



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

October 30, 2015

Via email to pwcssupt@pwcs.edu

Dr. Steven L. Walts, Superintendent
Prince William County Public Schools
P.O. Box 389
Manassas, Virginia 20108

RE: OCR Complaint No. 11-15-1102
Letter of Findings

Dear Dr. Walts:

This letter advises you of the outcome of the above-referenced complaint that was received by the U.S. Department of Education (Department), Office for Civil Rights (OCR), on January 14, 2015 against Prince William County Public Schools (the Division). The Complainant alleged that the Division discriminated against the Student, who attends XXXX School (the School), on the basis of disability. Specifically, the complaint alleged that the Division:

1. Failed to promptly and effectively respond when the Student's peers harassed him based on his disability; and
2. Treated the Student differently than similarly situated students without disabilities when it conducted a threat assessment of the Student and subsequently removed the Student from the School.

OCR investigated these allegations pursuant to its authority under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the Division is subject to these laws.

In analyzing the allegations, OCR reviewed the evidence under a preponderance of the evidence standard, meaning that OCR evaluated the evidence obtained in the investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the Division failed to comply with OCR's regulations. With regard to Allegation 1, OCR found sufficient evidence to support a finding that the Division's Section 504 grievance procedures and the Division's failure to promptly and effectively respond to reports that the Student's peers harassed

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

him based on disability violate Section 504 and Title II. With regard to Allegation 2, OCR found sufficient evidence to support a finding that the Division's student threat assessment policy, as written and as applied to the Student, violates Title II because it does not incorporate Title II's "direct threat" standard at 28 C.F.R. § 35.139(b). In addition, although OCR learned that the Division did not "expel" the Student from the School as the result of the threat assessment, the Division administratively removed him during the threat assessment process and then proposed changing his placement to a different school, putting him on home-based instruction in the interim. OCR, therefore, also found sufficient evidence to support a finding that the Division denied the Student a free, appropriate public education (FAPE) by violating the procedural requirements of Section 504 when it changed the Student's placement. OCR also had preliminary concerns under Allegation 1, that the conduct of the Student's peers might have amounted to disability-based harassment, and, under Allegation 2, that the Division treated the Student less favorably than similarly situated students without disabilities in the application of its threat assessment policy; however, the Division expressed a desire to resolve these preliminary concerns before OCR concluded its investigation. On October 19, 2015, the Division signed a Resolution Agreement (copy enclosed) to address OCR's violation findings and its preliminary concerns. An explanation of the facts and OCR's analysis and findings follows.

BACKGROUND

The School is a Division school of choice that provides students in first through eighth grade rigorous academic instruction within the framework of a traditional education; students apply and are admitted through a lottery process. The Student started at the School in XXXX grade in XXXX. The Student was diagnosed with XXXX in XXXX, the School found the Student eligible for special education under the Individuals with Disabilities Education Act (IDEA) XXXX category and developed an Individualized Education Program (IEP) for him. In addition, the Student has a diagnosis of XXXX and XXXX. The IEP team conducted a functional behavior assessment of the Student and developed a behavior intervention plan (BIP) for him in February 2014. The School also found the Student eligible for its XXXX program in XXXX for the 2014-15 school year.

During the 2014-15 school year, the Student was in XXXX grade. His June 2, 2014 annual IEP provided for placement in the general education setting for the majority of the day, along with the following services: social skills services by an itinerant autism teacher in both the general education and special education settings, each for 60 minutes per week; learning disability services (work habits, organization, and written expression) for 60 minutes per week in the general education class and 30 minutes per week in the special education setting; and 60 minutes per month of speech/language therapy direct services. The Student's IEP also provided for the following accommodations and supports: environmental modification when requested; extended time on classwork; flexible schedule and small group setting for tests and quizzes; adaptive seating (cushion); headphones to limit outside noise; a behavior/work habits chart; and a grip for writing. In October 2014, the IEP team continued the Student's BIP because it was successful, but after an increase in the Student's behavioral incidents in November 2014, the IEP team planned to revise the BIP. A meeting was held for this purpose on December 3, 2015, at which time the BIP was revised slightly.

