



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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Kristen M. Howard, Esq.
Special Assistant to the Superintendent
Office of Equity, Advocacy & Civil Rights
Detroit Public Schools Community School District
3011 W. Grand Boulevard, 14th Floor
Detroit, Michigan 48202

Re: OCR Docket No. 15-15-1151
OCR Docket No. 15-15-1336

Dear Ms. Howard:

This letter is to notify you of the disposition of the above-referenced complaints filed on February 10 and June 18, 2015, respectively, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Detroit Public Schools, subsequently reconstituted as the Detroit Public Schools Community School District (the District). The complaints alleged that the District discriminated on the basis of disability against two students (Student A and Student B) and retaliated against the students and their parent. Specifically, the complaints alleged the following:

(OCR Docket #15-15-1151)

1. In November and December 2014, the District discriminated on the basis of disability when it failed to accommodate Student A's surgical restrictions and left her alone on the fourth floor of the XXXXX (XXX) building during a power outage.
2. In January and February 2015, the District discriminated on the basis of disability when it failed to provide Student A accessible classrooms at XXX.
3. In January and February 2015, the District discriminated on the basis of disability when it refused Student A access to her art class at XXX.
4. On or around January 28, 2015, the District discriminated on the basis of disability when it denied Student A and her parent access to an honors assembly in the XXX auditorium.

5. The District retaliated against Student A and/or her parent by denying the parent the opportunity to assist Student A to class on the elevator, by subjecting the parent to additional security measures and surveillance when she visited XXX, by refusing to allow the parent to observe Student A's classes and/or therapy sessions, and by removing services from Student A's Individualized Education Program (IEP) during the 2014-2015 school year.
6. The District discriminated on the basis of disability when it failed to evaluate Student B for an IEP, a Section 504 plan, or a behavior plan during the 2014-2015 school year.
7. The District discriminated on the basis of disability when it refused to allow Student B to return to XXX without a psychological assessment following a behavioral incident in October 2014.

(OCR Docket #15-15-1336)

8. The District discriminated against Students A and B on the basis of disability when it denied them access to its summer program at XXX in June 2015.
9. The District's decision to not allow Students A and B to participate in the summer program in June 2015 constituted retaliation for their parent's filing disability-discrimination complaints with the Michigan Department of Education and OCR.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability by public entities. Additionally, the regulations implementing both Section 504 and Title II prohibit retaliation against individuals engaging in activities protected by these statutes. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws.

Based on the complaint allegations, OCR opened an investigation of the following legal issues:

- whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied her the benefits of, or otherwise subjected her to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
- whether persons with disabilities are being denied the benefits of, excluded from participation in, or otherwise subjected to discrimination in the District's programs and activities because the District's facilities are inaccessible to or unusable by individuals with disabilities in violation of 34 C.F.R. §§ 104.21-23 and 28 C.F.R. §§ 35.149-151;

- whether the District failed to provide a qualified student with a disability with a free appropriate public education (FAPE) as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33;
- whether the District failed to conduct an evaluation of a student who, because of disability, needs or is believed to need special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35; and
- whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because the individual made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Section 504 or Title II in violation of Section 504's implementing regulation at 34 C.F.R. § 104.61, and Title II's implementing regulation at 28 C.F.R. § 35.134.

During its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant. OCR explains the relevant facts and determinations below.

Summary of OCR's Investigation, Legal Standards, and Analyses

Background

Student A and Student B attended XXX during the 2014-2015 school year. XXX is a XXX school serving only XXX students located at XXXXXX, Detroit. Although XXX only started in 2005, and became a XXX school in 2006, the building it occupies was constructed in 1900. Since that time, the District reported that the building has not undergone a comprehensive remodel since that time. XXX has four floors of classrooms and a freight elevator that goes from the ground floor to the third floor. Anyone wishing to access the fourth floor must take stairs from the third floor. Additionally, the District operates optional summer school programs at a variety of District schools, including an XXX program at XXX.¹

At the time the complaint was filed, Student A was a XXX student and was identified as a student with a disability and received educational services pursuant to an IEP. During the 2014-2015 school year, all of Student A's classes were located on the fourth floor with the exception of her art class, which was located on the first floor. The IEP in place for Student A at the start of the 2014-2015 school year was dated March 21, 2014. It did not list any services related to Student A's mobility; however, the parties agree that Student A was supposed to use the elevator from the first to the third floor with adult supervision and that she was to receive adult supervision walking the stairs from the third to the fourth floor. These supplemental services were added to Student A's March 6, 2015, IEP.

¹ The District also offered a XXX school that served only male students the 2014-2015 school year, which also offered a summer school program for XXX students.

