



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I  
5 POST OFFICE SQUARE, 8<sup>th</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

July 30, 2018

Tony DeMarco, Esq.  
Via e-mail to: [ajdesq@yahoo.com](mailto:ajdesq@yahoo.com)

Re: Complaint No. 01-15-1227  
Lynn Public Schools

Dear Tony DeMarco:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint you (the Complainant) filed against Lynn Public Schools (the District). The complaint alleged that the District failed to appropriately evaluate the Student during the spring of 2015 when she began experiencing escalating difficulty accessing the District's education program due to her disability (Issue 1). The complaint also alleged that the District failed to reconvene the Student's education team to determine an appropriate placement for her after a spring 2015 disciplinary incident at the School, which resulted in several months of missed education services (Issue 2). Lastly, the complaint alleged that as a result of advocating for the Student's educational placement, a District administrator retaliated against the Student by calling the police and filing criminal charges after an incident at the School (Issue 3).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. The District is subject to Section 504 because it receives funds from the Department and is subject to Title II because it is a public education system.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District. OCR also interviewed the Complainant and conducted a site visit to interview the special education administrator, team chair, vice principal, social worker, and school adjustment counselor.

After carefully considering all of the information obtained during the investigation, OCR found sufficient information that the District denied the student a free appropriate public education (FAPE) (Issues 1 and 2), which the District agreed to resolve through the enclosed resolution agreement. OCR is dismissing the retaliation allegation (Issue 3). OCR's findings and conclusions are discussed below.

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

## **Background**

During the 2014-2015 school year, the time at issue in this complaint, the Student was in the eighth grade and on an Individualized Education Program (IEP) dated May 14, 2014 to May 15, 2015 for an emotional disability. The Student transferred into the District during the sixth grade year and it appeared based on District records and interviews that the IEP followed the Student into the District from her previous district. The IEP noted that an evaluation was done in March 2012 by the prior district and made reference to a psychological assessment. However, the District could not produce to OCR any of the underlying evaluation records that served as any basis for the IEP beyond an April 2012 educational evaluation from a teacher and a summary and score report from a March 2012 Wood-Cock Johnson II Test of Achievement (WJ II). The District told OCR that it was unclear whether the District received further documentation from the other district when the Student transferred.

The educational assessment available referenced that the Student perseverated on problems and had focus issues. The WJ II provided information on her academic achievement levels. None of the materials provided any other information on the emotional disability that was identified as the primary disability on the IEP.

The IEP noted the student was academically strong, but “needs attention” and that her disabilities affect multiple areas including following rules, peer relationships and class participation. The IEP also discussed the challenges associated with the Student’s placement in Massachusetts Department of Children and Families (DCF) custody and foster homes. The IEP indicated she needed guidance to learn how to successfully regulate her emotions and would need to meet with the school adjustment counselor. The IEP also referenced a behavior plan, but the District could not produce any behavior plan from the time the IEP was created.<sup>1</sup> The Complainant and staff interviewed by OCR explained that the Student’s disability presented as agitation and perseveration on home issues which often resulted in classroom avoidance. She was also prone to anxiety and depression.

District staff told OCR that the Student started the 2014-2015 school year smoothly with no issues. These accounts were supported by the written records. Attendance records showed that the Student frequently attended school. From September through January the Student only had 4 absences and 6 tardies. An IEP progress report from November indicated the Student was able to identify whenever she needed to talk to a counselor, was aware of her feelings, and was able to generally deal with her feelings before things escalated. Throughout the school year, the guidance counselor maintained a contact log of her meetings with the Student and contact with DCF. The notes from the start of the school year made some mention of challenges at home and one occasion of the Student appearing depressed; but, overall, the record indicated that the Student was doing well. The first time the guidance counselor noted a concern was on November 26, 2014, when the vice principal reported that the Student refused to return to class following a check-in. However, no other concerns were noted through December. In fact, in December the guidance counselor noted that the Student seemed to be doing well and that her “mood and affect [were] appropriate” and that there was “no evidence of acute depression.”

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<sup>1</sup> The District did later develop a behavioral support plan, which is discussed further below.

Beginning in January 2015 and more significantly in February, the written record began to reflect a decline in the Student's state and her ability to access her educational program. Attendance records showed that the Student had 16 absences, 10 days of tardies, and 3 dismissals from February through May. Additionally, the Student was suspended at least 12 times during March and April for violations such as refusal to go to class, disruptive and disrespectful behavior, swearing, and wandering the halls. By comparison, the Student had no suspensions at the start of the school year.

