



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

July 12, 2017

Ms. Joan H. Proper, Esq.
9300 West Courthouse Rd., Suite 202
Manassas, Virginia 20110

Re: OCR Complaint No. 11-15-1089
Letter of Findings

Dear Ms. Proper:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on January 2, 2015 against Arlington County Public Schools (the Division). You (hereinafter the Complainant) filed the complaint on behalf of a student (the Student) at Glebe Elementary School (the School), and alleged that the Division discriminated against her on the basis of disability (visual, auditory, mental, and physical disabilities) by denying her a free appropriate public education (FAPE) during the 2014-2015 school year.

Specifically, the complaint alleged that the School failed to: (1) train staff, (2) create a modified grade-level curriculum, and (3) provide required instructional opportunities and materials including: (i) adequate auxiliary aids and adapted materials; (ii) adequate space for instruction and resting; (iii) access to augmentative communication tools; (iv) a walker, wheelchair, and adaptive seating, and (v) the opportunity to rest and eat when necessary.

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. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division; interviewed the Complainant, the Student's parents, Division administrators and staff, including the Student's service providers, the Student's private vision specialist, and the Student's guardian ad litem; conducted a site visit on June 9 and June 30, 2015; and listened to audio recordings of spring 2015 Individual Education Program meetings.

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

After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence to support a violation of Section 504 and Title II with respect to the Division's provision of a modified grade-level curriculum (Allegation 2) and provision of some instructional opportunities and materials (Allegation 3), which the Division agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support Allegation 1 with regard to training staff. OCR's findings and conclusions are discussed below.

Legal Standards

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, 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), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public educational systems, regardless of whether they receive Federal financial assistance from the Department. Because the Division receives Federal financial assistance from the Department and is a public entity, it is subject to the provisions of Section 504 and Title II.

The implementing regulation of Section 504, at 34 C.F.R. § 104.33, requires that school districts provide students with disabilities with a free appropriate public education (FAPE). An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of a student with a disability as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

In addition to the requirement to provide FAPE, the Title II regulation, at 28 C.F.R. § 35.160, further requires school districts to ensure that communication with students with hearing, vision, or speech disabilities is as effective as communication with students without disabilities. To do this, school districts must provide appropriate auxiliary aids and services where necessary to provide effective communication so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the school system. Title II requires schools to give primary consideration to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student. A school system is not required to provide a particular auxiliary aid or service if the school system can demonstrate that it would fundamentally alter the nature of a service, program, or activity, or that it would be an undue financial and administrative burden. However, the school system still has an obligation to provide an effective auxiliary aid or service to the maximum extent possible.

School systems must apply both a FAPE analysis and the Title II effective communication analysis in determining how to meet the communication needs of a student with a hearing, vision, or speech disability. In some cases, to comply with Title II's effective communication requirement, a school system may have to provide the student with aids or services that are not required for the student to receive FAPE.

Background

At the time the complaint was filed, during the 2014-2015 school year, the Student was seven years old and a Kindergartener at the School. The Student has been identified as having multiple disabilities, including auditory and visual impairments as well as physical and mental impairments, and was receiving services under the IDEA as a student with deaf-blindness and other health impairment. In addition to having dual sensory loss, for which she wears glasses and hearing aids, the Student requires support to stand or walk and does so with the aid of a wheelchair, gait trainer, and other supportive equipment. Additionally, she has been diagnosed with hyperacusis, a sensitivity to certain sounds that causes a panic response when she hears them. When the Student becomes upset, frustrated, or is unable to communicate she can engage in self-injurious behavior.

The Student has been enrolled in the Division since 2011. She received homebound instruction for several periods during the 2012-2013 school year and again during late spring 2014, during which time the Student's parents and the Division attempted to resolve disagreements about the content of the Student's IEP and the appropriate educational placement. During the 2013-2014 school year, the Student attended Reed Preschool, where staff implemented what the Division and the Student's parents agreed was the "stay-put" IEP. Following the 2013-2014 school year, the Student transitioned to the School for the 2014-2015 school year, as she had outgrown the preschool setting. The Student had limited attendance during the 2014-2015 school year. She was unable to attend school until September 22, 2014, due to a medical condition. She attended school on several occasions during October 2014; however, she was told not to return until the Division and the Student's parents agreed upon a transition plan, which became the subject of a separate dispute resolved by Virginia Department of Education (VDOE) on March 13, 2015.¹ Thereafter, she attended school for one hour per day beginning November 14, 2014, and continuing until March 2015, when she began to attend school approximately four hours each day. After the Student's return to school in November 2014, she continued to have regular absences related to illness, ongoing health needs, and disability-related appointments.² The Student's parents notified the School of their concerns about implementation of the Student's IEP via email on November 21, 2014, stating that the School "was not prepared to educate [the

¹ In addition to the Student's IEP, the Division developed a Transition Plan during the 2011-2012 school year, which guided the Student's return to school from a homebound placement. This plan detailed how to introduce the Student slowly to interacting with other students in a classroom by gradually changing her learning environment from a separate, individual learning station to one in a classroom, which allowed for interaction with other students. Transition Plan. It was incorporated into her IEP. VDOE determined that the Transition Plan still applied during the 2014-2015 school year and required the Division to take corrective action to ensure its implementation.

² At the time the complaint was filed, the Student was absent from school November 17-20, December 2-3, 8, 11, and 15-17. The Division was closed for Thanksgiving and winter breaks November 26-28 and December 24, 2014-January 5, 2015.

Student] or implement necessary accommodations in her IEP.” The parent continued that there was no separate learning station with reduced auditory and visual complexity; no quiet, dark location for rest; no communication system; no modified grade-level curriculum or adapted materials; and no training provided to staff other than the Intervener.

Analysis

Allegation 1: Training of Staff

The Complainant alleged that the Division did not train staff to work with the Student, as required by the Student’s IEP. Specifically, the Student’s parents stated to OCR that the Student’s providers were not trained in the competencies of the Virginia Deaf-Blind Project and were not familiar with the Student’s needs or working with students with deaf-blindness. Related to this concern was their concern that no one, including the special education teacher, was trained to work with the Student in the absence of the Student’s assistant.

The Student’s IEP requires her to have a one-on-one assistant on a daily basis who is “trained in the competencies of the Virginia Deaf-Blind Project training for paraprofessionals working with students who are identified with deaf-blindness.” This assistant was the Intervener, whose role is to act as the eyes and ears of the Student by explaining environmental and incidental information about the Student’s surroundings to her, and she began working with the Student during December 2013, while the Student was attending Reed Preschool. The Student’s parent sent the Division an email on July 2, 2014, requesting that the Intervener receive training over the summer because she believed the Student would be unsafe at school without the Intervener gaining a better understanding of her communication needs and how to intervene.

OCR determined that it has insufficient evidence to support this allegation. The Intervener began attending training led by the Virginia Deaf-Blind Project in January 2014 and completed the two semesters of coursework required for the Virginia Deaf-Blind Project training for paraprofessionals through the University of Utah. She completed the program in December 2014, and the Division provided OCR with a copy of the Intervener’s certificate of completion. The Intervener told OCR that she also participated in several other local, in-person training sessions offered by the Virginia Deaf-Blind Project.

Although the Intervener had not completed the training program in the competencies of the Virginia Deaf-Blind Project before she began to work with the Student, she had completed more than 10 months of the 12-month training program at the time the Student began attending the School in mid-November 2014 and completed the program one month later. OCR finds that she had substantially completed the program at that point in time and that this satisfies the IEP’s statement that the Student will have a 1:1 assistant who is “trained in the competencies of the Virginia Deaf-Blind Project...” Accordingly, OCR finds insufficient evidence to support a finding that the Division did not train staff as required by the Student’s IEP.

OCR notes that the Division relied on the Intervener to be trained in the competencies of deaf-blindness to work with the Student, while other service providers (excluding the vision teacher who did not see the Student until mid-April 2015) had not received training in working with

students with deaf-blindness. Although the November 2013 IEP does not require training for other providers, OCR suggests that the Student's special education teacher, and another person designated to intervene in the event of the Intervener's absence, receive similar training so that a trained individual is available to the Student at all times.