During the 2013-2014 school year, Student B was evaluated under IDEA for an IEP and determined not to be eligible for special education. The parent challenged this determination through due process, which resulted in the District's determination being upheld by an administrative law judge in an August 2014 decision. Student B was in the XXX at the time the complaint was filed and was not identified as a student with a disability.

Allegation No. 1

The complaint alleged that, in December 2014, the District discriminated against Student A, on the basis of disability, when it failed to accommodate Student A's surgical restrictions and left her alone on the fourth floor of the XXX building during a power outage.

Regarding this allegation, Student A's parent advised OCR that Student A had surgery on November 24, 2014. After the surgery, Student A returned to school on December 1, 2014, with a physician's note that indicated that she was not to engage in strenuous activity or contact sports until December 8, 2014. When Student A returned to school, her parent requested that the District provide her a "Follow the Kid" (FTK) aide to assist her with her book bag (backpack on wheels), assist her on the elevator, and assist her walking the stairs from the third floor to the fourth floor due to her surgical limitations. Student A's parent stated that she understood that the District would provide Student A with the requested accommodations.

The District advised OCR that it agreed to provide Student A an FTK aide to accompany the Student but that it did not agree that the FTK aide would carry her book bag. The District advised OCR that, on December 3, 2014, XXX administrators informed the parent that, rather than having the FTK aide carry Student A's book bag, XXX staff made lightweight folders for each of Student A's classes; each folder and a corresponding textbook would be kept in each of Student A's classrooms so that she would not need to carry materials from class to class or to her locker; and the District would provide the student a set of text books for her home so she would not need to transport them and would only need to transport folders home, if necessary.

Student A's parent was not satisfied with the District's proposed accommodations and, therefore, requested that she be allowed to assist Student A during the school day as her aide. The District denied the parent's request to serve as Student A's aide on December 4, 2014. Student A's parent thereupon requested, also on December 4, that the District provide Student A with homebound services until she could return to school without surgical restrictions; however, the parent withdrew the request later the same day while advising the District that the student would be returning to XXX on Monday, December 8, 2014, without any surgical restrictions.

Student A's parent also alleged that, on December 2, 2014, there was a power outage at XXX and that Student A was left unattended on the fourth floor. She further alleged that she had to go to XXX and call 9-1-1 for assistance to carry Student A from the fourth to the first floor since the elevator was inoperable during the power outage. The District contends that Student A was not left alone on the fourth floor during the power outage as the FTK aide was with Student A during the power outage. The District further contends that the parent had called 9-1-1 for assistance in carrying the student to the first floor without consulting District staff about alternatives.

Allegation Nos. 2 & 3

The complaint alleged that, in January and February 2015, the District discriminated against Student A, on the basis of disability, when it failed to provide Student A accessible classrooms and refused her access to her art class at XXX.

Regarding these allegations, Student A's parent advised OCR that, on January 16, 2015, Student A fell and injured her leg and back as a result of which she was out of school until January 20, 2015. When she returned to school her parent told the District that Student A was not permitted to climb stairs, was required to use a wheelchair for long distances, and a walker for short distances. OCR found that Student A's parent asked the District to relocate Student A's classes to the first floor and suggested that if Student A's classes could not be relocated to the first floor, that Student A be allowed access to the media center on the third floor and attend her classes on the fourth floor via a video link. The District informed the parent that it could not relocate Student A's fourth floor classes to the first floor and it did not have the capacity for a video link. Instead, the District offered to place Student A at a XXX school building where the classrooms were all located on the first floor or provide home instruction. The parent rejected both options as she did not want Student A attending a XXX program and she refused home instruction because Student A was released by her physician to return to school. The parent also asked the District to allow the student to attend an art class that was located on the first floor of XXX. The District denied the parent's request and did not want Student A to return to XXX until her restrictions were lifted.

On February 9, 2015, Student A was cleared by her physician to return to school using only her walker. She was allowed to walk the stairs from the third to the fourth floor, but would need adult support and would need an adult to carry her walker to the fourth floor. The parent wanted Student A to return on February 10, 2015, and brought her to XXX. The District would not allow Student A to return to school until February 12, 2015, because it wanted to clarify the restrictions with the physician's office and needed to find a FTK aide who was able to fully support Student A's weight.

Allegation No. 4

The complaint alleged that, on or around January 28, 2015, the District discriminated against Student A, on the basis of disability, when it denied Student A and her parent access to an honors assembly in the XXX auditorium.