On January 13, 2015, the Student received a disciplinary referral after his teacher learned that the previous day the Student was overheard by a student saying that he wanted to poison another student with hand sanitizer to make her sick. The teacher reported the incident to the School's guidance counselor, who initiated the Division's threat assessment process. As part of this process, the School threat assessment committee determined that the Student posed a moderate threat risk, requiring a more in-depth assessment. The Division's Threat Assessment Coordinator then conducted an assessment of the Student and on January 16 recommended that the Student not return to school until the IEP team could meet to review his services and placement. On January 20, the IEP team changed the Student's placement to home-based instruction on an interim basis pending consideration of placement in an autism program at another school and it revised his IEP services accordingly. On April 8, 2015, the IEP team continued home-based instruction services for the Student until July 1, 2015. During the investigation, the Division expressed interest in voluntarily resolving the open issues prior to the completion of OCR's investigation, pursuant to Section 302 of OCR's *Case Processing Manual*. Shortly thereafter, the IEP team on May 29, 2015 revised the Student's IEP to place him back at the School for the 2015-16 school year.

LEGAL AUTHORITY

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

The Section 504 regulation, at 34 C.F.R. § 104.34(a), requires a school district to educate a student with a disability with his/her nondisabled peers to the maximum extent appropriate to the needs of the student with a disability. A school district must place a student with a disability in the regular educational environment unless the district demonstrates that it cannot satisfactorily educate the student in the regular environment even with the use of supplementary aids and services.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires districts that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public entities that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR examines a number of factors in evaluating whether a district's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of

the procedures to complaints alleging discrimination by employees, other students or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

A school district's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the district's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a district must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student may have been bullied or harassed. When a student with a disability has engaged in misconduct that is caused by his or her disability, the student's own misconduct would not relieve the school of its legal obligation to determine whether the student with a disability is being bullied on the basis of disability under Section 504 and Title II.

Accordingly, under Section 504, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team or the Section 504 team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are

needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.

In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.

Title II's disability discrimination prohibitions do not require a public entity to allow an individual with a disability to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others. According to the Title II regulation, at 28 C.F.R. § 35.139(b), in determining whether an individual qualifies as a direct threat to the health or safety of others under 28 C.F.R. § 35.139(a), a school must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.

FACTS AND ANALYSIS

Grievance procedures

While the complaint did not raise the adequacy of the Division's disability grievance procedures as a separate allegation, OCR necessarily reviewed the Division's Section 504 grievance procedure, Regulation 738-1, as part of its investigation into how the Division responded to the alleged disability discrimination incidents and whether the responses followed required procedures. OCR determined that, on its face, Regulation 738-1 does not comply with Section 504's prompt and equitable standard. The policy does not include timeframes for each major step in the procedure or provide assurance that the Division will take steps to prevent recurrence of harassment and to correct its discriminatory effects on the student and others if appropriate. The former requirement ensures that complaints of disability discrimination and harassment are resolved in a timely manner. The latter is required because school districts have an obligation under Section 504 to provide students with disabilities a safe and nondiscriminatory educational environment. This obligation extends beyond the student toward whom disability based harassment is directed, to other students who might experience a hostile educational environment from the disability based conduct at the school. OCR finds that these procedural inadequacies violate the Section 504 regulation, at 34 C.F.R. § 104.7(b).

Allegation 1: The Division failed to promptly and effectively respond when the Student's peers harassed him based on his disability.

Response to harassment complaints

Although the policy and procedures are titled Complaint Procedures for Student Claims of Discrimination or Harassment, it appears that the Division did not apply this policy in the Student's case. Notwithstanding the deficiencies in the Division's procedure and its failure to apply it in the Student's case, OCR reviewed what investigative or responsive actions the Division otherwise took upon receiving notice of disability-based harassment to determine whether the Division responded in a prompt and appropriate manner to investigate or otherwise determine what occurred.

