX XXXXXXX XXXXXXXXXXXXXX XXX XXXX XXXXX XXXXXXX and that he XXX XXX XXXX X XXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX XX XXXXXXXXXXXX XX XX XXXXXXXXXXXX XXX XXXXX. The Student’s mother mentioned on the Form that the Student was bullied in elementary school. The Form also reflected that the Student’s mother did not think the Student was in immediate danger, and she was provided a brochure and counseling pamphlet. At the end of the Form, “Schedule a SST/IEP meeting” was checked and the term SST was underlined. A note next to it said that the SST meeting was scheduled for January XX, 2017.

The School held an SST meeting on January XX, 2017; the notes from the SST meeting stated that the meeting was held due to general concerns of the Student’s participation. According to the meeting notes, the Student’s teachers were concerned that he was not completing his homework and was resistant to participating in class. The notes reflected that the Student’s teachers had tried various interventions, such as moving the Student to the front of the class, not

strongly pressuring him to participate, and offering the Student to regroup so that he was more comfortable in a group setting. The SST notes included a remediation plan that the Student’s teachers would implement for the Student; this plan included offering counseling for the Student (the Student’s mother declined this offer); improving the Student’s handwriting or allowing him to type assignments; the Student working on his public speaking and group participation; and disconnecting the internet at home to decrease distractions. The District told OCR that the SST meeting and offer of counseling were appropriate general education interventions prior to conducting special education assessments.

The District also acknowledged that on the SST form, the Student’s English teacher noted the Student’s unique learning style, commenting that he was an auditory learner and although he never took notes, he processed information by listening. The District argued that the Student’s records showed that through his own learning style, he was able to excel in the curriculum and succeed academically.

March and Early April 2017

According to the District, on March XX, 2017, a witness observed the Student XXXXXXXX XXXXXXXXXXXX on one of his papers. The District administration responded to these incidents by speaking with the Student and he admitted to XXXXXXXX XXX XXXXXXXXXXXX. The District counseled him about this behavior and discussed his conduct. According to the District, the Student appeared to be regretful and said he was joking and did not mean anything he had written. The District additionally told OCR that in early April 2017, the administration received an anonymous phone call about the Student XXXXXXXX XX XXXX XXXXXXXX XXX XXXXXXXX. The District, the Student, the Student’s father, and law enforcement met to discuss the phone call; the Student stated that it was not true, XXX XXXX XX XXX XXX XXXX XX XXXX XXXXXXXX. After evaluating each of the incidents since January 2017, the District determined XXXX XXX XXXXXXXXXXX XXX XXX X XXXXXXX XX XXXXXXXXXXX XX XXXXXXXX.

April XX, 2017 Incident

On April XX, 2017, the Student was issued a Suspension Notice for a five-day suspension pending recommendation for expulsion for allegedly threatening XX XXXX XXXXXXXX XXXXXXXX (Student B), XXX XX XXX XXX XXXXXXXXXXXXXXX XXXXXXX. According to the Student’s Suspension Notice, the Student was disciplined for a XXXXXXXXXXXX XXXXXXXX and could return to campus on May X, 2017. The School also contacted law enforcement regarding the incident, XXX XXX XXXXXXXX XXX XXXXXX XXXXXXXX XXXX XXXXXXXX X XXXXXXX XXXXXXXXXXX XXXXXXX XXX XXXXXX XXXX XXXXXXX XXXXXXXX. The Suspension Notice included the actions taken by the administration, which involved meeting and speaking with both the Student and Parents, and referring the Student to the “Breakthrough Program.” The Suspension Notice also indicated that the Student did not have a Section 504 plan and was not a special education student.

The District’s documentation showed that its investigation into this April XX incident involved interviewing the Student, other students (including Student B), and having several students complete Student Incident Reports. X---paragraph redacted ---X.