Student A's parent advised OCR that on January 28, 2015, she and Student A arrived at XXX to attend an awards ceremony. The auditorium was located between the first and second floors and was not accessible by the elevator. The parent requested that XXX staff allow Student A to use the wheelchair lift that accessed the auditorium. After some confusion on the part of a XXX administrator regarding whether XXX had a wheelchair lift, Student A was able to access the lift and attend the ceremony, although she and the parent were a few minutes late due to the delay.

Allegation No. 5

The complaint alleged that the District retaliated against Student A and/or her parent by denying the parent the opportunity to assist Student A to class on the elevator, by subjecting the parent to additional security measures and surveillance when she visited XXX, by refusing to allow the parent to observe Student A's classes and/or therapy sessions, and by removing services from Student A's IEP during the 2014-2015 school year.

Student A's parent stated that all the District retaliated against her because she had advocated on behalf of Student A; specifically, she said she had filed previous disability related complaints with the Michigan Department of Education (MDE), as a result of which Student A was receiving compensatory services from the District, and that she continued to advocate for both Student A and Student B, including filing a due process complaint regarding Student B and requesting special education investigations.

With regard to the allegation that the District denied Student A's parent the opportunity to assist Student A to class on the elevator, the situation giving rise to this allegation was discussed in allegation #1, above. Specifically, after the District agreed to the parent's request to provide Student A with a FTK aide due to her surgical limitations in December 2014, Student A's parent objected to some of the accompanying accommodations and requested to serve as Student A's aide herself, a request which the District rejected.

With regard to the allegation that the District subjected the parent to additional security measures and surveillance when she visited XXX, the parent advised that: when she met with school administrators, a security guard would sit in the meetings; when she entered the school building, she was the only person required to show identification; on one occasion she was made to walk through the school's security system numerous times before being cleared to enter; on one occasion the security guard followed her into the school parking lot and said to her she "can say and do what [she] want now because [she] is off the clock;" and when she used the Parent Resource Room, the security guard would come in and out of the room, or look into the room, every 15 minutes.

With regard to the allegation that the District refused to allow the parent to observe Student A's classes and/or therapy sessions, the parent alleged that she asked for paperwork to permit her to observe classes but received an email denying her request. The parent conceded that the math teacher allowed her to observe Student A's class but alleged that she was not permitted to sit in on one of the Student A's speech therapy sessions. The District advised OCR that it does not maintain a District-wide policy specifically relating to parents/guardians and or the community observing classes; this is left to the discretion of the building administrator based on a case by case basis. The District did provide relevant Board Policies, including Board Policy 12.05, Visitors to Schools (and Unauthorized Persons), effective September 8, 2008. This policy states that each building will establish its own procedure or guidelines that must at a minimum "include a requirement that all visitors to the school building must report immediately to the school office upon entering the building. It will be the responsibility of the school principal/building administrator or designee to determine whether a person has a legitimate reason for being in the school building and to refuse admittance to or cause to have removed anyone who poses a safety or security risk or who might otherwise interfere with the educational process." The District additionally provided a copy of Board Policy 6:16. "Access to Buildings," which states in relevant part that "only those persons with a legitimate need to be within the schools shall be

authorized to enter. All persons, excepting students and staff, wishing to obtain authorized entry into school buildings must be cleared with the school principal or front office staff immediately upon entering the school building.”

With regard to the allegation that the District removed services from Student A’s IEP during the 2014-2015 school year, the parent stated that IEP services that were in Student A’s March 21, 2014, IEP that she felt were necessary for Student A were removed or reduced in Student A’s March 6, 2015, IEP by her IEP Team. The services that were removed or reduced included occupational therapy, speech therapy, seat preferences, and testing accommodations. The parent maintained that the removal or reduction in services was in retaliation for her advocacy on behalf of Students A and B. Student A’s parent sent an email to the District on March 18, 2015, requesting a due process hearing related to her disagreement with the placement decisions made by the IEP team regarding Student A’s March 6, 2015, IEP.

Allegation Nos. 6 and 7

The complaint alleged that District discriminated against Student B, on the basis of disability, when it failed to evaluate her for an IEP, a Section 504 plan, or a behavior plan during the 2014-2015 school year and when it refused to allow her to return to XXX without an assessment following a behavioral incident in October 2014.

During the fall of 2014, Student B was a XXX at XXX. The parent informed OCR that following a behavioral incident on October 29, 2014, during which she threatened to kill herself, the District informed her that Student B was not allowed to return to school without an assessment. District records further show that the day of the incident, District staff advised the parent by email of the incident and explained that “children voicing these types of remarks are generally referred for a psychological evaluation.” The email further documented that during a conversation regarding the incident with XXX staff, the parent advised the District that Student B already had an appointment that day to see a therapist. The email chain, of which OCR was not provided a complete copy, does not reveal any restrictions by District staff on returning to school. The parent’s email reply, however, states that she was told verbally by District staff during conversations preceding the email that Student B could not return to school until an assessment was conducted.