OCR reviewed meeting notes from IEP meetings and email communication between the Complainant and the School from the 2014-15 school year and from the 2013-14 school year. The IEPs indicate that the Complainant raised concerns about bullying over the course of two years. For example, in an IEP addendum dated November 7, 2013, not long after the Student was diagnosed with XXXX, it noted that the Complainant was concerned that the Student thought he was being bullied by a classmate and ignored by his peers. Because the concern was raised at an IEP meeting during discussion about the Student's XXXX-related characteristics, the Division had sufficient reason to believe that the alleged treatment of the Student might be disability-based and, therefore, had an obligation to take prompt and appropriate action to investigate or otherwise determine what occurred. Based on the evidence discussed below, OCR found that the Division did not promptly and effectively respond when the Complainant notified the Division that the Student was being bullied by his classmates based on his disability.

The November 7, 2013 IEP addendum noted that the teacher would talk to the other students in the class. While there is no evidence that the teacher did so, such action, had it been taken, may have been an appropriate response by the Division to an initial report of this type. However, the Complainant continued to report ongoing peer harassment based on the Student's disability in January 2014 emails to School administrators. These emails suggest that the School's previous attempts to address the harassment were inadequate and further response from the Division was warranted. In addition, at the end of the 2013-14 school year, the Student's father contacted Division administrators to report ongoing and unaddressed disability-based bullying by the Student's peers. These reports together put the Division on notice of possible ongoing and unabated disability-based harassment and trigger the Division's obligation to investigate or otherwise determine what occurred and respond appropriately. The Division does not claim that it responded to either of these subsequent reports of disability based harassment.

At the beginning of the 2014-15 school year, in an email dated September 4, 2014, the teacher told the Complainant that the Student had spoken to her about an incident with another student in the class and that she would address the incident as soon as possible. Soon thereafter, in an email dated September 15, 2014, the teacher told the Complainant about an incident that had occurred during recess in which another student had thrown a coupon booklet at the Student and it hit him just above the eye. The Complainant responded to the teacher that the Student had told her about the incident and had asked if there was a school at which the students would be nicer to him. The teacher responded that she always tries to teach the students in her class to look out for one

another and that, hopefully, they would see improvement in that area. In addition to a failure to investigate the Complainant's allegation of disability harassment, in the context of the previous ineffective responses, the teacher's response was not reasonably calculated to eliminate a hostile environment.

In an email dated November 19, 2014, the Complainant told the teacher of her concern that the Student was having more problems conforming and getting along with other children lately and asked whether they should develop another BIP or convene an IEP meeting. The Complainant also suggested that the Student needed more autism services to help with his social skills and learning how to more appropriately interact with people who are bothering him. The Complainant stated that the Student had been doing so well lately and that she would hate to see him go downhill due to academic problems and problems he is having with the other students. The same day, the teacher responded via email that she noticed that the Student had been having more trouble working with or near other students in the classroom lately and had spoken to a school administrator about setting up a meeting. According to information provided by the Division, the next IEP meeting was convened on December 3, 2014.

In the meantime, on November 20, 2014, the Complainant told the teacher about the Student's perception that other students were doing and saying mean things to him, as well as her belief that the Student needed more social skills services to better learn how to deal with this. The Complainant further stated that some of the students with whom the Student was having problems have called him "stupid" in the past. In an email dated November 21, 2014, the Complainant informed the teacher that other students were making comments about the Student's hair because of the way in which it is cut. The Complainant writes that because of the sensory issues that go along with Autism, the Student does not like to have his hair cut and that it often looks unkempt. She says that the Student is being teased because of his disability and asks the teacher to make sure the teasing ends. The teacher told the Complainant that she has spoken to the other students about the "power of words," but did not specifically mention the Student. In an email dated November 24, 2014, the School's Administrative Intern told the Complainant that the School was talking with the other students who have been saying "mean things" to the Student and that there is a "safe place" to which the Student may go when he arrives at school, so that he is away from the students who tease him.