According to the Complainant, the April XX incident occurred as a result of the Student being continuously bullied by other students, including Student B. On this particular day, the Complainant alleged that the other students, including Student B were harassing the Student about problems he was having in a class. X---paragraph redacted ---X. According to the Complainant, the group of students who had teased the Student throughout the year falsified their statements of the events and reported the Student to the School’s principal.

The Complainant also told OCR that while the Student filed an incident report against Student B on April XX, 2017, stating that Student B punched him and kept teasing him about XXXXX X XXXXXX XXX XX XXXXXXXXXXX XXX XXXXXXXX XXX XXXXXXXX XXXXXX XX XXXXXX XXXXXXXXXXXX the District didn’t appropriately investigate this harassment claim. Specifically, the Complainant claimed that the District did not take statements from teachers, interview the Student’s friends, or discipline the other students involved.

On April XX, 2017, the School’s Principal wrote a memorandum to the District’s Deputy Superintendent (entitled “Recommendation for Expulsion”), where he summarized the District’s/School’s investigation into the April XX incident, and recommended that the Student be expelled from the District.

May 2017

On May X, 2017, the Complainant wrote a letter to the District’s Director of Special Education requesting a comprehensive assessment for the Student in all areas of suspected disabilities, and administrative interventions. The Complainant noted in this letter that the Parents believed the recent incidents that led to disciplinary action against the Student arose out of disorders and disabilities that “should have been” identified by the District through a comprehensive assessment of the Student, and that the District “has an obligation to conduct such an assessment to determine whether the behaviors involved in the recent incidents stemmed from a manifestation of these underlying disabilities or disorders prior to any determination as to expulsion.” The District and Complainant both told OCR that during a May X, 2017 pre-expulsion meeting, the District agreed to conduct a special education assessment of the Student and not expel the Student. On May X, 2017, the District sent the Complainant and the Parents an assessment plan.

On May XX, 2017, the Complainant sent a letter to the District and consented to the District’s assessment plan, and requested four additional assessments; (occupational therapy specific to testing on sensory regulations and processing; social/emotional behavior specific to testing related to mental health; speech and language specific to social skills and pragmatic skills; and vocational specific to visual and auditory processing and executive functioning). The Complainant also confirmed June X, 2017 as the date for the Student’s IEP meeting. The Complainant’s May XX letter also stated that the District and Parents came to an agreement on

the following as to Student’s disciplinary records and placement for the remainder of the 2016-2017 school year:

- The District would process and complete the assessment plan in time for the June X IEP meeting;
- The District would provide the Student with home instruction (“HI”) programming for the remainder of the 2016-2017 school year wherein an assigned HI instructor would meet with the Student five (5) hours per week to provide instruction, and would coordinate with Student’s on-campus teachers to obtain the information and work from the Student’s ongoing classes. The HI teacher would provide completed work to the Student’s teachers;
- The District would grade the Student’s work from April XX, 2017 to the end of the 2016-2017 school year based on his performance on all assignments;
- The District would redact and remove all reference to expulsion recommendations on the Student’s educational record; and
- Should the Student complete all required work to pass each of his on-going classes, the Student would be permitted to graduate from School on time.

The Complainant noted in the letter that while the Parents approved of this temporary placement, the Parents did not believe this was the appropriate placement in the least restrictive environment, and did not believe that the disciplinary actions taken in April were appropriate. The Complainant reported to OCR that as of May XX, 2017, home instruction had not begun.

The District noted to OCR that the Parents never requested an assessment (until after the April XX incident) or otherwise notified the District that the Student had a disability. The District claimed that it was only after the April XX incident that the District first became aware of a possible disability and that it therefore agreed to assess the Student for special education placement.