District attendance records for Student B reflect that Student B attended the full school day on October 29; the following day, she received an excused tardy in the morning with an absence in the afternoon, and attended the next two school days in full. Subsequently, the parent provided OCR with a copy of the assessment that was conducted on October 29, 2014, and the XXX guidance counselor’s notes from a meeting the following morning attended by the parent and Student B. The assessment included a safety plan written and signed by Student B and aftercare instructions from Student B’s therapist. In her notes, the guidance counselor indicated that she met with the parent and Student B prior to Student B going to her classes and based on the documentation provided by the parent and the guidance counselor’s discussions with Student B, the guidance counselor permitted Student B to resume attending XXX that same day.

The parent stated to OCR that at the time of the October incident, the District did not evaluate Student B to determine whether she was a student with a disability but that for a short period of

time the XXX counselor provided as-needed assistance to Student B. The District provided OCR with documentation regarding additional incidents involving Student B in November and December 2014, where she wrote statements about wanting to self-harm and requested to see the counselor. The parent stated to OCR that she provided the District with documentation in October, November and December 2014 regarding concerns about Student B, however, neither the parent nor the District could provide OCR copies of documents or more detailed information about what, if anything, the parent provided to District regarding Student B at these times. OCR was unable to interview staff who worked with Student B because they had left the District.

The parent also stated that she provided the District with medical documentation regarding Student B in January and February of 2015 to support that the District should evaluate Student B to determine if she was a student with a disability. Emails provided by the District reflect that on February 24, 2015, the parent provided District staff with an Independent Education Evaluation (IEE) related to the District's April 29, 2014, evaluation and determination that Student B did not qualify for an IEP. It appears from various emails that after receiving the IEE, the District attempted to schedule an evaluation team meeting for Student B during late February and March, 2015 to discuss the information in the IEE. The District records reflect that the parent made an additional request for some kind of evaluation of Student B on April 13, 2015. In an email to the District dated April 13, 2015, the parent requested XXX conduct a functional behavior assessment (FBA) and create a Behavior Intervention Plan (BIP) for Student B. In response to the parent's request for an FBA and a BIP, the District sent her an evaluation consent form along with a copy of the District's procedural safeguards on April 13, 2015. The parent refused to sign the consent form. The District explained in a subsequent email that it could not conduct an FBA or develop a BIP unless Student B was identified as a student with a disability, which is why the District requested consent from the parent to conduct a new evaluation of Student B, and informed her that in the interim, a XXX counselor could prepare a behavior modification plan for Student B. The District attempted to schedule a meeting with the parent and to obtain consent to conduct a new evaluation. District records show that it continued to attempt to meet with the Complainant to discuss the IEE or alternately to secure her consent to evaluate Student B related to her request for a BIP into May 2015. According to the District, the parent ultimately did provide consent prior to the end of the 2014-2015 school year and Student B was evaluated and found eligible for special education services related to a diagnosis of ADHD.

Allegation Nos. 8 and 9

The complaint alleged that the District discriminated against Students A and B, on the basis of disability, when it denied them access to its summer program at XXX in June 2015. The complaint further alleged that the District's decision to deny Students A and B access to its summer program at XXX in June 2015 constituted retaliation for their parent's filing disability-discrimination complaints with the Michigan Department of Education and OCR.

The parent also alleged that Student A and Student B were denied the opportunity to access and participate in the 2015 summer school program offered at XXX, which, like the school, was a XXX, all girls program, on the basis of their disabilities. The parent stated that the District is offering XXX programs to both male and female students, but that her daughters were being denied access to the XXX program because of the accommodations they required.

The parent explained that on June 4, 2015, she received a letter dated June 3, 2015, regarding the opportunity to participate in a six-week summer school program at XXX, focused on reading and math proficiency. The parent stated that she returned two copies of the letter the next day, signed to indicate her interest in her daughters' participation in the program. Five days later on June 10, 2015, she received an email from the District's Program Supervisor for Special Education Compliance and Placement (the Compliance Supervisor) stating XXX was unable to provide summer school services required by Students A and B. The email offered an alternate arrangement whereby both students could attend summer school at another District school, XXX (the School). The District asserted that the School was the closest location to the parent's home that could accommodate both of the students. In particular, the School could accommodate Student A, whose disability required accompaniment while traveling stairs, as the classrooms at the School were located on a single level. The email stated that District's outreach nurse would train staff at the School the students' medical needs. The parent stated that aside from someone to accompany Student A in the elevator, as needed, and on the stairs—which did not require hand guidance, touching, or carrying anything to support her—both students required daily administration of medication and possibly emergency administration of medication. The parent stated that because of these services, the District was placing the Students in a XXX summer program when they should be able to accommodate the students at XXX in order to allow them to access the benefits of the XXX program.