Based on the above, OCR finds that a preponderance of the evidence indicates that the School was on notice about possible disability-based bullying of the Student and failed to take prompt and appropriate action to investigate or otherwise determine what occurred, in violation of Section 504 requirements.

Peer harassment of the Student

OCR's investigation team also identified preliminary concerns that the Student may have been subject to disability-based harassment by his peers, based on the email communications between the Complainant and the School/Division. Many of the parents' and the teachers' descriptions of peer statements and actions towards the Student reflect the Student's XXXX-related characteristics. Had the Division investigated and found that the Student was being harassed based on his disability, the School should have convened an IEP team meeting to determine whether, as a result of the effects of the harassment, the Student's needs had changed such that he

was no longer receiving FAPE. While the Student’s teacher mentioned to the Complainant that she noticed that the Student had been having more trouble working with or near other students in the classroom lately and had spoken to an administrator about setting up a meeting, the Division did not convene a meeting until December 3, 2014, and at this meeting did not make a determination as to whether the Student’s needs had changed as a result of the possible harassment. Notes from this IEP meeting, the purpose of which was to review the Student’s BIP, mention that the Student showed an increase in behavioral problems, such as talking out; disagreement with peers; and an inability to work collaboratively. There is a discussion of the types of situations in which the Student has become very angry, such as when other kids made fun of him or said mean things. The team decided to change the behavior incentive system in the Student’s BIP to allow the Student to earn points, rather than have points taken away. However, the School did not consider whether the Student’s decline in behavior was a result of the effects of possible bullying, or that the bullying effectively denied the Student a FAPE. The Division indicated a desire to resolve these preliminary concerns prior to the completion of OCR’s investigation.

Allegation 2: The Division treated the Student differently than similarly situated students without disabilities when it conducted a threat assessment of the Student and subsequently removed the Student from the School.

Threat Assessment Policy and Procedures

In June 2014, the Division revised its student threat assessment policy and adopted a new regulation establishing procedures for the assessment of and intervention with students whose behavior poses a threat to the safety of school staff or students.¹ See Policy 777 and Regulation 777-1.² To implement the policy and procedures, the Division developed a “Student Threat Assessment and Response Form” and “Student Threat Assessment Guidelines” that include student and witness interview forms. The Division’s threat assessment policy and procedures do not have any explicit provisions addressing situations where the student who is exhibiting threatening behavior has a disability. The assessment and response form has one line where the student’s special education status and specific disability can be noted, but it has no further information on how a student’s disability is to be considered in the context of a threat assessment.

OCR’s review of the Division’s threat assessment policy and procedures and associated documents revealed that they do not incorporate all the factors relevant to the Title II direct threat standard, which are necessary to avoid discrimination on the basis of disability in threat assessments of students with disabilities. For example, the Division’s policy and procedures require a determination on “the nature and degree of any safety concerns,” but does not require a determination of the duration of the safety concerns. One of the factors specified as relevant in making a determination under the Title II direct threat standard is “ascertainment of the nature, duration, and severity of the risk.” In addition, the Division’s policy and procedures instruct threat assessment teams to “develop strategies to reduce risk, as necessary,” but do not specify

¹ The Division did this after the state passed a new law, Virginia Code § 22.1-79.4, in 2013 requiring school divisions to adopt policies for threat assessment teams.

²<http://pwcs.schoolfusion.us/modules/cms/pages.phtml?pageid=149502&sessionid=979932e130c7177e92b014e5c4d1ffcf&sessionid=979932e130c7177e92b014e5c4d1ffcf> (last checked October 21, 2015)

that strategies should include “consideration of modifications or aids or services [for students with disabilities] that could mitigate the risk,” as required under the direct threat standard. Moreover, the Division’s policy and procedures fail to mention any reliance on current medical knowledge or on the best available objective evidence, also specified as a relevant factor in making a determination under the direct threat standard. Therefore, OCR finds that the Division’s threat assessment policy and procedures violate Title II’s direct threat provision, at 28 C.F.R. § 35.139.