The guidance counselor's contact log documented a consistent decline in the Student's emotional and physical state beginning in January. On January 14, 2015, the guidance counselor's log noted that there was a conference between herself, the vice principal, school nurse, and social worker, and that everyone noted it was a difficult week for the Student. The log indicated the District would contact the Student's foster mother and DCF to check on behavior at home. On January 16, the foster mother reported to the counselor that the Student was experiencing increased irritability, was acting out, and that the Student's foster placement would soon be ending. On January 20, the DCF worker reported to the counselor that they were aware of recent increased conflict and that the Student would be seeing a therapist. On January 21, the guidance counselor reported meeting with the Student and finding her "tired and subdued." The Student indicated she was trying to do work, but was struggling and also missing sleep. On January 26, the counselor was notified by the team chair that the foster mother had given DCF ten days to remove the Student from her home due to destructive behavior.

On February 4, the guidance counselor noted that she met with the Student, who was changing to a new foster home, and that the Student became increasingly irritable during the session. She noted the Student was seen crying earlier in the day and wrote the Student "denied being depressed." On February 13, the guidance counselor noted she had no contact with the Student that week due to absences and impending school vacation. On February 27, 2015, which was only the second day the Student had attended school since February 10, the counselor met with the Student. She said the Student "appears depressed, arrived late for school, and didn't want to go to class." The guidance counselor also wrote that DCF said there were concerns raised during her absence of mood swings, increased irritability, and depression. A copy of a DCF treatment plan provided by the District stated that the Student was hospitalized in February.

The Student's condition appeared to deteriorate even more significantly in March. The social worker told OCR he recalled the Student's deteriorating physical appearance in March. Specifically, he noted she was exhausted coming to school and did not present with the same level of neatness as before. The vice principal told OCR that she noticed a marked change in the Student in March when the Student spent more time talking to each staff person about her home situation.

In response to these increased concerns, the school adjustment counselor developed a behavioral intervention plan to assist the Student, who was frequently seeking out staff to call her case manager and the Complainant to discuss her home situation. District staff could not recall specifically when the plan was developed, but estimated that it was at some point around March after the Student was removed from her foster care placement. The school adjustment counselor

told OCR that the plan was developed by him alone and not during any IEP team meeting. The team chair described the plan as “informal.”

The plan called for the Student to meet with the guidance counselor upon entering and exiting the building. The guidance counselor would do a brief assessment of the Student’s emotional state and determine whether she was ready to proceed to class. The Student would not be penalized if she was late for class or if she had to leave early. If the guidance counselor was concerned, she was to contact the school adjustment counselor or social worker. If the Student went to class and experienced difficulty or was depressed, anxious, or irritable, she would be given a pass or escorted to the school social worker or vice principal who would determine if an assessment or intervention was required, and if so, would contact the school adjustment counselor. The plan also stated that if the Student became excessively concerned about contacting her lawyer or social worker, then she should be referred to the vice principal who could assist in calling them. If there were excessive concerns, she was to be referred to the school adjustment counselor or social worker for further assessment.

In practice, staff told OCR that the Student would go to the guidance counselor, social worker, vice principal, and school resource officer (SRO) to talk. Generally, the Student would go to the vice principal’s office to call her lawyer or social worker, and then the staff would try to redirect her to class. Staff stated that if the Student’s behavior was escalating, they would sometimes contact the DCF worker to dismiss her from school. Specifically, the vice principal stated they had a “deal” with the Student: if she went to class, she could make a call; and if she didn’t go to class, they would call her DCF program to pick her up (but sometimes the program refused to do so). The social worker explained that if the Student ultimately refused to attend class, she would be suspended.

On March 6, the guidance counselor noted in her log that the vice principal reported the Student was absent from school and then suspended after arriving to school in an agitated state, and that her behavior escalated throughout the day. The notes stated the vice principal also reported she had phoned DCF to dismiss her. On March 11, the guidance counselor noted in her records that it was her first face-to-face contact with the Student since February 27, and that the Student had “increased anxiety and agitation.” The counselor encouraged her to use check-in supports and relaxation techniques. On March 20, the counselor’s records stated the Student was suspended after “becoming agitated and aggressive towards school staff.” The Student reported increased anxiety and increased irritability to the counselor. The counselor wrote that she and others were “increasingly concerned about the Student who appears to be on downward spiral” and wrote: “if the symptoms continue or increase, will recommend psychiatric emergency prescreening, possible referral for day programming or PHP program.”