OCR reviewed the June 3, 2015, letter, a copy of which was provided by the parent. The letter states that the District's summer school is "open to all students who want to be proficient in reading and math..." and that "the extra instruction students received during the summer intervention program will help reinforce important skills and better prepare them for the next year." The parent also provided OCR copies of the letters of interest she submitted to enroll both daughters in the program. The District provided OCR with subsequent communications regarding enrollment for both daughters, including the above described June 10 letter between the District and the parent. The records show that after several back and forth emails in which the parent opines as to why the District can accommodate both students' needs at XXX during the school year, but that it asserts it cannot for the summer program, the District revised its determination regarding its ability to accommodate Student B. In a June 15, 2015, email to the parent, the Compliance Supervisor advises that XXX can provide the required accommodations for Student B, but that Student A will need to attend the School, with its "barrier-free environment." In another email, the parent suggested that any staff member could accompany Student A, as she does not require hands on assistance; the parent also offered to accompany Student A herself, as required at the beginning and end of her day; the District did not appear to respond to this offer. In a final email on June 16, 2015, the Compliance Officer explains that, Student A "will not be admitted to summer school at [XXX]. As previously stated [Student A] needs a one on one aide to ride the elevator and travel up and down stairs. Please do not bring [Student A] to [XXX] to ensure her safety."

The District provided attendance records that show Student B attended the summer program at XXX, be it with some irregularity.

The parent also alleged that the refusal to allow Student A and Student B to attend XXX's summer program was retaliatory. OCR found no records that contained direct evidence of a

retaliatory motive. The parent's history of advocacy for the disability rights of both students is well documented.

Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.33, provides that a recipient that operates a public elementary or secondary education program or activity must provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction. To be eligible for a FAPE, a student must be determined to have a physical or mental impairment that substantially limits one or more major life activities.

The regulation implementing Section 504, at 34 C.F.R. § 104.35, requires school districts to evaluate any child who, because of disability, needs or is believed to need special education or related aids and services and further requires recipients to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that 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 Section 504 regulation, at 34 C.F.R. § 104.4(b), specifically prohibits recipients from subjecting individuals to different treatment based on disability. Further, 34 C.F.R. § 104.4(b)(5) states that, in determining the site or location of a facility, a recipient may not make selections (i) that have the effect of excluding persons with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to persons with disabilities. Counted among recipient programs to which these provision apply are non-education programs, such as after school care, summer care and recreational programs. Qualified individuals with disabilities must be offered meaningful and equal access to any such programs operated by or with the significant assistance of a recipient.

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j)(1), defines an individual with a disability as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. The Section 504 regulation, at 34 C.F.R. § 104.3(j)(2)(iv), further provides that a person is regarded as having an impairment when the person: has a physical or mental impairment that does not substantially limit major life activities but who is treated by a recipient as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined by the regulation, but is treated by a recipient as having such an impairment. As of January 1, 2009, the date the Americans with Disabilities Amendments Act of 2008 took effect, a person is regarded as having a disability if he or she has been subjected to an action prohibited under Section 504 because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

See the Title II implementing regulation at 28 C.F.R. § 35.104. Accordingly, OCR’s analysis focuses on whether a recipient of Federal financial assistance perceives that an individual has a physical or a mental impairment, without considering whether the recipient perceives that individual to be limited in a major life activity.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), also provides that no qualified person with a disability shall, on the basis of a disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any recipient’s program or activity. With regard to public preschool, elementary, secondary, or adult educational services, a person with a disability is a qualified person with a disability if of an age during which persons without disabilities are provided such services, of any age during which it is mandatory under state law to provide such services to persons with disabilities, or a person to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act. See 34 C.F.R. § 104.3(l)(2). The Title II regulation, at 28 C.F.R. § 35.130(a), similarly states that an entity may not, based on disability, exclude a qualified individual from participation in, deny him the benefits of, or otherwise subject him to discrimination in the District’s programs or activities. The Title II regulation, at 28 C.F.R. § 35.139, further states: “Direct threat. (a) This part does not require a public entity to permit an individual 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. (b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity 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.”