The Student’s Threat Assessment

The School applied its threat assessment policy and procedures after the January 13, 2015 teacher’s report of the Student’s threatening statement about another student. The School guidance counselor immediately conducted an initial risk assessment of the January 2015 incident, interviewing the student who heard the statement, the student who was the target of the threatening remarks, and the Student. The threat assessment notes indicate that the Student was mad at the target student for throwing the Student’s backpack on the floor and stomping on it and the Student wanted to use hand sanitizer to get the student sick so that she would miss fun activities. The guidance counselor determined that the Student posed a moderate threat risk due to the nature of the plan to hurt a particular student and the potential for the Student to carry out the plan. The Student then was placed out of school by administrative action until the completion of the threat assessment process.

The Division’s threat assessment policy and procedures require moderate risk threats to undergo a level 2 assessment, which involves a more in-depth investigation by the full threat assessment team to determine “the nature and degree of any safety concerns and to develop strategies to reduce risk, as necessary.” Accordingly, the Division’s Threat Assessment Coordinator conducted this level 2 assessment of the Student two days later. The Threat Assessment Coordinator noted that the Student has Autism and found that, while the Student “does not appear to pose an increased risk for violence at this time,” he “continues to harbor feelings of anger and resentment towards the student who was the target of the threat.” The Threat Assessment Coordinator acknowledged that many of the Student’s feelings and characteristics exhibited during the incident and the assessment were not inconsistent with his disability, but noted “nonetheless, by both school and parent report, he appears to be experiencing increased difficulties managing his behavior and emotional responses.” The Threat Assessment Coordinator recommended that the Student not return to school until the IEP team could meet to review his services and placement.

OCR considered whether the Division properly conducted a direct threat analysis, as outlined under Title II, as part of its threat assessment of the Student. As mentioned earlier, in determining whether an individual with a disability poses a direct threat to the health or safety of others, a school must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk. A review of the information provided to OCR shows a lack of medical or other objective evidence about threats made by students with Asperger’s Syndrome or the Student in particular, no determinations on the probability that the potential injury will actually occur other than notes about hand sanitizer being readily available around the School, and no consideration of whether reasonable modifications or related aids or services would

mitigate the risk, despite acknowledgement that the School and the parent had reported behavioral difficulties that might necessitate adjustments to the Student’s educational services.

Based on a preponderance of the evidence, OCR finds the Division failed to comply with Title II’s standards to determine if the Student posed a direct threat to the health or safety of others. OCR also finds the School’s lack of written procedures incorporating the direct threat standard contributed to the failure to conduct a proper threat assessment of the Student.

Different treatment

Prior to the Student’s incident, the School had not conducted any threat assessments of any other student behavior during the 2014-15 school year. Shortly after the Student’s incident, in February 2015 the School conducted two other threat assessments for different students, neither of whom had a disability. In one situation, the School threat assessment committee determined that a student who yelled “Shut up, I am going to kill you” at another student was a low threat risk because he did not have a plan or the means to carry out the threat. In the other situation, the School threat assessment committee determined that a student who wrote a list of ten students’ names and titled it “Murder” was a moderate threat risk, but the Division’s Threat Assessment Coordinator reclassified the threat risk as low due to no indications that the list represented a communication of intent or planning to harm others.

The Complainant told OCR that she and her husband had previously reported and requested a threat assessment of a threat made against the Student by another student during lunch in the cafeteria—the other student showed the Student a piece of pizza and said “this is what you will look like after I kill you”—but that the School did not conduct a threat assessment of the other student in that case. OCR notes that the alleged threat against the Student and the parents’ report about it occurred at the middle of the 2013-14 school year, prior to the Division’s development of its new threat assessment policy and procedures. The Division confirmed that the School did not conduct any threat assessments during the 2013-14 school year. While the date of the Division’s new threat assessment policy and procedures might explain why the School did not conduct a formal assessment of the threat made against the Student the previous school year, the Complainant provided some evidence that she asked the School for a “risk assessment” to ensure the Student’s safety but got no response from the School other than the teacher indicating that she would discuss bullying with the class. The Division expressed a willingness to resolve these preliminary concerns prior to the completion of OCR’s investigation.