Allegation 2: Modified Grade-Level Curriculum

The Complainant alleged that the School failed to modify the grade-level curriculum for the Student, as required by the Student's IEP. The Complainant said that activities were ad hoc, and staff often did not have anything for the Student to do. As early as November 21, 2014, the parent wrote an email to the Principal stating that she did not believe the Division implemented a modified curriculum during the Student's attendance on November 14 or 21, 2014. In the email, the Student's parent wrote that the School "has not made preparations on what and how they plan to teach [the Student] and stated that the Intervener told her, when she asked about lessons, that "none were prepared." Then, according to the parent, on November 25, the Intervener again told her she did not have anything else for the Student to do and thought there would be books to use in the office where the Student was learning that day. The Student's parent said that the Intervener regularly told her, "I'm out of tricks," after an hour of activities with the Student so the parent took the Student home.

The Complainant also said that the Special Education Teacher worked with the Student approximately four times prior to March 2015. Instead, the Intervener filled the role of intervener and paraprofessional or teacher. The Student's parent believed the Intervener did not have direct supervision from the Special Education Teacher, whom she understood from past experience to be responsible for modifying the curriculum. Further, the Complainant told OCR that the Student did not receive speech-language, vision, or hearing services until April 2015 or later, which were necessary to implement a modified curriculum.

The Student's November 2013 IEP states that she will receive a "modified grade-level curriculum to allow for multiple repetitions of activities/concepts over time." It does not specify who was to make and implement curriculum modifications for instruction. The Student's IEP also called for both direct (1 hour/week of vision, 30 minutes/week of hearing, and 2 hours/week of speech-language) and "consult" (1 hour/week of vision, 30 minutes/week of hearing, and 30 minutes/week of speech-language) services for vision, hearing, and speech-language. While direct services occur when the provider interacts with and instructs the Student, "consult" services occur when the provider supports the Student's Special Education Teacher and Intervener to plan lessons, modify the curriculum and environment, and develop materials for use with the Student so that the Student can access the curriculum.³

³ According to VDOE's publication "Speech-Language Pathology Services in Schools: Guidelines for Best Practice," consultative services on behalf of a child "include providing information and demonstrating effective instructional and facilitation procedures. The speech-language pathologist may provide support for staff or analyze, adapt, modify, and create instructional materials and assistive technology for targeted students." Further, VDOE states, "This model is appropriate for...students whose teachers require additional support to create materials, implement specific communication strategies, or modify augmentative/alternative communication (AAC) equipment."

First, to understand what the Division was to modify, OCR reviewed the Division's Kindergarten curriculum, which consists of the Virginia Standards of Learning (SOLs) for Kindergarten. SOLs for Kindergarten include, among other concepts: (a) for reading, that students will understand how print is organized and read; demonstrate an understanding that print conveys meaning; develop an understanding of basic phonetic principles; expand vocabulary; demonstrate comprehension of fictional texts; and demonstrate comprehension of nonfiction texts; (b) for oral language, that students will demonstrate growth in the use of oral language; expand understanding and use of word meanings; build oral communication skills; and identify, say, segment, and blend various units of speech sounds; (c) for writing, students will communicate ideas by writing and use technology for reading and writing; and (d) for math, students will develop whole number concepts related to numbers and number sense (counting, more and less); computation and estimation (adding and subtracting up to 10); measurement (calendar, time, comparing two objects); geometrical shapes; data collection and display (counting and tallying); and patterns (sorting and classifying by attributes). OCR also reviewed the scope and sequence documents, such as the "APS English Language Arts (ELA) Scope and Sequence for Grades K-5: An Instructional Guide," a pacing guide, for information about when during the academic year the Division expected to provide instruction toward each SOL.

Next, OCR gathered information relevant to the Division's implementation of a modified curriculum through documents provided by the parties and interviews of Division staff.

OCR reviewed one "daily lesson plan" that the Student's Intervener prepared for daily instruction of the Student during the 2014-2015 school year. The Intervener explained to OCR that, although the plan looks like one day's lessons, it was actually for the whole semester since the Student repeated many topics and tasks. The undated lesson plan lists a schedule of activities for the Student, starting with singing a song chosen from a list; then, alternating each successive activity with singing a song. The plan lists a menu of five songs and two books familiar to the Student. It also lists five activities that the Student could complete: making a pattern, sorting animals, drawing, sorting words, and counting. The activity descriptions cue the instructor to discuss colors, animals, and body parts; draw shapes; and count butterflies.

OCR also reviewed daily activity logs, which recorded how long the Student attended school each day, the IEP goal addressed during instruction, and the staff who worked with her. For instance, on November 21, 2014 and the four dates that followed, the Division recorded, under IEP goals addressed: "songs with pictures (Cognitive Function, Expressive Language, Pointing with Hand-under-hand Assistance, Motor Function-picking up object and passing to adult), Books (Early Literacy, Expressive Language, Cognitive Function)." On December 9, the Division added "Patterns," and on December 10, the Student received physical therapy (PT) in place of patterns. The log for December 12, included "games-Connect 4," which the parent noted to OCR she had suggested the Intervener play with the Student when the Intervener was searching for another activity.

During interviews, the Principal told OCR that the special education teacher has the role of creating lesson plans, though plans do not necessarily have to be written. Here, the Intervener, not the Special Education Teacher, prepared the lesson OCR reviewed. Despite the Principal's statement, OCR cannot find that the Intervener's preparation of the lesson plan violates Section

504 because the IEP does not explicitly state who is to plan and implement curriculum modifications.⁴ Further, that the Division produced only one lesson plan may be evidence of limited implementation of a modified curriculum but is not dispositive given that lesson plans are not required.⁵

The lesson plan does not indicate with any specificity the particular curricular goal intended or the objectives of the Student's IEP that corresponded to the lesson activities. The series of activities in the lesson does not resemble the Kindergarten schedule sent to the parent in April 2014, nor does it reflect the scope and sequence of the Kindergarten SOLs, the text or materials planned, or the instructional activity designed to teach a curricular skill.⁶

The Division did not provide other lesson plans to show the concepts and skills that the Student's special education class and general education Kindergarten classes were learning during the 2014-2015 school year, or how those lessons were modified for the Student. The Division provided no other documentation of a modified curriculum for the 2014-2015 school year.⁷ Since neither the lesson plan nor the activity logs explicitly link the activities to the SOLs, whether the Division was instructing the Student using the SOLs or modifying curriculum for the Student is unclear. On one hand, the documentation does not provide strong evidence to support an explicit relationship to the grade-level curriculum or a long-term plan for instructing the Student in sequential curricular goals. On the other hand, the lesson plan and activity log documents suggest modifications to activities for the Student based on her needs,

Given the limited documentation from the lesson plan, which was not required, and activity logs showing that the Division implemented a modified curriculum for the Student, OCR turned to evidence from interview statements for further information about how the Division modified the curriculum for the Student. The Special Education Teacher told OCR that Kindergartners complete a unit of study about bears at the beginning of the year, so the Student also worked on that using the story of "The Three Bears." She also said that Kindergartners did sorting activities with fruit so the Student did, too. The Special Education Teacher stated that teaching some concepts, like bears, fruit, and 1:1 correspondence went on for months because the Student was unfamiliar with those concepts and that the staff would build on familiar ideas. The Special Education Teacher told OCR that the Student's work was based on the SOLs even if they would work on only two of five points with the Student.

⁴ OCR confirmed that the Special Education Teacher worked with the Student on rare occasion until April 2015. OCR has concerns about the lack of interaction between the Special Education Teacher and the Student, particularly given the regular involvement of the special education teacher at the Reed Preschool during the 2013-2014 in implementing a modified curriculum; however, Virginia does not have guidance about the role and responsibilities of paraprofessionals, in comparison to special education teachers, in providing instruction to students with disabilities. Section 504 and Title II are also silent. As a result, OCR is unable to make a finding of a violation.

⁵ The Special Education Coordinator stated that, on a daily basis, teachers must identify the goal they are working on, even if the lesson plan is not written.

⁶ OCR is further concerned that the content of the lesson plan framework, which included five songs and two books, as provided by the Division, is insufficient to reflect curricular content for an entire year.

⁷ Curriculum, by definition, implies a plan of some kind in that it is a designed course outcome. Although the parent was concerned about ad hoc activities, a concern that OCR shares, OCR does not have information to show that full, advanced planning was required to modify the curriculum or that ad hoc modified activities violated Section 504.