The Section 504 regulation at 34 C.F.R. § 104.21 further states that no qualified person with a disability shall, because a covered entity’s facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any of the entity’s programs or activities. The regulation references standards for determining whether an entity’s programs, activities, and services are accessible to individuals with disabilities, depending upon whether the facilities are determined to be existing, new construction, or alterations. The applicable standard depends upon the date of construction or alteration of the facility. For existing facilities, the regulations require an educational institution to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. As the implementing regulation at 34 C.F.R. § 104.22(a) states, this standard does not necessarily require that the institution make each of its existing facilities or every part of a facility accessible if alternative methods are effective in providing overall access to the service, program, or activity. Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. A recipient may meet this obligation by reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries or delivery of social services at alternate accessible sites. The Section 504 implementing regulation at 34 C.F.R. § 104.22(b) provides that in choosing among available methods for meeting the program access requirement for existing facilities, the institution is required to give priority to those methods that

offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

A recipient has an affirmative obligation to make reasonable modifications and provide those aids and services that are necessary to ensure an equal opportunity to participate for qualified individuals with disabilities, unless the recipient can show that doing so would be a fundamental alteration to its program. A recipient is not required to provide services or modifications to its programs and activities if such modification would create an undue financial burden or constitute a fundamental alteration of the nature of the activity or program. In considering whether a reasonable modification is legally required, the recipient must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the recipient must allow it unless doing so would result in a fundamental alteration of the nature of the program or activity. Even if a specific modification would constitute a fundamental alteration, the recipient would still be required to determine if other modifications might be available that would permit the student's participation. Where undue burden has not been demonstrated, recipients must provide each student with a disability with services necessary to his or her meaningful enjoyment of the benefit offered.

To comply with its obligations under Section 504, a school district must also provide a qualified student with a disability with needed aids and services, if the failure to do so would deny that student an equal opportunity for participation in a non-educational program in an integrated manner to the maximum extent appropriate to the needs of the student.

The regulation implementing Title VI, at 34 C.F.R. § 100.7(e), prohibits recipients of Federal financial assistance from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the regulation or because that individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the regulation. This requirement is incorporated by reference in the Section 504 implementing regulation at 34 C.F.R. § 104.61. Title II contains a similar provision at 28 C.F.R. § 35.134. To find a prima facie case of retaliation, OCR must find: (1) an individual experienced an adverse action caused by the recipient; (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. To be activity protected under Section 504 or Title II, the activity must challenge an act or policy that is covered by Section 504 or Title II. An act of intimidation, threat, coercion, or discrimination constitutes adverse action for purposes of the anti-retaliation regulations if it is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. Under that perspective, petty slights, minor annoyances, and lack of good manners will not normally constitute adverse actions. There are no per se exclusions, however; the surrounding circumstances are critical to OCR's investigation. Whether an action is adverse is judged from the perspective of a reasonable person in the complainant's position. In determining causal connection between the adverse action and the protected activity for the prima facie case, OCR looks at the facts as a whole and broadly construes whether there is some evidence of a causal connection. The evidence may be direct or circumstantial. One type of circumstantial evidence

is proximity in time of adverse action to the protected activity. OCR follows the general principle that as the time period between the protected activity and the adverse action increases, the likelihood that there is a causal link between these two activities decreases. If the action happened “very close” in time to the protected activity, the proximity in time could, standing alone, support an inference of causal connection. There is no specific time period within which a recipient’s adverse action must occur in order to establish causation.

Analysis

Regarding allegation #1, OCR has determined that Student A’s surgical limitations (i.e., to not engage in strenuous activities or contact sports), which lasted from November 24 through December 8, 2014, a period of 15 days, did not constitute a disability under Section 504 and Title II which the District was obligated to accommodate. OCR considered the limited severity of the impairment, its temporary non-chronic nature, as well as the lack of evidence regarding its long term or permanent impact in reaching this conclusion. Additionally, even if OCR determined that Student A was disabled from November 24 through December 8, 2014, the evidence shows that the District promptly provided appropriate accommodations (i.e., the FTK aide, duplicate text books, and lightweight folders) which met Student A’s impairment related needs during the time period at issue. Regarding the allegation concerning the power outage, OCR finds that a preponderance of the evidence does not support that the District left Student A alone during the power outage or inappropriately arranged for her evacuation from the building. Accordingly, OCR finds that a preponderance of the evidence supports that the District did not violate Section 504 or Title II, as alleged.

Regarding allegations ## 2 and 3, the complaint alleged that the District failed to provide Student A accessible classrooms and access to her art class at XXX in January and February 2015. Through its investigation, OCR identified a compliance concern regarding the District’s denial of access to XXX for Student A from January 20-February 12, 2015, after Student A suffered an injury and was required to use a wheelchair and a walker, and so was prohibited from walking stairs. Prior to OCR issuing a determination letter with respect to these allegations, the District expressed an interest in resolving these compliance concerns. Section 302 of OCR’s Case Processing Manual (CPM) states that allegations under investigation may be resolved at any time when, prior to the point when issuance of a final determination, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve the allegations with an agreement. Accordingly, OCR resolved these allegations with an agreement, which is discussed below.