During March, the Student totaled at least six suspensions for refusal to go to class and swearing. The most significant suspension incident occurred on March 27. When the Student refused to go to class, the Student was placed in a small room off the assistant principal’s office, became belligerent, and threw a calculator at the assistant principal, hitting her shin. That day, the counselor wrote the Student was suspended for refusing to go to class and disrespectful behavior. She also noted that the Student was referred for prescreening at Elliot Mental Health but did not meet hospital level of care.

On April 7, the guidance counselor again noted the increased absences and suspensions and indicated she had spoken with the team chair to convene the team as soon as possible to conduct a manifestation determination and recommend a functional behavior assessment (FBA). The guidance counselor stated that “clinically [the Student] appears much more anxious and depressed than she was earlier in the year...behavior also deteriorating...no longer responding to re-direction, and is becoming increasingly aggressive and argumentative. Her hygiene also appears to be deteriorating.” Discipline records showed that the Student reached ten days of suspensions on April 10. On April 14, the Student was suspended again. An IEP progress report dated April 15 stated that the Student had regressed and had great difficulty making it through the school day. The Student was suspended again on April 28.

The District sent a meeting invitation on May 1 for a manifestation determination to be held on May 6. The team convened on May 6 and determined that the behaviors resulting in her suspensions were related to her disability. It was determined that the District should conduct a FBA and a 45-day assessment, but the team could not agree on a place for the assessment. The team chair, who facilitated the discussion, said that there was a discussion of further evaluations, but that the team felt comfortable with the behavioral intervention plan in place and that there was not any concern about the safety of the Student or others in the building. The District proposed a placement at its Fecteau-Leary Junior/Senior High School which is a school for “educationally at risk students who have not been successful in a traditional high school setting. The school offers small class sizes with a dedicated and nurturing staff in a highly structured environment.” The Complainant requested an out-of-district assessment and placement. The team decided to reconvene on May 13 to determine an appropriate placement.

Prior to the team reconvening on May 13, the Student once again had difficulty attending class. On May 11, the Student went to the vice principal’s office. The SRO was called to the main office to assist the vice principal. The social worker and vice principal explained to OCR that the SRO was often called as an additional support member for the Student to talk to. The SRO’s report from the incident stated that the Student’s refusal to attend class had been an ongoing issue in the school year, indicating he had some awareness of the Student’s challenges. The SRO brought the Student down to his office, where the school social worker stopped by. According to records and interviews, the Student became loud and squirted hand sanitizer on the social worker. The social worker left to go get the principal. The principal asked the Student to clean up the hand sanitizer and when he handed her paper towels, the Student smacked his hand away. The SRO then arrested the Student and removed her from the building. Following this incident, the Student did not return to the school.

District staff expressed to OCR that they were not sure of the basis of the arrest. The school adjustment counselor stated he was made aware of it a day or two later and that his understanding was the SRO was there for safety concerns. The social worker noted that he did not pursue charges against the Student because he did not think that was an appropriate response, but that he believed the SRO, who was aware of the Student’s disability, arrested her because she hit the principal’s hand. The District stated that they had no control over whether the police pressed charges against the Student, which the police did.

To better understand the role of SROs in the District, OCR requested any policies and documentation related to SRO involvement in the school. In response, the District provided OCR with a copy of a Memorandum of Understanding (MOU) between the District, the Lynn Police Department, and the Essex County District Attorney's Office to "coordinate their response to violent, delinquent or criminal acts by students, including weapons reporting and alcohol and other drug use, that occur on school premises, school buses, or at school-related events." The MOU does not address the presence of SROs in the District. It states that "mandatory reportable acts" must be reported to the police. Such acts include sexual assault, civil rights incidents, possession of weapons or drugs, destruction or attempted destruction of property, and any serious incident of assaultive behavior. The MOU states that the police are responsible for making the decision as to the course of criminal or delinquency investigation. The MOU did not address nor did the District have any other internal policies related to District staff engaging an SRO with routine discipline matters. The District also stated that it did not maintain any records related to SRO involvement with students in the school.