The Student’s Change in Placement

The Complainant asserted that, as a result of the threat assessment, the School effectively expelled the Student because it would not allow him to return to the School. The Division did not technically issue a disciplinary ruling expelling the Student from the School, but instead couched its refusal to allow the Student to return in terms of the School not being able to meet the increased disability-related needs of the Student. OCR’s investigation of the Division’s threat assessment of the Student necessarily entailed review of the outcome and consequences of the Division finding that the Student posed a moderate threat risk because the finding affected his disability services and educational program.

OCR's review of the evidence found that, in reviewing the Student's services and placement following the threat assessment, the IEP team summarily concluded that the "IEP consensus is that [the Student] is in need of more services that cannot be provided at his current school." While the Complainant signed the January 20, 2015 IEP amendment after the threat assessment, she told OCR that she only did this so that the Student could receive home-based educational services after the School Principal told her that there was "no way" the Student could return to the School. Although the IEP team was composed of people knowledgeable about the Student and Autism, the team did not satisfy all of Section 504's procedural requirements. The IEP meeting notes do not specify what additional services the Student needed at that point, do not mention any additional evaluations that were conducted to show the Student's current needs, and do not specify any supplementary aids and services that were considered that might allow the Student to remain at the School in its general education setting, before proposing that the Student's placement be changed to a center-based XXXX program. An example of such a supplementary aid or service would have been the assistance of a one-on-one aide, something the Complainant had suggested to the School on more than one occasion. The IEP team does not appear to have considered "modifications or aids or services that could mitigate the risk," as required under Title II's direct threat standard as well as Section 504's LRE requirement, as the team discussed only one option on the continuum of least restrictive environment, i.e. removing the Student from the School, and failed to demonstrate that the Student's education in the regular environment with the use of supplementary aids and services could not be achieved satisfactorily.

OCR makes no findings on the Division's referral of the Student to the IEP team for further action after the threat assessment; however, procedurally, OCR has concerns that once the Division referred the Student to the IEP team for review, the IEP team failed to follow Section 504 procedural requirements in determining what "regular or special education and related aids and services" the Student needed in light of the type of behavior the Student exhibited during the incident. OCR has concerns that the School's failure to re-evaluate the Student before proposing a change in placement to a self-contained Autism program for part of the day, along with the School's failure to demonstrate that the Student could not be educated in the regular environment with the use of supplementary aids and services, do not meet Section 504 requirements. OCR finds that these procedural failures denied the Student FAPE, in violation of the Section 504 regulation, at 34 C.F.R. §§ 104.33, 104.34, and 104.35.

CONCLUSION

As noted above, the Division signed a Resolution Agreement to address OCR's violation findings and its preliminary concerns. When fully implemented, this Resolution Agreement will bring the Division into compliance with Section 504 and Title II with regard to the issues in this case. OCR has notified the Complainant of the Resolution Agreement and will monitor implementation of the Resolution Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly

authorized OCR official and made available to the public. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Division may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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

We thank you and your staff, as well as Division counsel, for your cooperation during this investigation. If you have any questions, please contact Kristi Bleyer (at 202-453-5901 or Kristi.bleyer@ed.gov) or Samantha Shofar (at 202-453-5929 or Samantha.shofar@ed.gov), the attorneys assigned to this case.

Sincerely,

/S/

Michael S. Hing
Supervisory Attorney
District of Columbia Office
Office for Civil Rights

Enclosure (as stated)

cc: Patrick Andriano, Esquire (via email to PAndriano@reedsmith.com)
Anne Witt, Esquire (via email to AWitt@reedsmith.com)