Regarding allegation #4, which alleged that the District denied the Student and her parent access to an honors assembly in the XXX auditorium on January 28, 2015, OCR found that a preponderance of the evidence supports that XXX staff did not deny Student A and her parent access to the honors assembly, as alleged. Rather, the information provided by Student A’s parent indicates that XXX staff provided her and Student A access to the auditorium, as requested, after slight delay in accessing the chair lift. Accordingly, OCR finds that the District did not violate Section 504 and Title II, as alleged.

With regard to allegation #5, OCR will address each component of the allegation individually. Regarding the allegation that the District retaliated against the Student A and her parent by denying the parent's request to assist Student A to class on the elevator, OCR found that the situation giving rise to this allegation was discussed in allegation #1, above. Specifically, after the District agreed to the parent's request to provide Student A with a FTK aide due to her surgical limitations in December 2014, Student A's parent objected to some of the accompanying accommodations and requested to serve as Student A's aide herself, a request which the District rejected. Student A's parent felt that the District's rejection of her request was in retaliation for her previous disability related advocacy. OCR finds, however, that the District's rejection of the request did not constitute an adverse action in so far as the District had already agreed to provide Student A an FKE aide immediately prior to the parent's request to serve as an aide. As such, the student did not suffer an adverse action as she already had aide services as the parent requested. Additionally, OCR cannot identify any adversity suffered by the parent as a result of the District's refusal to allow the parent to serve as Student A's aide. Accordingly, OCR finds that a preponderance of the evidence does not support that the District retaliated against the parent or Student A, in violation of Section 504 and Title II, as alleged.

Regarding the allegation that the District retaliated against the parent by subjecting her to additional security measures and surveillance when she visited XXX, the parent advised that: when she met with school administrators, a security guard would sit in the meetings; when she entered the school building, she was the only person required to show identification; on one occasion she was made to walk through the school's security system numerous times before being cleared to enter; on one occasion the security guard followed her into the school parking lot and said to her she "can say and do what [she] want now because [she] is off the clock;" and when she used the Parent Resource Room, the security guard would come in and out of the room, or look into the room, every 15 minutes. OCR has determined that the facts provided by the parent, as articulated above, without more, constitute petty slights, minor annoyances, and lack of good manners which do not constitute an adverse action. As such, OCR finds that a preponderance of the evidence does not support that the District retaliated against the parent, in violation of Section 504 or Title II, as alleged.

Regarding the allegation that the District retaliated against the parent when it refused to allow the parent to observe Student A's classes and/or therapy sessions, the parent alleged that she asked for paperwork to permit her to observe classes but received an email denying her request. When OCR asked for specifics, the parent conceded that the math teacher allowed her to observe Student A's class but stated that she was not permitted to sit in on one of Student A's speech therapy sessions. OCR notes that the information provided by the parent was contradictory. Although she alleged that she was prohibited from observing all classes and therapy sessions she subsequently conceded that she was permitted to observe one class and only identified one therapy session which she was not permitted to observe. She also did not identify any evidence or statements by any District personnel linking the District's lack of permission to observe the therapy session to her previous advocacy on behalf of Student A or B. As such, OCR finds that a preponderance of the evidence does not support that the District retaliated against the parent, in violation of Section 504 or Title II, as alleged.

With regard to the allegation that the District removed services from Student A's IEP during the 2014-2015 school year in retaliation for the parent's advocacy on behalf of Students A and B, OCR finds that, although Student A's parent disagreed with the placement decision made by the IEP team, which was embodied in the March 6, 2015, the parent provided no information indicating that any member of the IEP team made the decision for any reason unrelated to the individual disability-related needs of Student A. Additionally, Student A's parent did not identify any procedural issues or concerns that would raise issues regarding the validity of the placement process for the IEP developed by the IEP team. As such, OCR cannot infer a causal relation between the parent's advocacy and the IEP team's placement decision on March 6, 2015, as embodied in the IEP. Accordingly, OCR finds that a preponderance of the evidence does not support that the District retaliated against the parent or Student A, in violation of Section 504 or Title II, as alleged.

Regarding allegation # 6, that the District failed to evaluate Student B for an IEP or Section 504 plan during the 2014-2015 school year, OCR has determined that the District made multiple requests to evaluate Student B, and provide a consent form to Student B's parent request permission to do so, and promptly evaluated Student B after the parent signed the consent form. Accordingly, OCR finds that the evidence is insufficient to establish that the District violated Section 504 or Title II, as alleged.