Following the arrest, the Student's team reconvened on May 13. The District again offered a 45-day placement at Fecteau-Leary. Team members explained to OCR that the special education administrator, who was brought into the meeting by the team chair due to the Complainant's disagreement with the team, was the primary person who proposed placement options for the Student. OCR's investigation indicated that there may have been some disagreement among team members about the appropriate placement. Specifically, several team members recalled proposing an in-district placement option, with the school adjustment counselor recalling he even proposed the Student staying at the school. The team meeting notes reflect that the school adjustment counselor recommended bringing the Student to Elliot Hospital and a partial program. The notes reflected limited discussion of the Student's needs, beyond the arrest incident, challenges at home, and medication changes, or placement options beyond Elliot or the Fecteau-Leary in-District program. The special education administrator explained that the District offered the Student a summer program at Fecteau-Leary, or a 45-day assessment with a continuation into the fall, and a psychological evaluation to be done by the District's evaluator prior to the end of the school year. The team agreed to a referral to Fecteau-Leary beginning on May 19. The referral form stated she had a "minor" altercation with the principal, refused to go to class, experienced escalating behaviors in March, and that the team was questioning whether she was bi-polar and hypomanic. The special education administrator stated that a visit to Fecteau-Leary was set up for May 18 but that the Complainant did not attend because he indicated there was a concern with another student there.

The Complainant provided OCR with an email dated May 29 requesting a re-convening of the team. In the email, the Complainant stated he had gone to visit with the Fecteau-Leary principal on May 20, but that the principal cancelled the site visit stating that her staff had concerns about the Student's placement. In his email, the Complainant also raised a concern that there would be no chance of an assessment prior to the start of the school year. Instead, he proposed an assessment at a center that had a rolling admissions center and could offer a 45-day assessment prior to the start of the school year.

The administrator said that based on the refusal to attend Fecteau-Leary, she then began to make calls for another placement, but found it was difficult to get a 45-day assessment in June and

offered a summer program since the Student was missing school. The administrator was later able to get the Collaborative for Regional Educational Services and Training (CREST) to agree to accept the Student for the summer program with an assessment to start at the start of the school year. On June 4, 2015, the District emailed that the Complainant could sign the placement acceptance forms, which he did on June 5 but he noted that he was not waiving compensatory services. On June 26, the District prepared the final referral forms for the out of district placement and the Student was accepted into the program on July 17 and began the summer program on July 27. The Student's 45-day assessment began on August 31.

### **Legal Issues 1 and 2:** Evaluation and Placement

#### **Legal Standard**

The regulation implementing Section 504 at 34 C.F.R. Section 104.33(a) requires recipient school districts to provide a FAPE to all qualified students with a disability in their jurisdictions. An appropriate education is one designed to meet the individual needs of the Student and is based upon following the procedural requirements outlined in 34 C.F.R. Sections 104.34 to 104.36. Those procedural requirements, at 34 C.F.R. Section 104.35, include the requirement of school districts to conduct an evaluation before making any initial placement or significant change in the placement of a student with a disability, and to periodically reevaluate students who have been provided with special education and related services. The tests and evaluation materials must be chosen to assess specific areas of a student's needs and only trained people may administer the tests or evaluation materials. In interpreting the evaluation data and making placement decisions, the district must: (1) draw upon information regarding the student and the disability-related needs from a variety of sources; (2) document and carefully consider information about the student and the disability-related needs; and (3) make the placement decision by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data and the placement options.

When complying with the Section 504 regulation at 34 C.F.R. Section 104.35(d) to periodically reevaluate a student who has been provided special education or related services, a district may reevaluate consistent with IDEA timeframes, which is every three years, or earlier if warranted. For example, when there is information suggesting that a student's educational program is not meeting the student's individual needs, such as a significant decline in the student's grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student's plan or placement are necessary.

A school district must also reevaluate a student with a disability before any significant change in placement. A change of just location may not be considered a change of placement, but rather a change in placement is any substantive differences in the program or services that are going to be offered to a student. OCR also considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination).

That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities. If a school district finds that the misconduct was caused by or had a direct and substantial relationship to the student's disability, or the conduct in question was the direct result of the district's failure to implement an IEP or 504 Plan, the district may not exclude the student for more than 10 days; instead, it must continue the reevaluation to determine the appropriateness of the student's current educational placement. Conversely, if the school district finds that the misconduct was not a manifestation of a student's disability, it may generally discipline the student in the same manner as it would a student without a disability.