The Intervener further explained that she developed lessons about a concept, like seasons, and figured out how to break it down for the Student. She said that she prepared the Student's lessons and explained to OCR that she adapted plans based on the Student's behaviors and energy level: some days all that the Student wanted to do was sing, and on other days, when she had higher energy, they could do counting or sorting. The Intervener told OCR that she tried to match IEP goals to the curriculum, for example, by counting cubes and matching and sorting them by colors. She described modifying pictures of the three bears to distinguish the features of the mama, papa, and baby bears, and changing "porridge" to "milk" so the Student would understand. The Student's attendance continued to be limited to approximately one hour a day until March 2015 and that she had regular absences due to ongoing health needs. The Intervener also noted that she introduced limited new material during the Student's initial period of attendance during the 2014-2015 school year because the Student had difficulty transitioning, needed frequent breaks, and had interfering behaviors; as a result, the Intervener estimated that the Student might have 20 minutes of instruction during an hour of attendance. Based on interviews with Division staff, the Student completed activities that were modified to match her grade level and abilities and that correlated to the curricular standards, at a pace that was reasonable for her individual needs and considering her time in school.

OCR also reviewed evidence that suggests that the Division was not effectively modifying the curriculum for the Student. First, the Student's guardian ad litem observed the Student at the School on December 4, 2014, and January 28, 2015. She told OCR that during her observations, the Intervener appeared to have a lesson plan that modified the curriculum but that during the first observation the Intervener ran out of material to instruct the Student after 30-45 minutes, corroborating the parent's concern.⁸

OCR also interviewed a third-party vision specialist who has consulted with the Student about her needs since the Student was two years old and who also consulted with the Student's providers at Reed Pre-School in the Division. The vision specialist noted that when she observed the Student at the School for one hour March 9, 2015, the Student was completing the same activities, e.g., *Brown Bear, Brown Bear*, that she had been working on during the vision specialist's Functional Vision Assessment the previous year.⁹ OCR does not necessarily view this type of repetition as an indicator that the Division was not implementing the Student's IEP, given the Student's limited attendance at school and that repetition was stipulated as part of a modified grade-level curriculum in the IEP, while presentation of new material was not. However, OCR also notes that when OCR asked the vision specialist whether she had observed implementation of a modified curriculum, she said there was no evidence of curriculum or objective content. She said she did not observe the Intervener asking follow-up questions about a fictional text, in line with the Kindergarten SOLs, such as "What did brown bear see? Where is the red bird?" or about colors, which she said also would have been a Kindergarten activity.

The vision specialist also said that at a meeting in February 2015 with the Student's guardian ad litem, the Student's parent, and the Intervener, the Intervener stated that she did not know what

⁸ The guardian ad litem said her understanding was that the Student was to attend school for an hour based on a plan to transition the Student.

⁹ An email message dated September 17, 2013, indicates that the Student's then-teacher at the Preschool was reading *Brown Bear* with the Student.

to teach or how to lesson plan for the Student. According to the vision specialist, when she asked the Intervener about support she was receiving, the Intervener told her that she was not receiving guidance from other providers and received no input from the Special Education Teacher about lesson plans. The guardian ad litem told OCR that during the February 2015 meeting, the Intervener said she was getting assistance with a general overview of what to accomplish, but the specifics of planning were left to her. The guardian ad litem said it was up to the Intervener to put concepts into a form that the Student could understand. She said the vision specialist gave the Intervener feedback about materials and ideas so that they were appropriately modified for the Student, and that the Intervener was receptive to the support. Thus, based on the statements gathered, OCR is concerned that the Intervener may not have had adequate support to effectively modify the curriculum for the Student on a daily basis.

Given these concerns, OCR turned to consideration of the role the Student's related service providers played in implementing a modified curriculum and their roles in supporting the Intervener and Special Education Teacher in doing so during daily instruction.

The Complainant told OCR that a central concern of the parent was whether the Intervener was receiving support from related service providers that was necessary to modify the curriculum for the Student. The evidence overwhelmingly shows that related services providers for hearing, speech-language, and vision did not consult with the Special Education Teacher or Intervener to modify the curriculum, as required by the Student's IEP, from November 2014 until April 2015.

OCR interviewed the Student's related service providers regarding their provision of services to the Student during the 2014-2015 school year.¹⁰ According to the Vision Teacher, her role was to implement the core and expanded curriculum, to coach teachers about how to modify lessons, and to make concepts accessible to the Student. She described to OCR how she modified the curriculum for the Student and conferenced with the Student's other providers about how to teach a new concept so the Student could understand it by distilling curricular content. For example, she discussed how she would figure out how to teach "fish-ness" to the Student by showing the Student how a fish is a fish. Likewise, the Hearing Teacher said her role was to provide educational and communication support in the classroom and to consult with staff to support them in working with the Student.

Activity logs provided by the Division indicate that the Vision Teacher and Hearing Teacher began working with the Student May 5, 2015, and May 18, 2015, respectively.¹¹ Neither provider consulted with the Student's Special Education Teacher or Intervener during the 2014-2015 school year before beginning to provide direct services to the Student.

The Vision Teacher described the importance of modifying the Student's setting and materials to make instruction accessible but said she was not involved in procuring the materials until April

¹⁰ Both the Vision Teacher and Hearing Teacher previously worked with the Student. The Vision Teacher began providing services to the Student in 2011, and the Hearing Teacher began working with the Student during the 2013-2014 school year. Both were familiar with the Student's needs, and OCR found them extremely credible.

¹¹ During an interview, the Vision Teacher told OCR that she began working with the Student in April 2015, after the April 8, 2015 IEP meeting, but OCR was not able to confirm this. The Division's logs first note the Vision Teacher's presence on May 5, 2015. She, like other related service providers, was scheduled to work with the Student during the afternoon, and the Student attended only in the morning from November 2014 to March 2015.

2015. She further explained how, after April 2015, she designed lessons modified for the Student and consulted with the Intervener so she would know how to introduce concepts and materials. When OCR asked the Vision Teacher if she was involved with the Student before the first session of 2014-2015 school year, she said that she was not involved in helping to develop the Student's curriculum and that no one reached out to her. She said she started having discussions about curriculum with IEP team members in April 2015. At that point, she said she adapted materials and coached providers on how to adapt materials for the Student as well as consulted with the Intervener by saying, "Watch me do this," or "Here's how we read this book," or "Don't have her face the window when it's sunny." She told OCR that she did not observe the Student earlier during 2014-2015 because she was not asked to do so. She said she met with the Special Education Teacher two or three times at the end of the year.

Likewise, the Student's Hearing Teacher told OCR she met with the Student only one time during the school year because the Student did not attend school in the afternoons when the Hearing Teacher had scheduled to see her.¹² The Hearing Teacher said her role was to reinforce communication. She told OCR that lessons would incorporate the curriculum, but she did not provide detail about how or what activities that would include, and reiterated that she only worked with the Student on one occasion during the 2014-2015 school year. She further told OCR that during the 2013-2014 school year, the previous special education teacher created lessons, but she did not work with the Special Education Teacher during the 2014-2015 school year. She told OCR that she consulted with the Speech-Language Pathologist (SLP) weekly after the SLP began seeing the Student, and she consulted several times with the Intervener. Further, as discussed further below, no information supports consultation to set up the Student's space before she began to attend or during the period when the Student's attendance was limited to one to two hours each day, which was an essential step to implementing modified curriculum for the Student and is discussed more below.

The speech-language pathologist (SLP), who was to provide direct services to the Student two hours per week and consultation services in the amount of 30 minutes per week, did not work with the Student until April 22, 2015 during the 2014-2015 school year.¹³ Unlike other related service providers, the SLP worked full-time at the School and did not have to travel from other schools to see the Student. The fact that the Student did not receive speech-language services until April 22, 2015, means that the Division could not have implemented a modified curriculum for the student with respect to her speech-language goals and oral language component of the curriculum prior to beginning services.

As discussed above, with respect to support with modifying the grade-level curriculum, according to the vision specialist at a meeting in February 2015 with the Student's guardian ad litem, the Student's parent, and the Intervener, the Intervener acknowledged that she was not receiving guidance from other providers, including from the Special Education Teacher about lesson plans. The guardian ad litem corroborated telling OCR that responsibility for planning lessons seemed to fall to the Intervener and that, during the February 2015 meeting, the

¹² The Hearing Teacher stated that she works with sixty students and could not rearrange her schedule to work with the Student. The Hearing Teacher worked with the Student during the 2013-2014 school year as well.