June 2017

On June X, 2017, the District held an IEP meeting to discuss the psychoeducational assessment conducted on the Student. The IEP team found the Student eligible for special education services based on emotional disturbance, speech/language impairment, and other health impairment – ADHD. The District offered the Student placement in general education with Speech and Language and Individual Counseling services. The IEP meeting notes reported that the IEP team determined the following:

- Language Communication – the Student demonstrated significant difficulty interpreting social language/social inferences in both social scenes and the classroom context;
- Social Skills – the Student had difficulty expressing his thoughts related to feelings, opinions and personal experiences. His language was disjointed and lacked cohesion;
- Social/Emotional – The Student had difficulty interacting positively with others, working cooperatively in groups, and appropriately solving social problems. On campus, the Student was unable to resolve peer conflicts through the use of age-appropriate strategies, to find a solution to stressful situations;
- Social Emotional/Behavioral Functioning – the Student had difficulty with interpersonal relationships, as he had trouble effectively solving problems, developing and sustaining

positive relationships with peers, and engaging in collaborative group projects. In the classroom, the Student experienced difficulty following directions/instructions, utilizing class time appropriately, staying on task when completing assignments and initiating classwork; and,

- Impact of Disability – the Student demonstrated significant social emotional difficulties, including building/maintaining positive relationships with peers and adults, communicating his feelings, and utilizing age-appropriate problem-solving techniques to resolve social conflicts. The Student also displayed a weakness in regards to making inferences and interpreting social language.

During the IEP meeting, the District made the following offer of FAPE: the Student will receive Speech and Language Services for 120 minutes per month, and individualized counseling services for 45 minute per week. The Parents did not ultimately agree to the IEP. The IEP notes indicated that the Parents were concerned that the Student was not assessed for autism, and that the Coordinator agreed that the Student should be assessed for autism, but noted that these assessments were conducted in an abbreviated time period, and not in the typical 60-day period. The IEP notes also stated that procedural safeguards were provided to the Parents.

The District noted to OCR that it conducted assessments of the Student, held an IEP meeting, and offered the Student a FAPE in less than three weeks after receiving consent to the assessment plan. The District also asserted that the Student was never expelled and that he was suspended for a total of four days during the 2016-2017 school year. Additionally, the District told OCR that it agreed to remove any mention of a potential expulsion from the Student's record. (OCR notes, however, that the District included the April XX, 2017 Recommendation for Expulsion memorandum and the Student's April XX, 2017 Suspension Notice (which included the language "suspended pending recommendation for expulsion") in its data response to OCR when providing the Student's cumulative record.)

August – September 2017

The District's documentation for the beginning of the 2017-2018 school year showed that the Student had not been expelled, and was enrolled at a high school in the District. On October X, 2017, the District informed OCR that the Parents removed the Student from the District, and enrolled him in private school. The Complainant confirmed that the Student recently enrolled in a private school, but indicated that the Parents believed they had to remove the Student from the high school because the District did not conduct the remaining autism assessment, did not hold another IEP meeting or make another offer of FAPE based on this autism assessment, and did not address the harassment that the Student continued to allegedly experience at the high school. The Complainant claimed that the District's failure to address the harassment resulted in the Student recently being diagnosed with anxiety.

District's Section 504 and IEP Policies and Procedures

The District provided OCR with a number of policies pertaining to identifying and evaluating students for special education instruction:

The District’s Administrative Regulation (AR) 6164.4 is entitled “Identification and Evaluation of Individuals for Special Education Instruction.” AR 6164.4 indicates that a “student shall be referred for special education instruction and services only after the resources of the regular education program have been considered and used where appropriate. All referrals from school staff for special education and related services shall include a brief reason for the referral and description of the regular program resources that were considered and/or modified for use with the student and their effect.” The corresponding Board Policy (BP) 6164.4, states that the District’s “Superintendent or designee shall establish a comprehensive system that includes procedures for the identification, screening, referral, and regular and triennial assessment of individuals eligible for special education, as well as procedures for the planning, implementation, and review of the education and related services provided to such individuals. The district's identification procedures shall include methods for utilizing referrals from parents/guardians, teachers, appropriate professionals, and others, and shall be coordinated with school site procedures for referral of students whose needs cannot be met with modifications to the regular instructional program.”