While following these evaluation processes, Section 504 at 34 C.F.R Section 104.36 requires a school district to implement a system of procedural safeguards that include notice to students' parents or guardian of the district's action(s) taken or not taken; an opportunity for the parent or guardian to examine relevant records; an impartial hearing with opportunity for participation by the students' parent or guardian and representation by counsel; and a review procedure.

### Analysis

*No Evaluative Information to Confirm Provision of FAPE.* When the Student transferred into the District in the sixth grade, the District chose to implement the IEP from the sending district. When a student with a Section 504 plan or an IEP enrolls in a new district with a plan from his or her previous district, the receiving district may implement that plan if the student's goals and educational needs can still be met in the program, or conduct an evaluation and develop a new plan, as appropriate. In this case, the District lacked any evaluative materials that could serve as a basis for determining whether or not the plan was appropriate and the Student's needs could be met by the District, as required. When the team first convened in May 2014 to consider the plan, the District could not produce any records demonstrating that the team sought out the needed evaluation materials. By placing the Student on a plan without any evaluation materials being documented and carefully considered, the District could not ensure that it was providing the Student with a FAPE, including during the timeframe at issue in this complaint (2014-2015 school year). Nor did it have any evaluative information to draw upon when developing the Student's informal behavioral intervention plan in March 2015 and/or making decisions at subsequent team meetings.

*Team Failed to Reevaluate Student or Provide Procedural Safeguards.* While it appeared, in spite of the lack of an appropriately developed IEP, that the Student did not experience any significant challenges at the start of the 2014-2015 school year, the District was on notice beginning winter that year of the need to reevaluate the Student. Contemporaneous notes and interviews indicate excessive concerns for the Student's emotional state. She had increased absences, tardies, dismissals, and suspensions; was hospitalized in February; had noticeable changes in her physical appearance; demonstrated increased agitation and classroom avoidance; and was even referred for a mental health hospitalization at the end of March. All of these changes indicated the need for a team to reconvene to assess whether further evaluations were needed and to determine whether the IEP was addressing the Student's needs. Based on the

information presented, the team should have convened as early as February to determine whether additional evaluations and services were needed for the Student. At the very latest, the team should have convened in March when District staff found the changing needs so serious that the Student required a new behavioral intervention plan, and also noted the Student’s “downward spiral” that may have required referral to a day program and an emergency psychiatric prescreening. Yet, the District failed to timely convene the team and did not do so until May. During this intervening period, however, the Student continued to decline.

While OCR appreciates the District’s efforts around March to develop a behavioral intervention plan, the plan was not developed as part of a team meeting process, which prevented it from receiving the benefit of evaluative data and input from a team of knowledgeable people, as required by Section 504. By not developing the plan following the procedural requirements of Section 504, the District also deprived the Complainant of the rights under 34 C.F.R. 104.36 of notice of and the ability to challenge the plan. Additionally, the District did not appear to truly follow the plan, as the school adjustment counselor and school social worker did not appear to do any additional assessments of the Student when she refused to attend class (as the plan stated would happen). Rather, if the Student could not return to class, she was suspended from school or her caseworkers would be called to dismiss her, effectively excluding the Student from school because of her recognized disability.

Even if the District was not on notice of a change in the Student’s conditions as described above – which is not the case here, in light of the record evidence documenting the Student’s decline – the District had an obligation to convene a team after the Student exceeded ten days of suspension in April due to this “significant change in placement.” Based on the available records, the Student reached 10 days of suspensions on April 10, but was suspended twice after that, and a manifestation determination meeting was not held for nearly one month – on May 6. OCR also notes that while not listed as suspensions, the District acknowledged there were days they asked for the Student to be dismissed, which increased the exclusions of the Student. As noted in the Legal Standards, above, OCR considers a series of short-term exclusions that exceed 10 days and create a pattern of exclusions to constitute significant change in placement requiring an immediate manifestation determination hearing. The District did not do so here, when it continued a pattern of exclusions until the hearing was held in May, in violation of Section 504.