¹³ The Speech-Language Pathologist observed the Student, but did not provide services, on two occasions in late March 2015.

Intervener said she was getting assistance with a general overview of what to accomplish but was responsible for putting concepts into a form that the Student could understand.

Indeed, the Intervener spoke up during the April 8, 2015 IEP meeting and said she was receiving no support from related service providers to implement the Student's IEP, which as discussed above, required providers to modify the Kindergarten curriculum. OCR listened to a recording of this meeting and confirmed that the Intervener said she did not receive support from the related service providers.

OCR finds the support of related service providers was necessary to appropriately modify the curriculum for the Student. The Intervener did not have such support. While the speech-language, hearing, and vision providers described modifications they made to the curriculum after they began working with the Student during the 2014-2015 school year, none provided services for the period from November 2014 to April and May 2015. Based on all of the evidence, OCR concludes that the Student's service providers were not assisting the Intervener or Special Education Teacher to implement a modified curriculum for the Student, as required by the Student's IEP.

In weighing the divergent and sometimes conflicting evidence about implementation of a modified grade-level curriculum, with respect to daily instructional activities, OCR concludes that the Intervener attempted to modify the grade-level curriculum for the Student; however, comments by the vision specialist and the guardian ad litem as well as the Intervener, raise concerns about whether the Intervener was able to effectively modify the curriculum and whether the Division was doing enough to develop appropriately modified lessons that would fill the entire time the Student was at school. As a result, OCR concludes that the Division failed to fully implement this aspect of the Student's IEP, resulting in a denial of FAPE. Furthermore, OCR concluded that the Intervener was not receiving necessary support from the Student's related service providers in modifying the curriculum. The Student did not receive hearing, vision, or speech-language services from November 2014 through April 2015, contrary to her IEP, in violation of Section 504 and Title II.

Allegation 3: Required Instructional Opportunities and Materials

The Complainant next alleged that the Division failed to provide adequate auxiliary aids and adapted materials, an appropriate educational setting, adaptive equipment, and an opportunity to eat and rest, as prescribed by the Student's IEP. OCR finds sufficient evidence that the Division failed to provide many of the aids and materials required by the Student's IEP, which were necessary for the Student to receive FAPE, in violation of Section 504 and Title II.

Auxiliary Aids and Adapted Materials

The Student's IEP requires the Division to provide "adapted materials—to include but not limited to multi-sensory, tactile, olfactory, taste (when appropriate) with additional photographs or symbolic representation of the concept." The parent told OCR that adapted materials had not been implemented during the 2014-2015 school year with the exception of the Student's "All

About Me,” book. Specifically, the parent was concerned that the Division used no new materials during the 2014-2015 school year.

With regard to adapted materials, the IEP states that adapted instructional materials “should be created at the direction of teachers and/or related service providers in advance of lessons or activities. The nature and type of adapted materials should be identified 2 weeks in advance of the lesson or activity. Such materials should be located or created by the one-to-one assistant or other qualified staff, and reviewed by the teacher at least 5 days prior to the planned activity.” The Student’s IEP does not require the School to create *new* adapted materials; rather, it requires that the Student’s service providers use adapted materials with the Student and that, when they do create new materials, they create them in advance of a particular lesson. According to interview statements by the Student’s service providers, the related service providers were responsible for assisting the Intervener to adapt materials for instruction and, as discussed above, the Vision, Hearing, and Speech-Language service providers did not work with the Student until April and May 2015. Consequently, OCR finds that without support from providers to create new adapted materials and introduce them during appropriate lessons, the Intervener could not have implemented this supplementary aid as required by the Student’s IEP and, therefore, the Division violated Section 504 by failing to implement this aspect of the Student’s IEP.

Among the auxiliary aids of concern noted by the complaint were a slanted surface; a light box; reduced visual clutter; familiar pictures; and decreased background noise and auditory clutter; and sensory strategies. OCR focused on these items when investigating this allegation.¹⁴ OCR addresses each in turn below:

The Student’s IEP stated that she was to use a “slanted surface/presentation that avoids glare. Pertains to books, communication devices, pictures, etc.”¹⁵ The Division stated a slant board was to be used during writing activities to “assure proximity control of paper, pencil, crayons, and markers.” The Vision Teacher said this item should have been used daily. The Intervener told OCR that the slant board was available at the beginning of the school year; however, photos of the Student taken by the parent during instructional time on December 1, 5, and 12, 2014

¹⁴Other aids raised by the complaint include consistent presentation of commands, directions, and labels, and a list of words shared between home and school; and a hat with a brim for bright lighting. OCR received limited and conflicting information about the aid for consistent presentation of words, and does not have sufficient information to determine whether the Division discriminated by failing to implement this. The complaint stated that, as of January 2, 2015, the School did not share a list of words used at school and had not instructed the Student regarding any new terms. Both the parent and the School acknowledged that they had not shared a list of words with each other. The School provided information to indicate that it used terms familiar to the Student, and also acknowledged it had presented few new terms to the Student in November and December 2014. The IEP does not require the School to teach new terms, only to ensure consistent presentation of terms that are used. The Complainant provided limited additional information to indicate inconsistent use of words. As a result, OCR cannot conclude the Division failed to implement this aid. With respect to a hat for bright lighting, the complaint also provided little information. The parent acknowledged that she had not provided a hat to the School and said the School had not provided one either. During a call with the Complainant on February 26, 2016, and in subsequent correspondence, the parent expressed that she was not primarily concerned with use of the hat because the Student was not exposed to much bright lighting during 2014-2015. Given the limited information about the Student’s need for and use of a hat, OCR has insufficient evidence to conclude that the Division failed to implement this aid.

¹⁵ The term slant board is not in the November 4, 2013 IEP. Rather, the unsigned, draft IEP dated January 16, 2015 states, “use slantboard for drawing or other activities on table top to prevent glare and improve visual access.”

show the Student was not using a slant board for writing or drawing activities. OCR finds that a slanted surface was not provided to the Student at the beginning of her enrollment at the School. Similarly, Division staff and the parent referred to the use of a bookstand, which they sometimes called a slant board, to hold up reading materials for the Student.¹⁶ During interviews, the Intervener told OCR that the bookstand was at the School “from the very first day,” while the Special Education Teacher told OCR that the Student received the bookstand, which was integral to daily reading, in “the winter.” Photos provided by the parent, taken December 19, 2014, one month after the Student began attending the School, show that the Student had this aid; however, it was broken and a book and portable CD player propped up the bookstand. OCR cannot confirm when the Division provided this aid to the Student but finds that evidence shows that it was broken, and, therefore, not implemented according to the Student’s IEP.

The Student’s IEP also called for a light box, “as needed,” which was to illuminate visual materials and teach visual, visual-motor, and visual-perceptual skills by creating contrast that makes visual skills easier.¹⁷ The Division stated that the light box was to illuminate and enhance objects presented to the Student to enhance visual acuity. The Intervener additionally stated it would help the Student focus. The Special Education Teacher and the Intervener told OCR that this item was available in the fall 2014. However, according to the parent, the light box was not used after the first couple of weeks of school and was stored on top of the cabinets while the Student was instructed in the teachers’ lounge; according to the parent, the School began using the lightbox again after the April 2015 IEP meeting. The parent told OCR that during the first few weeks of the Student’s attendance it had been used incorrectly by placing opaque objects on the box, which appeared as silhouette or shadow, rather than transparent or translucent items that would have illuminated the shape, color, and features of the object. The parent noted that after turning off the lightbox on November 25, 2014, the Student better saw the pictures related to a song activity. The Intervener told OCR that she would use the light box for various activities such as using clear color blocks to have the Student find different colors. She acknowledged to OCR that there was “other stuff you can do with it,” but said she did not use it for other activities. She said they did not use it very often because there were some activities it would not work for and instead used a Velcro board for materials that were opaque and used three dimensional objects. The vision specialist stated that during her observation on March 9, 2015, the light box was not present. OCR finds that the Division failed to consistently and correctly use the light box.

The Student next required task lighting such as a Levo Light to illuminate objects and draw the Student’s focus to those objects.¹⁸ According to the Division, a Levo light is a clip on a larger bright light that helps focus the Student’s attention. The Student needed this type of task lighting on a daily basis. The vision specialist said the Levo light was not available when she observed

¹⁶ This aid also is not contained in the November 4, 2013 IEP. Rather, the unsigned, draft IEPs dated November 3, 2014, and January 16, 2015 include “use of bookstand.”