Regarding allegation # 7, that the District refused to allow Student B to return to XXX without a psychological assessment following a behavioral incident in October 2014, OCR finds that the evidence supports that the District informed the parent that it would exclude Student B from its educational program until it received an assessment because Student B made suicidal statements on October 29, 2014. The District provided no evidence that it conducted any sort of individualized assessment to determine whether Student B posed a direct threat to the health or safety of others prior to establishing conditions for her return to XXX. The evidence further shows that only after the guidance counselor received an assessment and safety plan from Student B's therapist did she allow Student B to resume attending XXX. OCR finds that the XXX staff viewed Student A as having a mental impairment due to her emotional state and that the District was prepared to exclude her from the District's educational program based on unfounded fears, prejudices and stereotypes associated with perceptions of Student B's perceived mental impairment. Accordingly, OCR finds that a preponderance of the evidence supports that the District excluded Student B from its program, based on disability, in violation Section 504 and Title II, as alleged.

Regarding allegation # 8, that the District discriminated against Students A and B, on the basis of disability, when it denied them access to its summer program at XXX in June 2015, OCR found that a preponderance of the evidence supports the allegations with respect to Student A but does not support the allegation with respect to Student B. Specifically, the evidence shows that the District ultimately permitted Student B to attend XXX's summer program in June 2015 whereas the evidence shows that the District did not allow Student A to attend XXX's summer program in June 2015 because she needed a "barrier-free environment" due to disability-related mobility limitations and needed a one-on-one aide to use the elevator and stairs. The District did not assert, nor submit any evidence, that it had made a determination that the accommodations needed by Student A (e.g., one-on-one aide) would constitute an undue financial or administrative burden prior to denying her admission to XXX's summer program in 2015. As

such, OCR finds that a preponderance of the evidence supports that the District discriminated against Students A, in violation of Section 504 and Title II, as alleged.

Regarding allegation # 9, that the District retaliated against Students A and B by refusing to allow them to participate in its 2015 summer program in retaliation for her disability related advocacy, OCR found that a preponderance of the evidence does not support the allegation. Rather, regarding Student B, as discussed above, OCR found that Student B was ultimately not excluded from the XXX summer program, and thus was not subjected to an adverse action, as alleged. Regarding Student A, as discussed above, OCR found that Student A was excluded from XXX's summer program, as alleged, but was unable to find any evidence that the exclusion was causally related to the parent's disability related advocacy on behalf of the students; rather, OCR found that the exclusion was caused by the lack of program accessibility for individuals with mobility impairments at XXX, which OCR identified as a compliance concern as discussed above. As such, OCR finds that a preponderance of the evidence does not support that the District retaliated against Students A and B, in violation of Section 504 and Title II, as alleged.

Conclusion

On October 11, 2018, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address the concerns which the District agreed to resolve via Section 302 of the CPM as well as the violations which OCR found regarding 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130; 34 C.F.R. §§ 104.21-23 and 28 C.F.R. §§ 35.149-151 regarding access to the XXX and its summer program for Student A and the violation of Section 504 regulation at 34 C.F.R. § 104.4(a), and the Title II regulation at 28 C.F.R. § 35.130(a) regarding the District's exclusion of Student B based on disability. The Agreement requires the District to conduct a program and facility access review of the XXX and, based on that review, develop and implement a transition plan to address the nonstructural and structural changes needed to ensure program accessibility at XXX. Additionally, the District must develop and submit for review and approval by OCR a written policy for XXX that assures it will not exclude students with disabilities from its summer program, unless and until it has determined that to provide the necessary reasonable accommodation would result in an undue financial or administrative burden or fundamental alteration of the service, program, or activity. The District must also revise their summer program material to make clear that it will consider requests for reasonable accommodation in the program. Lastly, the District will draft and disseminate a memorandum to all XXX administrators and guidance counselors that makes clear the District cannot require a parent/legal guardian to obtain and/or pay for a medical assessment for a XXX student; and, that XXX staff cannot exclude a student from XXX based on a belief or concern that the student poses a health or safety risk to self. OCR will monitor implementation of the agreement.

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. 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, 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, OCR 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.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation. OCR looks forward to receiving the District's first monitoring report by January 11, 2019. For questions about implementation of the Agreement, please contact Ms. Chandra Baldwin. She will be overseeing the monitoring and can be reached by telephone at (216) 522-2669 or by e-mail at Chandra.Baldwin@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-7634.

Sincerely,

Donald S. Yarab
Supervisory Attorney/Team Leader

Enclosure