*SRO’s Involvement, Risk of Further Exclusions.* The Student’s informal supports in spring 2015 included check-ins with the SRO, whom District witnesses explained was “often” called upon as a “support member” for the Student. The District continued to involve the SRO to provide support services to the Student after concluding that the behavioral issues (including combative behavior) were a manifestation of the Student’s disability – and prior to conducting further evaluation or changing the Student’s services to address her needs. While the SRO was a support person for the Student, the District should realize that involving an SRO in non-criminal matters comes with an added risk to the Student because the SRO’s primary responsibility is law enforcement and not ensuring a student with a disability is provided with a FAPE. Here, the SRO arrested the Student for behavior that was similar to the behavior that only days before was found to be a manifestation of the Student’s disability – but which remained unaddressed by the District at this time. While a student with a disability can be referred to the police for criminal behavior, it appears everyone noted that the Student was struggling and nothing had been done

yet to assess how to address her needs when she was arrested. The District also lacked any policies on the involvement of SROs with students with disabilities, and in this case, it does not appear that the SRO was made aware of the team's manifestation determination. Without clear policies, procedures, and record keeping with regard to SRO involvement with students, the District cannot ensure that its use of SROs does not discriminate against students with disabilities by, e.g., resulting in further exclusion for disability-related behavior.

*Out-of-District Placement Not Supported by Team Process.* When the team reconvened on May 13, 2015 to determine next steps for the Student, the primary team member who made these decisions was the special education administrator, who was knowledgeable about placement options but not the Student or evaluative data. While the administrator determined the Student could attend Fecteau-Leary, the placement did not work out. Regardless of whether the District's or Complainant's account of the basis for Fecteau-Leary not working is credited by OCR, neither party disputes that the team did not reconvene to determine a new placement for the Student; instead, the special education administrator determined which schools to seek placement, which were all out-of-district placements. However, the District did not provide any evidence the Team had considered and determined that a substantially separate, out-of-district therapeutic placement was the appropriate placement for the Student at either of the May 2015 Team meetings. In fact, the District provided evidence to the contrary, demonstrating that the Team meetings focused almost exclusively on the District's belief that the Student could be educated in-District through Fecteau-Leary or a partial placement in-District and at Elliot Hospital. Again, the District failed to follow the requirements of Section 504 to make determinations with a team of knowledgeable people and to carefully consider and document all information.

Finally, while the Student appeared to be successful in the CREST summer program, the District did not ensure the Student was evaluated prior to entering this new and significantly different program, waiting instead until August to conduct an evaluation. While a team could have possibly determined that the placement was appropriate until an assessment could be conducted, a team was never convened to make that determination.

### Conclusion/Resolution

Based on the above, OCR found the District violated Section 504 and Title II, and denied the Student a FAPE, by placing the Student on an IEP without evaluative materials; failing to timely reconvene a team and evaluate the Student based on new information indicating that the Student's needs were not being met; failing to timely reevaluate the Student prior to significant changes in placement before the Student was suspended for an eleventh day; and failing to make decisions regarding services and placements in a team process, carefully considering and documenting the relevant information, and providing notice of those decisions to the Complainant when it developed the behavioral intervention plan and determined the out-of-district-placements for the Student after the manifestation meeting.

**Legal Issue 3: Retaliation**

With respect to the Complainant’s retaliation allegation (i.e., District retaliated by calling the SRO), OCR finds that this is not a separate allegation but actually a continuation of the District’s alleged discriminatory actions against the Student regarding its failure to appropriately address the Student’s disability-related needs, and OCR is therefore exercising its discretion to dismiss that allegation. In certain circumstances, an allegation of retaliation might, in and of itself, be a violation of one of the Federal civil rights laws OCR enforces. When the same facts would constitute both a retaliation violation and a violation of the substantive provisions of Section 504/Title II, and the remedies for both violations would be identical, OCR has the discretion to investigate only the substantive discrimination allegation for finding a violation and dismiss the retaliation allegation. OCR is exercising its discretion to dismiss the Complainant’s retaliation allegation.

**Conclusion**

On July 26, 2018, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 304 of OCR’s *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the District’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement entered into by the District on July 26, 2018, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged District breach.

This concludes OCR’s investigation of the complaint. This letter 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. 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. In the event that OCR receives such a request, it 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.

If you have any questions, you may contact Civil Rights Investigator Molly O'Halloran at (617) 289-0058 or by e-mail at Molly.O'Halloran@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adrienne M. Mundy-Shepard', with a long horizontal flourish extending to the right.

Adrienne M. Mundy-Shepard  
Acting Regional Director

Enclosure