¹⁷ The Student’s November 4, 2013 IEP states, “light box to be used as needed.” The unsigned, draft IEP dated January 16, 2015, states that the Student must have “access to light box to enhance visual attention and access.”

¹⁸ This item is not listed in the Student’s 11/4/13 IEP; however, the IEP states that the Student needed light sources to come from behind her. The unsigned, draft IEP dated November 3, 2014 requires use of “task lighting with the light source coming from behind and over the shoulder for non-electronic literacy activities.” The Division further concedes in its narrative response that a Levo light was necessary, writing that the Division’s Assistive Technology team, in conjunction with the vision teacher, provided the aid.

the Student at school on March 9, 2015. The Special Education Teacher told OCR that the Student had this task light, but she did not know what it was used for. OCR reviewed photos of the Student working at School, taken in December 2014, and did not see the Levo light in the photos, although OCR did confirm the Student had a Levo light, which was lying on the floor, when OCR visited the School in early June 2015. As a result, OCR finds that this auxiliary aid was not being used consistently as required by the Student's IEP.

Next, the Student's IEP required a setting with reduced visual complexity to heighten her ability to visually access items and instructional materials. The IEP notes this is done by simplifying the background against which items are presented by using solid color surfaces and by presenting fewer objects instead of more objects crowded together. Photographs and activity logs as well as interview statements show that on several occasions the Student's providers moved her from the teachers' lounge to other spaces in the School, which were visually distracting, to provide instruction.¹⁹ For instance, on November 25, 2014, the Student went to an office, and that office did not have reduced visual complexity; rather, the office contained bright visuals that distracted the Student. When OCR visited the Student's learning space in June 2015, we found it to have reduced visual complexity; however, the Student did not move to this location until February 13, 2015. The Division did not consistently provide reduced visual complexity in the educational setting from November 2014 until February 2015, in violation of Section 504 and Title II.²⁰

The Student required the aid of photos and picture symbols to communicate her thoughts and needs. The Student's IEP required the Student to use "pictures, photo symbols that [the Student] is familiar with." The Intervener explained that the Student used a Velcro book containing symbols and pictures, a two-step communication system through which she would point to a picture to make a choice or to choose words such as, "hi horse." Additionally, the parent and the Intervener referred to using a Velcro board during instructional time on which they placed pictures and symbols.²¹ The Intervener said that she ordered the picture communication book at the beginning of the school year, but she did not receive it until late December. Thereafter, she told OCR, she created the book to be like one the Student had at home. The parent confirmed that the book was not received until December 23, 2014, and said that the book was incomplete on the last two pages that include the Student's choices for rest, milk, and movement. The parent further told OCR that the Student first had a picture schedule, which allowed the Student to

¹⁹ The Student's receipt of instruction in the teachers' lounge is discussed more below. Additionally, we note that photographs from December 2014 show the Student working in front of a red bulletin board; while a solid color surface, according to the parent, red is an "anchor" color, which is distracting, to students with cortical visual impairment.

²⁰ The complaint raised a concern that staff failed to wear an apron to cover patterned clothing, which was necessary to reduce visual clutter. However, OCR could not determine when or how often staff wore patterned or bright clothing, or failed to wear the apron. As a result, with respect to this modification, OCR finds insufficient evidence to support the allegation.

²¹ OCR notes that the Complainant and parents raised concerns that the School staff only instructed the Student using materials she already was familiar with, and may have mastered, including songs and books. OCR finds that the Division used pictures and symbols during these instructional activities, which were familiar to the Student. The complaint asserted that the School staff could not have previewed or pre-taught novel pictures to the Student before using them in a lesson because the Student did not receive instruction of any new material at the time the complaint was filed on January 2, 2015. The Student's IEP does not require novel pictures to be used but that staff must preview them when they are used. Based on the limited information provided by the Complainant and Division about instruction the Student received, OCR cannot conclude that the Division failed to provide this aid.

know what activities to expect each day and aid her in transitions, on April 15, 2015. Email documentation from the Student's physical therapy notes supports the parent's assertion that the schedule was provided late in the school year and was done at the strong suggestion of the Physical Therapist. Although there is evidence, including photographic, that the Intervener used familiar pictures and symbols to instruct the Student using a Velcro board during instructional time, OCR also finds that the Division's failure to provide the communication book and picture schedule from the Student's first enrollment until December 23, 2014 and April 2015, respectively, is a violation of Section 504.

According to the Student's IEP, she needed a learning station with reduced background noise and decreased auditory clutter so that she could focus on the sounds related to instruction. According to the parent, and based on OCR's observation, the teachers' lounge, where the Student received instruction until February 13, 2015, shares a wall with the gymnasium and houses a staff printer, laminating machine, microwave, refrigerator, and soda machine. According to information from the Complainant and the parent, loud noise from the gymnasium can be heard from the teachers' lounge, and on multiple occasions, the Student was distracted by these sounds. The parent noted that on November 24, 2014, children were yelling in the gymnasium during the Student's attendance. On December 9, 2014, the parent noted what sounded like musical instruments in the hallway. On December 18, 2014, the Student was distracted by the printer and the entrance of staff into the teachers' lounge to retrieve materials from the printer as well as by loud music from the gymnasium. On January 30, 2015, a staff member entered the lounge to use the microwave, which disrupted the Student and the sound of the microwave triggered her want of milk. On the same day, the parent noted what sounded like cheering practice coming from the gym. On February 4, 2015, a visitor entered to purchase a soda from the vending machine, according to the parent. During interviews, the Intervener acknowledged that these disruptions occurred and that they challenged the Student. According to the parent's notes, on January 30, 2015, the Intervener apologized and said the Principal would send a message to staff that day telling them they could not enter the lounge. The Principal, similarly, told OCR that she had informed the staff by email that they could not enter the lounge; however, OCR did not receive a copy of this message and, therefore, cannot verify the date on which the Principal notified the staff. OCR finds that the Division failed to provide the Student with a setting of reduced background noise and decreased auditory clutter.²²

The Student's IEP provides that the Student will use "sensory strategies to promote and maintain an organized, engaged state. May include bouncing, swinging or other strategies as determined by the team." The Physical Therapist's therapy notes indicate that on several occasions during the spring of 2015, the Student engaged in swinging and bouncing as part of her therapy sessions. The Student began receiving physical therapy December 10, 2014. There is also evidence that the School staff assisted the Student to transition and calm by allowing her to listen

²² Related to auditory clutter, the complaint raised an allegation that the School failed to implement the aid of "proximity (within 1-2 feet) to sound during listening activities." The complaint stated that the Student could not have received this aid because the Student was not receiving any instruction. According to the complaint, the purpose of proximity to sound was to ensure the Student was proximate to sound in a *group* setting. The Student had an individual learning station during the 2014-2015 school year and was not transitioned to a group setting. As a result, proximity to sound in a group context did not apply. Based on the information provided, OCR cannot determine that the Division failed to provide this aid.

to music and take breaks, including to drink. Daily activity logs do not indicate the staff employed sensory strategies other than listening to music and taking breaks. There is evidence that, on several occasions, the parent intervened to calm the Student when she became agitated. During interviews, staff stated that in the beginning of the Student's attendance, when the Student attended for only one hour each day "it was harder to include movement breaks," but also said that once the Student began attending school for longer periods of time, staff began to include use of sensory strategies such as bouncing and swinging. Based on the conflicting information gathered by OCR about the Student's daily activities, we find there is insufficient evidence to conclude that the Division failed to implement this provision of the Student's IEP.

Adequate Space for Resting and Instruction

Next, the Complainant alleged that the School failed to provide an adequate space for resting and instruction. The Student's IEP required her to have a "quiet/dark location for resting," and to have a "separate learning station with reduced auditory and visual complexity in consultation with vision and hearing specialists." The Complainant told OCR that the School had not identified a specific or appropriate location for rest that was available for the Student on a daily basis. The Student had a small mat, similar to a yoga mat, with a blanket. Further, the Complainant stated that the teacher's lounge, where the Student was instructed from November 2014 through February 2015 was not an appropriate separate learning station.