AR 6164.4 and BP 6164.4 do not provide additional or specific information regarding how specifically the District will locate and identify individuals who might qualify for special education services (*i.e.* through its SST process, or other procedures (implementation and monitoring of interventions put in place following SST meetings, etc.).

The District also provided OCR with its AR 6164.6, which is entitled “Identification and Education Under Section 504.” AR 6164.6 indicates that the “law does not require a specific procedure for referral of a student for evaluation. Items #1-2 below provide such a procedure and should be modified to reflect district practice.

1. Any student may be referred by a parent/guardian, teacher, other school employee, student success team, or community agency for consideration of eligibility as a disabled student under Section 504. This referral may be made to the principal or 504 Coordinator.
2. Upon receipt of a referral for eligibility, the principal shall promptly convene a meeting of a multi-disciplinary 504 team to consider the referral and determine whether an evaluation of the student is appropriate.”

The Board Policy for AR 6164.6 (BP 6164.6) states that “the district shall work to identify children with disabilities who reside within its jurisdiction in order to ensure that they receive educational and related services required by law.” Although AR 6164.6 explains who may make referrals for a Section 504 evaluation and what should happen upon such a referral, neither AR 6164.6 or BP 6164.6 explain when such a referral is appropriate (*e.g.* when District or School staff know a student needs or have reason to believe a student needs special education or related aides and services because of a disability, as required by 34 C.F.R. § 104.35(a)), or what kind of information (*i.e.* SST meeting notes, report cards, doctor’s diagnoses, etc.) the District will use to determine whether it has reason to suspect that a student has a disability, and should therefore initiate an evaluation of the student.

Issue 1: Whether the District denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability in a timely manner, and by disciplining the student without following adequate evaluation and placement procedures.

Legal Standard:

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 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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. 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.

In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

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. Section 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding the identification, evaluation or placement of the student. A procedure consistent with the IDEA is one means of meeting this requirement. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. 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 act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 cumulative days in a school year 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.

Analysis and Conclusions of Law:

Here, OCR found that the Student had a long history, as early as first grade, of challenges related to organization, focus, distraction, and the ability to follow directions. District documents reflected that the Student’s teachers or other school staff in first, second, fifth, sixth and eighth grades all noted similar challenges for the Student, and the Student’s mother also reported similar challenges to the Student’s teacher via email in seventh grade. Thus, although the Student did well on various standardized tests and qualified for GATE, as the District has pointed out, his records reflected significant challenges with various tasks related to organization, focus, concentration and related issues. More recently, in January of the 2016-2017 school year, when the District conducted a Threat Assessment of the Student, the Threat Assessment Form indicated that the Student XXX XXXXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXX XXXXXXX. This information gave the District reason to suspect that the Student may have a disability related to ADD or ADHD, especially given the Student’s history of difficulty with tasks potentially related to executive functioning. Because the District had reason to suspect the Student may have a disability, the District’s obligation to evaluate the Student for a disability was triggered pursuant to 34 C.F.R. Section 104.35(a). However, rather than evaluate the Student, either under IDEA or Section 504, the District conducted an SST meeting, where individuals who were familiar with the Student again noted many of the same challenges for the Student, and the team determined that the Student needed additional supports to be successful.

In addition to the information suggesting the Student may have a disability related to ADD or ADHD, the District also became aware of other severe, unusual, and alarming behavior by the Student during the 2016-2017 school year. Specifically, in January 2017, the District became aware of alarming writing and drawings by the Student, XX XXXXX XX XXXXX XXXX XX XXXXXXX XX XXXX XXXXXXXXXXX XXX XXXX XXXXXXXXXXX XX XXXXXXX X XXXXXXX XXXXXXXXXXX X XXXX XXX X XXXXX. As discussed above, the District conducted a Threat Assessment, and held an SST meeting, but did not initiate an evaluation pursuant to IDEA for emotional disturbance or other possible areas of disability. Later that School year, the Student engaged in further alarming and unusual behavior that the District became aware of, at least by April XX. X---paragraph redacted---X. However, despite this information, the District did not initiate any effort to evaluate the Student related to these extreme behaviors, in January, March, early April or even after the April XX incident that led to the Student’s recommendation for expulsion. Instead, the District developed an IEP for the Student on June X, 2017, only after the Student was suspended on April XX, 2017, recommended for expulsion, and the Complainant specifically requested an assessment on May X, 2017.

In its narrative response to OCR, the District defended its delay in initiating an evaluation of the Student because the Student performed well academically, and was admitted into GATE, even in the face of comments on the his report cards that noted his academic and behavioral issues. This

suggests that the District misunderstands the basis for determining whether a student has a disability – a substantial impairment of a major life activity – by relying inappropriately on a student’s academic success (or lack thereof) to determine whether or not a student needs to be evaluated for a suspected disability, rather than looking to the specifics of the impairment and its impact on the student, including the condition, manner, and duration by which the student’s major life activity(ies) are impacted by the impairment, to determine eligibility. As OCR has noted, while grades or test scores may be factors among others that are considered in determining whether a student has a disability, grades or test scores alone may not be used to determine eligibility. Similarly, OCR has repeatedly noted that gifted or honors students may also be students with disabilities.

OCR further notes that the District ultimately found the Student eligible for special education services based on multiple areas of eligibility of emotional disturbance, speech/language impairment, and ADHD on June X, 2017, and offered the Student individual counseling and speech and language services. The June X, 2017 IEP specifically noted that the impact of the Student’s disability was that the Student had significant emotional difficulties, including building/maintaining positive relationships with peers and adults, communicating his feelings, and utilizing age-appropriate problem solving techniques to resolve social conflicts. It also noted that the Student displayed a weakness in regards to making inferences and interpreting social language in both social and classroom settings.

Thus, as described above, the District had reason to suspect the Student may have a disability at least by January 2017, yet the District failed to conduct a timely evaluation of the Student in violation of Section 504 at 34 C.F.R. Section 104.35(a). Given the Student’s ultimate IEP eligibility which included emotional disturbance, the Student’s April XX behavior may well have been related to the Student’s disability.

Significant Change in Placement & Discipline

In addition, after April XX, the Student was suspended and placed on home instruction – a significant change in placement due to discipline. And, as explained above, pursuant to 34 C.F.R. Section 104.35(a), when a District has reason to suspect a Student may have a disability, the District must conduct an evaluation of the Student before any significant change in placement. Section 104.35(c) further requires that any such placement decisions be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. And, Section 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action regarding such a significant change in placement of the student. However, despite having reason to suspect the Student may have a disability, as explained above, and after the Complainant requested an evaluation of the Student on May X, the District significantly changed the Student’s placement on or about May XX by placing the Student on home instruction, without conducting an evaluation of the Student, or using a group of knowledgeable persons, such as a Section 504 or IEP team, to determine the appropriate placement for the Student prior to changing the Student’s placement. Therefore, OCR determined that the District made this significant change in placement based on discipline without following adequate evaluation and placement procedures in violation of Section 504 at 34 C.F.R §104.35-104.36.

District's Section 504 and IEP Policies and Procedures

Further, OCR reviewed AR 6164.6 and BP 6164.4, as well as AR 6164.6 and BP 6164.6, and determined that although these policies and procedures discuss referral of students for IDEA and Section 504, the policies and procedures did not provide specific information regarding when students should be referred for evaluation under the IDEA or Section 504 processes, or the kind of information that should trigger such referrals by school or District staff. In particular, with respect to identification of students with disabilities pursuant to Section 504, the District's policies and procedures do not state that students who need or are believed to need special education or related aides and services due to a disability will be referred for evaluation by the District, as required by the regulation implementing Section 504 at 34 C.F.R. § 104.35(a). Instead, the District's Section 504 policy explains who "may" make referrals under Section 504, without clearly stating when such referrals are required, as described above. The IDEA and Section 504 policies also do not explain specifically how the District will locate and identify students who might qualify for special education services, and what information (*i.e.* discipline information, a review of SST meeting notes, a review of comments and grades on report cards, etc.) it will assess in determining whether it has reason to suspect that a student has a disability.