Documentation and interviews with staff witnesses illustrated that the Student had neither a quiet, dark place to rest nor an appropriate separate learning station from the time she began to attend the School until February 13, 2015. According to interviews with staff and email correspondence, on one occasion, January 28, 2015, the School offered the Student to rest on the linoleum floor of an office (which later the School converted to her learning station), but the Student's parent declined, citing that the offered location was dirty and not appropriate for a child of the Student's age. On March 10, 2015, the Student's parent emailed the Principal, asking for the Principal to provide an appropriately sized cot or rug so that the Student did not have to lie on the tile floor with only a blanket. The Complainant noted that the floor was not clean. The Principal responded to the parent's request later on March 10, 2015 that the School staff would borrow a preschool cot for the Student to try and would clean the floor; on March 18, 2015, the Principal asked if the Student's parent and providers were ready for her to order the preschool cot for continued use.

School staff told OCR that a room was always available for the Student to rest. The Special Education Coordinator told OCR that the space might change from day-to-day. When OCR probed about the location designated for the Student, the School staff confirmed that there was not a set location at the School for the Student to rest because of space constraints; however, they insisted that each time the Student was tired, they would be able to look around the School to find an unused space where she could rest on a small, thin mat. They explained that the resting place might change daily, depending on what was available but assured OCR that they would be able to find a location.

OCR finds that the School's plan to search the School for an available location every time the Student was tired did not fulfill the IEP's requirement for a designated quiet, dark location and

amounts to a failure to implement the Student's IEP and a violation of Section 504. Searching the School for an appropriate location each time the Student was tired was not reasonable. The School did not set a daily schedule of the locations available. Given the Student's needs for rest at unpredictable times of the day and her difficulty adjusting, finding a resting place on an ad hoc basis was not adequate to meet her individual needs as outlined in the Student's IEP. Furthermore, as the Intervener indicated and the Principal confirmed, the small mat that was available from November 2014 to March 2015 was not age appropriate for the Student.

Similarly, the School did not provide the Student with an appropriate separate learning station from November 14, 2014 through February 13, 2015. During that time period, the Student's learning station was located in the teachers' lounge. According to School staff, teachers were not allowed in the teachers' lounge (per the Principal's verbal instruction) while the Student was there, but sometimes they would enter anyway. Evidence shows that teachers entered periodically to use the microwave, refrigerator, laminating machine, or vending machine. When others would enter the room the Student would focus on the sound. On several occasions other groups were using the lounge when the Student arrived. On one of those occasions, the Student waited for the group to relocate. On another occasion (December 12, 2014), the Student was moved to a conference room that happened to be empty.

Additionally, the space was not appropriate for the Student's educational needs. In the teachers' lounge, she did not have appropriate adaptive equipment, including an adaptive chair or desk. Instead, the Student sat at a "regular" chair and table, facing the wall, which were not modified to support her and did not fit her. According to the Complainant, sometimes the Student sat at the end of the large teachers' conference table, which was not modified for her. Photos of the Student in December 2014 corroborate this. On the other side of the wall to the teachers' lounge that contained her table was the gymnasium from which, the Complainant told OCR, came a great deal of noise. The Intervener, who corroborated the Complainant's description of the space, told OCR that she set up this space for the Student because no other space was available. Furthermore, the Vision and Hearing Teachers had no role in setting up the learning station, as required by the Student's IEP. Neither individual began working with the Student until April or May 2015, and neither was consulted in advance of the learning station being set up. The Vision Teacher specifically emphasized to OCR that the set-up of the learning space is very important for the Student and noted that she had not been involved in procuring materials for the Student until April 2015. According to the Intervener, the Student moved from the teachers' lounge to an unused office, formerly occupied by the School Resource Officer, in March 2015.²³

On at least five occasions between November 14, 2014 and February 13, 2015 the School staff moved the Student to other locations in the School, including an office, a conference room, and a classroom. The staff moved the Student to the "officer's office" on two occasions in January 2015, but then moved her back to the lounge again. In those locations, the Student did not have an appropriate setting: her chair was too large and the office where she worked contained visual clutter. The Division did not provide an appropriate separate space for instruction in the converted office until February 13, 2015. As a result, OCR determined that the Division failed to provide the Student with an appropriate separate learning station as described by her IEP prior to February 13, 2015, in violation of Section 504 and Title II.

²³ OCR, however, verified that the date was February 13, 2015.

Augmentative Communication

Next, the Complainant alleged that the School failed to provide access to augmentative communication tools. The Student's IEP requires "continuous / immediate access to augmentative communication tools (e.g. 'I Want Something' button, speech generating device, access to words for needing rest, feeding)." More specifically, the IEP states, "In consultation with AsTech, use augmentative communication to include visuals (objects, concrete/photo/symbolic pictures, choice boards), speech generating device, and auditory scanning in daily communication exchanges." The IEP additionally states in another section for accommodations that the Student must have consistent presentation of her words (in the communication book) and continuous access to the "I Want Something" button. The Assistive Technology (AT) report, incorporated into the Student's IEP, requires a monitor for vision support.²⁴

The IEP requires "continuous access to 'I Want Something' button," as it was essential to the Student's ability to communicate. According to OCR's interview with the Intervener, the Student had the "I Want Something" button from the beginning of the school year. The parent, however, contests this and said it arrived in January 2015. An email of November 18, 2014, in which the Intervener asked the Student's parent the brand and diameter of the button the Student used at home so the Division could order similar ones for consistent use at school, demonstrates that the button was not present at school when the Student began attending in November. The parent later told OCR that it had not been provided as of December 23, 2014. On the other hand, the Special Education Teacher suggested that the button was present when she first worked with the Student on December 22, 2014. The button is not present in photographs of the Student's instructional setting taken between December 1 and 19, 2014. Although OCR received conflicting statements as to whether and when the Student received access to the "I Want Something" button, the photos together with the email suggest that the Student did not have the "I Want Something" button for the initial period of attendance; therefore, OCR finds that the Student did not have the necessary continuous access to the "I Want Something" button in violation of Section 504 or Title II.

According to the AT report incorporated into the Student's November 4, 2013 IEP, she was to have a monitor for vision support.²⁵ The Vision Teacher emphasized the importance of daily use of this item; however, she was unsure whether it was used before she began working with the Student in April 2015. During an interview, the Special Education Teacher told OCR that the monitor was in the School since the fall, but confirmed that it was not set up for the Student until the spring. The Intervener told OCR that she ordered the monitor in February 2015, and it did not arrive for a long time. During the April 8, 2015, IEP meeting, the Intervener said the monitor was at the School, but she had not used it during the school year. She said that they were waiting to receive a computer, which she had ordered, to hook up the screen. While OCR cannot confirm when the monitor arrived at the School, the data and interviews support that the Student did not receive instruction using the required monitor from November 2014 through April 2015.

²⁴ The unsigned, draft IEP dated January 16, 2015, requires the Student to have "books and literacy materials presented via 24" monitor."

²⁵ Additionally, the unsigned IEP dated, January 16, 2015, included a 24" monitor for vision support.

OCR finds that the School's failure to provide the monitor for vision support is a violation of Section 504.

A speech-generating device is required by the Student's IEP as part of available augmentative communication tools.²⁶ The AT report, incorporated into the November 4, 2013 IEP, in turn, states that the Student needs a speech-generating device, such as an iPad or a Dynavox, to communicate her thoughts, wants, and needs. The AT report recommended trialing an iPad or Dynavox. The AT report further stated that, "with the two devices (a high tech speech generating device) and a choice/flip book, [the Student] will have access to more content vocabulary without the demand of continuously navigating multiple pages." The Special Education Teacher and the Principal stated to OCR that the Student had this device during most of the school year. However, there was no documentation reflecting that the School used the iPad or Dynavox with the Student during the 2014-2015 school year.

The Intervener explained that the Student had access to a Dynavox through the Division but acknowledged that it was not programmed for the Student, and it needed to be programmed to mirror the device the Student used at home to be an effective communication tool. The parent asserts the Dynavox was not used from November 2014 to April 2015 and further stated that the School did not ask her to bring in the Student's personal Dynavox to aid in programming. She said that late in the year, the Intervener said she could bring in the Student's personal Dynavox, but the parent believed she would need to complete a waiver to do so and did not have clear information about it. The Hearing Teacher said the Student received a Dynavox during the 2014-2015 school year, but she was not sure when, and records indicate she did not see the Student until May 18, 2015. Moreover, during the April 8, 2015, IEP meeting, the Intervener told the team that the Student had not used the Dynavox at school that year.

Likewise, the iPad was recommended as part of the AT report that the team incorporated into the student's IEP. The Vision Teacher said this device was needed for illumination, and it aids the Student's vision as well as allows her to communicate using buttons similar to the "I Want Something" button. The Intervener told OCR that the parent did not bring the iPad to School. She said she asked her to bring it to re-format it with additional buttons and keep it at the School, but the parent did not respond. The parent, in turn, told OCR that she did not recall being asked to bring the iPad to School for that purpose and said she returned the device when it was "due" to the Division. The Hearing Teacher told OCR she did not work on it during the 2014-2015 school year. Notes suggest, and the parent acknowledges, that the Student occasionally used the iPad to listen to music at home, when working with the Intervener, and, eventually, with the speech-language pathologist (SLP) as a break while drinking milk or to facilitate calming. With this exception, regardless of the underlying reasons, OCR concludes that the Student did not use the iPad at School for instruction or communication during the 2014-2015 school year.

²⁶ The Student's IEP requires "continuous / immediate access to augmentative communication tools (e.g. 'I Want Something' button, speech generating device, access to words for needing rest, feeding)." More specifically, the IEP states, "In consultation with AsTech, use augmentative communication to include visuals (objects, concrete/photo/symbolic pictures, choice boards), speech generating device, and auditory scanning in daily communication exchanges."

Based on this information, OCR finds that the staff failed to use the speech-generating device with the Student as required by the Student's IEP. The Principal and the Special Education Teacher were far less familiar with the Student's day-to-day education than the Intervener, and there is otherwise no evidence to support their statements that the device was used. Therefore, the Division violated Section 504 by failing to implement this aspect of the Student's IEP. Additionally, failure to use augmentative communication appropriately violates Title II's requirements relating to effective communication.

Adaptive Equipment

Finally, OCR reviewed the Student's receipt of mobility-related aids and services. The IEP states that the Student is to have a "walker available daily within the classroom or therapy room," and that she must also have a "wheelchair available, adaptive seating."

The Intervener acknowledged during OCR's interview that a wheelchair was not available during a one-month period but said they would not have used it anyway during the short period that the Student daily attended school. The Physical Therapist, on the other hand, said that she fitted the Student for the wheelchair during the therapy session on February 6, 2015,²⁷ and described the importance of fitting it to the Student's size and needs, including height and seat depth. OCR confirmed the Physical Therapist's statements by way of the Physical Therapist's detailed, contemporaneous therapy notes. The Physical Therapist stated that the Student's adaptive chair had wheels on it, but the Student did not have a dedicated wheelchair before February 6, 2015.

As to the walker, or gait trainer,²⁸ according to the Intervener, there was always one in the building, but she never used it. The Special Education Teacher said it may have been taken for another student but, like the Intervener, emphasized that the Student always had access to it.

In contrast, the Physical Therapist told OCR that she fitted the Student for a gait trainer during her third therapy session on January 28, 2015. She stated that the gait trainer arrived "within a few sessions," and her therapy notes provided by the Division suggest that the Student used it on February 4, and that it was placed, along with the wheelchair, in a "designated room for daily use" on February 11, 2015. She further noted that the Student was to use the gait trainer throughout the school day and week, and that it was not a tool reserved for physical therapy sessions.

However, OCR found no evidence to support that the Student used adaptive equipment such as the wheelchair or gait trainer outside of therapy sessions. Division staff suggested that the wheelchair was unnecessary because the parent brought the Student to school in a chair with wheels, which was available to the Student because the parent remained at the School throughout the Student's attendance. The School also suggested that the Student did not attend school daily

²⁷ The Physical Therapist initially met with the Student on October 8, 2014. She resumed therapy on December 10, 2014. She and the Student then encountered a series of weather delays and absences for the Student before continuing again on January 28, 2015 and weekly thereafter. According to the Physical Therapist, she began to see the Student twice weekly in April 2015.

²⁸ The Physical Therapist explained that a walker is similar to a gait trainer; however, the gait trainer provides additional support to the Student, including trunk support. She said that during a trial she determined that additional support was necessary for the Student to maneuver and that she expected the Student would progress to a walker.

for a duration long enough for her to move about the building and, therefore, a gait trainer and wheelchair were unnecessary. Nonetheless, OCR finds the Division had an obligation to provide the equipment, as required by the IEP. OCR concludes that the Division failed to provide the Student with an appropriate wheelchair and gait trainer until mid-February 2015.

Finally, in terms of adaptive seating, the Intervener stated that the Student used a “regular” chair, not a modified seat such as a Rifton chair that provides support to the Student. The Physical Therapist’s notes state that she left the chair at the School with the Student’s name on it on September 10, 2014. The Intervener said the Student had a Leckey chair, another type of adaptive seat, the previous school year but that it was refitted for another student. The Special Education Teacher said that the Student continued to have access to it, but there is no evidence the Student used the Leckey chair during the 2014-2015 school year. The Intervener said that the Student had been fitted for another chair during October 2014; however, that chair was big and bulky and did not fit the desk well so they did not use it.

Similarly, the Physical Therapist told OCR that, although she had fitted the Student for a Rifton chair on October 8, 2014, the Student used a regular chair in the teachers’ lounge, not adaptive seating, and that the Intervener did not communicate to her that the Student was not using an appropriate chair until February 6, 2015.²⁹ The chair was ill-fitting and did not provide the Student with necessary support. The Physical Therapist told OCR that once she learned that the Student was not using an appropriate chair, she sought an adjustable table that would better fit the Rifton chair, which she placed in the room that became the Student’s learning station. According to the Physical Therapist, the Student began to use the Rifton chair consistently in mid-February 2015 once she had a learning station and an appropriately sized table. OCR confirmed this by reviewing the Physical Therapist’s therapy notes through February 2015. The Physical Therapist also told OCR that the Student received a new Rifton chair at the end of the school year.³⁰ OCR finds that the Division failed to provide the Student with adaptive seating as required by the Student’s IEP until mid-February 2015.

Based on the data and witness interviews, OCR concludes that the Division did not fulfill its obligation to provide the Student with the adaptive equipment noted in the IEP from November 14, 2014 through February 11, 2015. Consequently, OCR finds that the Division violated Section 504 when it did not provide necessary adaptive equipment to meet the Student’s physical and mobility needs.

Opportunity to Rest and Eat

Finally, OCR considered whether the Student had opportunity to rest and eat, in accordance with her IEP, “as indicated by her demeanor.”

²⁹ The Physical Therapist stated to OCR that she fitted the Student for a Rifton Chair on October 8, 2014. She said that she did not know until later that the Student did not use it or that it did not fit the table the Student used.

³⁰ On June 9, 2015, prior to the Physical Therapist’s interview on July 9, 2015, OCR observed the Student’s learning space, including the new adaptive chair, which still had its tags. When OCR inquired about the chair and its tags, School staff initially indicated that OCR was viewing the chair the Student had used throughout the year. However, the Student’s new intervener (Intervener 2) then entered the room and told OCR that the chair had just arrived.

Although OCR found above that the Division did not afford the Student an appropriate *place* to rest, it did offer her the *opportunity* to do so. The School offered rest to the Student on multiple occasions, including on January 5, 2015, January 28, 2015, and February 4, 2015. The Student's parent declined these offers. According to activity logs maintained by the Division, on several occasions, the parent indicated to the Intervener that the Student was tired and then took the Student home to rest. According to the documentation OCR reviewed and to the information obtained from interviews, the School staff offered the Student the opportunity to stay and rest on at least some occasions; however, the issue remained that the School did not provide an appropriate location for the Student to rest when she needed it.

OCR further found that the Student could request food, usually milk, using her "I Want Something" button, and did so. Information obtained during interviews indicates that on some occasions the Student drank milk at the School, and on other occasions, the Student's parent took her home for food and milk. Activity logs from January 2015 further illustrate that the Division offered an opportunity to eat, which the parent declined. On other occasions, therapy notes, observation notes, and activity logs indicate that the Student drank milk and water and ate snacks or meals at the School, particularly for breaks. Again, OCR concludes that the Student had the opportunity to eat, as required by her IEP.

As a result of these opportunities, OCR finds that it has insufficient evidence to support that the Division failed to provide the Student with an opportunity to rest and eat.