Conclusion

For all of the reasons explained above, OCR found that the District failed to provide the Student a FAPE by failing to evaluate the Student in all areas of suspected disability in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability, and that the District made a significant disciplinary change in placement without following adequate evaluation and placement procedures.

On November 1, 2017, and without admitting to any violation of the law, the District entered into the attached Resolution Agreement in order to resolve the non-compliance OCR found. Pursuant to the Agreement, the District agreed to: (1) remove and/or redact any recommendation for expulsion and any references thereto from any other document in the Student's cumulative file or record; (2) provide compensatory services to the Student in the areas of Speech and Language, Individual Counseling, and Academic Counseling; (3) and provide training and a written guidance memorandum to District and school staff on its obligations under Title II and Section 504 with respect to identifying, evaluating, placing, and disciplining a student with a disability, or suspected disability.

ALLEGATION 2: Whether the District subjected the Student to harassment by other students based on disability, and failed to respond appropriately and effectively to notice of the harassment.

Legal Standard:

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, Title II and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

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

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 conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed 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. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Analysis and Conclusions of Law:

The Complainant asserted that throughout the years, the Parents informed the District of the bullying and harassment that the Student experienced, and while this harassment occurred for many years, it intensified during the Student's fifth grade year, as described above. The Complainant provided OCR with emails sent to the District regarding the Student being bullied in the fifth grade. The District, however, told OCR that it only became aware of this bullying in January 2017 during the Student's Threat Assessment, when the Student's mother mentioned the Student had been bullied in elementary school.

After reviewing the documentation collected by OCR, OCR found evidence that the District may have been notified of alleged harassment that may have been disability-based – both in the past and more recently during the 2016-2017 school year. Based on this information, OCR is

concerned that the District may have been aware of incidents where the Student was bullied as early as the Student's fifth grade, and may not have responded adequately. However, prior to the completion of OCR's investigation of this issue, the District expressed an interest in voluntary resolution of the issue, pursuant to Section 302 of OCR's Complaint Processing Manual. After OCR determined that a resolution prior to the completion of the investigation of this issue was appropriate, on November 1, 2017, and without admitting to any violation of the law, the District agreed to enter into the attached Resolution Agreement to resolve the concerns OCR identified with respect to this issue.

CONCLUSION

Based on the evidence and analysis summarized above, OCR has determined that with respect to Allegation 1, the preponderance of evidence supported a conclusion that the District failed to provide the Student with a FAPE by failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability, and that the District also made a significant disciplinary change in placement, without following adequate evaluation and placement procedures. With respect to Allegation 2, because the District voluntarily resolved this allegation prior to the conclusion of OCR's investigation of the issue, OCR did not reach a conclusion as to whether the District failed to respond appropriately and effectively to notice of peer-to-peer harassment based on the Student's disability.

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 Complainant concurrently.

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.

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.

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.

When fully implemented, the Resolution Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of this Agreement until the District is in compliance with Title II, Section 504 and their implementing

regulations, at 34 C.F.R. Part 104 and 28 C.F.R. Part 35, which were at issue in the case. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Thank you for your cooperation in resolving this matter. If you have any questions regarding this letter, please contact Nezhia Burkes at (415) 486-5592 or Nezhia.Burkes@ed.gov, or Naghmeh Ordikhani at (415) 486-5588 or Naghmeh.Ordikhani@ed.gov.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

Enclosure

cc: Ric Silva, Adams, Silva, & McNally LLP, Counsel for District (by email only)