Conclusion

Based on the language of the Student's IEP; documents provided by the Complainant and Division; and interviews of the Complainant, the Student's parents, and Division staff, OCR finds that the Division did not implement all provisions of the Student's IEP. As a result of the Division's failure to implement the Student's IEP, OCR concludes that the Division denied the Student a FAPE in violation of Section 504. Additionally, the Division's failure to provide the Student aids and services, as part of Allegation 3, violates Title II's requirement to provide effective communication and equal opportunity to participate in the educational program.

On June 15, 2017, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the Division is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the Division's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct visits and may request additional information as necessary to determine whether the Division has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the Division on June 15, 2017, if the Division fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including 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 Division written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

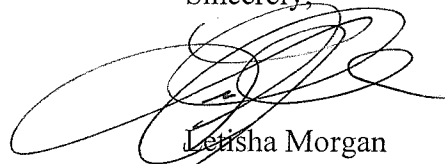
This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Division must 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. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate your cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Amy S. Williams, the OCR attorney assigned to this complaint, at 202-453-5933 or amy.s.williams@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lenisha Morgan', with a large, stylized flourish extending to the left.

Lenisha Morgan
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

RESOLUTION AGREEMENT
Arlington County Public Schools
OCR Complaint No. 11-15-1089

Arlington County Public Schools (the Division) agrees to fully implement this Resolution Agreement (Agreement) to resolve Office for Civil Rights (OCR) Complaint No. 11-15-1089. This Agreement does not constitute an admission by the Division of a violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II), or any other law enforced by OCR.

1. The Division and the Student's parents have developed a plan for providing individualized compensatory and/or remedial services to the Student for the time period the Student did not receive appropriate regular and/or special education or related services and supplementary aids and services, from November 14, 2014 to May 18, 2015, taking into consideration the location and type of services required by the Student's Individualized Education Program (IEP) effective November 4, 2013 and her 2012 Transition Plan. The plan includes timely compensatory and/or remedial services for the Student, with a completion date not to extend beyond August 31, 2017. The plan was developed in lieu of resolution of these issues through an impartial due process hearing.¹

Reporting Requirement:

By June 30, 2017, the Division will provide documentation to OCR of the dates, times, and locations that compensatory and/or remedial services were provided, a description of what was provided, any service logs or other supporting documentation (if applicable), and the name(s) of the service provider(s).

2. By June 16, 2017, the Division will convene a special education meeting to discuss how the Division can meet the Student's educational needs using Division resources and/or resources outside the Division and develop an appropriate IEP.

Reporting Requirements:

- a. By June 30, 2017, the Division will provide to OCR documentation that the Division has convened an IEP meeting (or meetings), including the minutes, Prior Written Notice, and resulting IEP.
- b. If an IEP is not agreed upon by August 1, 2017, the Division will provide to OCR an explanation of the status of development of the Student's IEP and the services the Division is providing to the Student in the interim.
- c. If an agreement is not reached during the meeting discussed in Action Item 2(a), once an IEP is finalized, the Division will provide a copy of the IEP to OCR along with all related meeting minutes, Prior Written Notice, and any other materials.

¹ The Division previously provided OCR with a copy of the plan, referred to as "Exhibit A" in correspondence with OCR, dated June 13, 2017.

3. By August 30, 2017, the Division will develop a plan to track, in writing, implementation of the Student's IEP, particularly modified curriculum, related services, and supplementary aids as provided by her individual IEP. The plan will note, by date, modifications to the general curriculum and whether each aid was used. If not used, the plan will describe why the aid was unnecessary. The plan also will include the date an aid initially was procured.

Reporting Requirements:

- a. By August 15, 2017, the Division will provide OCR, for review and approval, a written description of the method the School will use to track whether the Student is receiving the services, as required by individual IEPs.
 - b. The Division will provide documentation to OCR to support its implementation of the plan to track the Student's services at 6-month intervals: December 15, 2017, and again on June 30, 2018.
4. By November 30, 2017, the Division will provide mandatory training to all instructional personnel and administrators at the School, and at any Division school the Student subsequently attends, as well as itinerant providers of the Student's services (prospective providers) on the requirements of Section 504 and Title II. The training will be conducted over several sessions from August 1, 2017 to November 30, 2017 and will emphasize the Division's obligations under Section 504 to implement Section 504 Plans, IEPs, or other plans as written. The training will be conducted jointly by the Division and a credentialed specialist from the Virginia Deaf-Blind Project or similar organization. The training will include information on, but will not be limited to:
 - The specific roles of special education teachers, regular education teachers, related service providers, and paraprofessionals in providing services required by Section 504 Plans/IEPs;
 - The importance of, and techniques to foster, collaboration between regular education teachers, special education teachers, related service providers, and paraprofessionals in providing services required by Section 504 Plans/IEPs;
 - Educating and instructing students with deaf-blindness, and specifically with cortical visual impairment, including modifying a student's environment based on visual, auditory, sensory, emotional, and physical needs; modifying curriculum and adapting materials; assisting a student's self-care needs; and communicating effectively.
 - Implementing Section 504 Plans/IEPs, including implementing auxiliary aids and services, developing appropriate lesson that modify the Division's curriculum and use appropriate adapted materials, and using the aids identified in the Section 504 Plans/IEPs for educational benefit; and
 - Monitoring the implementation of the Student's IEPs, by using the developed method to track whether the Student is receiving the services as required by her IEPs as developed per Action Item 3 of this Agreement.

Reporting Requirements:

- a. At least 3 weeks before the proposed training, the Division will provide OCR with the title and qualifications of the trainer, copies of the agenda, and any training materials

for OCR's review and approval to ensure that the proposed training satisfies the requirements of Action Item 4. OCR will provide the Division with feedback on the training no later than one week before the date on which the training is scheduled.

- b. Within 15 calendar days after each training session, the Division will provide OCR with documentation confirming completion of the required training, including: (a) the date of each training session(s); and (b) a sign-in sheet listing the names and titles of the School instructional personnel and administrators who participated in each training session.
5. By June 30, 2017, the Division will initiate work with the Virginia Deaf-Blind Project to develop a technical assistance plan with measureable goals, deadlines, reviews, and other accountability benchmarks with the purpose of providing ongoing training and support to help Division staff educate students with deaf-blindness in the general education setting; to help Division staff modify lesson plans and materials appropriately and then implement the lessons and materials so that student have access to the curriculum equal to that of peers without disabilities. In the event that the Virginia Deaf-Blind Project is unable to provide assistance to the Division, the Division shall select a private provider to assist in this effort, mutually agreed upon by the Complainant.

Reporting Requirements:

- a. By June 30, 2017, the Division will provide documentation to OCR that it has initiated work with the Virginia Deaf-Blind Project to develop a technical assistance plan. This documentation will identify a date by which the Division expects to have completed development of the plan.
 - b. By January 30, 2018, the Division will submit to OCR the plan developed in partnership with the Virginia Deaf-Blind Project.
 - c. By June 30, 2018, and every six months thereafter until completion of all benchmarks in the plan, the Division will submit to OCR documentation of its progress toward meeting the benchmarks.
6. By August 30, 2017, the Division will ensure that the School has developed a written plan outlining how it will provide services to the Student when one of the service providers is absent or otherwise unable to provide the services to ensure effective communication under Title II that will allow the Student to participate in the Division's educational program.

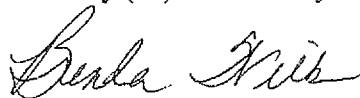
Reporting Requirements:

- a. By August 15, 2017, the Division will provide OCR, for review and approval, a copy of the plan to provide services to the Student when one of the service providers is absent or otherwise unable to provide the services.
 - b. The Division will provide documentation to OCR to support its implementation of the plan to provide services during the absence of a trained provider such as her intervener or special education teacher in December 2017 and again in June 2018.

The Division understands that OCR will not close the monitoring of this Agreement until OCR determines that the Division has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Section 504 at 34 C.F.R. Part 104, and Title II at 28 C.F.R. Part 35. The Division understands that by signing this Agreement, it agrees to provide data and other information in a timely manner. Further, the Division understands that during the monitoring of this Agreement, OCR may visit the Division, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the Division has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Section 504 at 34 C.F.R. Part 104, and Title II at 28 C.F.R. Part 35, which was at issue in this case.

The Division understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce this Agreement, OCR shall give the Division written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

By:



Dr. Brenda Wilks
Assistant Superintendent for Student Services
and Special Education

Date:

